Jeremy Waldron

The Dignity of Legislation

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This book is an attempt to restore the good name of legislation in political theory. Focusing in particular on the writings of Aristotle, Locke, and Kant, Jeremy Waldron recovers and highlights ways of thinking about legislation that present it as a dignified mode of governance and a respectable source of law. The emphasis is primarily on legislation by assemblies, large gatherings of representatives who air their disagreements in ferocious debate and make laws by deliberation and voting. Jeremy Waldron presents a unique study of the place of legislation in the canon of political thought – a study which emphasizes the positive features of democracy and representative assemblies. *The Dignity of Legislation* is original in conception, trenchantly argued and very clearly presented, and will be of interest to a wide range of scholars and thinkers.

Jeremy Waldron is Maurice and Hilda Friedman Professor of Law at Columbia University. He has held posts in Oxford, Edinburgh, Berkeley, and Princeton, and has lectured extensively in his native New Zealand. He is author or editor of numerous books and articles on law, philosophy, and political theory, including *The Right to Private Property*, *Liberal Rights: Collected Papers 1981–91* and *The Law*.

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"It is good for me that I have been afflicted,
that I may learn Your statutes."

PSALM 119:71

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The 1996 Seeley lectures form part of a wider project that I have been working on for a number of years. Versions of Chapter 3 were presented at McGill Law School, at the Harvard Government Department and at Columbia Law School in 1995. An early version of Chapter 4 was presented at Princeton University in 1995. And a version of Chapter 6 was also presented that year as a public lecture at the University of Vermont. Some of the material in Chapter 2 surfaced in a lecture I gave (the Gerber Lecture) at the University of Maryland School of Law in 1994; it was published as "The Dignity of Legislation" in the *Maryland Law Review*, 54 (1995). A version of Chapter 3 was published as "Kant's Legal Positivism" in the *Harvard Law Review*, 109 (1996). Chapter 5 was published in *Political Theory*, 23 (November, 1995). It was not one of the original presentations I gave at Cambridge, but it fits so well with the material from the Seeley lectures that I am grateful for the opportunity to include it here. A quite different version of Chapter 6 (omitting the material on Locke's account of majority-decision)

has been published under the title "Legislation, Authority, and Voting," in the *Georgetown Law Journal*, 84 (1996).

The present book complements some more analytical work that I have done in jurisprudence on the subject of law, legislation, disagreement, and rights: that work is published in a separate book, entitled *Law and Disagreement* (Oxford University Press, 1999). The two books have common concerns – a concern to place legislatures at the center of our philosophical thinking about law, and a concern to avoid minimizing the theoretical implications of disagreement concerning justice and rights – but there is little substantial overlap. The revised version of Chapter 6 that I referred to above appears also in *Law and Disagreement*, but for the most part there is a tidy division of labor between the two volumes. *Law and Disagreement* deals with these issues mostly analytically, whereas the Seeley lectures focus primarily on contributions to our understanding of legislation from the history of political thought. I hope that, together, the two add up to the beginning of a project that will enrich our work in legal philosophy with the resources of political theory.

1

Introduction

I shall not say much by way of introduction to this volume or elaboration of my title. I believe that legislation and legislatures have a bad name in legal and political philosophy, a name sufficiently disreputable to cast doubt on their credentials as respectable sources of law. Whether or not this disrepute is justly earned by the antics of the past or present membership of the British House of Commons, say, or the two houses of the US Congress is an issue on which I shall say nothing. For the problem I see is that we have not even developed a normative theory of legislation that could serve as a basis for criticizing or disciplining such antics. More importantly, we are not in possession of a jurisprudential model that is capable of making normative sense of legislation as a genuine form of law, of the authority that it claims, and of the demands that it makes on the other actors in a legal system.

Our silence on this matter is deafening compared with our philosophical loquacity on the subject of courts. There is nothing about legislatures or legislation in modern philosophical jurisprudence remotely comparable to the discussion of judicial decision-making. No one seems to have seen the need for a theory or ideal-type that would do for legislation what Ronald Dworkin's model judge, "Hercules," purports to do for adjudicative reasoning.[1]

Indeed the situation may be even worse than this; it is certainly worse in America. Not only do we not have the normative or aspirational models of legislation that we need, but our jurispru-

dence is pervaded by imagery that presents ordinary legislative activity as deal-making, horse-trading, log-rolling, interest-pandering, and pork-barreling – as anything, indeed, except principled political decision-making. And there's a reason for this. We paint legislation up in these lurid shades in order to lend credibility to the idea of judicial review (i.e. judicial review of legislation under the authority of a Bill of Rights), and to silence what would otherwise be our embarrassment about the democratic or "counter-majoritarian" difficulties that judicial review is sometimes thought to involve.[2]

And so we develop an idealized picture of judging and frame it together with a disreputable picture of legislating. Political scientists know better of course. Unlike law professors, they have the good grace to match a cynical model of legislating with an equally cynical model of appellate and Supreme Court adjudication. Part of what I am interested in doing in these lectures is to ask, "What would it be like to develop a *rosy* picture of legislatures that matched, in its normativity, perhaps in its naivete, certainly in its aspirational quality, the picture of courts – 'the forum of principle,'[3] etc. – that we present in the more elevated moments of our constitutional jurisprudence?"

In this volume, then, I am going to try to recover and highlight ways of thinking about legislation that present it as a dignified mode of governance and a respectable source of law. I want us to see the process of legislation – at its best – as something like the following: the representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and they do so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them. That is the sort of understanding of legislation I would like to cultivate.

And I think that if we grasped that as our image of legislation, it would make a healthy difference in turn to our overall concept of law.

To articulate this understanding is partly a task for analytical legal philosophy; and I have attempted that side of things elsewhere.[4] But we also need to explore the resources we have in our tradition of political thought for sustaining and elaborating this view of legislation; and that is the purpose of this volume. None of the political philosophers whose work I shall discuss can be regarded primarily as *a theorist of legislation.* But there is much more on this in their writing than is commonly supposed – even in the writings of thinkers who are taken to be opposed to the claims of positive law and majority-rule in the name of natural rights or autonomous moral reason. In the chapters that follow, I will be pursuing clues and intimations in the thought of three major thinkers in our tradition – Kant, Locke, and Aristotle – to see what we can learn from them in regard to the standing of this philosophically under-theorized form of law-making. They are not by any means "the usual suspects" in this matter: if there *are* theorists of legislation in our tradition, they are *par excellence* Jeremy Bentham, Jean-Jacques Rousseau, and perhaps Thomas Hobbes. Those three will not be neglected; but I thought it important to show that themes connected with legislation are a little more pervasive in the canon of political theory than a study confined to the usual suspects would reveal.

I hope that what follows is of more than merely academic interest. The British people are justly proud of their Parliament – particularly the House of Commons. In the next few years, however, the government of the United Kingdom is likely to undertake considerable revision of the country's constitutional structure. Many of the proposed changes will be salutary – reform

of the monarchy, for example, and the hereditary and ecclesiastical sides of the House of Lords. Other needed changes may be neglected: I have in mind some reform of the preposterously unfair and disproportionate system of electoral representation; it is now a matter of some embarrassment that the UK is one of a very few democracies that persevere with a "first past the post" rule. One of the changes that *is* envisaged is the incorporation of a Bill of Rights into British law, together with an American-style practice of judicial review of legislation. (The incorporated Bill of Rights is likely to be the European Convention on Human Rights, and at the time of writing it is unclear whether British courts will be given the power to strike down statutes or simply to declare them unconstitutional.) Such a change, if it goes through, will have momentous consequences for the British Parliament and its place in the constitution. The proposal for this particular reform commands widespread support, and it does so largely because ordinary people are worried about the extent of executive control of legislative affairs in Britain. The executive dominates Parliament, so that parliamentary sovereignty often seems to amount to a form of elective executive dictatorship. But people are also worried about majority legislation as such – that is, by the idea of legislation by a popular assembly, even at its best, even if it were not dominated by Downing Street. In other words, I am sure the bad reputation of legislation in legal and political theory has a lot to do with the enthusiasm (particularly elite enthusiasm) for this change. People have become convinced that there is something *disreputable* about a system in which an elected legislature, dominated by political parties and making its decisions on the basis of majority-rule, has the final word on matters of right and principle. It seems that such a forum is thought unworthy of the gravest and most serious issues of human rights that a modern

society confronts. The thought seems to be that the courts, with their wigs and ceremonies, their leather-bound volumes, and their relative insulation from party politics, are a more appropriate place for resolving matters of this character.

I am not convinced;[5] but it is not my intention to make the case here against judicial review of legislation. I do think it imperative, however, that such a reform should not be undertaken without a clear sense of what is valuable and important in the idea of a legislature and of the dignity and authority that legislation can command. It should certainly not be undertaken on the basis of the impoverished conception of legislation that is found presently in our jurisprudence or in the theoretical underpinnings of American constitutional law. I hope, therefore, that the chapters that follow may contribute something substantial to the development of this understanding, and provide us with a better basis for thinking about the constitutional choices that we face.

So, my title is "The Dignity of Legislation" and my aim is to evoke, recover, and highlight ways of thinking about legislation in legal and political philosophy that present it as an important and dignified mode of governance. My strategy is two-fold. In the first chapter and the last, I shall speak directly of the matters I have just outlined. But in the three middle chapters, I am going to try and tease out what there is to be said in favor of positive legislation from the three rather unpromising canonical sources that I mentioned: Aristotle, John Locke, and Immanuel Kant. My sense is that these are names not commonly associated with the idea of the dignity of legislation. On the contrary: Kant is associated with the notion that there are severe limits on the claims that positive law may make against the autonomous moral thinking of the individual person; Locke is philosophically the founding father of the limited legislature and the idea of natural rights against the

legislature; and Aristotle is more commonly associated with suspicion of democracy and the ideas of political virtue on the basis of which an enhanced role for the judiciary is often today defended. Nevertheless it is from Aristotle's work, from Locke's and from Kant's, in the canon of political thought, that I shall try to recover some of what I think we need in the way of a philosophical account of the dignity of legislation.

2

The indignity of legislation

I

In the introductory lectures on political science that he gave in Cambridge in Michaelmas Term 1885,[1] John Robert Seeley noted the tendency of German writers on politics to characterize states (or stages in the development of the state) according to what is taken to be the province of their main activity, their most important function, the function that organizes and inspires everything that they do. There is *Der Kriegstaat* (the state organized for war), *Der Rechtstaat* (the state organized around the principle of the Rule of Law and individual rights), *Der Handelstaat* (the state devoted to the advancement of trade), *Der Polizeistaat* (the police-state), and so on.[2] *We* live, said Sir John, in a *Legislation*-state, which is not at all the same thing as a *Rechtstaat*, but rather a form of state devoted to the business of making continual improvements in the life of the community by means of explicit legal innovations, i.e. by parliamentary legislation.[3] We may be committed in principle to *laissez-faire* economics and to free trade, he said; we may accept Mill's principle of liberty so far as society's interference with the private life of the individual is concerned,[4] but we do not infer from this any principle or moral requirement of government inactivity. On the contrary, every day another demand emerges for new legislation to deal with some difficulty or to reorganize some aspect of social affairs, be it education or public hygiene or the reform of the civil service. All parties in modern politics agree, said

Seeley, "that there is a vast amount to be done, that we have more work before us than can possibly be overtaken," and that consequently "governments ought to be continually busy in passing important laws."[5]

Seeley denied that he was passing judgment on this tendency; he said he was just trying to classify it. But the tone of distaste is unmistakable in the midst of his taxonomy. The legislation-state, he said – that is, the state engaged continually in making laws, unmaking them, and amending them – is an anomaly:

> Historically, this is as unlike as possible to the doctrine of other periods. The state in other times . . . was not supposed to be concerned with legislation. Communities had indeed laws, and at times, though rarely, they altered them; but the task of alteration hardly fell to the state . . . In earlier times, the state, that is the power which issues commands and inflicts punishments, was hardly supposed capable of making law. It could conduct a campaign, levy a tax, remedy a grievance, but law was supposed to be in a somewhat different sphere. Law was a sacred custom; the state might administer, or enforce, or codify it; but legislation, the creating or altering or annulling of law, was conceived as a very high power, rarely to be used, and concerning which it was doubtful who possessed it. Laws are ὑψίποδες δἰ αἰθέρα τεκνωθέτες "walking on high, born above the heavens." Often religion was called in, and commonly some degree of fiction was used to conceal the all too daring alteration that was made.[6]

On this point, Seeley concluded, "we have completely broken with the tradition of earlier times."[7]

He was not the only person who took this tone – Henry Sumner Maine was another,[8] Walter Bagehot was a third[9] – and though the pitch of legislative activity in England in their time was unprecedented, their attitude towards legislation and legislators was hardly new. More than a hundred years earlier and at Oxford,

William Blackstone observed, in his lectures on the Common Law of England, that a long course of reading and study is required to form a professor of laws, "but every man of superior fortune thinks himself *born* a legislator." As a result, said Blackstone, "the Common Law of England has fared like other venerable edifices of antiquity, which rash and unexperienced work-men have ventured to new-dress and refine, with all the rage of modern improvement."[10] (Indeed it was the point of his *Commentaries* to remedy this situation. Though they were delivered in 1765 as lectures at Oxford, they were not intended as a contribution to the education of *lawyers*; instead they were aimed at the sort of gentlemen in the audience who might be expected to seek positions as legislators, five or ten years hence, in the House of Commons.)[11]

And the attitude persists into our own time, in American jurisprudence perhaps even more than in English. We hear the concerns of Blackstone and Bagehot and Seeley echoed in the sentiment widespread among twentieth-century legal scholars that the character of Common Law systems is changing for the worse as legislation crowds out the more endogenous and traditional bases of legal growth. Statutes, we are told, "have no roots" and are often "hastily and inconsiderately adopted."[12] "Choking on Statutes" – the title of the first chapter of Guido Calabresi's book on courts and legislation – is an apt motto for this sort of attitude.[13]

II

Among some Common Law jurists, this attitude crystallizes in a curious, almost snobbish reluctance to regard legislation as a form of law at all. In what I think was his last published essay, the great Harvard formalist Christopher Columbus Langdell reviewed

A.V. Dicey's book *The Relation Between Law and Public Opinion in England During the Nineteenth Century.*[14] Langdell began his review by explaining that, despite its title, this was not a *law* book at all,[15] that the inclusion of the word "law" in Dicey's title was unfortunate and misleading. "As commonly used by lawyers, the word means law as administered by courts of justice in suits between litigating parties, but here it is clearly not used in that sense but in the sense of legislation."[16]

What could possibly be meant by anyone's insisting that legislation is not law? At its least controversial, the claim embodies a healthy dose of Legal Realism. A bill does not become law simply by being enacted, or taking its place in Halsbury or in the statute-book. It becomes law only when it starts to play a role in the life of the community, and we cannot tell what role that will be – and so we cannot tell *what law* it is that has been created – until the thing begins to be administered and interpreted by the courts. Considered as a piece of paper with the stamp of parliamentary approval, a statute is not law, but only a possible *source of law.*[17]

But Langdell, of all people, was anything but a Legal Realist; his approach to the law and to legal education at Harvard Law School was exactly what the realists took themselves to be revolting against.[18] Anyway I am sure he was not just making this simple analytic point in denying the honorific "law" to something as mean and ordinary and political as the parliamentary legislation that Dicey was writing about. As I said in Chapter 1, there is a sense in legal philosophy that legislation lacks some of the *dignity* associated with the venerable institution we call law. While the Common Law has been evolving for centuries, "working itself pure" in Lord Mansfield's phrase[19] – so that each precedent or each doctrine, however much we dislike it in itself, has something in its lineage that elicits our respect – a statute thrusts itself before

us as a low-bred parvenu, all surface and no depth, all power and no heritage, as arbitrary in its provenance as the temporary coalescence of a parliamentary or congressional majority. I suspect that it is on account of this pedigree – or lack of pedigree – that statutes are considered unworthy by jurists like Langdell of the appellation "law" with all that that implies.

The issue is not just one about words: is the honorific title "law" to be granted to or withheld from legislation? In ordinary usage and in the daily work of most lawyers, there is no question. Legislation *is* law; indeed it constitutes the bulk of the legal materials that ordinary people have to come to terms with. It is more a matter of the explicit working out of concepts. The question we should ask is this: given that the legal world in which citizens and their attorneys encounter the demands of the state is largely a statutory world or at best a world in which Common Law and statutes mingle chaotically and indiscriminately, why in legal *philosophy* have we persisted in working out conceptual structures that make the Common Law – the law developed by judges and courts – the central and interesting issue. Why is it judge-made law and not legislature-made law that connects most naturally to the other political values that "law," "justice," "legality," and "the Rule of Law" evoke? Why is *this* our concept of law in jurisprudence, while statutes and legislation linger on the periphery of our philosophical concerns, as rather embarrassing and problematic instances of this concept, if indeed they are instances of the concept at all?

III

I mentioned in the last section the sense of statutes – pieces of legislation – as parvenus on the legal scene, all power and no

heritage. By contrast with other sources of law, legislation has attributes of the brazen and the impudent. A judge when he legislates at Common Law (if that is what he does) has at least the good grace to pretend that he is *discovering* what the law already was all along: he does not present himself explicitly as a law-maker. In fact, as we all know, the law is changed every day in our appellate courts; but mostly it is changed under cover of a seemly pretense that nothing could be further from our minds, or the minds of the court, than any legislative aspiration. The language and the style are declaratory even if the reality is revisionist. The legislature, by contrast, has the impudence to say, "Forget what the law may have been all along. This is what it shall be now." And the law is supposed to be changed – changed, as I say, *brazenly* – in virtue of nothing more seemly than the community's recognition of the legislating body's deliberate intention to do just that.

Those who remember their H.L.A. Hart – when I was at Oxford *The Concept of Law* was prescribed (quite properly) for study in political theory as well as for study in jurisprudence – will recall that Hart regarded this business of deliberate change – "susceptibility to deliberate change" – as one of the things that distinguished the law of a community from its morals. "It is," he wrote, "characteristic of a legal system that new rules can be introduced and old ones changed or repealed by deliberate enactment . . . By contrast moral rules or principles *cannot* be brought into being or changed or eliminated in this way."[20] The last point is not intended as a consequence of moral realism (as in: no one can change or amend the laws of nature). Hart meant "the social phenomenon often referred to as '*the* morality' of a given society or the 'accepted' or 'conventional' [or 'positive'] morality of an actual social group."[21] The explanation of morality's immunity to deliberate change is sociological not metaphysical: "it is incon-

sistent with the part played by morality in the lives of individuals that moral rules, principles or standards should be regarded, as laws are, as things capable of creation or change by deliberate act."[22] Moreover, immunity to deliberate change applies to other social norms as well, including such non-moral norms as traditions and cultural practices. They can *change*, of course, as can conventional morality; but they cannot be changed deliberately.

So – from a sociological point of view – a society comes to have a legal system on Hart's account as some of its traditional moral rules and practices begin to play a different role in the lives of its members – a role that makes, firstly, their articulation and, secondly, their amendment, abrogation or revision, thinkable in a way that it wasn't thinkable before. Hence the need for the apparatus which Hart makes central to his particular version of legal positivism: I mean the apparatus of secondary rules, rules of recognition, and practices of keeping track of which rules have changed and which have not. This apparatus is necessary, because the role which rules now play in the life of the society means that members no longer have access to the rules "instinctively" or "intuitively" or just by virtue of their socialization and upbringing.

The constraints of this volume do not allow a proper exploration of the extremely interesting (and neglected) connection between this theme in Hart's jurisprudence and the sociological or social-theoretic side of what is too often regarded as a purely analytic thesis of legal positivism[23] – namely, that law has no necessary connection with justice. The contrast between morality's immunity and law's susceptibility to deliberate change helps explain Hart's hesitation about regarding the Rule of Law as "an unqualified human good."[24] In a "pre-legal" society, that is, one governed simply by a set of conventional moral practices, everyone

knows the rules. The transition to legal governance, however, and the establishment of rules of recognition inevitably involve the emergence of a corps of specialist law-detectors who know the marks of legislation, and know how to tell which rules have deliberately been given social authority and which have not. Hart cites this point about legislation as a substantive basis for his well-known skepticism about any necessary connection between law and morality. Since "a great proportion of ordinary citizens – perhaps a majority – have no general conception of the legal structure or of its criteria of validity,"[25] the emergence of deliberately enacted law brings us face to face with what he calls "a sobering truth: the step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost."[26] Those who make and can recognize enacted law may use that capacity and that specialist knowledge for their own benefit, and to the detriment of the rest, who find they know less and less about the detailed basis on which their society is organized, certainly less than they or their ancestors did when it was organized solely on the basis of primary rules; and they will be less in a position to question or participate in the processes by which they are governed. The prospect of injustice thus accompanies the division of labor involved in the growth of technical law. "In an extreme case," Hart concluded, "only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; and the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system."[27]

Unfortunately the story I have to pursue is a less riveting one. It is about the way in which modern jurisprudes reading or following

Hart have managed to play down this business of "*deliberate change*" as the essence or mark of law.

For the fact is that, although legal positivism has traditionally given pride of place to legislation as a basis for law, modern positivists are much less interested in this than they are in the processes whereby law is developed in the courts. They maintain the traditional view that law is defined positively in terms of its institutional source (not the moral quality of its content), but the institutions they focus on are courts, not legislatures. They retain the Hartian idea of a rule of recognition, but they orient it towards the recognition by one court of the validity of another court's output, rather than a court's recognition of the enactment of a legislature. And so deliberate, explicit legislation – the kind which involves parliaments not courts – begins to disappear from the core of the positivist picture.

The jurisprudential theory of Joseph Raz is a fine example of this tendency. In Raz's account, what makes a legal system a *system* is not the strategic position of a legislature, but the fact that there is an organized set of norm-applying institutions (like courts) which recognize norms as valid in virtue of the same source-based criteria. Now, on the traditional positivist understanding, a phrase like "source-based criteria of validity" would refer us automatically to a legislature. But in principle, Raz says, there is no reason why courts need to orient themselves towards a legislature at all. The criteria of validity shared by a system of courts may refer simply to a heritage of earlier decisions by similar norm-applying institutions. Suppose the following two things are true of a legal system: (1) it is the task of the courts to apply pre-existing norms; and (2) any determination by a court as to what those pre-existing norms are is binding on other courts. A system of courts governed by these two principles might well develop a complex and evolving

body of positive law, each constituent norm of which would be valid by virtue of its source (in a determination by a court as to what some pre-existing norm amounted to), without any institution thinking of itself or being perceived as an explicitly legislative body, in the sense of a body whose function it was to change the law or to enact new law deliberately. Of course law in such a system would change, and new law would be created; but it would be created by virtue of mistakes by courts in the application of the task laid down in (1), mistakes which would nevertheless themselves acquire the status of authoritative legal norms by virtue of the doctrine of authority laid down in (2).[28] Such a system would satisfy Raz's own "sources thesis"[29] and it would involve the operation of a rule (or rules) of recognition. But it would not be oriented, as those ideas are often thought to be oriented, towards a sovereign legislature as source, and towards criteria of valid enactment as the basis on which law is distinguished from non-law. Hence, Raz concludes that "the existence of norm-*creating* institutions, though characteristic of modern legal systems, is not a necessary feature of all legal systems, but that the existence of certain types of norm-applying institutions [i.e. courts] is."[30] And so, on the basis of this purely theoretical possibility (that a legal system might exist without a legislature), Raz deems any further account of legislation – that is, self-conscious and explicit law-making – inessential for jurisprudence.

What is going on here? We expect legislation to be at the center of the positivist tradition in jurisprudence. Yet here we have intentional law-making being presented as a contingent and philosophically peripheral aspect of law in one of the leading positivist theories of our time. What are we to make of this? Why the embarrassment abut legislation? Why the greater sense of comfort with institutions that deny or disguise their law-making?

IV

One possible explanation is to see this embarrassment about legislation as an instance of a more general nervousness about the role of deliberate intellectualization in politics. There are powerful resonances between the jurisprudential misgivings which I am trying to fathom and certain traditions of political thought which are very suspicious of the explicit and the deliberate in politics.

In English political philosophy, the high priest of these misgivings has been the conservative Michael Oakeshott, and its most eloquent expression Oakeshott's essay "Rationalism in Politics."[31] The ascendancy of legislation in English law, and the ascendancy of the legislative mentality in English politics, were for Oakeshott an indication of the extent to which "the consciously planned and deliberately executed [is] considered (for that reason) better than what has grown up and established itself unselfconsciously over a period of time."[32] We have lost faith, he said, in the emergence and evolution of social frameworks. We see the business of law as technical problem-solving in society, and we are reluctant to regard anything as a solution, or as standing in place of a solution, which we have not deliberately set up as such.

It is no accident therefore that Oakeshott regarded Jeremy Bentham as one of his bugbears, and that he made available special reserves of contempt for Bentham's project of a rational code of laws inscribed by an enlightened legislator on a *tabula rasa* scrubbed clean of all contamination by the ancient and barbaric cobwebs of the Common Law.[33] And it is notable that when Oakeshott set out his notorious *list* of the "the creatures of the rationalist brain," "the progeny of political rationalism," it included a very considerable number of statutes or legislative proposals:

The project of the so-called Re-union of the Christian Churches, of open diplomacy, of a single tax, of a civil service whose members have "no qualifications other than their personal abilities," of a self-consciously planned society, the Beveridge Report, the Education Act of 1944, Federalism, Nationalism, Votes for Women, the Catering Wages Act, the destruction of the Austro-Hungarian Empire, the World State (of H.G. Wells or anyone else), and the revival of Gaelic as the official language of Eire . . .[34]

Now, I am not saying Michael Oakeshott was in league with those jurists who have disparaged or neglected legislation as a form of law. Most of the legal scholars, particularly the Americans, who complain about legislation polluting the Common Law have never heard of him; and in any case they do not have the theories of knowledge, practice, and understanding that would qualify their concerns about legislation as philosophical opposition to rationalism as such. Certainly there is no reason to regard Joseph Raz, for example, as a closet Oakeshottian. But there are some subterranean connections, particularly between Michael Oakeshott's account of unselfconscious practice and H.L.A. Hart's account of the nature of rules.

Think back to Hart's point about the immunity of certain types of rule to deliberate change. In part, this claim of Hart's is bound up with what is known as his "practice conception" of rules. A traditional rule, for example, is immune to deliberate change because "[r]ules acquire and lose the status of traditions by growing, being practiced, ceasing to be practiced, and decaying; and rules brought into being or eliminated otherwise than by these slow, involuntary processes could not thereby acquire or lose the status of tradition."[35] This argument suggests that immunity to deliberate change might apply to any rule that is appropriately understood in terms of the practice conception of rules. A practice

is, in one dimension, a *pattern* of behavior, a regularity; and the suggestion seems to be that such patterns establish themselves not by fiat, but gradually, evolving by processes of habituation, imitation, and social convergence. Like habit, a rule takes time to get a foothold in individual behavior; and like a custom, a practice takes time to establish itself as a mutually reflected habit in the conduct of many people in daily interaction with one another. The normative dimension of a practice – the "internal aspect" of a rule – is probably also best conceived of as something that establishes itself gradually. A practice takes on a normative aspect not because individuals suddenly *decide* to frown upon or condemn certain things in themselves and others which they did not previously frown upon or condemn; it happens rather because individuals slowly develop a "*standing disposition* . . . to take such patterns of conduct both as guides to their own future conduct and as standards of criticism."[36] Gradually something becomes not only the thing that is generally done around here (in a descriptive sense). Its being done around here takes on a flavor in the lives of those who do it as "the thing to do" or "the done thing." Or, if the rule works like a prohibition, it gradually becomes the case not only that the act in question is never done, but that it presents itself to those who are tempted to do it as something which is "not done" in this community. And again, the suggestion is that the sort of settled attitudes connoted by these English-sounding phrases are not the kind of thing one can easily change or affect as a matter of intention.

Hart's debt to Peter Winch[37] (and through Winch, to Oakeshott and Wittgenstein) is well known in relation to the practice conception of social rules. His thesis about the immunity of practices to deliberate change is very Oakeshottian in character, sharing, apparently, Oakeshott's conviction that the primal and

most important sense of social morality is that in which it exists among the members of a community as a mutually reinforced set of habits or skills established in the character and dispositions of individuals and sustained by the taking-it-for-granted which is woven into the fabric of social life.[38] This sort of social in-dwelling cannot be legislated. It is certainly something that can change, something that can arise or gradually evaporate. But to think that one could decide deliberately to change such things is to imagine, fatuously, that the character and dispositions of individuals, mutually reflected and reinforced in the detail and frequency of social interaction, are under direct social control. Nothing – the suggestion seems to be – could be further from the truth.

Of course, the distinctive thing that Hart adds to this picture – the thing that I suspect Oakeshott misses altogether – is that practices of this implicit kind can evolve not only at the primary level of social morality, but also at a secondary level. That is, a society can evolve practices whose task it is to govern the processes by which first-level rules and practices are modified. Indeed, in Hart's own jurisprudence, the practice conception of rules comes to be focused almost exclusively on what Hart calls secondary rules – rules of change and rules of recognition. These are the practices and (as they say in England) the conventions that constitute a legislature and empower it to lay down the law and to subject the immemorial practices of primary morality to the rational processes of deliberate change.

Oakeshott is surely right to think that this liability to change as a result of processes constituted by the secondary rules alters the character of primary rules. Once that liability is established, the primary rules can no longer be merely practices in the sense outlined a couple of paragraphs ago; instead they are now artifacts of practices of a different sort, practices of legislation. (This

implication of Hart's two-tiered picture deserves more study. It would follow, for example, that it is a mistake to think of Hart's two tiers of rules as comprising two tiers of practices, in the same sense of practices.)[39] Still, it is odd to think that such a change is cause for nothing but lament. We are complex animals, in our thoughts and in our sociability. And it is surely a tribute not an insult to our modes of being-together that we develop not only practices, but practices-about-practices, that is second-order practices that bring our modes of interaction into relation with our capacities for both rational and moral thought. It may be true – as the Oakeshottians emphasize – that one cannot make explicit the know-how that is involved in riding a bicycle. But one can reflect nevertheless on the design of bicycles and the regulations governing their safety. Similarly it may be true that one cannot learn *noblesse oblige* from a book. But the members of a society can reflect upon whether *noblesse oblige* is the sort of social responsibility that they want for the tasks that are to be performed among them. They can develop practices of reflecting and deliberating upon that, and they can also develop a practice embodying the results of such reflection in social initiatives – a practice which we call legislation. It is a practice that is capable of fostering new kinds of practice, of eliciting new sorts of know-how, and of contributing explicitly to the nourishment of new modes of implicit virtue.

V

Besides Oakeshott, the other main theoretical critic of rationalism and of the prominence of legislation in modern government is Friedrich Hayek. Hayek's critique of legislation is more explicit than Oakeshott's: it is sustained through most of the first volume

of *Law, Legislation and Liberty*,[40] as the basis of Hayek's conviction that we have gone seriously wrong in our modern approach to law and administration. Though the essence of good government, according to Hayek, is rule by general laws, it is important for him that such laws be conceived of as implicit in the practices of a free society and that, if they are thought of as changing, their change should be gradual and spontaneous, rather than planned and orchestrated by a legislator. Law, in this sense, is quite different from legislation.[41] It is independent of human purpose, for its function is to accommodate human purposes. It is independent of human will, for its business is the coordination of free wills. It may not be perfect, but the best one can hope for is that it will "work itself pure." It is not something to be reworked or made-over in the image of some ambitious lawgiver's rational scheme. That is Hayek's conception of law. By contrast, Hayek insists, the chief concern of legislative bodies has always been, not the accommodation and coordination of independent purposes, but the structuring, financing, and administration of government and the state. Those are tasks which have to be done deliberately if they are to be undertaken at all. So, since deliberate rule-making is essential to this sort of organizational activity, there is a natural tendency to associate explicit organization with all forms of deliberate rule-making. In other words, the legislative mentality as such is gradually oriented towards an essentially managerial vision of law:

> It was in connection with the rules of the organization of government that the deliberate making of "laws" became a familiar and everyday procedure; every new undertaking of a government or every change in the structure of government required some new rules for its organization. The laying down of such new rules thus became an accepted procedure long before anyone contemplated using it for altering the

established rules of just conduct. But when the wish to do so arose it was almost inevitable that the task was entrusted to the body which had always made laws in another sense . . .[42]

Thus the tendency of modern "social legislation" is to treat the whole of society as an organization to be "managed" and "administered," with frightful consequences for liberty and constitutionalism, and the Rule of Law.[43]

That's the broad picture. And, in general, we find the same imagery in Hayek's argument that we found in Oakeshott: the legislator as hubristic Enlightenment social engineer. Again, Jeremy Bentham is arraigned as the main culprit – someone seeking to construct and reconstruct society according to his own rationalist conceptions. For Hayek too, Bentham's villainy is part of a more general tendency in jurisprudence:

the whole conception of legal positivism which derives all law from the will of a legislator is a product of the intentionalist fallacy characteristic of constructivism, a relapse into those design theories of human institutions which stand in irreconcilable conflict with all we know about the evolution of law and most other human institutions.[44]

Of course, it is ironic that in all of this Hayek completely misses the point that actually existing legal positivists are in fact falling over one another to distance themselves from any jurisprudence that is centered on the sort of deliberate and self-conscious lawmaking that goes on in Congress or Parliament. At the level of political theory, Hayek and Oakeshott are dismayed by the emphasis on legislation and legislatures. At the level of legal philosophy, however, they need not be worried at all: jurisprudence remains fixated on the courts, on judicial reasoning, and on what is taken to be the organic, spontaneous and implicit growth of the Common Law.

VI

I suspect that the reason for this continuing fixation in jurisprudence does not really have anything much to do with the philosophical critique of rationalist constructivism. It is more a worry about compromising what is taken to be the appealing anonymity of law and – so long as that anonymity is sustained – its apparent neutrality, or at any rate its distance from or independence of politics.

When I stated earlier that jurists are more comfortable with law-making by bodies which deny they are making law than with law-making by bodies which aggressively announce that as their very intention, I didn't mean that they value diffidence and modesty for their own sake. I mean that a large part of the authority, the legitimacy – if you like, the simple *appeal* – of a legal system is that we may regard ourselves as subject to government by laws, not by men. And the danger of focusing on legislation is that, as a source of law, it is *all too human*, all too associated with explicit, datable decisions by identifiable men and women that we are to be subject to *these* rules rather than *those*. If we don't like an emerging doctrine of Common Law, we can blame it on the heritage. But if we don't like a statute, we tend to see it as a piece of Tory legislation, or a socialist measure, something to be blamed on William Beveridge or Franklin Roosevelt or Shirley Williams.

Now I am not saying that everyone buys this image of the Common Law as neutral and anonymous in its provenance. Many do not; it is one of the major points of controversy between legal traditionalists and followers of the Critical Legal Studies movement. But that's just the point: judicial reasoning poses a special challenge or a special controversy for jurisprudence in relation to this issue. The processes by which courts reach their decisions are

supposed to be special and distinctive, not directly political, but expressive of some underlying spirit of legality. It is a matter of some importance for jurisprudence to find out whether these claims about the special character of judicial reasoning can be sustained. There is no similar controversy about legislative reasoning. Everyone knows that argument in Congress or in Parliament is explicitly and unashamedly political. There's no controversy in jurisprudence about that; you can read it in Hansard or watch it on C-SPAN. It is either the interplay of interests, or the direct clash of policy proposals and ideologies. It's what Joseph Raz calls "*pre*-legal reasoning";[45] as such it is not something with which legal philosophers need to worry themselves.

VII

We *think* we know how legislators argue; but do we really? That is, do we really understand what legislation and legislative reasoning amount to for legal purposes? Do we have an adequate grasp of the connection between the deliberation that goes on in Congress or in Parliament and the authority of the statutes that result as law?

One indication that we are still a little at sea in this matter has to do with the fraught and controversial business of ascertaining *legislative intent*. In a 1992 House of Lords decision in the case of *Pepper* v. *Hart*,[46] it was held for the first time in recent English law that the courts were entitled to consult the record of parliamentary debate in order to settle some issue of how a statute should be interpreted. This is quite an innovation in English law. For centuries, the courts had regarded themselves as debarred from any such enquiry by an aspect of the constitutional settlement of

1689, which provided that the proceedings of the House of Commons shall not be impugned or called into question in any court of law. The fact that what is essentially a point of parliamentary privilege – designed to protect the latter-day equivalents of John Pym from judicial persecution – had stood for so long in the way of any consideration of legislative intent in statutory interpretation is at once touchingly quaint and exasperatingly English. But it is also indicative of how far we are from clear thinking on this matter.

The parliamentary privilege argument was ludicrous; but that doesn't mean that searching the parliamentary record for evidence of legislative intent is a sensible thing to do. On the contrary, I think the whole idea that legislative proceedings can reveal legislative intent is seriously flawed, and itself just one more indication of the inadequacy of our legislative jurisprudence.

On the face of it, the idea of legislative intent makes sense. Legislation is intentional action: as I said earlier, the striking thing – the brazen thing – about legislation is that the law is deemed to have been changed simply in virtue of the legislature's communication of its intention to do just that. What's more, if there is a question about *what change* has been effected in this way, the answer is supposed to be: the very change that the legislature announced its intention to effect. So far, so good. But so far this conception of legislative intent does not take us beyond the text of the bill or the statute. The intention being communicated and given performative effect in the act of legislation is just the intention conventionally associated with the language of the enactment. If there are further questions about what that language means – because it is vague, for example, or ambiguous – the concept of intent that we have set out so far offers no guidance whatsoever.

In the case of an individual speaker, when her words are

unclear, we can ask her what she meant or we can consult what we know of the thoughts or ideas associated with her original utterance. That is, we can make sense of the idea of an occurrent intention associated with the individual speech act, of which there may be evidence or indications over and above the conventional content of the speech act itself. And if the legislature were a single natural individual we could do exactly the same thing. Confronted with an ambiguous enactment, we would take the sovereign aside and ask her what she meant; or if she was unavailable, we would pore over what else we knew about the state of mind she was in at the time that she did her legislating.

None of this makes sense, however, or at least none of it makes straightforward sense, in the case of a legislature that is *not* a single natural individual, a legislature that rather comprises hundreds of members, with radically diverse (indeed, usually politically opposed) opinions and states of mind. I am not saying that such a body cannot have intentions or perform intentional actions. It can, but only in virtue of its formally specified acts – i.e. only by virtue of the constitutional rules (about voting, about First, Second, and Third Readings, etc.) that stipulate what is to count as an Act of Parliament, an Act of Congress or whatever. Beyond that, there is no question of our being able to attribute *to the legislature as such* any thoughts, intentions, beliefs, or purposes. Beyond the meaning embodied conventionally in the text of the statute that has been put before the House and voted upon, there is no state or condition corresponding to "the intention of the legislature" to which anything else – such as what particular members or groups of members said or thought or wrote or did – could possibly provide a clue. True, the intentional enactments of the legislature are constitutional functions of the voting-acts of the individual members; and those acts of voting must be understood

as intentional as well. But what matters here is simply the intentionality of "yea" or "nay" in relation to a given motion, not any hopes, aspirations or understandings that may have accompanied the vote. The legislators have their own individual hopes and expectations of course, but unless it is seriously proposed that we aggregate these states of mind using some sort of shadow majority-rule,[47] we have to admit that there is simply no way of bringing these particular intentions into relation with one another once we abandon any assumption that they are uniform.[48]

VIII

I have discussed this question of legislative intent at greater length than I had planned. Although it is just getting underway in English law as a result of *Pepper* v. *Hart*, it is big business in the United States. There, lawyers spend hundreds of billable hours combing the congressional records and the committee records to find any scrap of material, any speech or memo by a member of the majority, favorable to the interpretations they are advancing. It's a controversial practice: the quest for legislative intent has been described as something more like searching for a friendly face in a crowd than discovering a canonical basis for interpretation.[49]

The point I want to emphasize in this part of the chapter is that this practice has gotten underway without very much deep consideration of what sort of agent a modern legislature is. In this regard, the philosophy of law has been quite unhelpful to those who have to do the difficult and practical business of statutory interpretation. The arguments that I have just made against the idea of legislative intent turn crucially on the fact that our legislatures consist of not just one monarch, but hundreds of people, with divergent and often conflicting beliefs and concerns,

facing one another as equals in a highly structured and formalized environment. For more than three centuries, however, this fact has been largely regarded as uninteresting, beneath notice in positivist jurisprudence.

Reading back through the philosophy of law, one finds that, when they talk about legislation at all, jurisprudes are most comfortable treating the legislature on the model of a single individual. It is a default position that has even infected the cosmological argument for the existence of God. Lytton Strachey tells the following story about its influence on Florence Nightingale. Towards the end of her life, Miss Nightingale wrote a book of philosophy:

> One copy was sent to Mr. [John Stuart] Mill, who acknowledged it in an extremely polite letter. He felt himself obliged, however, to confess that he had not been altogether convinced by Miss Nightingale's proof of the existence of God. Miss Nightingale was surprised and mortified; she had thought better of Mr. Mill; for surely her proof of the existence of God could hardly be improved upon. "A law," she had pointed out, "implies a lawgiver." Now the Universe is full of laws – the law of gravitation, the law of the excluded middle, and many others; hence it follows that the Universe has a lawgiver – and what would Mr. Mill be satisfied with, if he was not satisfied with that?
>
> Perhaps Mr. Mill might have asked why the argument had not been pushed to its logical conclusion. Clearly, if we are to trust the analogy of human institutions, we must remember that laws are, as a matter of fact, not dispensed by lawgivers, but passed by Act of Parliament. Miss Nightingale, however, with all her experience of public life, never stopped to consider the question whether God might not be a Limited Monarchy.[50]

– or, for that matter, a bicameral assembly!

As I say, there is nothing new about the Nightingale position; it

has permeated legal positivism since the foundation of that school. True, in both Jeremy Bentham's work and John Austin's, one finds a gesture towards the idea – which of course was the political reality in contemporary England – that a legislature might be a large and numerous body. Thus Bentham said neutrally that we identify a *sovereign* whenever we notice "any person *or assemblage of persons* to whose will an entire political community are (no matter on what account) supposed to be in a disposition to pay obedience: and that in preference to the will of any other person."[51] But that phrase – "assemblage of persons" – was almost his only concession to the point. For the rest of his jurisprudence and in much of his political philosophy, the sovereign was almost always referred to as "he" (and for once, refreshingly, it is the number not the gender of the pronoun that preoccupies us). And this despite Bentham's insistence that he was talking about real legislators: "I speak here of those who frame [the] laws, not of those who touch them with a sceptre."[52] I am not saying Bentham was uninterested in legislative assemblies. On the contrary, he can claim to have founded the peculiar English obsession with the shape and furniture of legislative chambers – an obsession which surfaces again in the writings and speeches of Winston Churchill.[53] But he saw no consequences for jurisprudence in the assembly aspect of legislation.

One way to read this is to see it as indicative *sub rosa* of a definite philosophical bias in favor of monarchy – whether in the form of the philosopher-king, the unitary sovereign, or the enlightened despot. Certainly that is what one would conclude from associating the positivism of Bentham and Austin with that of Thomas Hobbes. For when Hobbes said "the Legislator is *he* . . ."[54] the pronoun was not at all neutral, but reflective of his personal conviction that monarchy was by far the best form of

government, because, among other reasons, "a Monarch cannot disagree with himselfe, out of envy, or interest; but an Assembly may; and that to such a height, as may produce a Civill Warre."[55] All the same, since Hobbes had no choice but to acknowledge that this "one thing alone I confess in this whole book not to be demonstrated but only probably stated,"[56] the strict logic of his position required him to repeat from time to time that, in theory at least, sovereignty might be vested "either in one Man, or in an Assembly of more than one."[57]

I think, in the end, that this too is part of what is involved in our jurisprudential unease about legislation. Legislation is not just deliberate, administrative, or political: it is, above all, in the modern world, the product of an *assembly* – the many, the multitude, the rabble (or their representatives). The judges stand above us in their solitary splendor, with their books, their learning, and their insulation from the conditions of ordinary life. If they are not alone on the bench, they are surrounded by a very small number of intimates of similar distinction, with whom they can cultivate relations of collegiality, scholarship, and exclusionary virtue. A parliament by contrast is an unruly body of many times that number – perhaps a hundred times as many. To echo Blackstone, a long course of training is required to become a judge; but every member of the rabble sent up by the electors to Westminster thinks himself *born* a legislator. And there are so many of them, one can scarcely hear oneself think. How could this be a dignified way of making or changing the law?

That's the worry that fascinates me – the clear consensus in the canon of legal and political thought that the size of a legislative body is an obstacle, rather than an advantage, to rational lawmaking.

Part of that consensus is explained by a sense, originating in

ancient prejudice but surfacing also in the Enlightenment, that the larger the legislative assembly the lower the average level of wisdom and knowledge among the law-makers. The views of the Marquis de Condorcet are typical. On the one hand, Condorcet proved arithmetically that majority-rule makes a group more likely to give the correct answer to some question than the average member of the group; what is more, the greater the size of the group, the more likely it is that the majority answer is right, provided the average competence of the individual members of the group (the chances of each coming up with the right answer to the question before them) is greater than 0.5. On the other hand, Condorcet also maintained that average individual competence tends independently to decline as group size increases (and then of course the arithmetic of majority-decision works in the other direction):

A very numerous assembly cannot be composed of very enlightened men. It is even probable that those comprising this assembly will on many matters combine great ignorance with many prejudices. Thus there will be a great number of questions on which the probability of the truth of each voter will be below ½. It follows that the more numerous the assembly, the more it will be exposed to the risk of making false decisions.[58]

Even if the ignorance of the large group of legislators is not a problem, there is still a concern, exhibited for example by James Madison, about their susceptibility to passion and malign influence:

the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning, and passion the slave of sophistry and declamation. The people can never err more than in supposing that by multiplying their representatives beyond a certain

limit they strengthen the barrier against the government of a few. Experience will forever admonish them that, on the contrary, *after securing a certain number for the purposes of safety, of local information, and of diffusive sympathy with the whole society*, they will counteract their own views by every addition to their representatives. The countenance of the government may become more democratic, but the soul that animates it will be more oligarchic.[59]

The apprehension about oligarchy reflects, in part, a concern about the difficulty of large numbers of representatives coordinating sufficiently to produce laws that are coherent. The more members there are, the more they will need a facilitator or coordinator; and by a kind of iron law of oligarchy, it is to the latter's hands that power will eventually devolve.

For most theorists, however, the concern is less about oligarchy than the simple difficulty of coordinating large numbers of members in a given legislative session. William Blackstone described as "Herculean" the task of extracting "*a system* from the discordant opinions of more than five hundred counsellors" in a representative assembly.[60] And even Jean-Jacques Rousseau – the apostle of participatory law-making – asked, in *The Social Contract*, "How can a blind multitude, which often does not know what it wills . . . carry out for itself so great and difficult an enterprise as a system of legislation?"[61] As we all know, Rousseau addressed that difficulty with his image of "the law-giver", a mythic figure distinguished, for our purposes, as much by his singularity as by his "superior intelligence."

A hundred years later, we hear echoes of the same concerns, in English political theory. John Stuart Mill worried about the prospects of coherent legislation emerging when bills are "voted clause by clause in a miscellaneous assembly."[62] He argued in general that "[n]o body of men, unless organized or under command, is fit for

action";[63] and since legislative functions are as much matters of action as executive functions, he concluded that "a numerous assembly is as little fitted for the direct business of legislation as for that of administration."[64] Walter Bagehot wrote in similar fashion about the House of Commons: "Here are 658 persons, collected from all parts of England [sic], different in nature, different in look and language."[65] How is something coherent supposed to emerge from the babel of their cross-cutting proposals and counter-proposals? There is a saying in England, Bagehot added, " 'a big meeting never does anything'; and yet [here] we are governed by the House of Commons – by 'a big meeting.' "[66]

The theme on which I wish to conclude this chapter, then, is the *size* of the modern legislature, the plurality, the sheer *numbers* of persons that deliberate law-making involves. We all assume that even if the executive and the judiciary are populated in their highest reaches by just a handful of people, the legislature – alone of all the great branches of government – should assemble people in their hundreds. What is the basis of this assumption? What does it tell us about legislation? How could something which is so obviously a bad idea – law-making by a "big meeting" – have become so entrenched as a principle of constitutional organization?

In the chapters that follow, I will argue that this consensus about "big meetings" is not quite as monolithic as it seems. Machiavelli warned us, almost five hundred years ago, not to be fooled into thinking that calmness and solemnity are the mark of a good polity, and noise and conflict a symptom of political pathology. "Good laws," he said, may arise "from those tumults that many inconsiderately damn." And he continued:

To me it appears that those who damn the tumults between the nobles and the plebs blame those things that were the first cause of keeping

Rome free, and that they consider the noises and the cries that would arise in such tumults more than the good effects that they engendered.[67]

We should look, he said, at what conflict and tumult and numbers can accomplish for liberty, and not be too easily disconcerted by the noisy or smelly or unsavory atmosphere of the popular assembly. That's the advice I shall follow, and in this book I will look for others in political theory who have followed it too, in this matter of the dignity of legislation. I mean unexpected others: for it turns out that even among those who believe in the unity of virtue, even among those who extol the singularity and objectivity of natural law, even among those who focus our attention on the awe-inspiring solitude of moral thinking, there are philosophers who take seriously the plurality of our politics, who see that there is an issue for law in the fact that there are many of us and that we disagree with one another, and who believe it is a mistake to attempt to represent that multiplicity in a legislature which consists of just one solemn and enlightened mind. In the following chapter, then, I will look at Kant's postulate of moral disagreement as the circumstance of politics; at Aristotle's speculation that there may be more wisdom in a multitude than in the wisest individual among them; and at John Locke's recognition that, taking everything into account, people "could never be safe nor at rest, nor think themselves in Civil society, till the Legislature was placed in collective Bodies of Men, call them Senate, Parliament, or what you please."[68]

3

Kant's positivism

I

There are many of us, and we disagree about justice. How we think about such disagreement will determine how we think about politics. And since law is the offspring of politics, how we think about disagreement will determine in some measure how we think about positive law.

Here is an example. The members of a community may be divided on the question of whether a testator should have the Lear-like power to exclude a surviving child from the enjoyment of his estate. Some citizens, celebrating testamentary freedom, say he should: it is after all *his property*, and it should pass according to his wishes. Others say he should not: once he is dead, the importance of respecting his preference diminishes in comparison with the importance of securing the welfare of his dependents. The issue is a political one, not simply because the citizens disagree, for we disagree about all sorts of things – the virtues of the modern novel, the causes of the Punic Wars – on which no political decision is necessary. The issue of testamentary power is political because those who disagree on the merits agree nevertheless that the community needs some determinate resolution of the issue. Testamentary freedom is not something on which we can agree to differ. Or, rather, we can agree to differ in our *opinion*, but it is necessary all the same that we arrive at some position on the

matter to be upheld as *the community's* position on the rights and powers of property-owners.

Since we disagree about which position should stand and be enforced in the name of the community, we need a process – a *political* process – to determine what that position should be. And we need a practice of recording and implementing positions of this sort by individuals and agencies acting in the name of the community – a practice which is resilient in the face of disagreement with the community position, as a matter of personal or partisan opinion, by those entrusted with its implementation. If we call the measure identified as the community's position *the law* of that community, then the resilience of the practice to which I have just referred is (part of) what we mean by *the Rule of Law*.

Understood in this way, the Rule of Law is not simply the principle that officials and citizens should apply and obey the law even when it disserves their own interests.[1] It is the principle that an official or citizen should do this even when the law is – in their confident opinion – unjust, morally wrong, or misguided as a matter of policy. For the enactment of the measure in question is evidence of the existence of a view concerning its justice, morality, or desirability which is different from their own; *someone* must have been in favor of the law or thought it a good idea. In other words, the law's existence, together with the individual's own opinion, is evidence of *moral disagreement* in the community on the underlying issue. The official's failure to implement the law because it is unjust, or the citizen's doing something other than what the law requires because that would be *more* just, is tantamount to abandoning the very idea of law – the very idea of the community taking a position on an issue on which its members disagree. It is a reversion to the situation in which each

person simply acts on their own judgment, and does whatever seems good or right to them.

Would that be such a calamity? It may be, if people's moral judgments are irrational, ill thought through, uninformed, or partial. But even assuming that each does their best to ascertain what is really right and really just, there will still be problems, simply in virtue of different people arriving (however conscientiously) at different conclusions.

To return to our example: a man dies, and at his death his daughter is in possession of his house. The representative of a local organization for the relief of stray dogs arrives armed with a piece of paper, signed by the deceased (whose signature is reliably attested), purporting to will the property to the organization. The man from the dogs' home and his supporters are convinced that this is properly a matter of testamentary discretion, and so, in the name of justice and property, they seek to gain possession of the house. The daughter and her friends are equally convinced that her eviction and consequent homelessness would be unjust, and they resist any attempt to effect it. If the community has taken no position on testamentary freedom (or if most people ignore whatever position it has taken when that conflicts with their own view), then force is going to be used on both sides – the daughter's and the organization's. And, so far as each party is concerned, that force is being used *righteously*, in the name of justice.

Now force is certainly not inappropriate for the sake of justice. (One of the ways in which we mark off the domain of rights and justice from the rest of morality is that these are matters which may properly be enforced.)[2] But there is an affront to the idea of justice in force being used on opposing sides, confrontationally and contradictorily, in justice's name. The point of using force in the name of justice is to *assure* people of that to which they have a

right. But if force is being used to secure contradictory ends, then its connection with assurance is ruptured. Force, now, is being used simply to vindicate the vehemence with which competing opinions about justice are held, and this may well be worse than force not being put to the service of justice at all.

Hence the need for a single, determinate community position on the matter – one whose enforcement is consistent with the integrity and univocality of justice. Certainly, justice is affronted in another way if the position identified and enforced as that of the community is wrong. But given the inevitability of disagreement on *that* issue, and given the symmetry for all practical purposes of the rival positions on the matter – each side is sincere; each side thinks its view captures what is really just; each side believes the other is objectively mistaken – there is no *political* way in which the prospect of this substantive affront can be precluded. All we can do, politically, for the sake of the integrity of justice is to ensure that force is used to uphold one view and one view only – a view which may be identified as that of the community by anyone, whatever their substantive opinions on the matter.

II

The view I have just outlined is complicated, but I do not expect it to be especially controversial. Versions of it have been part of Western jurisprudence, particularly positivist jurisprudence, since the time of Thomas Hobbes. What I expect to be controversial is the claim that this represents the mature philosophy of law of Immanuel Kant.

The principle of putting personal judgments of justice and injustice to one side, and submitting instead to the laws that happen to exist, is usually advocated on the ground that peace and

security matter more for each individual than her own convictions about what is really right or really just. By contrast, believing as Kant did that "if justice goes, there is no longer any value to men's living on the earth," (105: 332)[3] one would certainly be expected to think that the conscientious pursuit of justice mattered more than the conflict and inconvenience which might result from each individual doing what seems right and just to them.

Kant's contribution to legal philosophy is often taken to be primarily a contribution to the "normative" enterprise of discussing what the law ought to be. John Rawls describes his own work (at least in *A Theory of Justice*) as "Kantian" because it cherishes the same values – respect for individuals, respect for autonomy, greatest freedom for each compatible with a like freedom for all, and so on – that Kant cherished in his account of what a just society would be like. Even more than this, to call someone a "Kantian" in modern political philosophy is to imply that they set great store by individual moral thinking and use that, rather than the commands of the state or the traditions of Common Law, as their point of orientation in thinking about rights and justice. Thus, in American constitutional jurisprudence, to identify someone as a Kantian is to say that they think there are ways of figuring out what is really just and what rights we really have – ways which are modes of *moral* reasoning, and which do not leave us at the mercy of what some legislature has decided, or what happened to occur to a particular bunch of constitution-framers in Philadelphia in 1791. In this sense, Rawls's arguments in *A Theory of Justice* are Kantian, not just because they emphasize equality, autonomy, and respect, but because they make political claims for a mode of individual moral thinking that at its best is supposed to trump the goals, policies, and values embodied in existing law.

If modern legal scholars see Kant as the forerunner of rights-as-trumps, a generation of students in political theory have come to see him through the eyes of Robert Paul Wolff as someone skeptical of all claims to legal authority, insisting instead on the responsibility of each person to figure out for themselves what they ought to do. The true moral agent, said Wolff, never does what another tells them *because* they have been told to do it: "For the autonomous man there is no such thing, strictly speaking, as a *command*."[4] Since submission to legal authority involves doing certain things precisely because the legislature tells us to, the burden of Kantian autonomy seems to be that we are required, on principle, to reject legal authority – to become, as Wolff puts it, philosophical anarchists.[5]

Those brought up to regard this as Kant's position will, I fear, be quite surprised to find him saying that the prospect of people trying to figure out rights and justice for themselves is itself a *problem* – indeed *the* problem definitive of the state of nature in Kant's account of the advantages of civil society. They will be disconcerted to hear him interpreted here as saying that our clear duty is to abandon this troublesome practice – of thinking things through for oneself and acting on one's own autonomous judgment – in order to embrace what appear to be the decidedly heteronomous obligations of positive law.

It is well known, of course, that Wolff's inference from autonomy to anarchy stumbles on the stubborn fact of Immanuel Kant's own political authoritarianism. Kant maintained that defiance of the legislature "is the greatest and most punishable crime in a commonwealth."[6] Citizens may *complain* about injustice by writing letters and pamphlets,[7] but their complaints must be completely dissociated from any thought of disobedience. He calls the moral requirement of obedience "*absolute*"[8] – hardly the

language of one who believes either that "philosophical anarchism [is] the only reasonable political belief for an enlightened man,"[9] or that citizens may follow their own consciences on matters entrusted to Congress, Parliament, or the courts.

We could just dismiss all this as an artifact of Kant's waning powers in the 1790s. The essays that constitute his political philosophy date from his declining years in which, as Hannah Arendt puts it, "the decrease of his mental faculties, which finally led to senile imbecility, is a matter of fact."[10] It would be wrong, however, to take that tack – dismissing the authoritarianism as a senile aberration, unconnected with the glories of the Critical Philosophy – until we were sure that there was nothing to be made of it, nothing to be said for it, nothing in the arguments with which Kant defended it that might be of value to us in our own jurisprudence.

III

There is a famous text which, in typically compressed and obscure fashion, sums up what I take to be Kant's doctrine of the importance of positive law. My aim in this chapter is to explore, or – perhaps more accurately – to reconstruct, the reasoning which underlies what is undoubtedly an extremely important passage, perhaps *the* most important passage, in Kant's political philosophy.

> Experience teaches us the maxim that human beings act in a violent and malevolent manner, and that they tend to fight among themselves until an external coercive legislation supervenes. But it is not experience or any kind of factual knowledge which makes public legal coercion necessary. On the contrary, even if we imagine men to be as benevolent and law-abiding as we please, the *a priori* rational idea of a non-lawful

state will still tell us that before a public and legal state is established, individual men, peoples, and states can never be secure against acts of violence from one another, since each will have his own right to do *what seems right and good to him*, independently of the opinion of others. Thus the first decision the individual is obliged to make, if he does not wish to renounce all concepts of right, will be to adopt the principle that one must abandon the state of nature in which everyone follows his own desires, and unite with everyone else (with whom he cannot avoid having intercourse) in order to submit to external, public and lawful coercion. He must accordingly enter into a state wherein that which is to be recognized as belonging to each person is allotted to him *by law* and guaranteed to him by an external power (which is not his own, but external to him). In other words, he should at all costs enter into a state of civil society.[11]

The importance of this passage in Kant is matched, as always, by its obscurity. I hope I can cast some light on it, and I will return to it many times in the discussion that follows.

The passage is remarkably Hobbesian – both in its tone, and in the shape or structure of the argument it intimates; and I want to begin by exploring some of these structural similarities. But first, a hesitation. Taking Hobbes as Kant's forerunner (as I want to do) faces the intriguing challenge that one of Kant's major essays in political philosophy – Part II of "On the Common Saying: This May Be True in Theory, But It Does Not Apply in Practice" – is subtitled "*Against Hobbes.*"[12] In fact the disagreements signalled by the subtitle are relatively minor. Kant believes that a ruler has obligations to his subjects which may be articulated in terms of a (hypothetical) contract.[13] Hobbes does not, for he rejects the idea that the sovereign is party to the social contract. However, Kant agrees with Hobbes that the subject may not enforce contractual terms against the ruler. Also Kant insists that the subject must be

able to articulate his rights against the ruler in exercising "freedom of the pen"; he believes that Hobbes denies this.[14] As I say, these disagreements seem minor compared with the Hobbesian *spirit* embodied in the passage we are studying.

There is a comment in the *First Critique* (in a section near the end, around A752, entitled "The Discipline of Pure Reason in Respect of its Polemical Employment") written eleven years before "Theory and Practice" and sixteen years before the long passage I have just quoted, where Kant accepted quite casually that the basic logic of legal philosophy was Hobbesian. He wrote: "As Hobbes maintains, the state of nature is a state of injustice and violence, and we have no option save to abandon it and submit ourselves to the constraint of law."[15] He used this as an analogy to the way in which critique puts an authoritative stop to "[t]he endless disputes of dogmatic reason";[16] but for our purposes what is striking is how close (how *explicitly* close) the logic of the analogy is to the *particular* Hobbesian logic which we are considering.

Like Hobbes, Kant entertained the hypothesis of "a state of nature" in which men live without government or legislation. Like Hobbes, too, Kant's state of nature is not interesting to us primarily as a historical hypothesis. It is, as he puts it, merely "an *idea* of reason"[17] – in the passage I quoted earlier, it is "the *a priori* rational idea of a non-lawful state." Yet it is an idea which has "undoubted *practical* reality," because it expresses an understanding of what we gain by living under government and what we would stand to lose if we were to abandon the business of sustaining and giving allegiance to a political order in favor of each person acting on his own conscience and his own convictions.[18]

We know Hobbes believed that, apart from government, the exigencies of survival engage us in a war of all against all.[19] This conflict is not at all mitigated by people raising banners of "good"

and "evil" over their positions, or fighting only when they think important values are at stake. Hobbes believed that people acting on their own judgments of good and evil was not distinct from, but part and parcel of, the war of all against all. We fight anxiously for our survival, and the value judgments we are disposed to make reflect the exigencies of our survival.

The only moral judgments *not* implicated in the war of all against all are judgments of natural law, which counsel us to seek peace where it is possible.[20] And, of course, the essential condition of establishing peace, in Hobbes's view, is the subordination of all individual judgment about good and evil, justice and injustice, to the dictates of a sovereign legislator. The sovereign will need to establish and secure a set of rights, a scheme of justice; and will need to have "the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe, without being molested by any of his fellow Subjects."[21] Such political power is impossible if each citizen insists that their own moral thinking trumps the sovereign's positive law. "That every private man is Judge of Good and Evill actions" is, Hobbes says, a "seditious doctrine,"[22] for it amounts more or less to a declaration of war on anyone who takes a different view. If two or more people exercise the right of private judgment, then they must inevitably exercise it as they did in the state of nature – i.e. at odds with one another, in a way that reintroduces the specter of internecine and irresolvable conflict. Indeed, the exercise of private judgment does not just make war more *likely* – it *is* war, on Hobbes's account of the matter (bearing in mind that "the nature of War, consisteth not in actuall fighting, but in the known disposition thereto, during all the time there is no assurance to the contrary").[23]

Private judgment on matters of public concern amounts to war,

because individual judgments are likely to be (a) contrary to one another and (b) taken seriously enough to be fought over. For Hobbes, the same thing explains both (a) and (b): private judgments about rights, property, and justice pertain to the exigencies of individual survival, and the circumstances of human life are such as to provoke mortal anxiety, diffidence, and competition in this regard.[24] This explanation will not do for Kant. Moral judgments are not driven by material interests or the exigencies of survival in the Kantian scheme of things. Yet in the passage we are studying, Kant as much as Hobbes thinks of the state of nature as a condition of violence. What is the explanation for this?

We can't just say "human nature" or even "unsocial sociability." Kant is at pains to emphasize that his violent characterization of the state of nature (and thus the case for positive law) survives any realistic assumption we might make about human motivation: remember his phrase in that passage we quoted, "[E]ven if we imagine men to be as benevolent and law-abiding as we please . . ."[25] He has to adopt this strategy, or else he would have said nothing to show someone *convinced of his own goodwill or rectitude* that it is nevertheless wrong to set up an individual judgment of right against the positive law of the community. Even if we are angels, we are opinionated angels, and we hold conflicting views about right which we are prepared to fight for.

So – lacking a Hobbesian explanation – we have to look for different, distinctively *Kantian* answers to the questions mentioned earlier: (a) Whence comes the prospect of moral disagreement? and (b) Even granted disagreement, why should we expect Kantians to fight for their rival opinions? I shall deal with them separately.

What explains moral disagreement?

Insistence on the diversity of opinion concerning matters of right is not a position commonly associated with Kant's moral philosophy. He is supposed to be the theorist of the categorical simplicity of duty – the still, small voice – but a *clear* voice, that cuts through the tangled calculus of self-interest.[26] In his political philosophy, however, there is an important distinction between formal concept and substantive application, so far as these issues of certainty and diversity are concerned.

The main subject-matter of justice and right in Kant's account is *property* – the possession and use of external material resources. Kant followed Hobbes in regarding the issue of property – "whence it proceeded, that any man should call any thing rather his *Owne*, th[a]n *another mans*" – as the thread to be tugged in order to unravel the mysteries of political philosophy.[27] The *concept* of property and the allied concepts of *empirical* and *intelligible possession* were, Kant believed, amenable to philosophical exposition, and he expounded them in the first seventeen paragraphs of *The Doctrine of Right* (37–56: 245–70).[28] The details need not detain us here; suffice to say that though the exposition is terribly convoluted, Kant gives no indication that *these* complexities are the source of the disagreements we are trying to explain. On the contrary, he says that at least "*in relation to their form*," laws of property are something that people actually share in the state of nature (37–56: 245–70). What they don't share, however, is a consensus on what these forms amount to so far as the substance of anyone's ownership is concerned. Our concept of property is one whose application to the world is difficult, controversial, and tendentious. If there were to be property or anything like it in the state of nature, it would have to be based on some principle such

as First Occupancy (47: 259).[29] But occupancy, which Kant interprets to mean "taking control" (51: 263), is almost always an indeterminate standard: how do we correlate acts of occupancy with an exact extent of land controlled?[30] Besides, the question of how much exactly I come to own when I take control of a piece of land is surely bound up in part with a sense of the impact of my action on others' situations. But it may be quite unclear how many others there are, or it may be a matter of dispute how many of all the others there are (everywhere) I am supposed to take into account in determining my acquisition here and now.[31]

This is to say nothing of the prospect of disputes as to who actually *is* (or *was*) the first occupant of a piece of land. That prospect is more or less inevitable, given Kant's account of what appropriation amounts to. To appropriate X is not simply to take X under one's physical control but to do so in a manner such that one's right in X will be violated if, subsequently, another person uses or encroaches upon X even while one is not actually in physical control of it.[32] But in the state of nature, if I appropriate a piece of land and then wander off, how is another to know – when they come across it – whether it has already been appropriated or whether they are entitled to deal with it as first occupant? The problem is particularly acute in a theory like Kant's that does not insist on labor, cultivation, or any other *mark* of occupancy (55: 268).[33]

These difficulties of application are not matters on which reason offers no guidance, matters to be settled by arbitrary stipulation, like the rule about which side of the road to drive on. (Here I diverge from the excellent account given by my friend Thomas Pogge of Columbia University.)[34] Surely, of two people wrestling for control of a piece of land, one or the other was *in fact* the first occupant; surely there is *a right answer* to the question of whether

someone has taken more than their share, under a Lockean proviso. Moreover, belief in a right answer is likely to inspire each party to struggle particularly vehemently for their view of the matter; each will say, "It really matters that we get this *right*." By contrast nobody fights very hard over questions like which side of the road to drive on. So the trouble with the application of norms of property is not that there are in principle no right answers, but that there is no basis common to the parties for determining which answer is right.[35]

We, of course, might also want to mention other sources of disagreement, going to what Kant calls the form of the principles of justice themselves, not merely their empirical application. Kant disagrees with Locke on the Labor Theory of acquisition; both of them disagree with Rousseau on the initial desirability of appropriation; and so on. In our day, every political philosopher has their own theory of justice, and we revel in the fact that no two are the same. Yet I have found it extremely difficult to persuade colleagues to reproduce, or at least recognize, *within* their philosophical theories of politics, law, and constitutionalism, the existence and significance of the controversies about justice and rights that engage them in fact as political philosophers.[36] I suspect people fear that dwelling too much on the significance of moral disagreement is tantamount to an admission that there are no right answers in the realm of justice and rights. In recent metaethics diversity of opinion has sometimes been adduced – by John Mackie, for example – as a ground for subjectivism.[37] The inference is fallacious of course: a diversity of opinion in astronomy does not undermine the prospect of objective right answers to questions about dark matter, etc., and nor should a diversity of opinion about justice undermine our view that there are right answers in that realm as well.[38] What it might undermine,

though – indeed, what it should undermine – is our confidence that the right answer can be discerned (from among all the views that are put forward) in any way that is politically dispositive.

Why would disagreement lead to violence?

Our second question was: why would disagreement among Kantian individuals (whether about applications or principles) lead to violence in the state of nature? Remember we are assuming that each party is acting sincerely, on principle, and moreover that each knows this about the others. Why on this assumption would they fight?

The first thing to bear in mind is that the issues likely to be in dispute – the extent of property rights, for example – are issues that matter to people. Even if our opinions about right and wrong in the state of nature are not merely (as Hobbes thought) the reflex of our survivalist impulses, still the opinions are associated with the conditions of our survival. One who believes they are entitled to use a certain resource is not just holding a view in moral philosophy, but a moral view about the basis on which their life is to be sustained.

Another way of putting this is that we cannot afford to postpone the appropriation and use of external resources until such time as consensus is reached on matters of justice. Kant has his own version of John Locke's dictum, "If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him."[39] Useful things, Kant postulates, must be able to be used (41: 246); people must be able to make at least provisional acquisitions of external resources even if there is no state to ratify them. But, given that people are likely to disagree about the principles governing acquisition (or certainly about their applica-

tion), we may expect that in many cases one person will find themselves claiming just title to what another also claims entitlement to. The material urgency that necessitated provisional acquisition in the first place is likely to preclude any gentle withdrawal or moderation of the competing claims.

For, secondly, the claims of justice that accompany conflicting acquisitions are not just urgent in a material sense; they are likely also to be morally urgent – that is, vehement, even self-righteous, in their moral tone. If people believe (with Rawls) that justice is "the first virtue" of social arrangements and thus more important than peace, prosperity, or security,[40] or if they believe (with Kant himself, in the comment we noted at the beginning of the chapter) that "if justice goes, there is no longer any value to men's living on the earth" (105: 332), then they are unlikely to have much compunction about fighting with or even killing those who are upholding what they take to be *in*justice. Kant saw this moral vehemence – this tendency to insist on the importance and righteousness of one's own way of viewing right and wrong – as a general characteristic of man's "unsocial sociability." Even the mere existence of *another* person, trying to figure things out morally, is a standing affront to a given individual for, as Kant puts it, the latter "encounters in himself the unsocial characteristic of wanting to direct everything in accordance with his own ideas."[41]

A third point addresses directly the role of *force* in all this. Violence is understandable in a struggle for survival among Hobbesian creatures; but there may still appear something unseemly about rival *Kantians* using force to vindicate the principles they espouse. However, we need to bear in mind the subject-matter. We are not talking about people fighting or killing one another over personal ethics or even the categorical imperative.

Issues of right and justice deal morally with matters that *already* concern the extent to which one person's external actions impact upon the external freedom of others. The very subject on which these Kantians are tussling is the interplay of forces – crudely, who should give way when bodies collide. Or to put it another way: to hold a view about justice or right, according to Kant, is to hold a view about which acts of force are appropriately responded to with deliberate force and which are not. Coercion is justified (as a kind of "negation of the negation") when it is used against an action that wrongfully hinders or interferes with someone else's external freedom.[42] If people disagree about which actions wrongfully hinder freedom and which ones do not, then according to Kant they are *already* disagreeing about the occasions on which force may be used.[43]

IV

So now a third question: (c) Why is it so *bad* that people fight for their views about rights and justice? Why is conscientious conflict a calamity? From Kant's point of view, it is of course not enough to say that a state of nature in which each acted on and fought for his own judgment of justice would be an unpleasant place in which to live, a situation we wouldn't enjoy. That's not an adequate basis for a Kantian argument. But I believe an adequate answer can be gleaned from *The Metaphysics of Morals*. Admittedly, it is based on nothing much more than a couple of intimations on Kant's part; so what follows will be in good measure a development and reconstruction, not just an interpretation, of Kant's theory.

The line of argument I see as most important begins with a perception of mismatch between the unilateral character of a

property appropriation in the state of nature and the universal character of the obligations it purports to generate:

> When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right. (44: 255)

We are familiar with people creating obligations for themselves by unilateral actions (by promising, for example). But acquisition involves one person creating obligations for others, obligations which are wholly for the benefit of the appropriator. By his own actions, the appropriator purports to acquire not duties but rights against all the world, so that thousands of other people, people he has never spoken with, people he has never met, people who have never even heard of him, suddenly find themselves laboring under obligations for his benefit which they did not have before.[44]

Kant maintains that this imposition of duties on others cannot possibly have any validity if it is the product of a merely unilateral will: "for a unilateral will cannot put others under an obligation they would not otherwise have" (52: 264). Why not, exactly? Kant's reasons have to do with the general systematicity of right. *Any* obligation that a person has must be presented as part of a *system* of mutual respect, not merely as an artifact of one person's demands. A putative obligation which is both contingent and unilaterally imposed looks questionable or arbitrary from this point of view: it does not look like the sort of thing that fits into a system of Kantian right. In general, people are entitled to assume in the state of nature that their external freedom will be limited only to the extent necessary to harmonize their freedom with that of everyone else in accordance with a universal law (24: 231); and it is not clear how a unilaterally imposed obligation fits into that

picture. What is needed, in other words, is "a will that is *omnilateral*" (51: 263) rather than unilateral; and that, Kant seems to be implying, is unavailable in the state of nature. It is secured only through the legislative will of the state.

Not so fast, someone may interrupt. Is it not possible for the will of a Kantian individual to *be* "omnilateral," if that person's willing is actually disciplined by the idea of universalizability?[45] (Isn't that, after all, exactly what judging things from the moral point of view *is*, according to Kant?) On this objection, it is wrong to say that individuals acting on their own judgments in the state of nature amounts to unilateral wills governing matters that ought to be governed by a common will. Instead, individuals acting on their own *moral* judgments in the state of nature is something that already involves universalization and thus a transcendence of the unilateral viewpoint. The would-be appropriator tests the principle of his acquisition by asking whether it would be possible for everyone to proceed on such a principle, i.e. he asks whether he can also will that his maxim should become a moral law.[46] If the answer is "Yes," then he is entitled morally to proceed – according to this objection – with or without the ratification of an actually existing legislature.

A related model of individual thinking is found in the *Third Critique*, which Hannah Arendt has argued is the *real* locus of Kant's political philosophy.[47] There Kant talks about a way of judging that "takes account . . . in our thought, of everyone else's way of presenting [something], in order *as it were* to compare our own judgment with human reason in general and thus escape the illusion that arises from the ease of mistaking subjective and private conditions for objective ones."[48] Disposed to regard oneself as morally entitled to appropriate some piece of land, one nevertheless pauses and asks, "How are other people likely to view

this acquisition of mine given their different interests and situations?" and one tries to form a fair judgment that could be maintained, so to speak, from *anyone's* point of view, not just the point of view of the interests and opportunities of the person actually making it.

So – still sticking with the objection – why is neither of these modes of individual judgment sufficient to overcome the problem of the unilateral imposition of duties in the state of nature? There is no doubt that Kant believes something like this sort of thinking is required as individuals appropriate things in the state of nature. Even one's provisional acquisitions must be undertaken "in conformity with the idea of a civil condition" (52: 264); that is, they must be guided by the idea of a system of property rights which could function consistently as a body of civil law. But this ideation, though necessary, seems not to be sufficient for Kant. Why not?

The answer cannot be that there is a difference between the individual thought-experiment of putting oneself in another's shoes and the political discipline of really listening to what others actually have to say; though of course there is.[49] Unlike the others we are considering in this book, Kant did not have a robustly participatory image of politics, and the supersession of individual judgments of right by the centralized deliverances of a civil legislature might well involve a decline in genuine "omnilateralism." He did not claim for positive law that it would actually take account of everyone's circumstances or everyone's point of view. Its virtue would be its unity, its integrity, not its reflecting necessarily, in its content, the views and concerns of all individual members.

To answer our question, we have to go back to the stubborn point about disagreement. Whatever rosy things we want to say about either of the modes of individual "omnilateral" thought

which we have been considering, we cannot say that they will lead different individuals to converge on the same conclusion. The irremovable facts about individual moral reasoning are these: my universalizations are likely to differ from your universalizations; my attempt to take everyone's point of view is likely to lead to a different conclusion from your attempt to take everyone's point of view; the deliverances of my reasoning guided by the idea of a civil condition will not be the same as the deliverances of your reason guided by that idea. So long as individuals come up with different judgments, we remain in a situation in which force is being used unilaterally, in fact if not in spirit, by different factions to support different views about what justice really requires.

We come back, then, to the argument I sketched at the very beginning of this chapter. It is not inappropriate for force to be used to secure justice and right. But the point of using force in the name of justice is to *assure* people of that to which they have a right. If force is used by different people to secure ends which contradict one another, then its connection with assurance is ruptured. At best, force is now being used simply to vindicate the vehemence with which each person's opinion about justice is held; it is now contributing nothing to the security of conditions of right. The association which matters here is the association of power with univocality. A condition of assurance is one in which I can be sure that my own voluntary restraint (in regard to property) will be matched by the reciprocal restraint – if need be, the coercively secured reciprocal restraint – of others. But if I am aware that there are several conceptions of justice and rights let loose in the community, each upheld by its own self-righteous militia, then any sense of universalizability, reciprocity or respect for others that I might exhibit remains merely academic. Because of cross-cutting patterns of coercion and enforcement, no *one*

sense of right will ever hook up reliably with the idea of a mutually secured basis on which people might coexist in the world.[50]

The basic tenor of Kant's argument is summed up in the proclamation "*There shall be no war*" – which Kant calls the "irresistible *veto*" of "moral-practical reason": "[W]ar is not the way in which anyone should pursue his rights" (123: 354). Again, this is not supposed to mean that force is inappropriate in upholding rights; we have seen several times that Kant denies this,[51] and modern political philosophy follows him in that. What is precluded, Kant insists, is a *war* or *conflict* of forces deployed in the name of right. For when force presents itself in that mode, it is no longer presenting itself as something reliably and actually self-canceling – the negation of the negation, "*a hindering of a hindrance to freedom*" – which of course is how Kant wants to understand the contribution that coercion can make to right.

V

When you cannot avoid living side by side with others, says Kant, "you ought to . . . proceed with [those others] into a rightful condition" (86: 307), that is, into civil society governed by legislation. If you dig your heels in, the others are permitted (even required) to *force* you into civil society. And this gives the idea of social *contract* a curious feel in Kant's political theory.[52] It is a contract and hence voluntary; but entering into it is mandatory – something we must do, something we may be compelled to do – in the circumstances in which most people find themselves.

It might be thought that this issue of whether the move from state of nature to civil society is voluntary or mandatory is moot anyway, since Kant maintains that the state of nature and the social contract are entirely fictitious.[53] Certainly the main political

relevance of the "compulsory contract" idea is what it tells individuals about their moral situation in regard to the polity in which they happen to find themselves. It tells them that they are to think about their allegiance and obligation not in the light of an optional commitment, but in light of the reasons that would make such a commitment morally necessary and compelling.[54] Here again, Kant's position is structurally similar to that of Hobbes, who insists (when it matters) that the extent of one's political obligation is determined, not by the explicit terms of the contract one has signed, but by the reasons there were for signing the contract in the first place.[55]

But the similarity is only structural. For Hobbes, a person's reasons for entering into the social contract are always in the end individualized reasons of survival. Thus my reasons are not your reasons (as my survival is not necessarily the same as your survival), and my allegiance may justly be at an end long before anyone else's runs out (for example, if I am being led to the gallows). For Kant, by contrast, the hypothesis that one person may force another to enter along with him into civil society indicates that the ultimate ground of political obligation is not individualized in this Hobbesian way. The individual subject is not to regard his allegiance to the legislature in terms of benefit to his own interests alone. If he wants to think about the advantages of membership in civil society, he must think relationally, about the advantages it secures, so far as the relation between the external enforcement of his rights and the external enforcement of others' rights is concerned. His submission to the civil legislature is as necessary for the interest of others in the effective integrity of a univocal system of rights – others who would be entitled to *compel* him to enter if he did not want to – as it is for his own.

Above all, Kant's insistence on the mandatory character of our

subjection to civil society is important in justifying what was referred to earlier as his authoritarianism.[56] The person who calls into question the moral basis of a ruler's legitimacy acts as though it mattered that the setting up of a civil society happened fastidiously in one way rather than another. But Kant's argument is that what matters is that there *be* a civil society, and that we be subject to it, as soon as people start disagreeing and fighting about the practical application of justice. Similarly, the person who proposes to resist or disobey some piece of legislation is offering an affront to the very idea of right, according to Kant. For even assuming that the dissent is conscientious and based on impeccable moral arguments, it is still tantamount to turning one's back on the idea of our *sharing* a view about right or justice around here and implementing it in the name of the community. The one who proposes to resist or disobey is announcing in effect that it is better to revert to a situation in which each acts on their own judgment about justice. Ultimately it is in answer to this person that Kant has developed his moral defense of legislation and the idea of positive law.

VI

Is there anything, then, to say about the *quality* of the legislation that is enacted, upheld, and submitted to in civil society? Kant's position surely cannot be that whatever is positive law is substantively right on the merits. At best, the legislator is just another human being – or group of human beings – trying to figure things out. Their reasoning is subject to the vicissitudes that afflict *any* individual's thinking about who ought to own what. They make their determinations in the name of the whole community; but,

important as that banner is, it is not a prophylactic against error. And Kant concedes this in the following wry acknowledgment:

> [W]hile man may try as he will, it is hard to see how he can obtain for public justice a supreme authority which would itself be just, whether he seeks this authority in a single person or in a group of many persons selected for this purpose . . . [T]he highest authority has to be just *in itself* and yet also a *man*. This is therefore the most difficult of all tasks, and a perfect solution is impossible. Nothing straight can be constructed from such warped wood as that which man is made of.[57]

What about the possibility that the *provisional* acquisitions of external resources which individuals have made in the state of nature may operate as Lockean or Nozickian constraints on subsequent decisions by legislature on questions of property?[58] In fact one cannot – in keeping with the logic of the argument – treat Kant's provisional acquisitions in any sort of Lockean way. First, and most obviously, there *is* no state of nature: it's just an idea of reason. Secondly, it matters enormously that even the *idea* of acquisition in the state of nature is the idea of *provisional* acquisition; and the term "provisional" really bites. These acquisitions are conceived as provisional not only because they have yet to receive society's full imprimatur, but because they are the upshot of conflicting and contradictory individual determinations of justice. The idea of these acquisitions is therefore incapable of playing the sort of role in our current political thinking that Robert Nozick, for example, wanted the idea of a principle of justice-in-acquisition to play.[59] In other words, the very concept of acquisitions of property in the state of nature walks onto the stage of *Kantian* theory hand-in-hand with the idea that a system of positive law is going to have to modify most of the acquisitions, privilege others, and abrogate some of them altogether, in the

name of a single unified approach to justice rather than the ragbag of conflicting individual intuitions that have generated them thus far. The very idea of a provisional acquisition is, at its most generous, only the idea of some individual person's best effort to figure out unilaterally what they are entitled to. But what people need is a *system* of property rights, reflecting a single community determination of what each is entitled to. The *formal* idea of individual property rights is a constraining one – the community view need not be communitarian in its content – but still, the contradictory products of individuals' thinking pro tem on these matters cannot possibly constrain the formation of the community view.

We must therefore leave Kant in the classic, but honest predicament of the true legal positivist. He has set out the advantages of positive law, and given an indication of what we stand to lose if we abandon it. He does not deny that the contents of legislation may be judged wanting from the transcendent perspective of justice and right. He recognizes (indeed he helped to shape our conception of) the modes of thought – in modern philosophy, the Rawlsian modes of thought – that one deploys when one makes moral criticisms of existing law. But in the transition from moral philosophy to political philosophy, Kant insists that we now take account of the fact that there are others in the world besides ourselves. And he insists that we are to see others not just as objects of moral concern or respect, but as *other minds, other intellects, other agents of moral thought, coordinate and competitive with our own.* When I think about justice, I must recognize that others are thinking about justice, and that my confidence in the objective quality of my conclusions is matched by their confidence in the objective quality of theirs. The circumstance of law and politics is that this symmetry of self-righteousness is not matched

by any convergence on substance, that each of two *opponents* may believe that they are right. If nevertheless there are reasons for thinking that society needs just *one* view on some particular matter, to which all its members must defer at least so far as their external interactions are concerned, then there must be a way of identifying a view as the community view and a ground for one's allegiance to it, which is not predicated on any judgment one would have to make concerning its rectitude. That I contend is the basis of Kant's doctrine of positive law, and it is because he draws attention to this circumstance and this necessity that I cite him as one of the champions of the dignity of human legislation.

4

Locke's legislature (and Rawls's)

I

The author of *A Theory of Justice* thinks it obvious that legislative decisions will be subject to constitutional restriction and judicial review in a well-ordered society.[1] The author of *Two Treatises of Government*, written almost three hundred years earlier, thinks it obvious that they will not be (II: 150).[2] What are we to make of this difference?[3]

We might just put it down to a difference in institutional experience (perhaps proving Hegel right about the pretensions of normative political philosophy: the owl of Minerva takes flight from a different perch in 1680s England, whose pride is its Parliament, than in the United States in 1971, whose liberal self-image remains fixated on the Warren court). What I would like to do in this chapter, however, is argue that these texts display different ways of doing political theory, and in particular that they display different conceptions of the relation between substantive argument about justice, rights, and property (on the one hand) and arguments about political institutions and responsibilities (on the other).

Most of what I am going to say will be about John Locke rather than John Rawls, because it is Locke who is the challenge or the conundrum here. Locke is supposed to be the founder of liberal constitutionalism, the theorist of natural rights, the philosopher of the *limited* legislature. So why in the *Second Treatise* does he argue

that the legislature is supreme, that it must never be subject to any other body, and thus to judicial review or anything else, at least while the government lasts?

II

One explanation of the difference – a crude and, I think, an unconvincing one – is that Locke was able to rely on the existence of natural law and so did not need to think up any *institutional* means for constraining the legislature, whereas Rawls, whose substantive theory of justice and rights is constructive not transcendent, does not have this option.

It is certainly true that Locke presents the law of nature as a constraint on legislation: "The Obligations of the Law of Nature, cease not in Society . . . the Law of Nature stands as an Eternal Rule to all Men, Legislators as well as others" (II: 135). But whether this explains the difference between Locke and Rawls depends partly on what we want to say about the relation between natural law and positive legislation in Locke. What exactly is the function of human legislation, according to Locke, given his belief that natural law continues to apply after the institution of political society?

There is a tendency, encouraged sometimes by Locke himself, to treat that question as though it asked, "What can (or what *must*) human legislation *add* to natural law?" That is, "What does human society need in the way of legal rules and provisions which natural law, for whatever reason, does not already comprise or provide?" The most common answer to that question identifies matters on which natural law is said to be silent, but on which human societies need some ruling. Natural law does not tell us which side of the road to drive on, for it is surely a matter of

indifference (from a God's eye point of view) whether we drive on the left, like the British, or the right, like the Americans. But whatever God's interest, *we* need some common rule on the matter.

I doubt that this account will do. Solving problems of this kind is a fairly low-level and inconsequential task for a political institution. If this were all the legislature did, it would be quite crazy for Locke to give that body the importance he accords it in his constitutional theory. Consider the following passage – an apotheosis of the legislative power from the final chapter of the *Second Treatise* that might well serve as the motto for this book:

> Civil Society being a State of Peace, amongst those who are of it, from whom the State of War is excluded by the Umpirage, which they have provided in their Legislative, for ending all Differences, that may arise amongst any of them, 'tis in their Legislative, that the Members of a Commonwealth are united, and combined together into one coherent living Body. This is the Soul that gives Form, Life, and Unity to the Commonwealth: From hence the several Members have their mutual Influence, Sympathy, and Connexion . . . (II: 212)

As mentioned in Chapter 3, disputes about which side of the road to drive on are hardly the kind of conflict for which men seek "umpirage" in entering civil society, and for whose legislative solution they will daily give thanks; nor can addressing this sort of interstitial coordination problem be grounds for regarding the legislature as "the Soul that gives Form, Life, and Unity to the Commonwealth." We have to give legislation a somewhat more elevated task than this if we are to see the legislature in the light that Locke saw it.

Something similar can be said about the traditional Thomas Aquinas line on the relation between natural law and human law, viz.: "man has a natural participation of the eternal law, according

to certain general principles, but not as regards the particular determinations of individual cases."[4] There is a danger that if we make human law-making too much a matter of filling in details for individual or exceptional cases – too much a matter of *determinatio* in this narrow sense – then the power in question begins to look more like the executive prerogative discussed in Chapter 14 of the *Second Treatise* than like Locke's legislative power.

A more generous interpretation assigns the legislature the task of making natural law more determinate, not just for unusual individual cases and not just to solve trivial coordination problems, but at the level of more general moral obligation. I think Locke had something like this in mind when he wrote, in the passage quoted at the beginning of this section, that "[t]he Obligations of the Law of Nature, cease not in Society, but only in many Cases are drawn closer, and have by Humane Laws known penalties annexed to them to inforce their observation" (II: 135). To stick with road traffic examples for the moment, natural law reasoning might indicate to a driver that he should "slow down" when he passes through a heavily populated area, but it is unlikely to provide us with a numerical speed limit.

Or consider laws about property. In a state of nature, objects of ownership may be defined quite loosely – "Jones is the owner of the field by the old oak tree" – and the rights incidental to ownership may be broadly and vaguely understood. The function of human law, when it comes along, will be to provide for much more precise specifications – "Jones is the owner of a piece of land of so many rods and perches with such-and-such fastidiously defined boundaries" – and his ownership will now comprise a list of rights, powers, liberties, and immunities defined with Hohfeldian precision. In other words, the function of the legisla-

ture is to pin down more precisely the rules and distributions that already exist in rough and ready form in the law and in the state of nature. And this would be a valuable function because it is precisely on these matters of detail that people are most likely to come to blows.[5]

The passage quoted said also that it was the task of human law to attach "known penalties" to natural law offenses. In at least one passage Locke simply *defines* the legislative power as the "Power to set down, what punishment shall belong to the several transgressions which they shall think worthy of it, committed amongst the members of that Society" (II: 88). Yet we know that punishment is supposed to be closely governed by natural law criteria. The legislature has no greater authority to punish than an individual in the state of nature, and in the state of nature an individual's right is limited by "calm reason": it must be "proportionate to [the] Transgression, which is so much as may serve for Reparation and Restraint" (II: 8). In the state of nature, it is presumably every victim's or every vigilante's task to work out what in detail this involves with regard to various levels of offending. Once we enter civil society, that important task is collectivized and assigned to the legislature, and it is presumably the function of that body, too, to work out detailed doctrines of justification, excuse, mitigation, and so on.

As they do this the members of the legislature may from time to time find themselves considering whether some incident (or class of cases) which looked like a "transgression" might not be a transgression after all (because it was unintentional, for example) or they may find themselves deciding that "Restraint" (in Locke's formula "so much as may serve for Reparation and Restraint") is a matter of individual prevention rather than social deterrent. To the extent that this sort of thing happens, they will start to think of

the legislature as somewhere they actually *do* their natural law thinking about punishment, not just as a place where they convene to apply to the circumstances of their own society natural law understandings that are already available to them.

III

So there may be a rather serious mistake in thinking that the crucial question to ask about the relation between civil law and natural law is "What can the former *add* to the latter?" Though Locke wants to say that "the Law of Nature *stands* as an Eternal Rule to all Men, Legislators as well as others" (II: 135), he cannot mean that natural law is there already, on the books, something the legislators can look up or examine, in order to see what needs to be added or filled out.

A proposition of natural law is a conclusion of reason, and the reasoning that leads to that conclusion takes place on earth in real time, in a way that is subject to all the vicissitudes of human reason.[6] The law of nature may be an open book to God. But for us, natural law is not a given; it is knowledge to be attained (as I said) *in real time*, by which I mean to emphasize the great importance for Locke's political doctrine of the rejection of innate practical principles in the third chapter of *An Essay Concerning Human Understanding*.[7] We do not in any interesting sense *begin* with natural law principles. We have to reason to them every bit as much as we reason to their application.[8]

We must not therefore think of the Lockean legislature as a hall already enshrining the book of natural law, sitting in a glass case like the US Constitution in Philadelphia, awaiting the Congressmen or MPs when they arrive. And Locke's rejection of innate ideas requires us also to abandon any easy assumption that

the MPs or Congressmen come into the hall already knowing the law of nature, because God has whispered it to their consciences or imprinted it upon their minds. The issues that face our Lockean legislators are no doubt issues that many of them have thought about already; maybe a few have thought hard and conscientiously. Still, the legislative assembly is a place where for the first time there is formal occasion for them to do their natural law reasoning aloud and in the company of others. The legislature is a place where Lockean individuals try to figure out together what the law of nature requires.

I am not sure whether this view is controversial or not, but to ensure that it is fully understood, let me pin it down with an example. The most comprehensive piece of natural law argumentation in the *Second Treatise* is the argument about property in Chapter 5. It is an argument that precedes the discussion of legislatures and their tasks by a full six chapters; thus it is an argument whose placement in the book intimates – I think, misleadingly – the idea that the legislature is constrained by natural law conclusions that have been reached independently of its deliberations. Certainly, property is going to be an issue that legislators have to address in one form or another. What I am suggesting is that we should think of Chapter 5 of the *Second Treatise, not* as something that the members of the legislature already know and understand as they set about their business, but as an argument that Locke would like to have heard (and heard prevail) in the legislature as the members deliberated together on the subject of property. (When you read it with this in mind, you can hear that much of it has the character of political rhetoric in the best sense – anticipating objections, acknowledging alternatives, explaining why a theory which *sounds* strange is in fact more plausible than it appears, and so on.)

I am not suggesting that the convening of the Lockean legislature is the first time issues of property have ever been thought about and discussed. Locke denies this, and we should take at face value his claim that the argument he expounds could be understood and applied by rational individuals in the state of nature. What's more, any discussion of these matters in the legislature will be conducted in full awareness that the conclusions may have implications that are, so to speak, *ex ante* constraining of the legislature. There is a bit of a tightrope here. I am *not* adopting what I take to be the line of James Tully (my predecessor in the Seeley lectures)[9] that the legislature may ask itself questions like "What forms and distributions of property would serve the public good?" – questions which differ radically from those that people ought to be asking themselves individually in the state of nature.[10] The questions are the same: they are questions about individual natural rights of ownership, mixing one's labor, and so on. My suggestion is rather that the legislators cannot be in possession of natural right answers to these questions and thus cannot feel themselves constrained by those answers, unless they actually *do* the natural law reasoning. And one of the places where they do that reasoning is the legislative assembly itself.

IV

If this is our image of Locke's legislature, then there is already a contrast with Rawls. What Rawls says about legislation in Chapter IV of *A Theory of Justice* presents a picture of exactly the kind we are finding unconvincing in Locke's case.

Rawls says that when we think about legislation we are to think of his two principles of justice – the equivalent (for these purposes) of Locke's natural law – as established already, as

something to which the legislators are already committed. The legislature on Rawls's conception is not a place for fundamental disagreement about justice. Certainly, there may be some disagreement about social policy: "[T]he question whether legislation is just or unjust, especially in connection with economic and social policies, is commonly subject to reasonable differences of opinion."[11] But Rawls emphasizes that these are to be thought of as disagreements about the detailed application of the same fundamental principles.[12] He is arguing, in other words, as though legislative deliberation, in a well-ordered society, could not possibly involve *fundamental* disagreement about matters of principle, as though when we think about the legislative process we should regard all such disagreements of principle as having been settled at an earlier stage.

A word about "stages." In *A Theory of Justice*, we are asked to think about the justice of legislation in the context of what Rawls calls "the Four-Stage Sequence."[13] The first stage is the choice of principles of justice in the Original Position. The second is the framing of a just constitution, which Rawls understands as the constitution "that in the existing circumstances will most probably result in effective and just social arrangements."[14]

> In framing a just constitution I assume that the two principles of justice already chosen define an independent standard of the desired outcome. If there is no such standard, the problem of constitutional choice is not well posed, for this decision is made by running through the feasible just constitutions (given, say, by enumeration on the basis of social theory) looking for the one that in the existing circumstances will most probably result in effective and just social arrangements.[15]

The third stage is the choice of legislation by representatives: this is understood as an attempt by them to apply the principles

chosen at the first stage in accordance with the constitution framed at the second. And the fourth stage is the application of rules to particular cases by administrators and judges. Thus we see that Rawls's model assumes that all the fundamental work has been done in the Original Position. The two principles of justice are already established – otherwise neither the problem of constitutional design nor the question of public choice within the legislature would be "well-posed." The legislators are not conceived of as deliberating about the fundamentals of justice. Theirs is the more mundane task of applying the results in the form of determinate statutory policies.

We know, of course, that the Original Position is just a thought-experiment, not something to be conceived of as a meeting that actually takes place. Nor are the three subsequent stages to be thought of literally as temporal phases of the construction of a well-ordered society. Still, the order of presentation makes a difference, if not temporally, then to our sense of which issues are relevant, logically, to which choices. In Rawls's model we are asked to think through issues about the normal operation of a legislature, about the nature of its responsibilities, and – most importantly, for our purposes – about its relation to other institutions (such as courts), as though the deliberations of its members were conducted in the shadow, so to speak, of substantive conclusions about justice that have somehow already been reached. We are not asked to think about legislative design and institutional responsibility in light of the prospect – *which we experience as a political reality* – that fundamental principles of justice are something that the members of the legislature may disagree about. The task of legislative design is not understood by Rawls, as it has to be for us, as the task of accommodating or facilitating the expression of disagreement on that scale.

Rawls might respond that a sophisticated application of the four-stage sequence to the circumstances of what he would regard as a second-best society – a society that falls short of being "well-ordered" in his sense – will involve a complex mapping of all four stages onto just about every question that arises. So when we are designing a legislature or developing a conception of constitutional law for the real world, we are permitted to appeal to considerations from all four stages indiscriminately. But actually this will not do. For the problem in Rawls's conception is not that the stages in the four-stage sequence are, so to speak, in the wrong order. The problem is that the four-stage sequence allows *no place at all* for deliberation among people who disagree about justice. The first stage of Rawls's sequence is the Original Position, which assembles people who are thought of as defending their own interests, not as partisans of rival conceptions of justice, while the second and subsequent stages involve deliberation only in the light of the results of the first. The idea of deliberation among people who disagree about what conclusions the first stage (the Original Position) would generate, or – more likely – who disagree about whether the Original Position is an appropriate way to address issues of justice at all, gets no play whatsoever.

V

But does John Locke really have a more realistic or more helpful attitude towards disagreement about justice? It is not exactly clear what Locke thinks about disagreement. If people are doing their natural law thinking one by one, as individuals in the state of nature, are they likely – on Locke's conception – to reach the same conclusions? If we answer "Yes" to this question, then we can presumably look forward to a consensus in Locke's legislature.

But if we answer "No," we must expect there to be room in his political theory for deliberative disagreement when representatives convene in the legislature to do their natural law thinking together.

I have already said that the argument against innate practical principles removes one easy source of natural law consensus for Locke. Still, if the reasoning that is necessary to attain knowledge of natural law is straightforward, then consensus might still be available. And this is what Locke is prepared to say, in at least some of his moods. The law of nature, he says, is "as intelligible and plain to a rational Creature . . . as the positive Laws of Common-wealths, nay possibly plainer; As much as Reason is easier to be understood, than the Phansies and intricate Contrivances of Men, following contrary and hidden interests put into Words . . ." (II: 12). On this account, dissensus and disagreement are most usually the product of "hidden interests" and of the "artificial Ignorance and learned Gibberish"[16] of those who pander to them.

But that is not the end of the story. One of the best indications of what a theorist believes on this issue of consensus or dissensus is his attitude towards his own arguments and his own conclusions. Now, John Locke is certainly as vain as any other philosopher; he is as confident as any that he has got hold of the truth; and he has the usual tendency to ascribe the views of anyone who disagrees with him to ignorance or partiality. Still, his own manner of proceeding in the *Treatises* makes it clear that, although he is confident in his own view, he is well aware of a number of places where that view is controversial, where alternatives may reasonably be thought possible. In at least three places in the *Second Treatise*, he says that his view is likely to appear "strange to most men," i.e. counter-intuitive. I have in mind his argument

about the right of punishment in the state of nature (II: 9); his argument about labor overriding communal property in land (II: 40); and his account of the rights of conquerors in just wars (II: 180). He anticipates objections, he shows that he is well aware of alternatives, and also that he understands the social and economic circumstances – such as the pressure on land after the invention of money (II: 36, 75, and 111) – that would render matters which were previously simple and obvious, now complex and controversial.

This, I think, we should take as a key to the matter, and as our best indication that Locke in fact regards natural law reasoning as sufficiently complicated that, although there are right answers, they are not so obviously right nor are the lines of reasoning towards them so clear, that different individuals reasoning in good faith will not be led to different conclusions. I say this particularly because this intimation of dissensus connects nicely with two important aspects of Locke's political argument: first, his conception of the *need* for positive law, and secondly, his own thoughts on the prospects for unanimity in deliberative bodies.

VI

On the first point – the need for positive law – we are told that one of the most important drawbacks of the state of nature is the lack of "an establish'd, settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies" (II: 124). In the state of nature, one's rights are determined for practical purposes by other individuals acting on their own. If I disagree with you about an issue of property, then whether sanctions are imposed on me may be a matter of how your reasoning goes. Since individuals differ in the basis and character of their reasoning, there will be

problems about predictability: I will not know where I stand in the state of nature, because I do not know whose natural law reasoning I will be at the mercy of.[17]

By contrast, when positive law comes into existence – something we have worked out together in the legislature – then for the first time people share access to what Locke refers to as "settled, standing laws" (II: 137), "a standing Rule to live by" (II: 22), "an establish'd, settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong" (II: 124). It is important to see that when Locke uses language like this, he is contrasting settled laws not just with arbitrary royal authoritarianism, but also with the unilateral but unpredictable *good faith* efforts at natural law reasoning by individuals – case by case, situation by situation – in the state of nature.

With the establishment and operation of a legislature, law begins to exist in a new sense. It exists now as "ours," as something almost *tangible*, something each of us can count on as a *common* point of reference. Adapting words that Hannah Arendt used to describe the virtue of a written constitution, law exists now as "an endurable objective thing, which, to be sure, one could approach from many different angles and upon which one could impose many different interpretations, which one could change or amend with circumstances, but which nevertheless was never [merely] a subjective state of mind."[18] It has become part of the in-between of our world, something we can make common reference to, each understanding what the other is getting at. Whatever its provenance, natural law never *existed* in this sense in the state of nature. That is why, I think, the legislature is regarded as so important in Locke's constitutional scheme, for it is "in their Legislative, that the Members of a Commonwealth are united, and combined together into one coherent living Body" (II: 212).

Of course, in our century, Legal Realists and, later, members of the Critical Legal Studies movement say that this benefit (of positive legislation) is an illusion. They say that written law cannot provide this stability because it is so much a matter of interpretation and the indeterminacy of meaning that one is as much at the mercy of particularity, contingency, and idiosyncrasies of individual reasoning in a system of positive law as one was in the state of nature. And Locke was inclined sometimes to say this also. We should remember that, like Thomas Hobbes before him and Jeremy Bentham after him, John Locke was one of the philosophical critics of the English legal system (if one can indeed use the word "system" to refer to what Bentham called that "cobweb of ancient barbarism".)[19] There is a powerful passage in Chapter 10 of Book III of the *Essay* where Locke complained about the "Obscurity and Uncertainty" that existed as a result of legal word-spinners with their "multiplied curious Distinctions, and acute Niceties."[20] "[I]n the interpretation of Laws," says Locke, "there is no end; Comments beget Comments, and Explications make new matter for Explications."

> How else comes it to pass, that Princes, speaking or writing to their Servants, in their ordinary Commands, are easily understood; speaking to their People, in their Laws, are not so? And, as I remarked before, doth it not often happen, that a Man of an ordinary Capacity, very well understands a Text or a Law, that he reads, till he consults an Expositor, or goes to Council; who by that time he hath done explaining them, makes the Words signifie either nothing at all, or what he pleases.[21]

For Locke, though, this is true not just of human law but natural law as well. Attorneys mess up civil law, while it is the peculiar province of the clergy to mess up our understanding of natural law (II: 112). And the considered view of the author of both

the *Essay* and the *Two Treatises* seems to have been that among a group of well-intentioned individuals, what one can reasonably expect is that, even granted interpretive difficulties, people will have a better sense of where they stand under a set of standing positive laws which they or their representatives have enacted, than if they have to trust to each other's individual reasoning about the law of nature.

VII

I said that an interpretation of Locke that allowed room for fundamental disagreement about natural law would connect up with two points in his moral and political theory. The second point concerns Locke's recognition of the likely lack of unanimity within political institutions. He is quite adamant on this, citing "the variety of Opinions, and contrariety of Interests, which unavoidably happen in all Collections of Men" (II: 98), even when the most important issues of constitutional principle are at stake. Now the phrase "contrariety of Interests" suggests that Locke is not really referring here to disagreements of principle; if it is just a matter of contrary self-interest, then there is not really any difference of *opinion* on what natural law requires. In fact, I think, we should take both sides of the phrase seriously: "contrariety of Interests" *and* "variety of Opinions."[22] It is interesting that elsewhere in the *Second Treatise*, Locke associates the prospect of disagreement simply with human plurality as such: a husband and wife, he says, "though they have but one common Concern, yet having different understandings, will unavoidably sometimes have different wills too" (II: 82).[23] Each of us, even in our most intimate relations and certainly in our politics, must face the fact that ours is not the only consciousness grappling with topics of justice, and

that we must share the world with others who may disagree with us or whose thought may have followed different paths even on topics as important as this.[24]

Thus Locke insists that no institution will be able to survive if it relies on a rule of unanimity; something like majority-decision is going to be necessary if (in his wry phrase) "the coming into Society" is not going to be "like Cato's coming into the Theatre, only to go out again" (II: 98). There is not space here to go into Locke's defense of majority-decision (II: 96),[25] though that is a theme to which we will return in Chapter 6. Suffice to say that Locke's awareness of the need for a procedure like this is not accompanied by any illusion that the majority is necessarily right. For although the contents of natural law are not given to the legislators in advance, the *idea* of natural law is. With this idea in their heads, the legislators know that, of the rival views in the legislature, at least one must be objectively wrong. They know too that this is not just an intellectual game: the bare idea of natural law indicates that it really *matters* that we have gotten hold of the right view not the wrong view.

Even so, the fact that it really matters does not mean there is a way of checking. What we must not say is that we can *tell* if we go wrong as legislators, as majority-voters, by checking the result of our vote against natural law. Natural law is certainly to be regarded by legislators as a constraint on the laws they enact: Locke is quite clear about that (II: 135). But all that the legislators have, or anyone else has, of natural law is the tentative fallible conclusions about it that they have reached in their own reasoning. Although there *is* a natural law, whose content and force are independent of what we think, all it is for us on earth is gained by our attempts in real time to reason towards it, together with our awareness of our own fallibility in this regard. If we ask

ourselves "Is this majority verdict in accordance with natural law?" that is just another way of asking "Is it right?" – which was presumably what we all voted on in the first place. Which must not be taken to imply that our thinking we are right makes it right. That's just the trouble; it doesn't.

VIII

I have been assuming, in the midst of all this talk about majority-decision, that the legislative power is entrusted, in Locke's scheme of things, to an assembly rather than to a single individual. That is an important assumption. Like Thomas Hobbes, Locke is willing to say that in theory the legislative power may be vested in one person or in an assembly.[26] Unlike Hobbes, however, he thinks that there is an overwhelming case for vesting it in an assembly – preferably an assembly of elected representatives, and preferably an assembly of elected representatives who are not professional politicians.[27]

Why? The main argument is a Rule-of-Law point, about the importance of the legislators' being bound by the rules they enact in much the same way that ordinary subjects are bound. After bitter experience of tyranny and exploitation, Locke says, the people have figured out that they

> could never be safe nor at rest, nor think themselves in Civil Society, till the Legislature was placed in collective Bodies of Men, call them Senate, Parliament, or what you please. By which means every single person became subject, equally with other the meanest Men, to those Laws, which he himself, as part of the Legislative had established. (II: 94)[28]

There is also a point about consent to taxation, in regard to which members of the legislature represent both the interests of their

constituents and their plurality: the fact that there are hundreds of members in the legislature represents the fact that the interests of the citizens are many and various, not homogeneous.

What about the epistemic benefits of vesting the legislative power in an assembly? Is there any sense in Locke's conception that legislators are more likely to come up with a correct answer by reasoning aloud in each other's presence and then voting – more likely, I mean, than if each tries to reason the matter through on their own?[29]

Locke does not say much about the benefits of reasoning with others. In the *Essay* there is some inclination to say that debate and the "Eloquence" it evokes make matters worse. Eloquence – like "Rhetorick, that powerful instrument of Error and Deceit"[30] – is almost always a dirty word in Locke's dictionary. Against this, we must balance Locke's insistence at the very beginning of Book III of the *Essay* on the importance of language and its almost Aristotelian connection with human sociability. "God having designed Man for a sociable Creature, made him not only with an inclination, and under a necessity to have fellowship with those of his own kind; but furnished him also with Language, which was to be the great Instrument, and common Tye of Society."[31] His awareness of language as "the bond of Society" accounts for the importance he attaches in the *Essay* to the idea of "civil communication" or "civil conversation"[32] as a way in which we involve ourselves in one another's moral reasoning. It accounts, too, for the importance he attaches to protecting the integrity of "the Instruments and Means of Discourse, Conversation, Instruction and Society"[33] against those who make a living from perplexing and confounding the signification of words (namely, lawyers).

And there *are* arguments about the importance of discussion and collective deliberation in the *Two Treatises* – not prominent,

perhaps, but certainly present. In discussing why electoral corruption is wrong, for example, Locke stresses how important it is for representatives to "freely act and advise, as the necessity of the Commonwealth, and the public good should upon examination, and mature debate, be judged to require. This, those who give their Votes before they hear the Debate, and have weighed the Reasons on all sides, are not capable of doing" (II: 222). For all his belief in natural law, there are materials here with which we can make a case for John Locke as a theorist or proto-theorist of deliberative democracy.

IX

Still, we must be clear: on Locke's account, reasoning together improves the prospects for just legislation, but not enough to remove disagreement – we still need to vote – and not enough to remove the prospect of error. The majority and thus the legislature are still in danger of overstepping the bounds of what natural law and the natural rights of individuals really, i.e. objectively, require.

In what sense, then, is natural law a limit on the Lockean legislature? Clearly, it is not an institutional limit, for any human institution designed to represent the claims of natural law against the determinations of the legislature would itself be fallible, as the legislature is fallible. So what does Locke mean when he refers to natural law "Bounds" (II: 142), or the idea of a *limited* legislature? What does he mean when he says, "the Law of Nature stands as an Eternal Rule to all men, Legislators as well as others" (II: 135)? Is this just empty talk?

I think it may be read as a matter of political culture. An analogy to something else in the canon may help explain what I mean. When my students read John Stuart Mill's *On Liberty*, they

assume almost without thinking that it is a defense of the First Amendment and a call for the institution of some similar constitutional constraint in Victorian England. It does not occur to them to take seriously Mill's insistence that he is addressing himself to public opinion, or at least "the intelligent part of the public,"[34] and seeking to raise "a strong barrier of moral conviction" against the tendency of people to impose their own opinions as a rule of conduct on others.[35] Similarly, in looking around for an institutional embodiment of Locke's natural law limits, we are ignoring the prospect that he was seeking to bring about primarily a *moral* change – that is, an informal change in the political culture – not a change in the formal constitution.

It seemed important to Locke that legislators should believe in natural law, that they should take it seriously and go about their task imbued with a sense that there are limits to what they may do. It should be an implicit part of each legislator's task to try as conscientiously as he can to understand what those limits are and whether or not his legislative proposals contravene them. It seemed to Locke also important for citizens to imbue their deference to the authority of the legislature with an exactly similar sense. They should act and respond to the dictates of the legislature with an awareness that they (the citizens) are not required to do *whatever* it says, but that they are entitled to disobey or *in extremis* rebel when it goes beyond its limits. And accordingly the citizens too must try, for their part as hard as *they* can, to understand what those natural law limits are and whether or not the statutes that are presented to them contravene those limits. What's more, Locke wants to encourage a political culture in which all participants accompany these convictions with an insistent sense that – however difficult and controversial all this is – *still*, the matters in question are objective, and that they may get

it wrong, and that if they do, they are answerable to God for their mistake and for whatever havoc results.

In our modern preoccupation with constitutional law, we tend to lose sight of the possibility that our rights might be upheld and natural law respected more by the prevalence of a spirit of liberty and respect among the people, than by formal declarations or other institutional arrangements. But as the fate of scores of "constitutions" around the world shows, paper declarations are worth little if not accompanied by the appropriate political culture of liberty.[36] And if political culture is as important to liberty as a set of institutional constraints, then we should stop pretending that political philosophy is interested only in prescribing institutions. It was, after all, the professed aim of the *Two Treatises* to contribute in the first instance to political understanding not institutional design: "To *understand* Political Power right" is the aim of the *Second Treatise* (II: 4, my emphasis); and the assumption on which Locke proceeds is that a polity pervaded by a right understanding will differ remarkably in its character and operations from a polity whose members are under wilful or negligent misapprehensions about the rights and basis of government (II: 111).[37]

True, locating the sense of legislative limits in political culture rather than in an authoritative institution means that we are left with the prospect of disagreement, indeterminacy, controversy among the people as to what those limits are. People will disagree about what it is for the legislature to betray its trust, or even if they agree in the abstract they will disagree about when this has happened. (These are the very problems we discussed at the beginning of section VI.) Such disagreement, as Locke acknowledged, brings with it dangers of instability and conflict, for often what the people will be disagreeing about among themselves is the

issue of when they are entitled to resist or overthrow the legislature.[38] It is a problem that Locke thinks in the end is mitigated only by people's innate conservatism (II: 223). Certainly it is not a problem that can be settled in the Lockean context by a definitive written formulation of what the natural law requires. For in a sense that is what Lockean legislation essentially *is*, and the problem – remember – is that the legislature, like any human political body, may get the natural law wrong. To rely on the formulations of yet another legislative body – a super-legislature, a constitutional convention, or whatever – is simply to postpone or reproduce the difficulty.

X

Still, it is tempting to pursue the institutional question just one more time, even if it is anachronistic: Why would Locke (or a latter-day Lockean) not entertain the possibility of a further body to review the majority-decisions of the legislature, to check that they were in accordance with natural law? Why would he not consider an option such as the judicial review of legislation?

Locke is notorious for having said very little about the judiciary as a distinct branch of government. Certainly it does not figure in the little he says about the separation of powers. In his Introduction to the critical edition of the *Two Treatises*, Peter Laslett, noting Locke's failure to identify the judiciary as a separate branch of government, argues that on Locke's account the judiciary was not a separate power at all: "[I]t was the general attribute of the state."[39] Laslett is taking seriously something that Locke says over and over again, that what men do in the social contract is leave the state of nature "by setting up a Judge on Earth, with Authority to determine all the Controversies" that might arise among them (II:

89 *et passim*). This "Judge" is identified with the totality of government, not with any particular branch.

He is wrong, however, to imply that Locke says nothing about the specific function of a judicature. True, Locke does not say a great deal about what we would call judging: there are some remarks on hard cases, gaps in the law, discretion and so on (II: 159), and he talks about the need for "indifferent and upright Judges, who are to decide Controversies by [the] Laws" the legislature has made (II: 131).[40]

Nevertheless, for purposes of thinking about a possible institution of judicial review of legislation to test its conformity to natural law, Laslett is absolutely right. That function of judging just *is* legislation. What the legislators are supposed to do is attempt as honestly as they can (by reasoning together) to work out whether various proposals before them are in line with what natural law requires. To the extent that members of the society disagree about this – to the extent that natural law is controversial – legislation just *is* the adjudication of those controversies. In part, Locke's point is the same as Hobbes's:[41] if there is a body which can overrule the legislature, then that body is the true sovereign, the true law-maker in the society. Locke says that in anything but a revolutionary situation, "the Legislative is the Supream Power" and he infers from this the converse, that whatever is the "Supream Power" is the Legislative, arguing as Hobbes does that "what can give Laws to another, must needs be superior to him" (II: 150).

I admit that Locke does not consider the possibility with which *we* are familiar – that one body may have supremacy in proposing and enacting laws, while the other has supremacy only so far as reviewing and striking them down is concerned. But though Locke does not *consider* this possibility, his institutional argument really does effectively reject it. For I think what he wants to say is that,

whenever there are controversies about natural law, it is important that a *representative* assembly resolve them. In theory they may be resolved by a monarch or a junta, and the members of the junta may even wear wigs and gowns; in theory the ultimate legislative power may be vested in one person or a few. But in practice that will usually be unwise. What is important is that the institution which, by virtue of its representative character, embodies our "mutual Influence, Sympathy, and Connexion" (II: 212), should also be the one which determines – using something like majority-voting – our disagreements about justice, rights, the common good, and natural law. The institution which comprises our representatives and the institution which resolves our ultimate differences in moral principle ought to be one and the same. It is by combining these functions that it embodies our civic unity and our sense of mutual sympathy. "This," as Locke says, "is the Soul that gives Form, Life, and Unity to the Commonwealth" (II: 212).

I think this is a powerful and appealing position. It embodies a conviction that these issues are "ours" to deal with, so that even if they must be dealt with by some institution which comprises fewer than all of us, it should nevertheless be an institution that is diverse and plural and which, through something like electoral accountability, embodies the spirit of self-government, a body in which we can discern what Thomas Pangle refers to as the manifest footsteps of our original consent.[42]

Intriguingly, there are resources – sadly unexploited – for a similar view in John Rawls's argument. Rawls says justice requires that *all* (adult, sane) individuals have the right to participate, either directly or through representatives, in making laws and other decisions about the structuring of their society. Political power is a primary good regulated by the first principle of justice, and that generates what amounts to "a principle of (equal)

participation," so far as the political constitution is concerned.[43] What's more, Rawls insists that there is a very close connection between the principle of participation and the contractarian spirit of the original position hypothesis:

> Justice as fairness begins with the idea that where common principles are necessary and to everyone's advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented. The principle of participation transfers this notion from the original position to the constitution as the highest-order system of social rules for making rules. If the state is to exercise a final and coercive authority over a certain territory, and if it is in this way to affect permanently men's prospects in life, then the constitutional process should preserve the equal representation of the original position to the degree that this is practicable.[44]

In that sense, Rawls as much as Locke is committed fundamentally to the idea that the final resolution of our disagreements is a matter *for us*. The trouble is that Rawls has failed to map this general commitment to popular sovereignty, embodied in his own contractarianism, onto his account of what the business of the legislature would actually comprise in a real world not conveniently divided into his famous "four-stage sequence." As we saw in section IV, it is not clear that Rawls actually has the resources in his theory for transforming this general sense of the importance of legislative representation into a more specific conviction that we need to be represented, in the legislature, above all in our capacity as the holders of a diversity of rival opinions about justice.

XI

At the start of this chapter, I said I was aiming not just at an understanding of Locke but at some general account of the

relation between our theorizing about justice (in Locke's terms, our thinking about the requirements of natural law) and our theorizing about institutions like the legislature.

What I want to say is this. Often we proceed in political philosophy as though the proper mode of thinking about justice were the careful formulation of a view or theory *by each individual* (which he can write down and put in a book). Of course we hope that each will be open to suggestions and criticisms from other individual view-formers. But the telos of thought-about-justice is a view formed finally in the mind of one agent, and then acted on conscientiously by that agent, no matter what others think or say.

That sort of Thoreau- or Antigone-like steadfastness would make sense if we supposed that the fundamental question about justice were always in the end a question for the individual agent: "What am *I* to do?" It is striking, however, that today when a philosopher forms a view about justice and talks about "What I would do" (about immigration, for example, or school prayer, or welfare provision), he usually means not what he would do as an individual agent, but what he would do in the (presumably unlikely) event that he were in charge of the whole society and his conscience could mobilize us all. The fact is that social justice is not something anyone can do on their own; it is something we pursue together. And in Locke's theory, our contemplation of the state of nature idea is supposed to convince us of something similar about natural law: "[T]here wants an establish'd, settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong" (II: 124). As we saw in Chapter 3, we can only get to that point – an established law, held, implemented and enforced as *ours* in spite of our individual disagreements as to what it ought to be – by deliberation that stands credibly in the name of us all, deliberation that confronts

our differences in public and settles on a common view as a matter of social choice.

I think Locke recognized this. I think he regarded what we call our politics, specifically our *legislative* politics (and the electoral politics associated with it), as the primary forum where our thinking and disagreement about justice takes place. It is in the legislature that we or our representatives argue about justice; it is in the legislature where we disagree about justice, where we have second thoughts about justice, where we revise our sense of justice or keep it up to date. And it is because of *this* that Locke attributed such importance to the institution.

To go back to the contrast we began with, and to put the matter as strongly as I can: I believe that there is no interesting question of the form Rawls poses: "What would institutions look like if they were designed by people who already agreed on a set of principles (even true principles of justice)?"[45] We can ask it if we like – the second part of Rawls's book is dominated by it – but it is not a question that can yield any interesting answer, even at an ideal level, so far as institutional design is concerned. On the contrary, I think that even as an academic teaser, it offers the pernicious suggestion that *ideally* politics will not be tainted by partisan or ideological conflict, and that it is only in the second-best case – in a less than well-ordered society – that we have to think about how to deal with sordid matters like disagreement about justice and rights.

Against all this, it may be argued that a thinker like Rawls cannot simply confront disagreements about justice as a spectator – carefully noting the diversity of views, the extent of disagreement, etc. For he *is* a theorist of justice. He engages in these disagreements *as a participant*, and as an uncompromising opponent of conceptions other than his own. He surely cannot be

required to make room, in his own normative conception of a well-ordered society, for other views about justice that are incompatible with his, views which from his point of view have simply got things wrong. If justice-as-fairness is offered as a theory of justice, its principles must do *all the work there is to be done by principles of justice* and do it uncompromisingly.

There is no objection to this as a way of thinking about justice. But we ought to have misgivings about it as a way of thinking about political institutions. I may think politically as the partisan of a particular conception of justice competing uncompromisingly with its rivals. But I cannot think responsibly about institutions if my thinking is dominated completely by my substantive political convictions. To think about institutions and politics, I must be willing at least part of the time to view even my own convictions about justice – however true or important I take them to be – as merely one set of convictions among others in society, and to address in a relatively neutral way the question of what we as a society are to do about the fact that people like me disagree with others in society about matters on which we need a common view.[46] That is the logic of legislation. It is not an easy logic to live with, for it entails that much of the time one will be party to – or, at the very least, one's name will be associated with – the sharing and implementation of a view about justice that is not one's own. Still, I am happy to conclude that it was precisely in *recognition* of this prospect, not – as with Rawls – in denial of it, that John Locke was prepared to say of the legislature: "This is the Soul that gives Form, Life, and Unity to the Commonwealth: [it is f]rom hence [that] the several Members [of society] have their mutual Influence, Sympathy, and Connexion" (II: 212).

5

Aristotle's multitude

There is a passage in Chapter 11 of Book III of Aristotle's *Politics* that has not been given the attention it deserves in modern discussions of Aristetlian political philosophy. Certainly it has not been given enough attention in the theory of democracy and in theories of popular legislation. I want to remedy that neglect. Indeed the aim of this chapter is to *exaggerate* the importance of this passage – to light it up in a way that may go far beyond the intentions of its author – in order to benefit from its illumination of other themes and passages whose importance for the Aristotelian project is, by contrast, indisputable.

The passage I have in mind is Aristotle's attempt to answer a question he poses about political sovereignty at the beginning of Chapter 10:

> There is also a doubt as to what is to be the supreme power in the state: – Is it the multitude? Or the wealthy? Or the good? Or the one best man? Or a tyrant? Any of these alternatives seems to involve disagreeable consequences. (65: 1281a11)[1]

After reviewing some of these consequences, Aristotle begins Chapter 11 by saying that there might be some truth in the principle that the people at large rather than the few best ought to be in power in the polis. He says (and this is the passage I want to focus on),

> For the many, of whom each individual is not a good man, when they meet together may be better than the few good, if regarded not

individually but collectively, just as a feast to which many contribute is better than a dinner provided out of a single purse. For each individual among the many has a share of excellence and practical wisdom, and when they meet together, just as they become in a manner one man, who has many feet, and hands, and senses, so too with regard to their character and thought. Hence the many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole. (66: 1281a43–b9)

The claim that is made (or at least entertained) here is sometimes referred to as "the summation argument."[2] For reasons that I will explain in section V, I want to avoid that label. I shall call it by the grander term of the "doctrine of the wisdom of the multitude" (DWM), which has the advantage of begging no questions about the *basis* of the collective superiority of the many.

The claim as I understand it is this. If we are comparing, for the moment, the claim to sovereignty of the people at large (the general body of citizens) with the claim to sovereignty of an individual who happens to be the ablest, the best, and the wisest of the citizens, we may still say that the people's claim prevails. Although, considered individual by individual, each of the people is inferior to the one best man, considered as a body which is capable of collective deliberation, the people may make better, wiser, and abler decisions. For they have the benefit of *each person's* knowledge, experience, judgment, and insight – which they can synthesize into collective knowledge, experience, judgment, and insight – whereas the one best man can rely only on his own individual resources.

The initial formulation of the doctrine, then, for our purposes is as follows:

DWM_1: The people acting as a body are capable of making better decisions, by pooling their knowledge, experience, and insight, than any

individual member of the body, however excellent, is capable of making on his own.

Actually, that is a modest version of the Aristotelian claim. A stronger version would make the case for the multitude not only against kingship but also against aristocracy. That case is harder to make, since an aristocratic regime may itself benefit from the application of the doctrine. Consider the ten best men in the polis. Each of them, individually, though better than each person in the remainder of the citizen body, may be outshone by the wisdom of the multitude of the citizen body considered as a collective. But the appropriate comparison is not between the people and the individual aristocrats, but between the people acting as a body, on the one hand, and the group of ten aristocrats also acting as a body, on the other hand. Just as the people can pool their individual knowledge, experience, and judgment, so the ten aristocrats can pool theirs too. Presumably the collective wisdom of the ten best is superior to the collective wisdom of ten citizens chosen at random, since they have better individual insights, etc. to pool. And so on, presumably, for any subset of the citizenry, designated on the basis of excellence. To make the case for the extension of sovereignty to the many, that is, for a democratic suffrage, we have to make it against all such groups.[3] The strong version of the doctrine, then, is as follows:

DWM_2: The people acting as a body are capable of making better decisions, by pooling their knowledge, experience, and insight, than any subset of the people acting as a body and pooling the knowledge, experience, and insight of the members of the subset.

I think it goes without saying that the strong version, DWM_2, is practically the more important of the two. The political debates in Athens to which Book III of the *Politics* might be taken as a

contribution mainly concerned the issue between democracy and oligarchy, the rule of the many and the rule of the few, not between democracy and kingship. In terms of our modern discussions of participatory claims, the issue also has to be framed in that way. We are interested, for example, in conceptualizing the reasons that there were for expanding the franchise in the direction of universal suffrage in the second half of the nineteenth century and the first decades of the twentieth. That conceptualization is supposed to inform our sense of what is at stake in the forms of democracy with which we are familiar. In the context of legislation, we are interested in comparing, on certain issues, the claims of the people or their representatives (acting by majority-decision) with the claims of a judicial elite. In the end, then, the case for the many has to be made for the second or stronger version of the doctrine.

For the purposes of my discussion, however, I shall focus mainly on DWM_1. A number of the points I want to make concern how we think about the relation between the individual and the polis, and for that purpose the weaker version of DWM is sufficient to bring the important issues into focus. In most of what follows, I shall not be trying to show that DWM is true in a way that is immediately important for constitutional design. I shall consider instead its theoretical importance for our understanding of certain themes and issues in Aristotelian political philosophy, and their indirect consequences for our philosophical thought about legislation by a popular assembly.

II

As they stand, both versions of DWM are oriented to a comparison between the people at large and some elite. It is worth noting, however – although I shall not pursue this – that either version of

the doctrine might be turned in the other direction and used as the basis of an exclusionary claim in regard to admission to the citizen body. We know that when Aristotle talked about the people at large, he – like most Athenians – did not have universal suffrage in mind. The claim made in DWM is made with regard to a body which is itself a subset of all the inhabitants of Athens: women, notoriously, were excluded, as were children, as were those who were enslaved, as were resident aliens, and so on. The doctrine of the wisdom of the multitude might be used as a criterion for such exclusion: a person is justifiably excluded from the citizen body, if better decisions can be made by pooling the knowledge, experience, and judgment of the members of a citizen body that excludes him, than by pooling the knowledge, experience, and judgment of the members of a body that includes him.[4] I am not saying that this is actually the basis of Aristotle's view about the exclusion of women and natural slaves from the polis,[5] though it might be an interesting matrix on which to lay out the arguments he gives in the second part of Book I of the *Politics*. We should remember, too, that the DWM could generate a criterion of exclusion in this way only if it were the sole basis of the claim of sovereignty made on behalf of the people. And that is not the case; Aristotle indicates other grounds as well, for example that "a state in which many poor men are excluded from office will necessarily be full of enemies" (67: 1281b30).

III

There are two questions to be addressed. (a) Is DWM true, or at least plausible enough to be interesting? (b) What light does it cast on other aspects of Aristotle's political philosophy? In relation to the first question, I want to begin by considering what Aristotle's

attitude was towards DWM. His introduction of it was hesitant. "The principle that the multitude ought to be in power rather than the few best might seem to be solved and to contain some difficulty and perhaps even truth" (66: 1281a40).[6] But once introduced, it is referred to over and over again. Secondly, I want to inquire in detail into the basis of the doctrine's plausibility (such as it is), both in Aristotle's view, and in regard to other justifications that *we* might concoct.

Then, in relation to the second question, I want to begin expanding our sense of the significance of the doctrine. As it stands, DWM is presented by Aristotle as an argument for the participation of the many in the judgments and deliberations of the polis. That is, it comes to us in the first instance simply as a contribution to Aristotle's discussion of constitutional design. I have found it useful, however, in a number of regards that go far beyond that; and the main point of this chapter is to share with the reader that sense of its wider significance for political philosophy. At this stage, I will just list the five particular areas of interest.

The first two concern the relation between constitutional design and distributive justice. In the first place, the doctrine casts light on the concept of *merit* in the Aristotelian discussion of justice. The civic franchise is distributed on the basis of merit, in Aristotle's scheme. But in DWM, we have a notion of merit that is rather less individual than ordinary notions. Secondly, the doctrine provides an interesting model or exemplar of Aristotle's normative thesis concerning private property in Chapter 5 of Book II of the *Politics*. Political power (the right to participate) can be construed as something which is "owned" by individuals but enjoyed in common, with the account of rhetoric, deliberation, and political virtue providing a natural interpretation of "common use."

The other themes which I shall explore are more basic to Aristotle's conception of the relation between individual and polis. The third is this: if we assume that the DWM works because the members of the citizen body share their knowledge, experience, and insight by *talking* to one another, then we have a natural interpretation of why Aristotle regarded the capacity for reasoned *speech* as the mark of man's political nature. Fourthly, the arguments about the wisdom of the multitude cast doubt on any account of Aristotelian political theory that turns on the existence of moral homogeneity or ethical consensus among the citizenry. It is pretty obvious, I think, that the doctrine will not work unless individual members bring to the collective decision a *disparate* array of views, perspectives, insights, and experience. It is interesting, therefore, to speculate about the extent to which the Aristotelian doctrine presupposes a pluralistic and perhaps even a liberal view of what society is like (which is why I find it congenial to the pluralistic account of legislation that I am trying to develop). Finally, the doctrine may help us make sense of Aristotle's puzzling suggestions in Book III, Chapter 13 of the *Politics* about the lawlessness and ostracism of truly great men, and his hint that the Rule of Law may be possible only among those who are in some sense equal.

IV

The doctrine of the wisdom of the multitude is, as I have said, introduced with some hesitation. Aristotle is by no means sure that it clinches the issue of sovereignty in favor of the many: "Whether this principle can apply to every democracy, and to all bodies of men, is not clear . . . But there may be bodies of men about whom our statement is nevertheless true"(66: 1281b15).

He says that his view is conditional on the people not being "debased in character" (67: 1282a15); and as we shall see, he certainly utterly degraded does not rule out the possibility that there may be in a polis one man or a few men of such outstanding virtue that their ability outstrips even that of the others acting collectively – an elite "so pre-eminent that the excellence or the political capacity of all the rest admit of no comparison with his or theirs" (71: 1284a).

I will discuss this last possibility further in section XI. It is worth noting at this stage, however, that the passage which follows this intimation of pre-eminence also contains Aristotle's strongest suggestion that the connection between DWM and the idea of a polity subject to the Rule of Law is not merely contingent. For having raised the possibility of a "god among men," one whose wisdom exceeds even the pooled wisdom of the multitude, Aristotle draws the following inference:

> Hence we see that legislation is necessarily concerned only with those who are equal in birth and in capacity; and that for men of pre-eminent excellence there is no law – they are themselves a law. (72: 1284a11)

It is, in fact, interesting how far Aristotle is willing to go with DWM in his discussion of the Rule of Law. The initial question arose in Chapter 10 after Aristotle had conceded, realistically, that, although it is best if the laws rule and not men, still we have to ask who is to make and who is to administer the laws. The logic of DWM seems to apply most obviously to legislative assemblies (which is why it is of interest here), but it is worth noting that Aristotle applies it also to the laws' application and to the task of equitable judgment when there are gaps or silences in the law:

> [W]hen the law cannot determine a point at all, or not well, should the one best man or should all decide? According to our present

practice assemblies meet, sit in judgement, deliberate, and decide, and their judgements all relate to individual cases. Now any member of the assembly, taken separately, is certainly inferior to the wise man. But the state is made up of many individuals. And as a feast to which all the guests contribute is better than a banquet furnished by a single man, so a multitude is a better judge of many things than any individual. (76: 1286a24–31)

He applies the principle also to vindicate the Athenian practice of making state officials accountable to the popular assembly. Though he feels the force of the objection that those with the special capacity to take on magistracies should be selected and assessed for that purpose only by their peers ("[a]s, then, the physician ought to be called to account by physicians") and that election and evaluation can be properly made only by those who have the appropriate knowledge, he goes on:

Yet possibly these objections are to a great extent met by our old answer, that if the people are not utterly degraded, although individually they may be worse judges than those who have special knowledge, as a body they are as good or better. (67: 1282a14)

Indeed it is quite striking that what began as a hesitant speculation quickly becomes "our old answer," a recurring theme, a constant reminder in Aristotle's discussion of institutions:

For the power does not reside in the juryman, or counsellor, or member of the assembly, but in the court, and the council, and the assembly, of which the aforesaid individuals – counsellor, assemblyman, juryman – are only parts or members. And for this reason the many may claim to have a higher authority than the few; for the people and the council, and the courts consist of many persons, and their property collectively is greater than the property of one or a few individuals holding great offices. (68: 1282a34–41)

Not only that, but the doctrine is used also as the basis of criticizing and analyzing the claims of other thinkers. Thus in Book IV of the *Politics*, Aristotle says that in democracies,

> the people becomes a monarch, and is many in one; and the many have the power in their hand, not as individuals, but collectively. Homer says that "it is not good to have a rule of many" [*Iliad*, II 204], but whether he means this corporate rule, or the rule of many individuals, is uncertain. (89: 1292a10–14)

For these reasons, then, it seems not inappropriate to toy with the possibility that the doctrine of the wisdom of the multitude occupies a central rather than a peripheral place in Aristotle's overall conception of politics.

V

Central or not, there are questions to be raised about Aristotle's grounds for the doctrine. At times it seems that he offers in defense of DWM nothing much more than a culinary metaphor: as a "feast to which all the guests contribute is better than a banquet furnished by a single man, so a multitude is a better judge of many things than any individual" (76: 1286a29–31). Indeed, culinary metaphors pervade this part of Book III. We are told that "impure food when mixed with what is pure sometimes makes the entire mass more wholesome" (67: 1286b36), and that "the guest will judge better of a feast than the cook" (68: 1282a23). I shall return to both of these later. The idea behind the leading culinary metaphor seems to be one of variety: more contributors will produce a more varied feast, and a more varied feast is better.[7] I will look in detail at the first of these propositions in section X, when I discuss the relation of this view to what I take to be

Aristotle's pluralism. For the moment, I want to concentrate on the second. As a purely culinary matter, one may contest whether a potluck dinner is better than a carefully planned and organized banquet. But even if it is better, is there an appropriate analogy here with the kind of decision-making that a democratic legislature will have to engage in?

One clue is provided by a second set of analogies that Aristotle uses: the analogy of aesthetic appreciation. "[T]he many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole" (66: 1281a43–b9). This analogy seems to direct us to the multi-faceted character of the issues that arise for decision in the assembly. There may be many aspects to a given situation, and no one man, however wise, can be trusted to notice them all. This is obvious enough in the case of policy decisions. The assembly is debating whether to mount an expedition to Sicily: one citizen may be familiar with the Sicilian coastline; another with the military capacities of the Sicilians; a third with the cost and difficulty of naval expeditions; a fourth with the bitterness of military failure; a fifth with the dangers to a democratic state of successful military conquest; and so on. Between them, pooling their knowledge, they can hope to gain the widest possible acquaintance with the pros and cons.

It is interesting, though, that Aristotle relates this point – about different people seeing different aspects of a situation – not only to multi-faceted policy decisions, but also to equity-based judgments about individual cases:

> [M]atters of detail about which men deliberate cannot be included in legislation. Nor does anyone deny that the decision of such matters must be left to man, but it is argued that there should be many judges, and not one only. For every ruler who has been trained by the law

judges well; and it would surely seem strange that a person should see better with two eyes, or hear better with two ears, or act better with two hands or feet, than many with many . . . (79: 1287b23–8)

The idea, as I understand it, is that if legislation fails with regard to certain difficult cases, it does so precisely because those cases have a multi-faceted character that defies the sort of simple categorizations on which the Rule of Law depends. The cases where general legal rules fail are precisely the cases where one wants a mode of judgment that is sensitive to all or any aspects of the case. And that might be a situation where, as Aristotle says, one needs many eyes, not just two.

Yet – for either policy or particular judgment – putting it this way may not do justice to Aristotle's account. So far I have stressed the sensitivity of many individuals to many factual aspects of a situation about which a political or legal decision is to be made. But I think Aristotle's argument is meant to apply to ethical judgments or judgments of value as well.

One possible interpretation which is not purely a matter of the accumulation of factual knowledge is to assimilate Aristotle's view of politics to the utilitarian case for democracy put forward by the earlier Mill and the later Bentham. Maybe what happens when the many come together to make a decision is that they find out from each other how each person's well-being may be affected by the matter under consideration, so that they put themselves collectively in a better position to make a judgment of overall social utility. A merchant may not realize how much some measure he is initially inclined to support may prejudice the situation of the farmers until he hears it from the farmers' own mouths.

Or the process may even be cruder than that. Never mind deliberation: each member of the citizen body may simply vote in their own self-interest, so that it is the collective decision-

procedure (some form of majority-decision, presumably) which is "wiser," from the point of view of social utility, than any individual member of the collective. Indeed, this crude utilitarian conception of the wisdom of the multitude would have the advantage of providing very clear grounds not only for DWM_1 but also for DWM_2. If the criterion of wisdom is social utility, and if all groups make their decisions by some majority function over individual votes, and if all individuals simply and accurately vote their own well-being, then obviously the group that comprises everyone will be wiser than any subset.[8]

Readers will be relieved to hear, however, that I do not think this was Aristotle's view. Having turned Kant into Hobbes in Chapter 3, I do not propose now to turn Aristotle into James Mill. Nevertheless we must not ignore the hints of utilitarian argument. We must pay attention to Aristotle's suggestion that politics is one of those arts whose products are properly judged by the consumer, not just by the artist:

> [T]here are some arts whose products are not judged of solely, or best, by the artists themselves, namely those arts whose products are recognized even by those who do not possess the art; for example, the knowledge of the house is not limited to the builder only; the user, or, in other words, the master of the house will actually be a better judge than the builder, just as the pilot will judge better of a rudder than the carpenter, and the guest will judge better of a feast than the cook. (67–8: 1282a18)

There are two ways of reconciling this suggestion with the generally non-utilitarian cast of Aristotle's theory of politics. One possibility is that it reflects Aristotle's realistic and moderate view that men come together in society not just in order to live well, that is, in order to live a life according to virtue, but also and to a certain extent simply for the sake of life itself and life-related

interests. Though "a state exists for the sake of a good life, and not for the sake of life only" (63: 1280a32), still it is true that "mankind meet together and maintain the political community also for the sake of mere life (in which there is possibly some noble element . . .)" (60: 1278b25). Preferring the diners' judgment to the cook's is a way of respecting the importance – partial though it is – of this aspect of political community. For that purpose, the multitude is certainly a better instrument, because by definition it is more widely sensitive, than the one good man or any elite or junta.

The other possibility is that this utilitarian-sounding passage represents the obvious point that, even if Aristotle holds an objective theory of what the good life is, a theory which is not hostage to purely welfarist calculations, nevertheless it is an objective theory which gives considerable place to subjective elements – that is, to considerations of *what it is like* to live a life of a certain sort. Even if the agreeable life is not necessarily the good life, the converse may be true. Aristotle suggests in the *Ethics* that the good life is a pleasant and agreeable life, albeit a pleasant and agreeable life of a certain character.[9] Finding out then – in a political context – that certain decisions may make life subjectively disagreeable for many people will surely be relevant to an assessment of the ethical quality of those decisions.

VI

Be all that as it may, it seems clear to me that, in espousing the doctrine of the wisdom of the multitude, Aristotle is actually (or in addition) committing himself to the view that the many, acting collectively, may be a better judge than the few best, not only of matters of fact, not only of social utility, but also and most importantly of matters of value, matters of principle and the

nature of the good life which go well beyond the mere accumulation of individual experiences. The term traditionally used for the DWM – "the summation argument" – suggests that all that is going on is the *aggregation* of what each person brings to the argument. But that may be a misnomer – not only in the way that David Keyt says, because it suggests nothing more than a random and unordered collection of experiences;[10] even the application of a social welfare function is more than that. It is misleading because it suggests a merely mechanical ordering, whereas I think Aristotle has in mind something more synthetic or even dialectical. As I see it, his view is that deliberation among the many is a way of bringing each citizen's ethical views and insights – such as they are – to bear on the views and insights of each of the others, so that they cast light on each other, providing a basis for reciprocal questioning and criticism and enabling a view to emerge which is better than any of the inputs and much more than a mere aggregation or function of those inputs.

This is where the exploration really gets interesting. My hunch is that the kind of process that grounds and generates the wisdom of the multitude for the purposes of political philosophy is similar in character to the process represented by Aristotle's own methodology in ethics. Think of the passage about the *endoxa* at the beginning of Book VII of the *Nicomachean Ethics*. Introducing his discussion of self-restraint and *akrasia*, Aristotle says:

> Our proper course with this subject as with others will be to present the various views about it, and then, after first reviewing the difficulties they involve, finally to establish if possible all, or if not all, the greater part and the most important of the opinions generally held with respect to these states of mind; since if the discrepancies can be saved, and a residuum of current opinion left standing, the true view will have been sufficiently established.[11]

It is a fundamental assumption of Aristotle's meta-ethics that it is better to proceed towards true conclusions by examining the existing views and opinions that one hears than to proceed entirely a priori. By taking the *endoxa* seriously, even when they are mutually contradictory, one can see whether they cast light on one another to indicate various aspects of the truth. That this procedure may have (so to speak) a democratic dimension to it – that it is not purely confined to the study of received philosophical opinion – is indicated in Aristotle's remarks about views of happiness (*eudaemonia*) in Book I of the *Ethics*. For after briefly listing the opinions, Aristotle remarks:

> [S]ome of these views have been held by many men and men of old, others by a few eminent persons; and it is not probable that either of these should be entirely mistaken, but rather that they should be right in at least some one respect, or even in most respects.[12]

The philosopher's job – Aristotle's own job in the *Ethics* – is to consider the common views and use them to cast light on each other and to bring out the respects in which each has something to contribute to the truth. In this way, Aristotle's own philosophical method may be a model of what is supposed to go on when the many deliberate collectively. (And certainly it is not a vicious form of self-reference that Aristotle uses this method to talk *about* the doctrine of the wisdom of the multitude itself – treating this as a common view that may "contain some difficulty and perhaps even truth.")

I stated that I intended to exaggerate things a little in order to see how much illumination DWM can be made to cast on the rest of Aristotle's political philosophy. To stretch your credulity a little further, I want to suggest that we might look also to a much later advocate of the synthesis of diverse ideas for a model of what

collective deliberation can involve. I have in mind the third branch of John Stuart Mill's argument in Chapter 2 of his essay *On Liberty*. Recall that in defending freedom of expression and opinion, Mill asks us to consider first the possibility that the view in danger of suppression might be true, secondly the possibility that it might be false, and thirdly, the possibility that it contains a part of the truth or may contribute synthetically to a truth deeper or more accurate than currently received opinion. Remember – in regard to this third possibility – how he used Rousseau's contribution to Enlightenment thought as an example:

> [W]ith what a salutary shock did the paradoxes of Rousseau explode like bombshells in the midst, dislocating the compact mass of one-sided opinion and forcing its elements to recombine in a better form and with additional ingredients. Not that the current opinions were on the whole further from the truth than Rousseau's were; on the contrary, they were nearer to it; they contained more of positive truth, and very much less of error. Nevertheless there lay in Rousseau's doctrine, and has floated along the stream of opinion along with it, a considerable amount of exactly those truths which the popular opinion wanted; and these are the deposit which was left behind them when the flood subsided.[13]

I find it impossible in my own mind to avoid referring forward to this argument of Mill's when I read in Aristotle's *Politics* that, although the folly of the common people may lead some of them into error and a few of them into crime, nevertheless "[w]hen they meet together their perceptions are quite good enough, and combined with the better class they are useful to the state (just as impure food when mixed with what is pure sometimes makes the entire mass more wholesome than a small quantity of the pure would be)" (67: 1281b35).

In a recent discussion of DWM, Mary Nichols has complained that Aristotle overlooks the need for someone who would actually

do the synthesizing, someone who (on my account) would do for the various contributing views what the author of the *Nicomachean Ethics* does for the *endoxa*: "A work of music or poetry is more than the sum of its parts. Who is it who judges or appreciates the whole?"[14] In fact, I think, she underestimates the confidence we may have in *genuine* dialectic (as opposed to the fake dialectic of the single author considering "several views" but always on his or her own terms and in his or her own formulations). Again, J.S. Mill can help. Think of his suggestion about the synthesis of diverse ideas in *On Liberty*. Some issues, Mill argued, may not be amenable to being worked out in a dialectic tightly controlled by a single thinker:

> Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.[15]

On this account, the absence of a master-synthesizer may actually be an advantage. Of course, in the end, the view that emerges will end up being held *by* someone (one hopes by all, or by most).[16] There may nevertheless be something to the idea of a consensus "emerging" in open discussion rather than being actively engineered. Though Mill's concerns are no doubt anachronistic in this context, that is no reason to lose sight of the process Mill describes as the kind of possibility Aristotle is contemplating in his model of non-aristocratic politics.

VII

I will now consider the wider significance DWM may have for our understanding of certain central themes in Aristotle's political

philosophy. The first theme I shall discuss is the relation between Aristotle's views on political power and his meritocratic theory of justice.

It is easy to forget that Aristotle's argument in the middle chapters of Book III of the *Politics* is presented as an application of the theory of distributive justice expounded in Book V of the *Nicomachean Ethics*. (Indeed it is just about the only sustained application of the theory that we have in his work.) In the *Ethics*, we are told that "all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit."[17] In Book III of the *Politics*, Aristotle attempts to apply that doctrine to the distribution of one very important species of good – viz. "offices of a state," which he says are "posts of honour" (65: 1281a30). His discussion of what should count as merit for the purposes of the distribution of this good is a fine anticipation of the modern moral doctrine of relevant reasons.[18] "[S]ome persons will say that offices of state ought to be unequally distributed according to superior excellence, in whatever respect," including excellence of wealth and excellence of birth (69: 1282b23); but Aristotle has no trouble disposing of this view. It is, he argues, like saying that places in an orchestra should be distributed on the basis of beauty and physical courage, whereas in fact they should be distributed only on the basis of those excellences that directly contribute to the purposes for which orchestras are constituted – namely, excellence in playing. Similarly, the rival claims of candidates for office can only be based on the possession of elements which enter into the composition of a state.

A slightly different problem about the meaning of merit concerns not its elements or criteria, but the sort of concept it is.[19] Is merit, like our modern concept of desert, an essentially

backward-looking concept, proportioned to the moral quality of a person's past acts? Is it like the concept of desert that we use, for example, in awarding prizes and honors and in the retributive apportionment of punishment? Or is merit a forward-looking concept for Aristotle, indicating *ability* in regard to a task to be performed in the future? The backward-looking view has some support in the *Ethics*. In his discussion of proper pride, Aristotle observes that "[d]esert is relative to external goods; and the greatest of these, we should say, is that which we render to the gods, and which people of position most aim at, and which is *the prize appointed for the noblest deeds*; and this is honour."[20] Honor as "the prize appointed for the noblest deeds" certainly has a backward-looking flavor; and we should not forget that Aristotle explicates the good of political participation as a matter of *honor* in the *Politics*.[21]

Even so, I think that it's the forward-looking view that counts. Certainly that is what the orchestra analogy suggests: one distributes places in the orchestra to people on the basis that they will be able to play well, not on the basis of their having been able to play well in the past. Maybe past performance is evidence of prospective ability. But it is evidence of merit, not merit itself.

Now, if we take this forward-looking view of merit and combine it with DWM, we get a quite striking result. Not only is merit not a backward-looking concept; it is not necessarily even an individualized concept. The effect of DWM, as David Keyt points out, is to allow the equations of Aristotelian justice to range over groups, not just over individuals.[22]

Take two individuals, Brown and Jones, the former a man of modest virtue and pedestrian judgment, the latter a man of excellence so far as the political virtues are concerned. Considered in terms of their respective individual abilities, Jones merits higher

office than Brown; perhaps Brown considered by himself does not merit any office at all. But if DWM applies to a citizenry that includes both of them, then their claims to office may be identical. A group including Brown along with Jones may be collectively wiser than Jones himself or than any group comprising only Jones and his peers. It will of course almost certainly be true that a citizen body which included Jones but not Brown (C_J) would be collectively wiser than a citizen body that included Brown but not Jones (C_B). However, if C_J is collectively inferior in wisdom to a body that includes both of them ($C_{J\&B}$), then the difference in merit between Jones and Brown (which grounds the difference in collective wisdom between C_J and C_B) will be irrelevant so far as political office is concerned. Since the relevant office is membership in the collective decision-making body $C_{J\&B}$, that office should be distributed equally.[23] In this context, then, a person's merit is a matter of the collective political capacity of a group of which they might be a member.

I find this an intriguing result, not least for the light it casts on modern discussions about diversity and merit in academic hiring. Many of us support affirmative action, because we think that a political science department or a law school will be better able to discharge its mission if it has a diverse membership than if it consists simply in a pool of similar and similarly talented individuals. On the account I have given of Aristotle's argument, affirmative action can still be regarded as a distribution according to merit – only now, our starting point is the merit of the department or faculty as a whole. The justice-claims of particular individuals to a place in the academy are then derived from the merit-based justice-claims that can be made on behalf of the groups to which they might belong if appointed, rather than directly on the basis of anything that can be regarded as "their

own" merit. Accordingly, when we are choosing between two candidates for a position in a department, we should decide by comparing the merit that *the department* would have if it included one of them with the merit that *the department* would have if it included the other. We may come up with a different result on that basis than we would if we compared their individual merits on the unspoken assumption that each of them would be acting on his or her own.

VIII

Though Aristotle talks of "the many" or "the people at large," members of that class are more likely to think in terms of *individual* entitlements to participate, based simply on each person's status as a citizen. However, inasmuch as the case for democracy is based on DWM, these individual participatory entitlements must be exercised with some responsibility. There is an interesting analogy here with Aristotle's theory of property.[24]

Aristotle's discussion of property purports to be something of a compromise between a rejection of Plato's communism and an attempt to secure some of the social and ethical advantages that result from sharing:

> Property should be in a certain sense common, but, as a general rule, private . . . And yet by reason of goodness, and in respect of use, "Friends," as the proverb says, "will have all things common" . . . For, although every man has his own property, some things he will place at the disposal of his friends, while of others he shares the use with them . . . It is clearly better that property should be private, but the use of it common; and the special business of the legislator is to create in men this benevolent disposition. (26: 1263a25–35)

It is not clear what concrete arrangements Aristotle actually has in

mind when he talks about private property in common use. His examples mainly involve the sharing of private largess in a very close circle of friends, and of course that happens in *every* system of private property. Apart from the Lacedaemonian custom of travelers' appropriating provisions from fields that they pass by on their journey (26: 1263a35), there is nothing particularly common (in the sense of polis-wide) in the examples that Aristotle gives.

But if we turn to *political* property – that is, to the distributable good that consists of the right to participate in politics – we can make perfect sense of the idea of common use. An individual's right to participate is in a sense their private property. But the rationale for the distribution of this right requires that each should make use of that property, not just for their own purposes, but in a way that contributes to the excellence in judgment of the group or multitude to which they belong. Though each has an individual right, the proper use of that right involves an essentially collective exercise. It is possible, of course, that the enfranchisement of the many could be construed by each as a purely individualistic opportunity: "Now I can cast *my* vote. Now I can protect *my* interests. Let everyone else look after themselves." But except on the assumption that DWM is premised on purely utilitarian grounds, that attitude will be inappropriate. The individual member of the multitude is required by the logic of their own (and others') enfranchisement, not only to use their vote responsibly, but to use it in a way that interacts deliberatively with others, so that the final vote in the assembly reflects a synthesis which is something more than a mere aggregation of the constituent parts.

Thus each must bring their experience and their opinion about the good to the assembly in a form that can be communicated to others, and must listen to others and reflect on what they say as

they contribute their insight and experience. Ronald Beiner in his book *Political Judgment* takes as a motto an interesting comment by Thucydides: "One who forms a judgment on any point, but cannot explain himself clearly to the people, might as well have never thought at all on the subject."[25] The common use of political property requires specific virtues – skill in explaining one's own views, skill in listening to the views of others, skill in bringing the two into relation with one another in a way that highlights their strengths and diminishes their weaknesses, and skill once again in explaining the tentative synthesis that one has arrived at for the benefit of others (who are, of course, engaged in a similar exercise). These are skills of empathy, but they are also, of course, as Beiner reminds us, skills of *rhetoric*.[26] And they bring us to what is perhaps the most important connection I want to draw – between the doctrine of the wisdom of the multitude and Aristotle's conception of reasoned speech – *logos* – as the key to man's political nature.

IX

There is a suggestion in Rousseau's *Social Contract* that the general will could be expected to emerge even (or perhaps especially) if "the citizens had no communication one with another."[27] For Aristotle, by contrast, the wisdom of which the multitude is capable emerges only "when they meet together" – a phrase he repeats several times.[28] The institution of their meeting together is the assembly (*ecclesia*) and the medium of their meeting together is *speech*.

At the start of this chapter, I said my approach would be one of heuristic exaggeration. It is, however, impossible to overestimate the importance of the connection between DWM and the claim

made at the beginning of the *Politics* that the mark of someone's political nature is their power of speech.

> Now, that man is more of a political animal than bees or other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal who has the gift of speech. And whereas mere voice is but an indication of pleasure or pain, and is therefore found in other animals (for their nature attains to the perception of pleasure and pain and the intimation of them to one another, and no further), the power of speech is intended to set forth the expedient and the inexpedient, and therefore likewise the just and the unjust. (3: 1253a8)

For one thing the passage immediately undermines any crude utilitarian interpretation of DWM. If collective wisdom amounted only to an aggregation of expressions of individual utility, the multitude could be little more than animals, on this account, grunting in pleasure and squealing in pain.

But the connection I want to emphasize works in the other direction. If politics were typically a matter of monarchy, a matter of rule by the one best man, then this power of speech would be largely redundant, except as a vehicle for the expression of decision and command. Speech is the mark of man's political nature because speech is the medium in which politics takes place. And since politics takes place in the medium of speech, it necessarily takes place in a medium of plurality – a context in which there are many speakers, each contributing to a conversation something that none of the others could have got to by themselves.

Thomas Hobbes, infamously, took the human power of speech to be indicative of man's natural *un*fitness for society. What distinguished men from creatures like bees and ants (which Hobbes mistakenly thought Aristotle regarded as political animals) was, according to Hobbes, that bees and ants

want that art of words, by which some men can represent to others, that which is Good, in the likenesse of Evill; and Evill, in the likenesse of Good; and augment, or diminish the apparent greatnesse of Good and Evill; discontenting men, and troubling their Peace at their pleasure.[29]

It is tempting to think, then, that the Aristotelian position, in opposition to Hobbes, must be that speech is a medium in which we *share* a view about goodness or justice. Hobbes thinks speech is essentially divisive; Aristotle must think that speech is the natural medium for the expression of the amicable unanimity which is discussed in Chapter 6 of Book IX of the *Ethics*.[30] In fact it would be a mistake to state the contrast between Aristotle and Hobbes in these terms. Between divisiveness and unanimity are debate and complementarity: different views coming together in deliberation to contribute dynamically to a new synthesis. Speech, for Aristotle, is not just the unanimous chanting of accepted truths about justice: it is a matter of conversation, debate in the *ecclesia*, articulate discussion, the sort of dialectic which (as I said) one finds represented in Aristotle's works themselves.

In other words, politics for Aristotle is a matter of genuine interdependence. None of us can get by without the others in political life, which we could do if speech were merely a matter of each giving voice to a pre-ordained unanimity. It is perhaps significant that Aristotle characterizes the individual's dependence on the polis in Book I by asking us to consider what a foot or a hand would be like if the whole body were destroyed (4: 1253a21), and that he characterizes the wisdom of the multitude in Book III with the analogy of a body that has *many* feet, *many* hands, and *many* senses (66: 1281b6).

My suggestion then is that DWM stands as a kind of model or paradigm of our nature as *speaking beings*. Each can communicate to another experiences and insights that complement those that

the other already possesses, and when this happens in dense interaction throughout a community, it enables the group as a whole to attain a degree of wisdom and practical knowledge that surpasses even that of the most excellent individual member. I don't want to push the exaggeration too far. I do not want to say that the Book I doctrine of speech as the mark of man's political character intimates a direct essentialist argument for democracy. But the passage from Book I does indicate the centrality of the logic of DWM to Aristotle's overall argument in the *Politics*: that people do better in their practical thinking when they work in groups than when they rely, one by one, on their individual excellence. What DWM does, in the context of Book III, Chapter 11, is pursue that idea to an extreme.

X

I said in the previous section that if we connect DWM with the idea that speech is the mark of man's political nature, we can see that Aristotelian politics cannot just be the unanimous repetition of shared views. Speech is a sign of diversity, a sign that we have something distinctive to learn from one another.[31] DWM thus points us to Aristotle's critique of Platonic unity in Book II of the *Politics*, and to his own insistence on difference and diversity. "[T]he nature of a state is to be a plurality . . . [A] state is not made up only of so many men, but of different kinds of men; for similars do not constitute a state" (21: 1261a18–25).

Difference here amounts to more than the fact that we each have our own life to live, our own special needs to be taken into account in any plausible conception of the common good. We are talking here partly about something amounting to a division of labor with regard to knowledge or understanding – a point

made prominent in Thomas Aquinas's development of these ideas:

> Man . . . has a natural knowledge of life's necessities only in a general way. Being gifted with reason, he must use it to pass from such universal principles to the knowledge of what in particular concerns his well-being. Reasoning thus, however, no one man could attain all necessary knowledge. Instead, nature has destined him to live in society, so that dividing the labour with his fellows each may devote himself to some branch of the sciences, one following medicine, another some other science, and so forth. This is further evident from the fact that men alone have the power of speech which enables them to convey the full content of their thoughts to one another.[32]

In addition, we may also be talking about dialectical difference, as opposed to mere complementarity. My earlier comparison between DWM and Aristotle's way with the *endoxa* indicated that a multitude may be more insightful than one excellent man if its members contrive to spark off each other's dissonant ethical views and sharpen their moral awareness dialectically.

It is therefore difficult to agree with Alasdair Macintyre's claim that Aristotelian political community is "informed by a shared vision of the good."[33] If my hunches bear out, we should expect the citizens in Aristotle's polis to hold views about the good at least as diverse as those canvassed as *endoxa* in the *Ethics*. Of course, that's what common sense tells us also. Aristotle did not conjure up the conflicting *endoxa* from his own imagination. They were views commonly held, some among ordinary people, some among philosophers, some among the elite. He gave no indication that one would expect a good society to exhibit anything less than the diversity of ethical view displayed in the pages of the *Ethics* – the diversity he used as the starting point of his own dialectical

wisdom and which I am suggesting forms the basis also of the wisdom of the multitude concocted in political deliberation.

Now Aristotle does say early on in the *Politics* that man alone among the animals has a sense of good and evil, justice and injustice, and that it is the *sharing* of a view about these things that constitutes a polis (3: 1253a18). But the fact that that passage immediately follows the discussion of man's power of speech cuts at least both ways. I read it as indicating that our sharing a view about the good or justice is to be understood dynamically, as perhaps the upshot of our talking with one another, talk that presupposes that we come to the conversation from different starting points. So it is misleading for Macintyre to couch his position in terms of a "form of social order whose shared mode of life *already* expresses the collective answer or answers of its citizens to the question 'What is the best mode of life for human beings?' "[34] It is wrong, too, for him to suggest that if we ever actually reach *new* ethical conclusions through deliberation, it can only be because we started from shared premises.[35] Aristotle's own method in ethics intimates no such assumption, and nor, I am arguing, does his politics.

XI

The final connection that I want to make stems from Aristotle's discussion in Chapter 13 of Book III of the *Politics*, where he asks: What if, in a given society, DWM is false? After all, "if the people are to be supreme because they are stronger than the few, then if one man, or more than one, but not a majority, is stronger than the many, they ought to rule, and not the many" (71: 1283b23–26). That's predictable enough: we know that Aristotle was prepared to countenance aristocracy or monarchy in certain circumstances.

The striking thing, however, is his assertion a paragraph or two later that the person who provides the counter-example to DWM may justly or properly be regarded as *not a part of the polis*:

> If, however, there be some one person, or more than one, although not enough to make up the full complement of a state, whose excellence is so pre-eminent that the excellence or the political capacity of all the rest admit of no comparison with his or theirs, he or they can be no longer regarded as part of a state; for justice will not be done to the superior, if he is reckoned only as the equal of those who are so far inferior to him in excellence and in political capacity. Such a man may truly be deemed a God among men. (71: 1284a4–11)

Readers will not be surprised to hear that, in my present excited state, I cannot resist making a connection between this passage and Aristotle's insistence in Book I of the *Politics*, in a sentence immediately preceding the discussion of speech, that anyone who can survive or flourish without the *polis* is either a beast or a god: "[M]an is by nature a political animal. And he who by nature and not by mere accident is without a state, is either a bad man or above humanity" (3: 1253a2).[36] The man who is better than the rest even when they act collectively – the man who is as good without speech, without conversation, as the multitude are with it – has an excellent nature, but not a *political* nature. He is a god among men, for he has no need of the power of speech. From one point of view, he is the ideal monarch; from another point of view, he is (as Arendt recognizes) as much the antithesis of mundane politics as Billy Budd.[37]

Aristotle does not leave the matter there. Though he says in Chapter 15 that "the best man must legislate" (76: 1286a22), the passage in Chapter 13 continues, after "a God among men," as follows:

Hence we see that legislation is necessarily concerned only with those who are equal in birth and capacity; and that for men of pre-eminent excellence there is no law – they are themselves a law. Anyone would be ridiculous who attempted to make laws for them. (71–2: 1284a4–14)

It is difficult to know what to make of this. Aristotle's point seems to be about the Rule of Law: although the "God among men" should legislate, perhaps he should not be bound himself by the rules which he makes. The images of divinity and bestiality that Aristotle associates with apolitical natures take another turn at this point – "he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast" (78: 1287a30)[38] – that I have not been able to figure out.

Even harder to figure out are Aristotle's comments on ostracism. In Chapter 13 of Book III, he toys with the idea that the ostracism of the truly excellent – their expulsion from the polis over which they tower – "is based upon a kind of political justice" (73: 1284b17). They cannot be subject to law; they are, as Aristotle puts it, a law unto themselves. Yet that will not do for all sorts of reasons, not least that though they are better than the multitude, they are "not enough to make up the full complement of a state" (71: 1284a5). The one or the few excellent men, though *morally* self-sufficient, do not have the full self-sufficiency associated with political community:[39] they need to live alongside those with whom they cannot benefit from speaking. And those others in turn would be fools to forego the benefit of their excellence, even though that may mean denying the efficacy of their own political natures.

And so the discussion in Book III ends with unsatisfactory reassurances: "[T]he best must be that which is administered by the best" (81: 1288a34); "The whole is naturally superior to the part, and he who has this pre-eminence is in the relation of a

whole to a part" (80: 1288a25); "[S]urely it would not be right to kill, or ostracize, or exile such a person, or require that he should take his turn in being governed." (80: 1288a25) Surely? I am not so sure that the preferable conclusion is not the one from Chapter 16 of Book III that perseveres with the power of speech and takes account of the logic of collectivity:

> If, as I said before, the good man has a right to rule because he is better, still two good men are better than one: this is the old saying.
>
> two going together,
>
> and the prayer of Agamemnon,
>
> would that I had ten such counsellors![40]

6

The physics of consent

I

It is, I think, remarkable in our tradition how little sustained discussion there has been of the principle of majority-decision – I mean sustained discussion of its nature, basis, and justification. There is a line in Aristotle,[1] a few lines in *Leviathan*,[2] a page in Locke's *Second Treatise of Government*,[3] and some tantalizing and ambiguous comments in Rousseau's *Social Contract*.[4] None of these is remotely satisfactory as a philosophical defense of the use that is made of the majority principle by the theorist in question, though, as we shall see, the few lines that there are in Hobbes and Locke may provide the starting point of a satisfactory account.[5]

There is more in the late eighteenth-century writings of Condorcet – that's Marie-Jean-Antoine-Nicolas Caritat de Condorcet – and much more in twentieth-century political science, due largely to the efforts of social choice theorists who have been influenced by Condorcet's *Essay on the Application of Mathematics to the Probability of Decisions Reached by Majority Vote*[6] or who (whether under his influence or not) have explored the paths which he pioneered. However, as a couple of recent editors observed, "Condorcet has never entered the canon of 'great books' in courses on political theory in the English speaking world."[7] And so our question remains: why is majority-decision so under-theorized in the canon?

It is no good offering a Hegelian answer – that, since universal

suffrage was established as a political reality only in the twentieth century, we should not expect the owl of Minerva to have turned its attention to the issue much before now. For in fact, majority-decision is at least as old as Athenian democracy. Bosanquet called it "[t]he very instrument of all political action" and said that it "was invented, so far as we can see, by the Greeks. The simple device by which an orderly vote is taken, and the minority acquiesce in the will of the majority as if it had been their own . . . is found for the first time as an everyday method of decision in Greek political life."[8] Though the direct democracy of Athens has disappeared, the majority principle has endured and prevailed in almost every context where decisions are made by bodies comprising more than two or three individuals who regard one another as equals. The Roman *comitia* used it; the Church fathers and colleges of bishops used it; so did the senate of the Venetian republic; so did the councils of Machiavelli's Florence; so did medieval *parlements*; so did the citizens of Rousseau's Geneva; so did the American revolutionaries. As we build up this list, we should remind ourselves too that there is nothing particularly democratic about majority-decision. By itself the principle implies nothing about the suffrage. The corrupt House of Commons, bought and sold by eighteenth-century English property-owners, used majority-decision. Judges use it in the US Supreme Court when they disagree about whether to strike down a piece of democratic legislation. The governing bodies of gentlemen's clubs use it to choose among rival schemes for concealing the exclusive nature of their membership. For all we know, councils of terrorists use it for selecting their targets, when they disagree about who their next victims should be.

Hannah Arendt ventures the opinion in *On Revolution* that "the principle of majority is inherent in the very process of decision-

making"[9] – echoing Bosanquet's description – and she says it is "likely to be adopted almost automatically in all types of deliberative councils and assemblies."[10] Is the point then that the majority principle is *too obvious* to require any serious expenditure of philosophical energy?

But the obvious is our business; making sense (or nonsense) of the obvious is what philosophers do.[11] We are the ones who examine cause-and-effect, the reality of the external world, personal identity, and our ability as humans to argue about value. It is our job to seek what Kant called a *deduction* of the concepts that structure our practice and experience. The "obviousness" of a principle (at least when obviousness is not just triviality) – its being something which, although apparently important, we "take for granted" – is an indication of its central place in the conceptual scheme that structures our practice. It is an indication that it is exactly the sort of thing we should be confronting in philosophy, enquiring (as Kant would put it) about the principle's *right* to be taken for granted in this way.[12]

II

In addition, there is a particular interest for students of legislation. Among the many misgivings that jurists and constitutionalists have had about legislation, there is a concern about the preposterous way in which propositions or motions put before the legislature acquire legal authority. They do so by being *enacted*, i.e. by being passed or approved by the various chambers of the legislature and assented to by the head of state. That sounds all very solemn and dignified, until we recall that the particular mode of passage in a legislative chamber is voting and majority-decision – a purely statistical determination of whether there are more

members in favor of the bill than against it. Bills do not reason themselves into legal authority; they are thrust into authority with nothing more credible than numbers on their side.

In various activities, we settle things by tossing a coin: we toss a coin to determine which side is to defend which goal at the beginning of a soccer game. No one would think *that* an appropriate basis for determining which propositions should be accorded authority as sources of law. But counting votes seems much more like coin-tossing than like the exercises of reason and intellect that characterize the consecration of other sources of law – for example, the development of a new doctrine, principle, or exception in the deliberations of a court. How, then, can we be expected to take legislation seriously when it is determined in this apparently arbitrary way?

The arbitrariness indictment has a number of different counts, so far as legislation is concerned. The most important accusation contrasts an arbitrary process with a reasoned one, in a context where reason is necessary because of the high stakes of policy, morality, and justice that are involved. The issues that legislation addresses are issues where important individual interests are being balanced, and if great care is not taken, there is a danger that some will be oppressed or unjustly treated. Yet *voting* – counting heads – seems the very opposite of the sort of care that justice requires. Other concerns have to do with the inconstancy and incoherence of the law that results, as the parliamentary factions strive back and forth for numerical superiority. There is a fine statement of this in Hobbes's book *De Cive*. Arguing against the idea of legislation by assemblies, Hobbes says that in many cases "the Votes are not so unequall, but that the conquered have hopes by the accession of some few of their own opinion at another sitting to make the stronger Party." They try therefore to see "that the

same business may again be brought to agitation . . . so [that] what was confirmed before by the number of their then present adversaries, the same may now in some measure become of no effect . . ."

It follows hence, that when the legislative power resides in such convents as these, the Laws must needs be inconstant, and change, not according to the alteration of . . . states of affaires, nor according to the changeablenesse of mens mindes, but as the major part, now of this, then of that faction, do convene; insomuch as the Laws do flote here, and there, as it were upon the waters.[13]

My aim in this book has been to present legislation in a better light than it usually appears in legal and political philosophy. As I said at the outset, it is worth asking what it would be like to develop a rosy picture of legislatures and their processes that matched, in its normativity and perhaps in its naivete, the picture of courts which we present in the more elevated moments of our constitutional jurisprudence. I ask this in part because in questions of constitutional design and constitutional reform, it is important to compare like with like. We are all familiar with the way in which the arbitrariness of majority-decision in Parliament or in Congress is cited as a way of enhancing the legitimacy of Bills of Rights and judicial review. In the end, of course, this is a hopeless strategy for the opponents of majoritarianism. Appellate courts themselves are invariably multi-membered bodies whose members usually disagree with one another, even after deliberation. (Perhaps *especially* after deliberation!) And when they disagree, they too make their decisions by voting and majority-decision. Five votes defeat four on the Supreme Court of the United States. The difference, when an issue is shifted from legislature to court-room, is a difference of constituency, not a difference of decision-

method. So, if voting yields arbitrary outcomes under the principle of majority-decision, then much of American constitutional law is arbitrary. As Dan Farber and Philip Frickey point out in their excellent study *Law and Public Choice*, if we think (e.g. for reasons associated with social choice paradoxes) that "chaos and incoherence are the inevitable outcomes of majority voting, then appellate courts . . . are equally bankrupt . . . If we accept the thesis as to legislatures, we are left with nowhere to turn."[14]

However, the comparison between courts and legislatures and the issue of judicial review are not the only reasons why we want or need a philosophical theory of legislating. We need it, among other things, in order to develop appropriate conceptions of legislative authority and legislative interpretation. So whether the courts use majority-decision or not, we still need to face the question squarely in regard to statutes: what are we to make of the relation between legislating and voting, in an ideal model? How can we possibly consecrate legislation as a dignified source of law, when we recall that a given measure might have had no legal standing at all if some individual had happened not to be present in the legislature when a particular vote was counted, or if a drunken or duplicitous whim had moved him to vote the other way? How should that awareness bear on our interpretation of the statute and on the spirit in which it is received and integrated into the law? Without an adequate understanding of what is to be said in favor of the majority principle, we are quite at a loss as to how to answer these questions.

III

I stated in section I that political theorists seem to regard majority-decision as in some sense *obvious* (once one is committed

to decision-making by a group). Another word for "obvious" is "natural." It is natural, we may say, when the members of a group disagree, to put the matter to a vote and implement the policy favored by the greatest number.[15] Does "natural" help us at all in our quest for a philosophically respectable account of the basis of majority-decision?

At least one philosopher in our tradition, John Locke, uses a conception from natural science to explicate the majority principle. In his discussion of the second stage of the social contract (the stage at which those who have already agreed to act together in civil society gather to decide on the nature of the legislative institutions that they are going to set up), Locke says the following in defense of majoritarian procedure:

> [W]hen any number of men have, by the consent of every individual, made a Community, they have thereby made that Community one Body, with a Power to Act as one Body, which is only by the will and determination of the majority. For that which acts any Community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the Body should move that way whither the greater force carries it, which is the consent of the majority; or else it is impossible it should act or continue one Body, one Community, which the consent of every individual that united into it, agreed that it should; and so every one is bound by that consent to be concluded by the majority. (II: 96)[16]

Locke seems to be trying here to explicate majority-decision on the basis of physics or natural science. In nature, a body moves with the greater force: in politics, similarly, a political body moves at the behest of the majority, because *qua* majority it is stronger. What could be more natural than that? Later in this chapter I shall argue that the physicalist reading of this passage is not the only

reading, and certainly it is not the best interpretation. Even so, on the face of it, the physics of Locke's argument are intriguing.

We are asked to imagine a composite body, impelled internally by the various motions of its constituent parts or elements, to move in various directions. Some of the parts tend to move north, some of them south, and the body as a whole moves either north or south in accordance with the tendency of the greater number of its elements, as a result of their cumulative motion. (Or think of the body as a scrummage in rugby; some players are pushing one way, the others in the opposite direction; and the scrum as a whole moves in accordance with the greater force. Now if one side has a full eight members in the scrum and the other side only six or seven, we would expect the weaker side to give way and the whole mass to move upfield, to the weaker side's disadvantage.)

Notice, however, that this expectation assumes three things. It assumes, first, that the body will not fly apart or break up, that it will continue to move as a whole despite being impelled by these disparate internal forces. (In the rugby example, we assume that the scrum does not collapse and that the players will remain "bound" until they are permitted to "break.") Secondly, it assumes that if some of the elements are striving in one direction and the rest of the elements are striving in a different direction, the body as a whole will move *in the one direction or the other*, depending on which represents the tendency of the greatest number of parts. In other words, it assumes that the motion of the body will not be a resultant or vector of the direction of the elements. For instance, the model we are considering assumes that if two-thirds of the parts are striving north and one-third west, the body as a whole will move due north rather than north-north-west, reflecting the extent of the minority influence. (Similarly the rugby analogy assumes that the scrum will not "wheel" or move

diagonally across field.)[17] Thirdly, there is an implicit and important assumption that the influence of the parts on the motion of the whole is equal. If some of the parts are more massive than others, or their motion more agitated, there is of course no longer any reason to assume that the body will move in accordance with the direction of the greater *number* of parts. (In rugby, a seven-man scrum can defeat an eight-man scrum if the members of the former are heavier or if they bind and push with greater strength or better technique.)

Each of these three assumptions has potential political significance. First, even when the majority is politically stronger, its political power may be effective only so long as the political system holds itself together. All bets may be off if the minority elects to secede rather than accept defeat in a vote. The superior political (or in the last resort military) force which would be required if the stronger party were not only to get its way but also frustrate any attempt to secede might be much, much greater than that represented by a simple political majority. Secondly, the vector or resultant model seems to provide a better account of the outcome of much political conflict than the one-direction-or-the-other model. (However, what it better explains may be the compromise, coalition-building, or log-rolling elements in such conflict, rather than the pure element of voting.) Thirdly, the assumption of equality reflects only the formalities of politics. It ignores the intensity with which individuals and factions strive to get their way, as it also ignores the unequal political resources at their disposal.[18]

Much the same can be said about those physicalist accounts of majority-decision that see it as a surrogate for combat. "Voting," says Georg Simmel, "is a projection of real forces and their proportions . . . it anticipates, in an abstract symbol, the result of

concrete battle and coercion."[19] But what happens in a real battle depends (among other things) on how long the fight is joined, how outcome and advantage are related to terrain, etc., and on tactical skill and *matériel*, not just numbers.

Thomas Hobbes offers an intriguing variation on the military model, in his account of the role of majority-decision in the mechanics of a representative body:

> [I]f the Representative consist of many men, the voyce of the greater number, must be considered the voyce of them all. For if the lesser number pronounce (for example) in the Affirmative, and the greater in the Negative, there will be Negatives more than enough to destroy the Affirmatives; and thereby the excesse of Negatives, standing uncontradicted, are the only voyce the representative hath.[20]

The image offered here is of political decision-making as something like hand-to-hand combat, with victory going to the side with the last man left standing. But the analysis is no more convincing than Simmel's. It is a weird military logic indeed that sees battle as a set of pair-wise encounters – each necessarily internecine because of the equality of the individual combatants – with victory going to whichever army has so many soldiers that some of them cannot find partners-in-combat among the members of the opposite side! Once again, it's a logic that falls apart if a number of the combatants in the less numerous side are much stronger or more skilled than their counterparts.[21]

For these reasons, it seems unwise to rely on any physicalist or military-force explication of majority-decision. Such accounts would have to be so heavily qualified, or they would be applicable only in such peculiar circumstances, as to beg all the important questions that make majority-decision seem persuasive.

The first of the assumptions I mentioned – the cohesion assumption – merits some additional consideration at this point. I

mentioned earlier that the physicalist interpretation of the majority-principle works only if the body (which has divided into majority and minority factions) manages to hold itself together. It is interesting that, in physics, John Locke regarded the cohesion of bodies as something given, albeit something very mysterious: he said in the *Essay* that it is something we may take for granted but nevertheless cannot explain.[22] In politics, however, cohesion is not given; rather it is established in large part by the behavior of the members of the body in question. The very people who are exhorted (a) to abide by the majority view are also the ones who are exhorted (b) not to secede and to do their part to hold the body together. Now I am not saying that exhortation (a) is the same as exhortation (b). Locke sometimes seems to imply that it is, in his suggestion that the majority principle is the only possible decision-rule for an effective body incapable of unanimity (II: 97–98): but clearly other decision-rules are possible. What is clear is that exhortation (a) can succeed only if exhortation (b) does. Someone who is not convinced that the body ought to hold together will certainly not be convinced that, as a member of the minority, they ought to abide by the majority view. Now, since a force-based account of the way a body will move *if* it holds together is not a force-based account of its holding itself together, the physicalist version of the argument for majority-decision is necessarily incomplete. It needs to be complemented by a force-based argument in favor of cohesion. But patently no such argument is possible. Some items which may be regarded as possible parts of a larger whole tend to cohere naturally – for example, little blobs of mercury tend to form a larger blob when they come into contact with one another. Others – such as grains of sand – do not. There is nothing obvious or natural one way or the other. Clearly, then, Locke is going to need a straightforwardly

normative argument for political cohesion – for instance: one ought to do one's part to hold the body together, since that was the whole point of entering into the social contract. But then, just because it's normative, that argument will sit rather oddly and uncomfortably with the naturalist or physicalist account of the direction of the body, once its cohesion has been secured. One is tempted to say that if the physicalist argument cannot do *all* the work, it is hardly worth having for *any* of it.

In any case, there is something inappropriate in principle about force-based arguments in this area. We ask about majority-decision because we are interested in why the minority ought to regard themselves as bound, or why outsiders ought to take the voice of the majority as the voice of the whole. Or, more specifically, we ask about majority-decision because we are interested in the respect that ought to be accorded to statutes on the basis of their provenance in the collective decisions of a representative assembly. At best, however, a force-based account can only tell us how the minority *will* be bound (failing secession), not how they *ought* to be bound. Or it tells us how a coherent body *in fact* moves as a result of majority-impetus, not how we ought to respect or regard that movement.

This is not just the naturalistic fallacy. It is more a version of a point made by Jean-Jacques Rousseau at the beginning of *The Social Contract.* An argument based on force, said Rousseau, does not have the capacity in practical deliberation to oppose any reason – not even the slightest reason – that someone might have for resisting the force in question:

> Force is a physical power; I do not see how any morality can be based on its effects. To yield to force is an act of necessity . . . at best it is an act of prudence. In what sense can it be a duty? . . . As soon as anyone is able to disobey with impunity he may do so legitimately . . . If we must

obey because of force we have no need to obey out of duty, and if we are no longer forced to obey we no longer have any obligation to do so . . . If a highwayman ambushes me on a road by a wood, I must give him my money by force, but if I *can* keep it away from him, am I obliged in conscience to give it up?[23]

IV

Though Locke uses the language of force and motion – "it is necessary the Body should move that way whither the greater force carries it" (II: 96) – he may not intend this to be read in a physicalist way. A more interesting reading takes "force" and "motion" as quite abstract conceptions, almost logical terms, which may be imbued with various content, depending on whether we are dealing with material interactions or interactions of some different kind.[24] And in fact Locke makes it clear that the physics he has in mind is a physics of individual consent, not of individual strength or power:

> For that which acts any Community, being only *the consent of the individuals of it*, and it being necessary to that which is one body to move one way; it is necessary the Body should move that way whither the greater force carries it, which is *the consent of the majority*. (II: 96; my emphasis)

Consent does not carry physical force; it carries rather moral force with regard to the purposes for which consent is required.

Locke's argument for majority-decision is positioned in the immediate sequel to the formation of the social contract. The contract itself, of course, requires unanimity with regard to those who are taken to be bound by it: "Men being . . . by nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own

consent" (II: 95). At this stage, the "physics" of individual consent is that of a trumping veto. Though a large number of men may bind themselves together contractually, their doing so "injures not the Freedom of the rest; they are left as they were in the Liberty of the State of Nature" (II: 95).

However, those who have bound themselves do so with a view to setting up law-making institutions, and that process is conceived also by Locke as one which requires consent. The decision at this second stage is understood in the first instance as *an act of the community, a decision of the people*: the people must make a judgment as to how legislative authority is most appropriately set up (II: 132). Now, for Locke, an act of the community cannot be anything other than a function of individual judgments, "that which acts any Community, being only the consent of the individuals of it"(II: 96). So individuals must turn their minds to the problem that they face as a newly established community: how to set up a legislature and into what hands to entrust it.

As I stressed in Chapter 4, Locke envisages that this is something on which the members of a community must be expected to disagree, given "the variety of Opinions, and contrariety of Interests, which unavoidably happen in all Collections of Men" (II: 98). Each of the various opinions will tend to push the collectivity in one direction rather than another – but the "pushing" is now understood as the logical tendency of a proposition about consent rather than the physical force of the human who holds it. Since the judgment of the collectivity is some function of the judgments of individuals, the fact that individual A believes legislative authority ought to be vested in a monarch "pushes" the group towards a monarchical constitution, while the fact that B favors an assembly "pushes" the group in a republican direction. If C, like A, favors a single-person legislature, then there

is a *double* push in the direction of monarchy, so that, if no other individual is to be counted, that is the direction in which the body as a whole will move. Or, forsaking the physical language of push altogether, we may say: A's opinion "counts" for monarchy as the decision of the group; so in addition does C's; while B's is the only opinion that "counts" in favor of the opposite decision. Any account, then, of what is to be said in favor of monarchy or assembly, respectively, would note that there is twice as much to be said in favor of the former as there is to be said in favor of the latter.

That's the outline of the Lockean physics of consent, though clearly it needs further explication. But, first, how does this interpretation alter our view of what I referred to earlier as the three main assumptions of the Lockean account?

(1) The first assumption is that the body will continue to hold itself together. In the physicalist account, this involved the mystery of material cohesion.[25] In a consent-based model however, the interpretation of this assumption is easy. The "body" in question is already constituted by the consent of the individuals who compose it. It is that consent, or rather the commitment implicit in that consent, which is the sole basis of political cohesion at this stage. If the acceptability of majority-rule is called in question by the tendency of the body to come apart (acknowledging that this is one basis, but not the only basis, on which it might be called in question), an appeal can be made to the consent to the social contract that the individuals posing that question originally made: one can ask whether the individuals intended the body to remain in existence, capable of action, or not. Was their original consent serious, or did they join civil society in the manner of "Cato's coming into the Theatre, only to go out again" (II: 98)?

The assumption is also given a sharper edge by Locke's insis-

tence that no one can possibly think that a group composed of many people will be able to subsist and act on the basis of unanimity. Unanimous consent of all the members is "next impossible to be had" if we consider the vicissitudes that will keep some away from the assembly and divide the interests and opinions of others (II: 98). Since everyone knows this when they give their original consent to be a member of the body, no one can reasonably predicate their adhesion to the body on the requirement that it act only when there is unanimity. No such condition on the original consent would be reasonable. It follows, quite quickly, that each must accept – by virtue of their original consent – that the body should be capable in principle of moving legitimately, with their adhesion, in a direction contrary to that in which they in particular would like it to move. Since it is possible that all but the individual favor a move in direction X while he favors Y, and since he accepts that unanimity cannot be the sole condition of the body's movement, he must not rule out in advance the possibility that it should move in direction X despite his opposition.[26] (Or, if he does, he must base that on there being something special about *his* opposition; and that would contradict the assumption of equality, which we shall consider under the heading of the third assumption.)

So the original consent does a great deal of work in the argument for majority-decision. It is not – we should note – a consent to be bound by the majority. That would make the legitimacy of majority-decision purely a matter of convention: the people could have chosen any decision procedure, but they happened to agree to this one.[27] And that's not the hypothesis I'm exploring here. I'm exploring instead a consent-based interpretation of Locke's view that majority-decision is natural. The original consent, then, is consent to be bound by some decision-procedure

or other, a decision-procedure that might well involve something less than unanimity. But we have not got to the specifics of majority-decision quite yet.[28]

The other point to emphasize about original consent (to be a member of the body) is that it operates in the physics of Locke's account *as consent operates.* Theorists of authority and political obligation often look for something that can be construed as consent and they treat it then as a sort of "On/Off" switch that magically generates for their theory all the conclusions about political obligation that the most complete authoritarian could desire. Locke, however, recognized that if we are relying on consent, then we must allow the logic of consent to dominate the political implications of its having been given.

What is this logic? It entails, first, that consent is given for reasons. If we are really serious about basing political obligation and legitimacy on consent, then those reasons provide the basis of our account of what civil society is for. If I consent to be part of an organization to promote goals X and Y, I cannot be bound by that organization's decision to promote some quite different objective Z. (For example: a decision to join together with others for common safety and support does not commit me to the group's conclusions about common worship.) Similarly, if I consent to be part of an organization to promote goals X and Y, that organization loses its consensual legitimacy if it acts in a way that is patently destructive of X and Y. As Locke puts it, in a phrase that conveys as clearly as possible his commitment to what I am calling the limiting logic of consent, "no rational Creature can be supposed to change his condition with an intention to be worse" (II: 131). The logic of consent is more or less the logic of rational choice and if we discover that by some alleged act of political authority, men have in fact "put themselves into a worse condition

than the state of Nature" (II: 137), we are entitled to infer that government must have gone beyond its bounds, which are, as I said, the bounds established not just by the act but by the logic of consent. Finally, the idea of legitimacy by consent is limited by what the individual is morally permitted to consent to. Certain natural rights are, for Locke, inalienable not just in the sense that no rational creature *would* give them up, but also in the sense that – from a natural law point of view – no person is entitled to give them up:

> [N]o Body can transfer to another more power than he has in himself; and no Body has an Absolute Arbitrary Power over himself, or over any other, to destroy his own Life, or take away the Life or Property of another. A Man . . . cannot subject himself to the Arbitrary Power of another; and having in the State of Nature no Arbitrary Power over the Life, Liberty, or Possession of another, but only so much as the Law of Nature gave him for the preservation of himself, and the rest of Mankind; this is all he doth, or can give up to the Common-wealth, and by it to the Legislative Power, so that the Legislative can have no more than this. (II: 357)

We saw in Chapter 4 that people are likely to disagree, in and out of the legislature, as to what these inalienable rights amount to. But that there are such rights, that they impose limits on what one can consent to and thus limits on what one's original consent can commit one to so far as majority-decision is concerned – all that is quite beyond question, in Locke's argument.[29]

(2) The second assumption was that the body will move in one direction or the other, depending on the votes of the members; it will not move, as a physical body would, as a vector of forces. Thus suppose – with regard to the problem of constitutional design that Locke postulates – that some individuals vote in favor of a monarchical legislature while others vote for a perfect

democracy (II: 132). The assumption of the majoritarian principle is that it shall be one or the other, depending on which has the greater support; on the vector model, however, the body as a whole would veer towards a compromise, viz., a legislature consisting of more than one but fewer than all, depending on the exact balance of forces. How does our analysis in terms of the physics of consent interpret the rejection of the vector model?

The underlying Lockean assumption that "that which acts any Community [is] only the consent of the individuals of it" (II: 96) can be interpreted in two complementary ways. It can be interpreted – as we have construed it so far – to mean that nothing but individuals' consent shall determine the outcome of any political decision. Or it can also mean that nothing but individuals' consent shall determine the range of possible outcomes for political decision. The second interpretation insists that political choice is not from a range of *given* or *preordained* options, but choice from a range of options specifically proposed by individual members of the commonwealth. On this account, a compromise position may not be selected unless it is *someone's view* of what ought to be done. And if it is someone's view, then it ought to stand up as such in a contest for votes in the ordinary way. Thus the logic of individual consent, as the moving force in politics, is that the political body is not to move in any direction unless that direction has been explicitly proposed, and consented to by someone as a proposition. It may not move in a direction that no one has offered as a proposal simply as a result of voting among other proposals that have been offered.

(3) The issue in which the biggest difference is made by a move from a purely physicalist account to the Lockean physics of consent is the issue of equality of forces. In his study of Locke's theory, Willmoore Kendall suggests that Locke's argument rests on

the assumption "that the consents given and withheld are of *equal intensity*." No spectacle is more familiar in politics, Kendall writes, than "the ease with which a smaller number of persons with intense convictions can make their consent count for more than that of a larger number of persons."[30]

The first problem with this is that it assumes that consent is something which can vary in its force or intensity. It is not at all clear, in fact, that it can, and it is noticeable that Kendall slips immediately from talking of the intensity of consent to talking of the intensity of the convictions lying behind consent. Consent itself is not a scalar matter. If individual consent is required for legitimacy, then a transaction is legitimated as soon as consent is present; it doesn't particularly matter how enthusiastic or forceful the consent is. My consent to a surgical operation does not vary in its legitimating force by, so to speak, the flourish of my signature or the intensity with which I nod my agreement. Unless a lack of intensity raises a question about the *reality* of the consent, consent has no interesting variation in this dimension at all. The same seems to be true of consent construed as contract or promise. What is important in a contractual situation is that I really agree to the deal that is offered me; the deal does not vary, nor its enforceability, depending on how much or how intensely I agree.

The second problem is that Kendall misunderstands the sort of account that Locke is offering in his physics of consent. He is not postulating that as a matter of fact the movement of a political body depends on the force of individuals' participation. The Lockean physics of consent is more in the nature of a normative theory. The claim is that the only thing which *properly* moves a political body is the consent of the individuals who compose it. For the purpose of that normative proposition, consent is a matter

of individual authority and legitimation. People may vary in their political influence and know-how. But that is not the same as a variation on the normative force of individual consent. Even apart from the issues canvassed in the previous paragraph, Locke is adamant that, whatever the other variations among us, we are each other's equals so far as authority is concerned (II: 54). Our natural state, out of which the principle of majority-decision is to be conjured, is a state "of Equality, wherein all Power and Jurisdiction is reciprocal, no one having more than another" (II: 4). The importance of consent is based purely on this natural equality of legitimating authority, and that carries through to make irrelevant any other differences in political effectiveness among us, so far as the elements of political decision-making are concerned.

V

Interpreting the three assumptions in terms of the physics-of-consent model is not enough. We still have to interpret the physicalist argument in favor of the principle that the majority is to prevail.

The logic of that argument – in our original reading of the passage – was the logic of the aggregation of physical forces: with three forces pushing north and two pushing south, the body will move north when the individual forces are equal. But does the moral force of consent aggregate in the same sort of way? Willmoore Kendall has no doubts on this score: Locke's argument, he said, is "unexceptionable . . . insofar as it asserts that more consent (for consent *is* additive) generates a greater motivating force than less consent."[31] I am not so sure. Remember that consent is supposed to work, in the physics-of-consent model that we are considering, not as a moving or motivating force, but as an

authorizing and legitimating force. And there it's simply not obvious at all that consent aggregates. To take a trivial example: suppose I say "Yes" several times (on Monday, Tuesday, and Wednesday) to a surgeon's proposal to perform a dangerous operation on me on Thursday, but on Thursday morning, after thinking again, I say "No." There is no question of adding up the consents and saying that three outweigh one; instead the rule is that the latest expression prevails, no matter how many authorizations there previously were the other way. This example doesn't actually prove anything except this: that we may not *take it for granted* that consent is an aggregative concept in any context where legitimation is the issue.

One possible interpretation of consent as aggregative would be the utilitarian interpretation: if each person's consent reflects an accurate sense of his own interests, then the aggregation of individual consents might imply a reliable conclusion about the general interest, understood in a Benthamite fashion. There are many problems with this utilitarian interpretation of the majority principle, however.[32] The most prominent difficulty is that a utilitarian interpretation of voting brings us back to the problem of intensity that we thought we had dealt with under heading (3) in the previous section. Even if each individual counts equally, it by no means follows that the interests or preferences that they have at stake in some issue are equal or equally at stake for the purposes of a calculation of general utility. There are problems too in the implicit assumption that utilitarianism is the appropriate underlying basis for a decision-principle. It is not at all clear that that is so, especially when one is dealing with the fundamentals of social and constitutional design.[33] In this context, the principle of utility is at least as controversial as the majority principle; interpreting the latter in terms of the former may make the latter

more intelligible, but it makes the *case* for majority-decision no more persuasive.

There is also a deeper point here. Our problem right now is whether the consent of individuals should be understood aggregatively. We can point to utilitarianism as a body of theory which understands the preferences of individuals aggregatively. But there are well-known philosophical problems with exactly that understanding: do twenty small headaches caused by policy X add up to one huge headache sufficient to outweigh the large headache that a single individual will suffer if policy X does not go ahead? And there are similar questions about the aggregative structure of almost any consequentialist theory: why, exactly, is it better for the lifeguard to choose to swim in the direction that will enable him to save five swimmers rather than in the direction that will enable him to save one?[34] It's no good saying simply that it's obvious that five outweigh one: even if that's true (and many deny it), recall our discussion at the beginning of the chapter, that our task as political philosophers is to explicate the obvious, not to let the sense of obviousness do our work for us.

Recall finally that we are not supposed to be looking for an interpretation of majoritarian aggregation which implies that the majority is necessarily right. Yet that is what the utilitarian interpretation tends to suggest. (Or if that is not what it suggests, it's hard to see what it can add at all.) Locke's argument is not that the majority-decision is right, but that majority decision-making is legitimate or appropriate, in relation to the issues that consent is relevant to. Just as the fact that a person consents to a proposal doesn't make the proposal right or wise, so the fact that there is majority support for a proposal doesn't make it right or wise or just either. (That was what was emphasized in Chapter 4.)[35] Consent and majority-support are supposed to work in

relation to the legitimacy of popular decision-making, not at this stage in relation to the wisdom of the multitude.

How, then, is majority-counting supported on a legitimacy-oriented account? I think we should approach this question by asking: What is the best or most natural interpretation of "the aggregation of forces" in the Lockean physics of consent? The answer need not be "the aggregation of consent"; instead, the answer may be entirely non-aggregative, or it may point us indirectly to an aggregative conclusion that does not depend on any direct analogy with the physical aggregation of forces. The broad logic of consent in Locke's account has to do with justice to individuals and with recognition of and respect for their standing as equals. The basic metric, then, of any situation in which individuals have diverse and contrary views about the action of the body which they compose should be a metric of *fairness*.[36] We should ask ourselves: What is the fairest basis on which to proceed, in a situation in which we are faced with such disagreement? Our answer to that question will be the appropriate analogue, in the Lockean physics of consent, for the work done by the aggregation of forces in the physicalist account.

Let us recall the assumptions on which we are proceeding. A collective choice is to be made, despite disagreement, among a set of options proposed by individual members. The choice is to be made on the basis of nothing other than the views of individuals. Those views will be informed, one hopes, by discussion among the members: that is the burden of the Aristotelian argument in Chapter 5 and of the elements of deliberative theory that we noted in Locke's own view towards the end of Chapter 4.[37] But there is no superhuman repository of knowledge or will that can serve as the basis for decision: though one or other of the options may be objectively wrong, all we have on earth (as I emphasized in

Chapter 4) is individuals' views about this. So: all members agree that a decision among options proposed by the members is to be made by the members with reference to nothing other than the views of the members. And this decision, they agree, is to be made despite the fact that they (the members) are in disagreement as to what the decision should be – in other words, despite the fact that the decision of the body cannot possibly be unanimous. What in those circumstances is the fair way to proceed? Which way of proceeding is fairest to each and all of the individuals involved?

When we put the question this way, it seems we can move directly to the majority principle as the obvious answer. For it can be demonstrated that no other principle gives greater weight to the views of any individual member, except by giving their views greater weight than that assigned to those of some other individual member.[38] Indeed, the method of majority-decision attempts to give each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others. It makes the individual's view minimally decisive, in the sense that if member M_1 thinks we should do X and no other member of the group has a view, then X is what we should do.[39] But not only that, the method of majority-decision also accords maximum decisiveness to each member, subject only to the constraint of equality. In this sense, majority-decision presents itself as a *fair* method of decision-making, and as a natural interpretation of the physical aggregation of forces in the physics of consent.

Readers who are nervous about the directness of this move may be reassured if I show that we can reach the same result by a slightly more circuitous route. Recall Hobbes's account of majority-decision:

if the lesser number pronounce . . . in the Affirmative, and the greater

in the Negative, there will be Negatives more than enough to destroy the Affirmatives; and thereby the excesse of Negatives, standing uncontradicted, are the only voyce the Representative hath.[40]

The image is that, one by one, each affirmative is canceled out by a corresponding negative, until there is at least one negative standing unopposed. We may interpret this in terms of the physics of consent as follows. A five-member group has to choose, let's say, between doing and refraining from X as a matter of policy. The members believe that the decision should be a function of nothing other than their individual views. They understand that their views are relevant to the group decision in this way because the group may not act legitimately without their consent. But they understand too that the group must reach a decision on this matter, even if their individual views are not unanimous; each of them is already committed to that. They accept, finally, that for the purposes of the legitimacy of group action, one member's consent is as good as another's: though they vary somewhat in their ability and experience, they accept that they are one another's equals, so far as the requirement of consent is concerned.

So they now go about concocting a collective decision out of their individual consents and dissents. That process goes through several stages.

(1) The first thing that happens is that one member M_1 stands up and expresses opposition to X: she does not consent to X. If no one else were to say anything (given an opportunity), that would clearly be conclusive. It would be conclusive not just as a matter of preference but as a matter of legitimacy: for the group may not act without consent, and so far the only indication of the consent of the individuals is its withdrawal by M_1 from the proposal to do X.

(2) But then M_2 stands up: she is in favor of X and opposed to not doing X. So far as legitimacy is concerned, the situation is now evenly balanced: individual consent has been withdrawn from each of the options facing the group. If M_1 and M_2 were the only members, then the group would be paralyzed.[41] Or if unanimity were required the group would also be paralyzed no matter how many members there were. Fortunately however the group is not paralyzed because there is an odd number and they all agree that the group may act even without unanimous support. So we proceed to the third stage.

(3) The third thing that happens is that M_3 stands up. He too opposes X. So now we have moved from the stand-off at the end of stage 2 to a situation in which there is a further and, for now, unopposed voice in favor of not-X. If this were all, then, so far as legitimacy is concerned, it would be wrong for the group to proceed with X.

(4) Next, however, M_4 expresses his opinion in favor of X, and so we are back to where we were – paralysis – at the end of stage 2. So far as consent is concerned, there is nothing to be said in favor of X that cannot be said against it. Facing this uncomfortable prospect, the chair of the group says, "Anyone else?"

(5) At the last minute M_5 leaps to her feet. She does not agree to do X, she says: she is opposed to it. So now, the situation has changed from the stand-off at the end of stage 4, to the proposal eliciting nothing but fresh dissent. Since the group cannot proceed legitimately in the face of unopposed dissent, it must desist from X.

And that is how majority-decision can be presented in terms of a Hobbesian version of the Lockean physics of consent.

VI

The worry with which we began was that legislation looks *arbitrary* when it is presented as the outcome of majority-decision. How can we regard legislative decisions as a dignified source of law, when they are based on nothing more than the authority of numbers? In section V, I tried to give an answer to that worry by connecting the business of "head-counting" to the requirements of legitimacy and fairness. When we are deciding an issue on which we need a common decision and there are disparate individual views, majority-decision can be made to seem a respectful rather than an arbitrary political procedure.

In this section I want to pursue the appearance of arbitrariness a little further. For now we must examine the assumption of disagreement. Surely that is what is getting in the way here; that is what is leading us to substitute the crude arithmetic of head-counting for the process of reasoned deliberation.

Modern proponents of deliberative democracy stress conversation and unanimity as key procedural values. Ideally, they say, "deliberation aims to arrive at a rationally motivated *consensus* – to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals."[42] Now, such an aim is certainly important in terms of the logic of deliberation. To argue in good faith is to present reasons that (one thinks) the other should accept. For two or more people to persist in argument is for them to take seriously the possibility that in the end the same considerations will convince them all. (Otherwise, why bother?) However, accepting consensus as the internal telos of deliberation is not the same as insisting upon it as the appropriate political outcome. This is where deliberative theorists go wrong. They assume that dissensus

or disagreement is necessarily a sign of the incompleteness or politically unsatisfactory character of deliberation. Their approach implies that there must be something wrong with the politics of deliberation if reason fails, if consensus eludes us, and if there is nothing to do but count heads. Indeed, some have even suggested that we can only be sure that a political process *is* deliberative if its outcome is unanimity. A deliberative politics, we are told,

> seeks an answer to which we all can agree, since it is reached from a debate in which each is able, freely and fully, to offer his reasoned judgment under rules that treat no person as privileged and no answer as presumptively favored . . . Since each is able to present his reasoned judgment, each is able to ensure that the mutual advantage realized in the answer embraces his own good. Since no one is privileged, each is able to ensure this only by equally embracing the good of his fellows, and so demonstrating his equal respect for them and their endeavors. A reasoned interchange, in which all seek an answer to which all must agree, results in unanimity. The procedure of deliberative politics is thus informed by the standards that its outcome must satisfy.[43]

On an account like this, the need for voting must seem like an admission of failure, dictated perhaps by deadlines or practicalities or by the invincible ignorance or prejudice of some or all of the parties.

Thus, it is tempting for the theorists of deliberative democracy to try and marginalize voting, and the procedures (such as majority-decision) that voting involves, in their accounts of deliberation. This can be done in several ways. The deliberative ideal might be confined in its application to those who share common understandings (i.e. those who are unlikely to disagree) and who regard politics as a way of ascertaining what those shared understandings are.[44] Or it might be confined to areas of politics – such as constitutional politics – that the theorist in question

regards as more than usually consensual.[45] Or the theorist of deliberative democracy might infer that there is something wrong with the motivations of the participants when voting is found to be necessary. This third strategy is the most common and the most disturbing. Like Rousseau, deliberative theorists are always inclined to suspect that a division into majority and minority factions is a sign that some or all are voting on a narrow basis of self-interest, rather than addressing issues of the common good in the spirit that deliberative models presuppose.[46] They admit there is a second-best-theory problem of how to change people's motivations and inculcate the civic virtue and the concern for the common good that deliberative politics ideally presupposes. Still, they think that once we *get* a genuine deliberative democracy, the sordid business of counting votes will be largely unnecessary, at least on serious matters of principle. The authority of legislation will consist in its deliberative provenance not its majoritarian credentials.

Suppose, however, that we start from the contrary premise. Suppose we stipulate up front that – although deliberation is important – humans are liable to disagree with one another on justice and policy as much after deliberation as before it.[47] If we stipulate this, then we can insist that any adequate normative theory of law and politics must take it into account, and construct its view of the distinction between arbitrary and non-arbitrary decision-procedures accordingly.

What sort of stipulation would this be (that there is always liable to be disagreement)? It is tempting to say bluntly, "A realistic one." But it is more than realism. The prospect of persisting disagreement must be regarded, I think, as one of the elementary conditions of modern politics. Nothing we say about politics makes much sense if we proceed without taking this

condition into account (which is why so much that is said under the heading of "deliberative democracy" seems like dreaming). Here's an analogy. Consider John Rawls's idea of *the circumstances of justice* – the factual aspects of the human condition, such as moderate scarcity of resources and the limited altruism of individuals, which make justice as a virtue and a practice both possible and necessary.[48] We may say, along similar lines, that disagreement among citizens as to what they should do, as a political body, is one of *the circumstances of politics*. It is not all that there is to the circumstances of politics, of course: there is also the felt need to act together, even though we disagree about what to do. Like scarcity and limited altruism in the case of justice, the circumstances of politics are a coupled pair: disagreement wouldn't matter if people didn't prefer a common decision; and the need for a common decision would not give rise to politics as we know it if there wasn't at least the potential for disagreement about what the common decision should be. On this account, imagining away the persistence of disagreement is like wishing away scarcity in an account of distributive justice. Of course, in philosophy there is nothing wrong with making certain ideal assumptions: but whatever else we wish away in *political* philosophy, we should not wish away the fact that we find ourselves living and acting alongside many with whom there is little prospect of our sharing a view about justice, rights or political morality.[49]

Liberals do a good job of acknowledging disagreement, so far as comprehensive views of religion, ethics, and philosophy are concerned. Thus John Rawls insists that "a diversity of conflicting and irreconcilable comprehensive doctrines" is "not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy."[50] (It is also one of the

circumstances of justice.)[51] He gives an account of the persistence of this sort of disagreement.[52] And he concludes that it is therefore fortunate that we do not need to share in society a common view about religion, ethics, and philosophy. But Rawlsian liberals have done a worse job of acknowledging the inescapability of disagreement about the matters on which they think we *do* need to share a common view, even though such disagreement is – as I have argued – the most prominent feature of the politics of modern democracies.[53]

Rawls and his followers may respond that their job is to explore the idea of "a well-ordered society," defined as a society whose members share a view about justice.[54] They think this an important idea to explore in part because they believe (quite rightly) that an issue of justice is an issue on which we need to act together on the basis of a common view. But the *need* for a common view does not make the fact of disagreement evaporate. Instead it means that our common basis for action in matters of justice has to be forged in the heat of our disagreements, not predicated on the assumption of a cool consensus that exists only as an ideal.

These are not just abstract theoretical considerations. In the United States, in Western Europe, and in all other democracies, every single step that has been taken by legislatures towards making society safer, more civilized, and more just has been taken against a background of disagreement, but taken nevertheless in a way that managed somehow to retain the loyalty and compliance (albeit often grudging loyalty and compliance) of those who in good faith opposed the measures in question. The prohibition of child labor, the reform of the criminal process, the limitation of working hours, the dismantling of segregation, the institution of health and safety regulations in factories, the liberation of women – each of these achievements was secured in what I have

called the circumstances of politics, rather than in anything remotely resembling the justice-consensus that Rawlsians regard as essential to a well-ordered society. What is more, each of these legislative achievements claims authority and respect as law *in* the circumstances of politics, including the circumstance of disagreement as to whether it is even a step in the right direction. Such legislation does not claim authority and respect simply as an intimation of what an ideal society would be like; if it did, those with a different vision or social ideal would simply turn away.

VII

If we accept this thesis about the circumstances of politics, then we can begin to construct an aggressively affirmative response to the accusation of arbitrariness so far as majoritarian legislation is concerned.

The first thing to say is that the dignity of legislation, the ground of its authority, and its claim to be respected by us, have a lot to do with the sort of *achievement* it is. Our respect for legislation is in part the tribute we should pay to the achievement of concerted, cooperative, coordinated or collective action in the circumstances of modern life.

In a variety of ways and for a variety of reasons, large numbers of us believe we should act, or organize things, together. There are lots of things that can only be achieved when we play our parts, in large numbers, in a common framework of action. Enterprises like protecting the environment, operating a health care system, securing the conditions for the operation of a market economy, or providing a basis for dispute resolution will founder unless people act in concert, following rules, participating in practices, and establishing institutions. Action-in-concert is not easy, particularly

once people have a sense of themselves as individuals and of the ways in which acting with others might conflict with smaller scale projects of their own. In fact, when it actually takes place, action-in-concert is something of an achievement in human life.[55] Social choice theorists remind us that a common enterprise will often founder even when the potential participants agree about the project and share the same preference for its success. How much more of an achievement it is, then, when a large population act together in some common concern even though they disagree among themselves what exactly is to be done.

In the circumstances of politics, tossing a coin might be a way of settling on a common course of action. If the deadline for action was near enough and the need for concerted action sufficiently compelling, we might adopt any arbitrary method that made one course of action more salient. If the matter were particularly grave, we might even *admire* such methods, in a sort of Nietzschean or existentialist spirit: I remember the bracing feeling when a faculty meeting once prepared to toss a coin to decide which of two candidates to hire, after several hours of deadlock.

Is majority-decision to be respected in that spirit? Is it simply a technical device which enables us to choose one course of action – any course of action – in circumstances where we want to act together but are deadlocked about what to do?

Certainly any decision-procedure which addresses the circumstances of politics has to *look* technical. Suppose my two friends and I face a decision-problem of the kind we are considering: we want to act together in regard to some matter M, but one of us thinks it is important to follow policy X while the others think it important to follow policy Y, and none of us has reason to think any of the others a better judge of the merits of M than themselves.

Suppose, too, that we all know M requires a common policy in which each of us will play an independent but necessary part; moreover the part that each of us would play in X is contrary to the part that each of us would play in Y (in the sense that anyone playing the part assigned to them in the one policy would make it impossible for the other policy to succeed). In these circumstances, the following will obviously *not* be a way of settling on a common policy: each does whatever they think it is important to do about M. We must find a way of choosing a single policy in which the three of us can participate *despite* our disagreement on the merits. And, since each is to act independently once this method of choice has been followed, each must have a way of identifying just one of the proposed policies as "ours," i.e. as the one which "we" are following. That ability must not involve the use of any criterion such as C: "What it is important to do about M," for it is precisely disagreement about the application of C that gives rise to the decision-problem in the first place. The way in which any of us identifies a policy as "ours" must therefore seem arbitrary in comparison to C (though of course it will not be arbitrary in relation to the decision-problem). Majority-voting satisfies this requirement, for any member of the group may identify (say) Y as "the policy favored by the majority," whether or not they think that Y satisfies C.

But is that all we can say for it – that it is a successful technicality? I think we can say more, along the lines of what I called the physics of consent. Majoritarianism is not just an effective decision-procedure, it is a respectful one. It respects individuals in two ways. First it respects and takes seriously the reality of their differences of opinion about justice and the common good. Majority-decision does not require anyone's view to be played down or hushed up because of the fancied importance

of consensus. In commanding our support and respect as a decision-procedure, it does not require any of us to pretend that there is a consensus when there is none, merely because we think that there ought to be – whether because any consensus is better than none, or because the view that strikes *some* of us as right seems so self-evidently so that we cannot imagine how anyone would hold to the contrary.

There is a dangerous temptation to treat an opposing view as something which is "beneath notice," if you will, in respectable deliberation by assuming that it is necessarily ignorant or prejudiced or self-interested or based on insufficient contemplation of moral reality. Such an attitude embodies the idea that since truth in matters of justice, right, or policy is singular and consensus is its natural embodiment, some *special* explanation – some factor of deliberative pathology, such as the lingering influence of self-interest – is required to explain disagreement, which explanation can then be cited as a reason for putting the deviant view to one side.

The kind of respect I have in mind – the respect embodied in the majority principle – involves rejecting this inference. It need not involve rejecting the premise about the singularity of truth; that is, it need not involve anything like relativism. Respect has to do with how we treat each other's *beliefs* about justice in circumstances where none of them is self-certifying, not how we treat the truth about justice itself (which, after all, never appears in politics *in propria persona*, but only – if at all – in the form of someone's controversial belief).[56] Nor is it just a point about fallibility, though of course anyone who holds a view about justice must think it possible they are mistaken and must not act in a way that shows they think that possibility can be ignored. It is rather that, whatever the state of my confidence about the correctness of

my own view, I must understand that politics exists, in Arendt's words, because "not man but men inhabit the earth and form a world between them"[57] – not one person but people – that mine is not the only mind working on the problem in front of us, that there are a number of distinct intelligences working on whatever issue we face, and that it is not unexpected, not unnatural, not irrational to think that reasonable people would differ.

I said there are two ways in which majoritarianism respects individuals. It does so, as we saw in section V, by treating them as equals in the authorization of political action. I guess that in a sense tossing a coin treats them as equals too. Or more carefully, we could have a political system in which each person put their view into a hopper, and picked one of them out at random and acted, as a society, on that. (Such a lottery system might be thought to have the advantage of avoiding the inevitability of permanent minorities.)[58] Each would have an equal chance of their view being decisive. But this is a Pickwickian sense of equality. A case can be made that an equal distribution is a distribution at the highest level consistent with equality.[59] If so, the majority principle fares better as a principle of equal respect, because it gives each individual's vote a greater chance of determining the outcome than it has in the lottery proposal.

But is it not arbitrary, the opponent of majoritarianism will say (and this is almost the last response I will give), to accord equal weight to people's votes in this mechanical fashion? John Stuart Mill's position in *Considerations on Representative Government* may be recalled for us. Mill maintained ferociously that

> it is a personal injustice to withhold from anyone . . . the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people. If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should

be legally entitled to . . . have his consent asked, and his opinion counted at its worth . . .[60]

But "not at more than its worth," Mill added. Fairness does not require that the view of a wise and intelligent person have the same weight – the same potential for decisiveness – as the view of a person who is ignorant and unreasoning. Indeed it is arguable that fairness requires the opposite, at least if fairness means something like "that to which no one can reasonably object." As Mill puts it,

> Every one has a right to feel insulted by being made a nobody, and stamped as of no account at all. No one but a fool . . . feels offended by the acknowledgment that there are others whose opinion, and even whose wish, is entitled to a greater amount of consideration than his.[61]

Thus a conception of equal respect which is responsive to proven or acknowledged differences in reason, wisdom, and experience may justify some sort of plural voting scheme, rather than the equal weight implicit in plain majority-decision.[62]

Whether it is possible in the circumstances of politics to *justify* (or agree upon) criteria of wisdom, etc. for the purposes of these differentiations is another matter. If the mark of wisdom is having reached just decisions in the past and people disagree about what counts as a just decision, then it is not clear how we can determine who is wise and who is not without failing in respect for persons in the first of the senses set out above (namely, respect for the reality and implications of disagreement).

Something similar can be said about a point that Charles Beitz makes, that any inference from equal respect to majority-decision would have to "reflect an implausibly narrow understanding of the more basic principle [i.e. equal respect], from which substantive concerns regarding the content of political outcomes . . . have

been excluded."[63] Beitz is surely right that the concept of equal respect for persons is normally used in a way that conveys not just the speaker's view about how political decisions are reached but also their view about the substantive impact on individuals of the outcome itself. Such a speaker will not be convinced, then, that equal respect entails majority-decision, for they will know that majority-decision can lead to outcomes which (as they believe – and maybe rightly) do not give individuals the substantive respect to which they are entitled.[64]

Once again, however, we can see that this broad notion of respect is unusable in society's name in the circumstances of politics. It is because we disagree about what counts as a substantively respectful outcome that we need a decision-procedure; in this context, folding substance back into procedure will necessarily privilege one controversial view about what respect entails and accordingly fail to respect the others. Thus in the circumstances of politics, all one *can* work with is the "implausibly narrow understanding" of equal respect; and I hope I have convinced the reader that majority-decision is the only decision-procedure consistent with equal respect in this *necessarily* impoverished sense.[65]

VIII

My strategy in this book has been to invoke the names of canonical figures in political theory to bolster the claims that can be made on behalf of legislation by a popular assembly as a respectable source of law. As I mentioned at the outset, we have looked beyond the usual suspects in this regard. We have not looked to Bentham or Rousseau. We have looked to Aristotle, supposedly the theorist of differential political virtue; we have looked to John

Locke, the philosopher of natural rights as limits on legislatures; and we have looked to Immanuel Kant, supposedly the high priest of autonomous individual moral reasoning. We have found in these theories a fund of insights into the need for legislation, the distinctive contribution that a plural assembly can make, and the respectfulness of majoritarianism as a decision-procedure.

It would be disingenuous, however, to end without remarking that none of these three (or four, if you count the contribution from Hobbes that I've also been considering in the present chapter) can reasonably be regarded as a proponent of legislation by the people (along the lines, say, of a plebiscite or California-style initiative). For Kant, the equal participation of all is at best an ideal theoretic assumption.[66] Locke is most comfortable with a representative assembly, like the House of Commons, or perhaps a mixed legislature like Lords, Commons and monarch (II: 213), and according to some of his interpreters had difficulty with the idea of universal suffrage.[67] And Aristotle's considered view seems to have been favorable to a mixed regime rather than to the sovereign popular assembly he toyed with in the chapters that we considered from Book III of the *Politics*.[68] (And even that leaves aside the general ambivalence about legislation in Athens – an ambivalence no less than the ambivalence in turn-of-the-century American jurisprudence, which we considered at the beginning of Chapter 2.)[69]

The point is particularly important with regard to the arguments I have been studying in this chapter. In the case of both Hobbes and Locke, majority-decision is defended as a principle to be used by a newly formed political community to make the most basic decisions. In Hobbes it is defended as a basis for choosing the sovereign; in Locke it is defended as a principle for setting up a legislature, and for selecting the shape and character of subsequent

rules for political decision-making.[70] As Locke puts it, that primal majority may reserve the legislative function to itself

> and then the Form of the Government is a perfect Democracy: Or else may put the power of making Laws into the hands of a few select Men . . . and then it is an Oligarchy: or else into the hands of one Man, and then it is a Monarchy. (II: 132)

Although (as we saw in Chapter 4) he thought there were very good reasons for favoring the choice of a representative assembly – "collective Bodies of Men, call them Senate, parliament or what you will" (II: 94)[71] – those were reasons of political prudence; they had nothing to do with the Lockean thesis of the "naturalness" of majority-decision which we have been examining. The primacy accorded to *a majority of the people* is simply a function of the artificiality (not the undesirability) of any other arrangement (II: 99).[72] In other words, the Lockean and Hobbesian arguments I have been considering in this lecture have not been arguments about legislation as such; they have been arguments about the primal need to extrapolate some decision-procedure from the very notion of a political society as such. As John Dunn observes:

> [T]he notion of a political society in the absence of any historically accredited decision-procedure prescribes majority-voting on all legislative issues. But of course nothing at all like such a situation existed in seventeenth-century England – or for that matter in any long-term political community which Locke ever mentions. And there is no doubt that he would have regarded majority-voting on all issues by a whole population as a grotesquely dangerous and practically absurd political structure . . . His comments on the status of majorities in political choice were a part of his formal analysis of the concept of political legitimacy. They were in no sense whatever a proposal for the appropriate form of social organization.[73]

So if we think that majority legislation is a good thing, we are not entitled to think this because the great John Locke proposed it.

My intention in this book, however, has not been to quote from Aristotle, Hobbes, Locke, and Kant as if they were our oracles.[74] We looked at Locke's argument at the beginning of Chapter 8 of the *Second Treatise* because we had heard it said that majority-decision was an "arbitrary" decision-procedure, and we wanted to see what else there was to say on that issue. Locke's account of its non-arbitrariness in one context has provided us with some of the resources we might need to see that our practice of using it in other contexts is also not as arbitrary as one might think. And similarly with Kant's account of the need for uniform laws and Aristotle's account of the wisdom of the multitude. These are neither prophecies, nor policy proposals, nor constitutional amendments; they are *arguments* embedded in the rich tapestry of our tradition of theorizing about politics, past instances of the very activity in which we engage when we speculate in our own voices about whether courts are better than legislatures at dealing with disputed matters of principle. These issues did not arise yesterday, and it is worth reminding ourselves – particularly in jurisprudence – that arguments have been made and answered in these areas in political theory for hundreds, indeed thousands of years.

At the end of Chapter 2, I mentioned a warning by Machiavelli, that we should not be misled by noise and tumult, conflict and disagreement, the smell or the sound of the rabble, into thinking that an indecorous politics is necessarily a symptom of an unhealthy politics, or that popular participation is necessarily a sign of disorder.[75] That lesson is probably easier for political scientists to learn than legal scholars, for the former associate themselves with political theory in all its ribald splendor, while the

latter tend to confine themselves philosophically to the hushed tones of jurisprudential discussions of the nature of judicial reasoning. And they form their view of the dignity or standing of various sources of law accordingly. This book has been an attempt at cross-fertilization. It is worth bringing jurisprudence a little bit closer than it is usually brought to the variety of ways in which people have theorized about politics: for law must be seen eventually as the offshoot of politics whatever the jurisprudes say. But I hope that the book also has the effect of helping political theorists to see that topics in legal philosophy are not beyond their domain, but offer a helpful focus for refreshing our understanding of what are otherwise rather overly familiar texts.

NOTES

1 *Introduction*

1 See Dworkin, *Taking Rights Seriously*, 105–30 and *Law's Empire*, 239 ff.

2 The phrase "counter-majoritarian difficulty" is from Bickel, *The Least Dangerous Branch*, 16.

3 The phrase is Ronald Dworkin's: see Dworkin, *A Matter of Principle*, 33.

4 See Waldron, *Law and Disagreement*.

5 See Waldron, "Rights and Majorities," "A Right-Based Critique of Constitutional Rights," and "Freeman's Defense of Judicial Review." See also Part Three of Waldron, *Law and Disagreement*.

2 *The indignity of legislation*

1 Seeley, *Introduction to Political Science*, esp. Lecture VI.

2 Ibid., 140.

3 Ibid., 146.

4 For Seeley's discussion of Mill, see ibid., 108–9.

5 Ibid., 144.

6 Ibid., 145.

7 Idem.

8 Maine, *Popular Government*, 140: "It is not often recognized how excessively rare in the world was sustained legislative activity till rather more than fifty years ago . . .".

9 See Bagehot, *The English Constitution*. Enumerating the powers of Parliament, Bagehot wrote: "Lastly there is the function of legislation, of which of course it would be preposterous to deny the great importance, and which I only deny to be *as* important as the executive management of the whole state . . . There are seasons when legislation is more important . . . But generally the laws of a nation suit its life; special adaptations of them are but subordinate; the administration and conduct of that life is the matter which presses most" (ibid., 119).

10 Blackstone, *Commentaries on the Laws of England*, Vol. 1, Introduction, 5.

11 I owe this point to David Lieberman.

12 Pound, "Common Law and Legislation," 404, quoting observations from Baldwin, *Two Centuries' Growth of American Law*. But Pound himself cautions against judicial antipathy to statute law: "It is fashionable to point out the deficiencies of legislation. . . It is fashionable to preach the superiority of judge-made law. It may be well, however, for lawyers and judges to remember that there is coming to be a science of legislation and that modern statutes are not to be disposed of lightly as offhand products of a crude desire to do something, but represent long and patient study by experts, careful consideration by conferences or congresses or associations, press discussion in which public opinion is focused upon all important details, and hearings before legislative committees" (ibid., at 383–4).

13 Calabresi, *A Common Law for the Age of Statutes*, 1. Runners-up for the motto position include an "orgy of statute making" (Grant Gilmore's phrase, cited by Calabresi, ibid.) and "[t]he 'statutorification' of American law" (idem).

14 Langdell, "Dominant Opinions in England During the Nineteenth Century," 151.

15 Ibid., 153.

16 Ibid., 151.

17 See Gray, *The Nature and Sources of the Law*, 84–5, 123–5 and 152.

18 For the tendency of Langdellian formalism to privilege judge-made law over legislation, see Duxbury, *Patterns of American Jurisprudence*, 16–17.

19 *Omychund* v. *Barker*, *1 Atk. 21, 33 (K.B. 1744), 26 Eng. Rep. 15, 23 (1744)*.

20 Hart, *The Concept of Law*, 175.

21 Ibid., 169.

22 Ibid., 175–6. However, the sociological explanation may refer obliquely to a metaphysical claim. Maybe conventional morality is immune sociologically from deliberate change, because it can only play the part it does in the lives of individuals if those individuals believe that they are following transcendent standards which cannot (now, *metaphysically* cannot) be changed by human fiat. (And this belief in metaphysical immutability might of course be sociologically significant even if it were false or meaningless: see Mackie, *Ethics: Inventing Right and Wrong*, 20 ff.)

23 It is quite wrong to hold that Hart's insistence that law is not necessarily just is a purely semantic or conceptual or analytic thesis: cf. Coleman, "Negative and Positive Positivism," 147.

24 Using a phrase adapted from Thompson, *Whigs and Hunters*, 266.

25 Hart, *The Concept of Law*, 114.

26 Ibid., 202.

27 Ibid., 117.

28 Raz, *Practical Reason and Norms*, 132–8. See also Raz, *The Authority of Law*, 105–11.

29 Raz, *The Authority of Law*, 47.

30 Ibid., 105 (my emphasis). See also the discussion at ibid., 87–8.

31 Oakeshott, *Rationalism in Politics*, 5–42.

32 Ibid., 26.

33 Oakeshott delighted in the fact that Bentham failed in this project: "It is all very well to see Bentham's influence everywhere in the legislation of the nineteenth century, but when we consider how

extreme his views about English law actually were, what must be noticed is, not the number of his isolated suggestions which have been put into practice, but the total rejection which his fundamental principles have suffered." Oakeshott, "The New Bentham," 141.

34 Oakeshott, *Rationalism in Politics*, 11.

35 Hart, *The Concept of Law*, 176.

36 Ibid., 255 (my emphasis). This passage is from Hart's postscript.

37 Winch, *The Idea of a Social Science*, 57 ff.

38 See Franco, *The Political Philosophy of Michael Oakeshott*, esp. 170 ff.

39 I think that Hart accepts this. In *The Concept of Law*, he argues that, in a flourishing two-tier legal system, it is no longer important that compliance (on the part of the citizenry) with the primary rules be associated with any particular "internal point of view." Certainly a legal system cannot exist unless the rule of recognition is practiced by a corps of officials with the appropriate internal point of view; but as far as primary rules are concerned, it is sufficient that they are mostly *complied with* by the citizens at large. See ibid., 112–17. I am grateful to Jules Coleman and Stephen Perry for some discussion of this matter.

40 See Hayek, *Rules and Order*.

41 Ibid., 72.

42 Ibid., 91.

43 Ibid., 124 ff. For a more favorable view of this connection between legislation and administration (a view that also casts doubt on whether legislation is best regarded as "law"), see Rubin, "Law and Legislation in the Administrative State."

44 Hayek, *Rules and Order*, 73.

45 The phrase is Joseph Raz's, in conversation.

46 *Pepper* v. *Hart* 3 W.L.R. (1992).

47 And how is that supposed to work? Are we interested in the intentions of the minority who voted against the bill as well as the majority who voted in its favor? Can the "intentional" majority straddle the majority who voted in favor and the minority who voted against?

48 For different views, see Brest, "The Misconceived Quest for the Original Understanding," esp. 212–13, and Dworkin, *Law's Empire*, Ch. 9.

49 See Radin, "Statutory Interpretation," 871. For the most forceful recent critique, see Scalia, *A Matter of Interpretation*, esp. 16–37.

50 Strachey, *Eminent Victorians*, 192–3.

51 Bentham, *Of Laws in General*, 18 (my emphasis). Austin's language is similar: "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme" (Austin, *Lectures on Jurisprudence*, Lecture VI).

52 Bentham, *Of Laws in General*, 238n.

53 See Wheare, *Legislatures*, 7–13.

54 Hobbes, *Leviathan*, 185.

55 Ibid., 132. See also Hobbes's discussion in *De Cive*, Ch. 10, sects. X–XV, 136–8.

56 Hobbes, *De Cive*, Preface, 37.

57 See e.g., Hobbes, *Leviathan*, 129, 184.

58 Condorcet, *Selected Writings*, 49. See also the contributions by Estlund et al., "Democratic Theory and the Public Interest."

59 Madison et. al., *The Federalist Papers*, 351, Number LVIII. I am grateful to Marshall Sanger for this reference. The whole discussion in *Federalist* LV–LVIII is worth reading in this connection.

60 Blackstone, *Commentaries*, Vol. 3, quoted in Lieberman, *The Province of Legislation Determined*, 62.

61 Rousseau, *The Social Contract*, Book II, Ch. 6, 193.

62 Mill, *Considerations on Representative Government*, Ch. V, 109. Mill continued: "The incongruity of such a mode of legislating would strike all minds, were it not that our laws are already, as to form and construction, such a chaos, that the confusion and contradiction seem incapable of being made greater by any addition to the mass."

63 Ibid., 102.

64 Ibid., 109.

65 Bagehot, *The English Constitution*, 122.

66 Ibid., 123.

67 Machiavelli, *Discourses on Livy*, Bk I, Ch. 6, 16.

68 Locke, *Two Treatises*, 329–30 (II, para. 94).

3 *Kant's positivism*

1 See Fuller, *The Morality of Law*, 81–91.

2 See the discussion in Hart, "Are There Any Natural Rights?" 79–80: "The most important common characteristic of this group of moral concepts is that there is no incongruity, but a special congruity in the use of force or the threat of force to secure what is just or fair or someone's right to have done shall in fact be done; for it is just in these circumstances that coercion of another human being is legitimate."

3 All references in the text are to page numbers of Mary Gregor's translation of Kant, *The Metaphysics of Morals*, followed by page number of Vol. VI of the Prussian Academy edition of Kant's works.

4 Wolff, *In Defense of Anarchism*, 14–15 (emphasis in original).

5 Ibid., 18: "Insofar as a man fulfills his obligation to make himself the author of his decisions, he will resist the state's claim to have authority over him . . . He will deny that he has a duty to obey the laws of the state *simply because they are the laws* . . . [I]t would seem that anarchism is the only political doctrine consistent with the virtue of autonomy."

6 Kant, "On the Common Saying," 81.

7 Ibid., 85. See also Kant, "An Answer to the Question: 'What is Enlightenment?' " 55–6.

8 Kant, "On the Common Saying," 81.

9 Wolff, *In Defense of Anarchism*, 19.

10 Arendt, *Lectures on Kant's Political Philosophy*, 9.

11 The quotation is from Kant, *Political Writings*, 137. For a slightly

different translation (Gregor's) of the same passage, see Kant, *The Metaphysics of Morals*, 89–90: 312.

12 Kant, "On the Common Saying," 73.

13 Ibid., 84.

14 Ibid., 85.

15 Kant, *Critique of Pure Reason*, 601. I am grateful to Richard Tuck for this reference.

16 Ibid.

17 Kant, "On the Common Saying," 79.

18 See Hobbes, *Leviathan*, Ch. 18, 128–9: "[T]he estate of Man can never be without some incommodity or other; and . . . the greatest, that in any forme of Government can possibly happen to the people in generall, is scarce sensible, in respect of the miseries, and horrible calamities, that accompany a Civill Warre; or that dissolute condition of masterlesse men, without subjection to Lawes. . ."

19 Ibid., Ch. 13, 89.

20 Ibid., Ch. 14, 92 ff.

21 Ibid., Ch. 18, 125.

22 Ibid., Ch. 29, 223.

23 Ibid., Ch. 13, 88–9.

24 See ibid., Ch. 11, 69–70 and Ch. 13, 87–88. See also Hobbes, *De Cive*, Ch. 1, vi at 46: "But the most frequent reason why men desire to hurt each other, ariseth hence, that many men at the same time have an Appetite to the same thing; which yet very often they can neither enjoy in common, nor yet divide it; whence it follows that the strongest must have it, and who is strongest must be decided by the Sword."

25 Williams, *Kant's Political Philosophy* points out at 168 that Kant is at one with David Hume here. Hume writes: "The question . . . concerning the wickedness or goodness of human nature enters not in the least into that other question concerning the origin of society" (Hume, *A Treatise of Human Nature*, 492).

26 Kant, "On the Common Saying," 70: "The concept of duty in its complete purity is incomparably simpler, clearer and more natural

and easily comprehensible to everyone than any motive derived from, combined with, or influenced by happiness . . . [T]he concept of duty, if it is presented to the exclusive judgment of even the most ordinary human reason, and confronts the human will separately and in opposition to other motives, is far *more powerful*, incisive and likely to promote success than all incentives borrowed from the latter selfish principle."

27 See the discussion of the "Clue of Reason" in "The Epistle Dedicatory" to Hobbes, *De Cive*, at 26–7: "[M]y first enquiry was to be, from whence it proceeded, that any man should call any thing rather his *Owne*, th[a]n *another mans*."

28 See footnote 2, above. Page references in the text are to Kant, *Metaphysics of Morals* together with the page reference to Vol. VI of the Prussian Academy edition of Kant's works.

29 Kant rejects the Lockean view that (in the case of land) what is needed is a particular mode of occupancy – labor, i.e. cultivation – and he rejects the plantation ideology (viz., that European cultivators are entitled to dispossess hunters or nomads) that goes with it (53: 266). See also his fierce and direct condemnation of the expropriation of native peoples in Africa and America (121–2: 353).

30 As Kant puts it, "The indeterminacy, with respect to quantity as well as quality, of the external object that can be acquired makes this problem (of the sole, original external acquisition) the hardest of all to solve" (53: 266).

31 This is a matter of the application of the "Lockean proviso" – an acquisition being justified only if "enough and as good" is left for others (or, in weaker versions, only if others' situations are not worsened overall). See Locke, *Two Treatises of Government*, II, paragraph 27, and Nozick, *Anarchy, State and Utopia*, 175–82. Note that the logic of the Lockean proviso is quite unaffected by the differences between Kant and Locke on mode of acquisition; it applies to any theory of unilateral acquisition. See Waldron, *The Right to Private Property*, 280–3.

32 "[S]omething external would be mine only if I may assume that I could be wronged by another's use of a thing even *though I am not in possession of it*" (37: 245).

33 See also Kant's "Explanatory Remarks," on the tension between the principle of First Occupancy and the principle of Adverse Possession: "The question is whether I can also *assert* that I am the owner even if someone should come forward claiming to be the *earlier* true owner of the thing, but where it was *absolutely* impossible to learn of his existence as its possessor . . ." (131: 364).

34 Pogge, "Kant's Theory of Justice," 414: "There is still some residual indeterminacy regarding cases of potential conflict with respect to which even the material principle is indifferent (the problem of coordination). For example, you might embrace a scheme under which people drive on the left-hand side of the road, while I favor the equally acceptable scheme of driving on the right. This last indeterminacy, irresolvable a priori, requires a central legislative process to complement the constraints of natural law by those of positive law . . . Positive law irons out this incompleteness by selecting, on empirical grounds (such as convenience) and to some extent arbitrarily, one system of constraints from among those that satisfy pure practical reason." Pogge is surely right that there will be some cases like this. But I think Kant meant also to stress the irresolvability of disagreement about issues on which there is in principle a right answer.

35 The account I have given of various sources of indeterminacy is not explicitly linked by Kant to his idea of people being at odds because each goes around doing what seems right and good to him or her. But it is a plausible interpretation. It was well known in the tradition of thought about property that First Occupancy runs into just these difficulties, and that in the state of nature there is no way of preventing such difficulties from giving rise to conflicts about who has the right to what.

I am encouraged to find that a similar line of argument is sketched

out in Kersting, "Politics, Freedom, and Order," 352: "The reason why Kant's philosophy also joins in the chorus of modern political philosophy singing '*exeundum-e-statu-naturali*' lies in the indeterminacy of the rational principles of right for the appropriation and use of things . . . Kant . . . must argue for a concretization and differentiation of the implications of rational right through positive right because in the natural condition chaos rules with respect to the concept of right – each person attempts with equal right to fill the emptiness of the natural laws of property with his own interpretation. The result is a war for the monopoly of interpretation over equally justified but incompatible opinions about property . . ."

36 See Waldron, *Law and Disagreement*, Chs. 1, 8, and 10.

37 Mackie, *Ethics: Inventing Right and Wrong*, 36: "Radical differences between first-order moral judgments make it difficult to treat those judgments as apprehensions of objective truths."

38 See Moore, "Moral Reality," 1089–90. Moore maintains that the argument from diversity to subjectivism confuses objectivity with inter-subjective agreement. But if the inference from diversity to subjectivism is fallacious, so too would be any inference from the fact that Kant was an objectivist about justice to the proposition that he *cannot* therefore have believed in the existence of such diversity of opinion, or made anything significant of it so far as political and legal philosophy is concerned.

39 Locke, *Two Treatises*, 288 (II, paragraph 28).

40 Rawls, *A Theory of Justice*, 3.

41 Kant, "Idea for Universal History," 44.

42 'If a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with Right by the principle of contradiction an authorization to coerce someone who impinges upon it" (25: 231).

43 All three of these points elaborate, in different ways, Kant's assumption that the problems in the state of nature and the necessity to enter civil society apply to people who "cannot avoid living side by side with others." Proximity to others is, for Kant, one of "the circumstances of justice." (Rawls's phrase – see Rawls, *A Theory of Justice*, 126–30.) If humans were widely dispersed across the face of the earth, and hardly ever ran into one another, then there would be no call for either right or law, because there would be no impingement of our external actions on each other and perhaps no competition for the use of the same resources. As Kant puts it, "if [the] surface [of the earth] were an unbounded plane, men could be so dispersed on it that they would not come into any community with one another, and community would not then be a necessary result of their existence on earth" (50: 262).

44 Moreover, the obligations they acquire in this way are potentially onerous ones, affecting under conditions of scarcity the material resources they may use to sustain their lives. (See the discussion in Waldron, *Right to Private Property*, 266–71.)

45 I think Kant toys with this possibility at one stage in his discussion of First Occupancy. He identifies *original* acquisition with *unilateral* acquisition, but then continues: "However, if an acquisition is *first* it is not therefore *original*. For the acquisition of a public rightful condition by the union of the will of all for giving universal law would be an acquisition such that none could precede it, yet it would be derived from the particular wills of each and would be *omnilateral*, whereas original acquisition can proceed only from a unilateral will" (48: 259). To the extent that I understand this (which is not very much), I think Kant is suggesting that a will which knows itself to be really the *first* appropriator (with respect to a given resource) is intervening in effect *qua* will as such rather than as the will of a particular person.

46 Kant, *Grounding for the Metaphysics of Morals*, 15.

47 Arendt, *Lectures on Kant's Political Philosophy*.

48 Kant, *Critique of Judgment*, 136 (paragraph 40).

49 Compare the discussion in Mill, *On Liberty*, 45, on the difference between hearing others' objections "presented" by the person who is about to go on and rebut them and hearing others' objections "from persons who actually believe them, who defend them in earnest and do their utmost for them."

50 At best, one would be in the sort of Hobbesian position of maintaining one's sense of justice *in foro interno* (Hobbes, *Leviathan*, Ch. 15, 110). But in the Kantian scheme of things, this would be a travesty for, as we have already noted, the whole point of justice and right is to regulate the external characteristics of our conduct, not to regulate our attitudes. Thus Kant insists that "anyone can be free so long as I do not impair his freedom by my *external action*, even though I am quite indifferent to his freedom or would lie in my heart to infringe on it" (24: 231).

51 Indeed, Kant entitles one of the early sections of *The Metaphysics of Morals*: "Right is Connected with an Authorization to Use Coercion" (25: 231).

52 Kant, "On the Common Saying," 73.

53 Ibid., 79.

54 Murphy, "Acceptance of Authority," 276 argues that the Kantian approach to political obligation cannot dispense with a consent requirement: "Though [people in the state of nature] ought to commit themselves, *they are under no moral requirement to comply with the institution's dictates* until *they have committed themselves.*" But this distinction will not survive either the Kantian view that one person may force another to enter civil society when the former finds himself in conflict with the latter, or the Kantian view that anyway the question must be one, not of how we entered civil society, but of what our current obligations to it are.

55 Hobbes, *Leviathan*, Ch. 21 at 151: "[T]he Obligation a man may sometimes have . . . dependeth not on the Words of our Submission; but on the Intention; which is to be understood by the End

thereof. When therefore our refusall to obey, frustrates the End for which the Soveraignty was ordained; then there is no Liberty to refuse: otherwise there is."

56 Towards the end of section II above.

57 Kant, "Idea for a Universal History," 46. Cf. the title and epigraph of Berlin, *The Crooked Timber of Humanity*, ix.

58 For the contrast between *provisional* and *conclusive* acquisition, see Kant, *Metaphysics of Morals*, 52: 264. Alan Ryan suggests something along these lines in Ryan, *Property and Political Theory*, 79–80.

59 Nozick, *Anarchy, State and Utopia*, 150–3.

4 Locke's legislature (and Rawls's)

1 John Rawls, *A Theory of Justice*, 228–9.

2 All citations in the text of this chapter are references, by treatise and paragraph number, to Locke, *Two Treatises of Government*.

3 The author of *Political Liberalism* hedges his bets, observing that whether we have a system of parliamentary supremacy, an American-style Bill of Rights with judicial review, or indeed a constitution with entrenched provisions, placed beyond amendment, like that of Germany, is not a matter on which the theory of political liberalism, as such, needs to take a view. (See Rawls, *Political Liberalism*, 235.)

4 Aquinas, *Treatise on Law*, 18–19.

5 Some of this, incidentally, will involve assembling factual information. Consider the so-called "Sufficiency Proviso" associated with Locke's labor theory of acquisition – that one may legitimately appropriate only so much as leaves "enough and as good for others" (II: 27). If one is trying to observe this proviso, it is important to find out how many "others" there are whose claims have to be considered in this way. And it is important for those who are making property claims to have a *common* sense of that if they are to be able to "settle" the boundaries of their claims and "moderate" their respective dominions. A legislature can provide them with that

information and so may give them for the first time some objective sense of what the Sufficiency Proviso *amounts to* in the circumstances in which they find themselves.

6 For a discussion of the time element in human reasoning, particularly in relation to demonstrative reasoning, see Locke, *An Essay Concerning Human Understanding*, Bk. IV, Ch. 2, para. 4.

7 Ibid., Bk. I, Ch. 3, para. 13.

8 Even our coming to the age of reason is no more than the maturing of our ability to do this; it is certainly not the same as immediate inheritance of the ideal products of such reasoning, and Locke gave no indication that our rationality would not continue to be exercised by this and other issues for the whole of our adult lives. (See II: 57–9. I interpret the argument in this passage to be that responsibility under the law of nature presupposes the capacity to understand it, not that such capacity brings actual understanding the instant it matures.)

9 See Tully, *Strange Multiplicity*.

10 See Tully, *A Discourse on Property*, esp. 157 ff.

11 Rawls, *A Theory of Justice*, 198–9.

12 Ibid., 223.

13 Ibid., 195–201.

14 Ibid., 198.

15 Ibid.

16 Locke, *Essay*, Bk. III, Ch. 10, para. 9.

17 See also the discussion in Nozick, *Anarchy, State and Utopia*, 54 ff.

18 Arendt, *On Revolution*, 157.

19 A delightful phrase quoted by Postema, *Bentham and the Common Law Tradition*, 266.

20 Locke, *Essay*, Bk. III, Ch. 10, para. 12.

21 Ibid.

22 That is, we should emphasize the connection between reasoning and disagreement in Locke. When Locke argues (*Essay*, Bk. I, Ch. 3, para. 4) that "there cannot any one moral Rule be propos'd, whereof a

Man may not justly demand a Reason," he goes on to say that it is "from hence" (i.e. from reasoning) that "flows the great Variety of Opinions, concerning Moral Rules, which are to be found amongst Men . . ." (Ibid., Bk. I, Ch. 3, para. 6.)

23 This is the passage in which Locke goes on to say, notoriously: "[I]t therefore being necessary, that the last Determination, i.e. the Rule, should be placed somewhere, it naturally falls to the man's share, as the abler and the stronger."

24 As Arendt put it (*On Revolution*, 175), politics exists because "not man but men inhabit the earth and form a world between them."

25 There is a fine discussion in Kendall, *John Locke and the Doctrine of Majority-Rule*, 112–23. But Kendall is wrong to suppose that Locke is committed to the identification of what is right with what the majority rules (cf. ibid., 133).

26 See II: 132. Cf. Hobbes, *Leviathan*, 129–38.

27 Hobbes's arguments to the contrary are set out most clearly in Hobbes, *De Cive*, Ch. 10.

28 The point is repeated at II: 143: "[I]n well order'd Commonwealths, where the good of the whole is so considered, as it ought, the Legislative Power is put into the hands of divers Persons who duly Assembled, have by themselves, or jointly with others, a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the publick good."

29 That is, is there anything in Locke's argument equivalent to Condorcet's jury theorem, or equivalent to the argument entertained in Aristotle, *The Politics*, Bk. III, Ch. 11 about the members of the assembly pooling their knowledge to come up with a better answer to the question before them than any one of them could come up with on their own? (I discuss this argument below, in Chapter 5.)

30 Locke, *Essay*, Bk. III, Ch. 10, para. 34.

31 Ibid., Bk. III, Ch. 1, para. 1.

32 Ibid., Bk. III, Ch. 9, para. 15.

33 Ibid., Bk. III, Ch. 10, para. 9.

34 Mill, *On Liberty*, Ch. 3, 90.

35 Ibid., Ch. 1, 18.

36 Cf. Alexander Hamilton in Madison *et al.*, *The Federalist Papers*, no. LXXXIV, 476–7: The security of a right like freedom of the press, "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all . . . must we seek for the only solid basis of all our rights."

37 See also Locke's insistence in the "Preface" to the *Two Treatises of Government* that "there cannot be done a greater Mischief to Prince and People, than the propagating wrong Notions concerning Government" (Locke, *Two Treatises*, 138).

38 Chapters 18 and 19 of the *Second Treatise* are preoccupied with this issue: see II: 203–10, 223–30, and 240–2.

39 Laslett, "Introduction," to Locke, *Two Treatises*, 120.

40 What little Locke does say about the judiciary must be put under the heading of his discussion of the executive power. As Gough reminds us in *John Locke's Political Philosophy*, 109 – this is not really so very different from Montesquieu, who described the judicial power as "*la puissance executrice de celles choses qui dependent du droit civile.*"

41 Hobbes, *Leviathan*, 184.

42 Pangle, *The Spirit of Modern Republicanism*, 254.

43 Rawls, *A Theory of Justice*, 221.

44 Ibid., 221–2.

45 And I fear that this remains Rawls's question even in his later work. The definition of a well-ordered society remains "a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice": Rawls, *Political Liberalism*, 35. People may come at the principles from different angles. But it is still the

case that a society (like ours) whose members disagree about principles of justice, and whose politics and legislature must accommodate such disagreement, is not well ordered in Rawls's sense.

46 Justice Holmes is famous for his observation in *Lochner* v. *New York* (1905) 198 US 45, that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*." More important, however, is the generalization he drew from that – viz. that the constitution "is made for people of fundamentally differing views." (Ibid., 75–6.)

5 *Aristotle's multitude*

1 In this chapter, all references in parentheses in the text are to Aristotle, *The Politics*, by page number (of the Cambridge Everson edition) followed by the standard marginal citation.

2 E.g. in Keyt, "Aristotle's Theory of Distributive Justice," 270.

3 See also the discussion in ibid., 271: "To reach the conclusion that the many should be supreme over every other group of free men a stronger minor premiss is required to the effect that the worth of the free men in the polis meeting together is greater than the worth of any individual among them or of any other (actual or possible, large or small) body of them."

4 Actually, there's a strong and a weak version of this too. On the weak version, he is excluded if and only if his inclusion would make the resulting citizen body *less* wise as a collective. On the strong version, he is to be excluded unless his inclusion makes the citizen body *more* wise as a collective.

5 It is interesting, however, that in expressing his own ambivalence towards the principle, Aristotle indicates that if it were applied in an unqualified form it could license the inclusion of animals (or animal-like humans) in the polis: ". . .by heaven, in some cases it [i.e. DWM] is impossible to apply; for the argument will equally hold about brutes; and wherein, it will be asked, do some men differ from brutes?" (Aristotle, *Politics*, 66: 1281b16).

6 Everson indicates in a note to his edition that the text of this sentence is "corrupt."

7 Though compare Mary Nichols's comment in *Citizens and Statesmen*, 195 n20: "In the background to Aristotle's reference to the feast to which many contribute is the meal described at the end of Aristophanes' *Assembly of Women* (1163–82), a meal made up of so many random foods that the mixture is revolting."

8 Bearing in mind that, according to Aristotle, "the whole cannot be happy unless most, or all, or some of its parts enjoy happiness" (28: 1264b18).

9 E.g. Aristotle, *Nicomachean Ethics*, Bk. II, Ch. 9.

10 Keyt, "Aristotle's Theory of Distributive Justice," 271.

11 Aristotle, *Nicomachean Ethics*, Bk. VII, Ch. 1, 1145b1.

12 Ibid., Bk. I, Ch. 8, 1098b.

13 Mill, *On Liberty*, 57.

14 Nichols, *Citizens and Statesmen*, 66.

15 Mill, *On Liberty*, 58.

16 Though see the discussion in Waldron, "Legislative Intention and Unintentional Legislation," esp. 346–8. See also Waldron, "Religious Contributions in Public Deliberation," 836–7.

17 Aristotle, *Nicomachean Ethics*, Bk. V, Ch. 3, 1131a.

18 See Williams, "The Idea of Equality," 239 ff. and Gutmann, *Liberal Equality*, 96 ff.

19 I am grateful to David Gill for several conversations on the topic discussed in this and the following paragraphs. His view, however, is the opposite of mine.

20 Aristotle, *Nicomachean Ethics*, Bk. IV, Ch. 3, 1123b (my emphasis).

21 "Then ought the good to rule and have supreme power? But in that case everybody else, being excluded from power, will be dishonoured. For the offices of state are posts of honour; and if one set of men always hold them, the rest must be deprived of them" (65: 1281a30).

22 Keyt, "Aristotle's Theory of Distributive Justice", 270: "The strategy

of the argument is to apply the principle of distributive justice to men taken collectively as well as individually. In terms of our formulation of the principle in modern functional notation, the strategy is to allow the individual variables '*x*' and '*y*' to range not only over individual free men but also over groups or bodies of free men."

23 This assumes, of course, that the basis of the collective wisdom of $C_{J\&B}$ turns on the equal right to speak and vote in the group's decision-making. See also the discussion in Chapter 6, below.

24 My argument in this section owes a lot to many conversations with Jill Frank.

25 Thucydides, *History of the Peloponnesian War*, Bk. II, Ch. 6; quoted by Beiner, *Political Judgment*, 83.

26 Beiner, *Political Judgment*, 83

27 Rousseau, *The Social Contract*, Bk. II, Ch. 3. But "communication" arguably refers to the formation of factions. (I am grateful to Paul Thomas for this point.)

28 See Aristotle, *Politics*, 66: 1281b1 and 1281b5.

29 Hobbes, *Leviathan*, 119–20 (Ch. 17).

30 Aristotle, *Nicomachean Ethics*, Bk. IX, Ch. 6, 1167a.

31 As Mary Nichols writes, "It is precisely because the members of the multitude have *different* contributions to make that they have a just claim to rule. Aristotle teaches democrats the value of heterogeneity to a defense of their claim to political participation" (Nichols, *Citizens and Statesmen*, 66).

32 Aquinas, *On Princely Government*, Bk. I, Ch. 1.

33 MacIntyre, *After Virtue*, 146.

34 MacIntyre, *Whose Justice? Which Rationality?*, 133.

35 Ibid., 134.

36 See also Aristotle, *Nicomachean Ethics*, Bk. IX, Ch. 9: "It would be a strange thing to make the happy man a solitary: no one would choose to have all the good things of the world in solitude: man is meant for political association, and whose nature it is to live with others."

37 See Arendt, *On Revolution*, Ch. 2.

38 Ibid., p. 78: Bk. III, Ch. 16, 1287a30.

39 For the self-sufficiency of the polis, see Aristotle, *Politics*, 3: 1252b30.

40 Aristotle, *Politics*, 79: 1287b12–15. The quotations are from the *Iliad*, X 224 and II 372, respectively.

6 *The physics of consent*

1 Aristotle, *Politics*, 144: 1317b5.

2 Hobbes, *Leviathan*, Ch. 16.

3 Locke, *Two Treatises*, 331–3 (II: paras. 96–98).

4 Rousseau, *The Social Contract*, Bk. I, Ch. 5 and Bk. IV, Ch. 2.

5 For a diagnosis, see Kendall, *John Locke and the Doctrine of Majority-Rule*, 16 ff.

6 In Condorcet, *Selected Writings*, 33–70.

7 McLean and Hewitt (eds.), *Condorcet: Foundations of Social Choice and Political Theory*, 73.

8 Bosanquet, *The Philosophical Theory of the State*, 4–5.

9 Arendt, *On Revolution*, p. 164. Notice also Arendt's contrast between *majority-decision* and *majority-rule*: "Only where the majority, after the decision has been taken, proceeds to liquidate politically, and in the extreme case, physically, the opposing minority, does the technical device of majority decision degenerate into majority rule" (ibid.).

10 Arendt, ibid.

11 See Waldron, "What Plato Would Allow," esp. 170–1.

12 See Kant, *Critique of Pure Reason*, 120–2 (A84/B 117 ff.).

13 Thomas Hobbes, *De Cive*, Ch. 10, 137–8.

14 Farber and Frickey, *Law and Public Choice*, 55.

15 Cf Thomas Jefferson's observation: "Every man, and every body of men on earth, possesses the right of self-government. They receive it with their being from the hand of Nature. Individuals exercise it by their single will – collections of men by that of their majority; for

the law of the majority is the natural law of every society of men." – Jefferson, *Political Writings*, 83.

16 Numbers in parentheses in the text of this chapter are references to Locke, *Two Treatises*, by treatise and paragraph numbers.

17 Of course in politics, there may not be a range of intermediate options for the vector to veer into. But in many cases there are, as it were, natural compromise positions between the view urged by the "Ayes" and the view urged by the "Noes." Indeed one might argue that if there are not, then majority decision-making is particularly vulnerable to the paradoxes of Arrow's Theorem: see Arrow, *Social Choice and Individual Values*.

18 This is Kendall's objection to the force analogy: see Kendall, *John Locke and the Doctrine of Majority-Rule*, 117.

19 Simmel, "The Phenomenon of Outvoting." (I owe this quotation to Spitz, *Majority Rule*, 156.)

20 Hobbes, *Leviathan*, Ch. 16, 114.

21 David Heyd has suggested to me that the analogy here may be on the basis of action in an organic body. Certainly, the image of individual forces canceling one another out until just one is left standing looks remarkably like Hobbes's account of the relation between will and deliberation in an individual (ibid., Ch. 6, 44): "When in the mind of man, Appetites, and Aversions, Hopes, and Feares, concerning one and the same thing, arise alternately; and divers good and evill consequences of the doing, or omitting the thing propounded come successively into our thoughts; so that sometimes we have an Appetite to it; sometimes an Aversion from it; sometimes Despaire, or Feare to attempt it; the whole summe of Desires, aversions, hopes and Fears, continued till the thing be either done, or thought impossible, is that we call DELIBERATION . . . In Deliberation, the last Appetite, or Aversion, immediately adhering to the action, or omission thereof, is that wee call the WILL."

22 Thus he argued that the ability of a material substance to hold itself

together is no less mysterious than the active capacities of a spiritual, thinking substance. See Locke, *Essay*, Bk. II, Ch. 23, sect. 24. "[H]ow clear an idea soever we think we have of the Extension of Body, which is nothing but the cohesion of solid parts, he that shall well consider it in his Mind, may have reason to conclude, That 'tis as easie for him to have a clear Idea, how the Soul thinks, as how Body is extended. For since Body is no farther, nor otherwise extended, than by the union and cohesion of its solid parts, we shall very ill comprehend the extension of Body, without understanding wherein consists the union and cohesion of its parts; which seems to me as incomprehensible, as the manner of Thinking, and how it is performed."

23 Rousseau, *Social Contract*, Bk. I, Ch. 3 (my emphasis). See also Dunn, *The Political Thought of John Locke*, 129n.

24 Dunn, *The Political Thought of John Locke*, 129n., suggests that it is "as plausible to see the concept of force as moralized by the notion of consent as it is to see the notion of consent turned into a term of social coercion."

25 Locke, *Essay*, Bk. II, Ch. 23, sect. 24.

26 Locke makes the point by asking what new Engagement there would be in the social contract over and above a person's natural liberty, "if he were no farther tied by any Decrees of the Society, than he himself thought fit, and did actually consent to?" (II: 97).

27 They *might* choose some different decision-procedure. But Locke emphasizes that the argument given in this passage establishes the majority principle as a natural default rule for any assembly that has not chosen any other: "And therefore we see that in Assemblies empowered to act by positive Laws where no number is set by that positive Law which empowers them, the act of the Majority passes for the act of the whole, and of course determines, as having by the law of Nature and Reason, the power of the whole" (II: 96).

28 See also Kendall, *John Locke and the Doctrine of Majority-Rule*, 114: "It is simply not true that a society must choose between decisions

by majority-vote and dissolution after a brief period of experiment with unanimous decisions . . ."

29 Thus I reject Willmoore Kendall's assault on inalienable rights as a feature of Locke's majoritarianism: see ibid., 68–74.

30 Ibid., 117.

31 Ibid., 117 (emphasis in original).

32 See also Waldron, "Rights and Majorities."

33 The classic argument to this effect is of course that of Rawls, *A Theory of Justice*, 3–4 and 22–34.

34 Cf. Taurek, "Should the Numbers Count?" 306: "When I am moved to rescue human beings from harm in situations of the kind described, I cannot bring myself to think of them in just this way . . . My concern for what happens to them is grounded chiefly in the realization that each of them is, as I would be in his place, terribly concerned about what happens to him. It is not my way to think of them as each having a certain *objective* value, determined however it is we determine the objective value of things, and then to make some estimate of the combined value of the five as against the one."

35 Thus Kendall is quite wrong, I think, about the direction of Locke's majoritarianism. Cf. Kendall, *John Locke and the Doctrine of Majority-Rule*, 112.

36 For an emphasis on fairness as the basis of majority-decision, see Barry, *Political Argument*, 312 ff and Barry, "Is Democracy Special?".

37 See above, Chapter 4, section VIII, notes 30–3 and accompanying text.

38 For the theorem (in social choice theory) that majority-decision alone satisfies elementary conditions of fairness and rationality, see May, "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision." See also Sen, *Collective Choice and Social Welfare*, 71–3. There are useful discussions in Ackerman, *Social Justice in the Liberal State*, 277–93, Beitz, *Political Equality*, 58–67, and Dahl, *Democracy and its Critics*, 139–41.

39 Ackerman, *Social Justice in the Liberal State*, 283, offers a slightly different account of "minimal decisiveness" in terms of tie-breaking: "If, say, there are 99 people in the Assembly, then majority-rule gives me a decisive voice when the rest of you are split 49–49; and the same is true of your decision as well. When confronted with the prospect of a tied vote, the majoritarian does not appeal to some unresponsive decision-procedure, but instead recognizes each citizen's right to have his considered judgment determine the social outcome."

40 Hobbes, *Leviathan*, Ch. 16, 114.

41 Hobbes says: "a Representative of even number, especially when the number is not great, whereby the contradictory voyces are oftentimes equall, is therefore oftentimes mute, and uncapable of Action" (ibid.).

42 See Cohen, "Deliberation and Democratic Legitimacy," 23.

43 Gauthier, "Constituting Democracy," 320.

44 See Walzer, *Spheres of Justice*. For a critique, see Dworkin, *A Matter of Principle*, 216 ff.

45 This seems to be the strategy in Gauthier, "Constituting Democracy," 322.

46 Rousseau, *Social Contract*, Bk. IV, Chs. 1–2, 247–51. Concerns similar to mine are expressed by Young, "Communication and the Other," at 125–6.

47 See Knight and Johnson, "Aggregation and Deliberation," 286–7.

48 Rawls, *Theory of Justice*, 126–30. The classic account of the circumstances of justice is that given by Hume in *A Treatise of Human Nature*, Bk. III, Part II, sect. ii, 493–5, and especially in *An Enquiry Concerning the Principles of Morals*, Section III, Part I, 183–92. See also Hart, *The Concept of Law*, 193–200, for a similar idea under the heading "The Minimum Content of Natural Law."

49 This topic – the circumstances of politics – deserves much greater attention than it has received in political and legal philosophy. It is, I believe, the foundation of many of the distinctively political

virtues, and it is indispensable for understanding procedural decision-rules and the concomitant ideas of authority and obligation.

50 See Rawls, "The Domain of the Political and Overlapping Consensus," 246.

51 Rawls, *A Theory of Justice*, 127.

52 This is the argument about "the burdens of judgment," in Rawls, *Political Liberalism*, 59 ff.

53 Indeed, it is the most prominent feature not just of modern politics but of political philosophers' own interactions with colleagues when we are debating the issues of rights and justice, on which we are all supposed to be experts.

54 Rawls, *Political Liberalism*, 35. Calling a society well-ordered, Rawls says, conveys among other things that "it is a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice . . ."

55 The emphasis on action-in-concert and the fragility of its achievement dominates Hannah Arendt's political philosophy. See Arendt, *The Human Condition*, 199 ff.

56 See also the discussion in Waldron, "The Irrelevance of Moral Objectivity."

57 Arendt, *On Revolution*, 175.

58 I owe this point to David Heyd.

59 See Vlastos, "Justice and Equality," 62 ff.

60 Mill, *Considerations on Representative Government*, Ch. 8, 329.

61 Ibid., 335.

62 See also Rawls, *A Theory of Justice*, 232–4.

63 Beitz, *Political Equality*, 64.

64 Cf. Dworkin, *A Matter of Principle*, 59–69.

65 Beitz might respond by saying that if we *do* have to work with a narrow procedural notion of respect for persons, the only decision-method we can infer from it is the unanimity requirement embodied in something like Rawlsian contractarianism (cf. Beitz, *Political Equality*, 63). But of course unanimity is precisely what is not

available in the circumstances of politics, the only circumstances in which we actually need a decision-procedure. Anyway, as Beitz himself notes, the contractarian requirement of unanimity is usually seen these days as a substantive heuristic, not the basis of a procedural model – which is why it overlooks, as all substance-oriented approaches do, the fact of substantive disagreement.

66 Kant, "On the Common Saying," 74 ff.

67 See, e.g., Wood, "Locke Against Democracy."

68 Book IV of Aristotle's *Politics* contains his constitutional prescriptions, which fall considerably short of full democracy.

69 See Ostwald, *From Popular Sovereignty to the Sovereignty of Law*, esp. Chs. 2 and 5–6.

70 Hobbes, *Leviathan*, Ch. 18; Locke, *Two Treatises*, II: 132.

71 See also Locke, *Two Treatises*, II: 143.

72 As Hobbes put it, "The first in order of time of these three sorts [of government] is democracy, and it must be so of necessity, because an aristocracy and a monarchy, require nomination of persons agreed upon; which agreement in a great multitude of men must consist in the consent of the major part; and where the votes of the major part involve the votes of the rest, there is actually a democracy" (Hobbes, *De Corpore Politico*, Ch. 21, 118–19).

73 Dunn, *The Political Thought of John Locke*, 128–9.

74 See Waldron, "What Plato Would Allow."

75 Machiavelli, *Discourses on Livy*, II, Ch. 6, 16.

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