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Reason and Liberal Theory
A Communitarian Critique

My study departs from the premise that the theory and practice of liberal democracy embodies a narrow conception of rationality. This conception, I have argued, is not only wrong but deleterious, its effects ranging from nihilism to totalitarianism.

This chapter offers partial substantiation of these claims. I begin by sampling some of the major currents and proponents of liberal thought since its inception (sec. 1). Although it is neither exhaustive nor conclusive, this survey illustrates the extent to which SR has influenced liberal theory and practice. Among other things, it strongly suggests that democracies that embody SR are incapable of managing conflict and promoting public welfare. The result is increased bureaucracy and compromise.

The failure of bureaucratic planning to approximate economic rationality and welfare compromise to approximate moral rationality generates only one legitimation crisis, however. The other crisis pertains to the fundamental incoherence of a liberalism torn between competing ideas of rationality and democracy—the one predominantly libertarian, the other communitarian. I discuss the communitarian countertendency in detail in chapter 3; here, I attempt to show how it remains subordinate to the

dominant, libertarian strand. To illustrate this point I turn to debates between Federalists and antifederalist Republicans over ratification of the Constitution. It is my contention that the history of constitutional interpretation up to the present can be seen as a continuation of this debate. In support of this claim I recur to significant cases drawn from public and private law (sec. 2).

I conclude by showing how the above tension gets mirrored in an incoherent conception of rational agency, or selfhood. Liberalism's legitimation crisis is also an identity crisis. Marx's critique of one-sided political emancipation gets at one aspect of this crisis: emancipated subjects acting under precepts of SR are alienated from their own social and moral essence. Sandel's critique of deontological contractarian theories of the sort advanced by Rawls gets at the reverse aspect: SR entails a notion of pure moral autonomy whose distinguishing properties are relocated in the external agency of the state (sec. 3). These critiques suggest that SR fails as an epistemological account of legitimation and as an ontological account of agency. The last section takes an initial step toward reconstructing a more satisfactory account of rational identity by reexamining Hegel's critique of abstract identity (sec. 4).

1. SR has its political roots in the social contractarian tradition of Hobbes and Locke. It was this tradition that first introduced a conception of public law authorized by the confluence of private wills. The public reason informing this union instantiated the basic equality and freedom of human beings oriented solely toward self-preservation. The moral domain—broadly speaking, that aspect of the human condition encompassing desirable and felicitous ends—was henceforth consigned to private predilection.

This subjectivizing of moral ends would have been inconceivable within the tradition of natural law dating back to Aristotle.[1] That tradition had imbued self-preservation with a rational impulse toward moral fulfillment. One's own happiness was thought to be organically dependent on the happiness of all. Far from being a manifestation of the merely private, desires ostensibly embodied—however imperfectly—the rational ends of a naturally and divinely ordained hierarchy of being.

Although Aristotle believed that the precepts of morality were plain to rational persons, he assumed that some persons—due to circumstances of birth and education—were better equipped than others to perceive the general good, and that they alone should be accorded the exclusive privilege of ruling. Thus his modest praise of restrictive forms of democracy

still echoes Plato's concern about the unstable, conflict-ridden mob rule that occurs whenever the masses come to power.[2]

Thomas Hobbes took issue with the elitist implications of this concept of moral reason but not with its antidemocratic bias. Writing in the aftermath of the scientific revolution inaugurated by Galileo and Bacon in the seventeenth century and constrained by the social realities of nascent capitalism, Hobbes repudiated teleological notions of reason and, in accordance with physical mechanism, held that passions—above all, the fear of death—determined behavior. Self-preservation continues to be the natural end of human endeavor in his theory but is drained of any moral significance.

Hobbes reasoned that, in a hypothetical state of nature, each person would have an *equal* and *unlimited* right to acquire whatever he or she deemed necessary for survival, either alone or in combination with others. Driven by their desire to assure themselves constant access to scarce resources, persons embark upon an insatiable quest for power that cannot but terminate in a war of all against all. Shorn of all operations but those of logical and causal inference and grounded in immediate experience of particulars, reason does not so much prescribe the ends of action as it does the means for maintaining action as such; it counsels us to seek peace whenever others are willing to do likewise. Reason is thus a slave to passion, calculating the shortest route to the long-term satisfaction of our most urgent desires.

Hobbes's account of rationality is problematic for reasons I have alluded to in the introduction. In the next chapter we will see why its reliance on SR renders it useless for explaining causal reasoning of any kind. Presently it suffices to note that Hobbes's version of practical reason (natural law) does not articulate an ideally just order replete with virtues to be emulated. At most it specifies the minimum steps that any group of enlightened egoists with conflicting interests must take in setting up institutions of law and order conducive to their mutual self-preservation. Each realizes that he or she must lay down his or her natural right to all things if others are willing to do likewise and, by majority consent, transfer it to a person or group of persons authorized to issue and enforce legally binding commands (Hobbes 1929, chaps. 14, 18).

Despite Hobbes's defense of natural equality, his contention that sovereign authority is above the law has not made him very popular with liberals. It is therefore not surprising that Locke has had a greater following among them. Locke stressed the importance of democratic procedures in the social contract, favored popular representation, and most importantly, implemented the private/public distinction in defending constitutionally

limited government. Yet, notwithstanding his appeal to moral reason in establishing equal natural rights to property, his subsequent defense of a market-based economy with its attendant inequalities testifies to a rather different notion of rationality. For Locke no less than Hobbes, rationality consists in efficiently securing the means of preservation through ceaseless industry and calculated accumulation of wealth—capacities, he believed, that were possessed by some European men but not Africans, Native Americans, women, children, and wage laborers. This explains why, on Locke's account, the peaceable state of nature is fast reduced to a state of war once the Lockean provisos limiting the acquisition of property are made moot by the introduction of a money economy.[3] But as the Hobbesian example so amply attests, unsociable rationality seems a poor premise on which to hitch a defense of limited government. Thus, while Locke's moral principles may have justified constitutional democracy, his assumptions about differential capacities for economic rationality did not (Macpherson 1962, 232).

Today few contractarians appeal to natural law doctrines of the sort defended by Locke. Reasonable thinkers that they are, they prefer the secular versions worked out by Hobbes and Kant. Those, like David Gauthier, who have renewed the Hobbesian argument under the guise of game theory have not succeeded in explaining how agreements between self-interested persons who are tempted to make exceptions for themselves—especially under conditions of inequality and uncertain risk—could be morally binding. (Later on we will have occasion to discuss further the limits of rational choice and game-theoretic models of SR as applied to the explanation of social interaction and democratic rationality.)

Most contemporary contractarians opt for the deontological approach pioneered by Kant. I discussed the difficulty with this approach in my introduction: it locates moral reason in an empirically vacuous, transcendental subject. To avoid this problem, contemporary Kantians like Rawls attempt to reformulate the idea of a social contract in terms of formal procedure. Ironically, by placing less emphasis on metaphysical introspection of transcendental duties than on game-theoretical calculation based on empirically confirmable primary goods, this procedural version risks losing the singular advantage afforded by deontological theories, namely, the capacity to explain impartial moral incentives that transcend self-interest.

Thus, unlike Hobbesian game-theoretic explanations of justice, Rawls's deontological strategy of argumentation must qualify the strategic rationaltiy of his hypothetical contractors by building moral side constraints into the "original position" of collective choice as well as into the principles chosen, which articulate the "basic structure" of a society composed of rational agents who mutually respect one another's autonomy. In order to procure

a result that any rational agent would accept, Rawls assumes that the contractors party to the original position are ignorant of the specific circumstances of their social situation as well as their own specific desires, values, and life plans. Detached from the unique capacities, traits, and motivations that comprise their unique identities, they are identified solely by the common rational faculty of free choice, whose single interest they seek to advance, regardless of whatever other interests they might have.

As we shall see in the conclusion of this chapter—if it is not already apparent—Rawls's reformulation of Kant may not succeed in extricating deontological contractarianism from metaphysical incoherence. Be that as it may, my present concern is over the impact this reformulation has on Rawls's theory of justice—specifically, its understanding of democracy. Rawls follows Kant in privileging individual autonomy—the basic capacity for rational choice—over social equality. Political inequalities stemming from these social inequalities must then be compensated by redistributive schemes that, as noted in the introduction, generate dependence, not autonomy.

To put the matter somewhat differently, Rawls's appeal to an individualistic conception of rationality that defines the moral and economic parameters of choice *prior* to collective deliberation gets reflected in his sharp distinction between the public sphere, consisting of such institutions as the Constitution and legal system, and the private sphere, consisting of the nuclear family and competitive market. To the former he assigns political rights, to the latter economic rights pertaining to distributive justice.

The distinction between political rights and economic rights, and the priority accorded to the former over the latter, reflects the former's privileged relationship to the conditions of rational choice stipulated in the original position.[4] Given its close proximity to an abstract conception of reason, the fair value of political liberty comes to mean something quite innocuous, namely, equal possession of voting rights and eligibility for office. Since formal political rights do not extend to the private sphere, they have no bearing on workplace hierarchies.[5] Hence the fair value of sharing in decisions of production and consumption that deeply affect one's autonomy and self-respect go unprotected.

To be sure, Rawls is deeply troubled by the impact of private property and wealth in skewing opportunities for informed and unconstrained participation in public discussion. He thus argues that constitutional government ought to "insure the fair value of political liberty for all persons" by securing the autonomy of political parties "with respect to private demands . . . not expressed in a public forum and argued for openly by reference to a conception of the public good" (Rawls 1971, 226). Since he concedes that inequities in wealth and status undermine the fair value of political

liberty by granting to some a greater influence in the shaping of public opinion (225), it seems that he should advocate even greater economic equality than his own difference principle will allow. Indeed, at one point he notes that property and wealth must be kept widely distributed in a society allowing private ownership of the means of production (225). But he never tells us how this redistribution might be effected within a capitalist system tolerating high levels of unemployment and social inequality. In the final analysis Rawls leaves us with the consoling thought that the low esteem and political impotence of those at the bottom of the social ladder might be offset by monetary compensations provided by the government. But welfare payments cannot redeem this loss of freedom and self-respect. As we will see, the paternalistic dependency fostered by the client-provider relationship simply undermines the autonomy requisite for political inclusion that redistribution ought to guarantee.

1.1 Despite its anti-utilitarian point of departure, Rawls's theory of justice is often praised for its inclusion of utilitarian calculation in moral reasoning, since it is precisely this feature that gives his deontological framework empirical substance. Hence it now seems appropriate for us to address this tradition's contribution—or lack thereof—in developing a democratic notion of public reasoning.

Utilitarianism saw itself as a bastion of rational—liberal and democratic—reform. If the aim of legislation is promotion of the greatest happiness for the greatest number, and if each person's happiness is to count as much as anyone else's, then, utilitarians concluded, the most rational regime must be elective representative government.

Although Bentham and Mill were both advocates of universal suffrage *in principle*, each eventually came out in support of a franchise limited to men possessing at least modest wealth and education.[6] They did so out of political expediency and the individualistic conviction that the primary justification for democracy was *protection* of private property against personal tyranny.[7] Both accepted the division between rich and poor as an unavoidable consequence of natural inequality, and so had strong reservations about extending the franchise to the lower, uneducated classes. By the same token they accepted the justice of private property because it conformed to reason as they understood it. Although the principle of diminishing utility favored a more equitable distribution of wealth, greed struck them as an all but irresistible incentive for optimizing aggregate utility. Given what they regarded as a *natural* propensity to acquire property—and thus a *natural* propensity to enter into contractual relations free

from public constraint—it was rational that the happiness of most, if not all, persons be maximized by the production of more consumer goods, inequalities in distribution notwithstanding. Since such a system was clearly in the interest of the wealthy, the extension of the franchise to the poor became irrelevant.[8]

As a counterexample to the picture of utilitarian democracy depicted here, one is tempted to mention the reform efforts of John Stuart Mill, who along with T. H. Green, Bernard Bosanquet, F. H. Bradley, and other British idealists—and in opposition to his predecessors in the utilitarian tradition—subscribed to Humboldt's view that "the end of man . . . is the highest and most harmonious development of his powers to a complete and consistent whole."[9] Consonant with this romantic conception of human nature, the proper function of democracy, he maintained, should not be limited to protection of property. It should also include the broadest expression of political opinion, conducive to the *development* of all persons as responsible citizens without regard to class or gender.[10] Although Mill was clearly concerned about the communitarian conformism of Rousseauean democracy, he nonetheless evinced a sympathy for the older republican—and egalitarian—virtues. Indeed, in some respects his vision of democracy comports better with CR than Rousseau's. Rousseau thought that public debate marked a failure of citizens' capacity to inwardly perceive their common interests (Rousseau 1987, 204); occasionally, he suggests that communication itself is responsible for fomenting divisive factions (156). In sharp contrast to Rousseau and Bentham, Mill held that the simple aggregation of preferences ignores the discursive process by which preferences are rationally justified. Democracy should facilitate the critical alteration of preferences, not their passive representation.

Mill hoped that obstacles to universal suffrage, especially disparities in wealth and education that retard the development of the working class and generate conflict, might be remedied by replacing the existing regime of wage exploitation with a competitive system composed of worker cooperatives.[11] Yet so doubtful was he of the capacity of people to communicate rationally—to set aside their class interests for the sake of the common good—that he could not but affirm a stronger role for an impartial bureaucracy of elites educated in the mold of SR. And so his view of the educational function of the state in generating a common good is not so different from the antiliberal, Hegelian conception entertained by the British idealists. In the final analysis, the system of plural voting and appointed legislative commissioners that he proposed to offset the numerical advantage of the working class clashed with his vision of participatory, representative democracy.[12]

1.2 The rise of mass political parties in the twentieth century served to blunt the edge of class conflict and so disqualified Mill's worst fears. Yet it did so at the expense of abandoning his idealistic hope for a participatory democracy. To be sure, there were those like John Dewey, who continued to espouse the cause of participatory democracy. However, scientific rationalism and democratic pragmatism seemed ill-equipped to counteract the prevailing hierarchies of power. In endorsing the corporatist alliance between labor and capital that he saw emerging in the twenties and thirties, Dewey (1962; 1963) simply overestimated the egalitarianism of scientific culture as it functions within corporate capitalism.

Contrary to Dewey's expectations, it was the popular dissemination of hierarchical (foundationalist) and mechanistic conceptions of science—not the egalitarian, communicative, and adaptive intelligence he extolled—that proved decisive for democracy. Specifically, SR conspired with the emergence of the party system to engender a new phenomenon—*mass*, plebiscitary democracy—that provided the perfect vehicle for marshaling uncritical loyalty to the state. Mass democracy encouraged just that deferential respect for elites (technocrats, bureaucrats, and party leaders) so conducive to the aims of corporatism and class compromise.[13] And it gave the corporate managers of mass media (largely deregulated under the Reagan regime to allow for ever more hegemonic control by the wealthiest of elites) unprecedented opportunities for manufacturing consensus from the top down (Chomsky 1988).

Not surprisingly, the elitist and centrist tendencies in mass democracy found expression in economic theories of partisan politics. Those by Joseph Schumpeter (1943) and Anthony Downs (1957) are particularly noteworthy. According to these theories, competing elites arrayed in opposing political parties offer various assortments of goods to the electorate in exchange for votes. As Downs noted, when voters are evenly distributed along an ideological continuum, parties in a two-party system will move to the center; otherwise they will diverge from it. More disturbing for Downs was the implication, already well documented by Kenneth Arrow, that there is no rational decision procedure that can insure a fair aggregation for certain distributions of preferences.[14] This result was anticipated two centuries earlier by Marquis de Condorcet in his *Essai sur l'application de l'analyse à la probabilité des décisions rendue à la pluralité des voix* (1785). Condorcet noted the potential for multiple, cycling majorities in preference rankings involving the resolution of several issues in paired combinations or a single issue presenting more than two options. Since both of these conditions sometimes obtain, albeit more frequently in legislative agenda-setting contests than in elections, the fairness of majoritarian procedures is open to

challenge, especially by permanent minorities, who feel that their vital interests have been sacrificed for the sake of satisfying a weak (or indeterminate) majority's less vital preferences (Barry 1979).[15] Indeed, Arrow's "Impossibility Theorem" (1951), which proved the fundamental irrationality of collective choice procedures, is confirmed by the failure of political parties to link voter preferences with policy outcomes, to provide clear-cut options, and to rise above accommodation to lobbies by elites. The democratization of mass parties in the United Kingdom and the United States during the seventies only partially remedied these difficulties, and was offset by countervailing tendencies strengthening the power of elites vis-à-vis the party rank and file.

Pluralists like Robert Dahl and Charles Lindblom defended the system in spite of its failure to satisfy principles of rational choice, arguing that mass parties generally permit vocal minorities to exercise some political influence in the form of voting blocs (Dahl 1956; Lindblom 1977; Berelson 1954). Given the irreducible plurality of opposing values and interests, the best that could be expected—so it was argued—would be *polyarchical* rule by minorities that encouraged stable economic growth through compromise.[16] Indeed, the argument was made that the system actually produces an optimal equilibrium of supply and demand, despite the fact that *effective* demand, itself largely orchestrated by the parties themselves, is primarily skewed in favor of the wealthy and educated.[17]

Notwithstanding their initial optimism, Dahl and Lindblom observed with increasing dismay the disequilibriating impact that economic corporations, government bureaucracies, and wealthy interest groups have on the democratic competition for power (Dahl 1982). To offset the veto power of economic corporations on government policies, Dahl advocated the extension of democracy to the workplace and the limitation of privatized government bureaucracies (Dahl 1985).

Recent trends in the evolution of mass parties during the last decade belie the optimism of pluralist theory. Mass parties have been weakened by their own internal dynamics, which compel them to ally themselves with the mass media. The ubiquitous visibility of media-anointed stars accounts for the capacity of incumbents and outsiders alike to generate campaign funds without relying on party support. Meanwhile the masses—having become increasingly disillusioned with the failure of parties to provide clear-cut alternatives—have redirected their loyalties toward other beneficiaries of media attention: special interest groups.[18]

Although pluralist theory is bankrupt as a description of democratic politics, it continues to function as a powerful ideology preserving the contractualist notion of democracy as a form of power-brokering among

elites, whose market-simulating behavior ostensibly provides the checks and balances requisite for protecting minorities against hegemonic tyranny. Of course, neither political parties, plural interests, nor compromise policies as such are to blame for the rationality deficits plaguing mass democracy. I will argue in chapter 5 that the normative constraints of CR mitigate paradoxes of rational choice and majoritarian tyranny when suitably qualified. More to the point, as Jon Elster—no latecomer himself to rational choice theory—has recently observed, strategic calculations under conditions of SR are no substitute for democratic discussions about justice under conditions of CR.[19]

I will examine the strengths and weaknesses of rational choice theory in greater detail in chapters 2, 4, and 5. Its failure to offer a complete account of democratic legitimacy should not blind us to its partial validity in explaining a subordinate aspect of political rationality. At the same time, one ought not dismiss its deficient understanding of rational political agency, a shortcoming it shares with pluralist—indeed, most liberal—theories.[20]

Summarizing the preceding discussion, we may conclude that mainstream liberal theory and practice have evinced a decisive preference for conceptions of democracy embodying SR—a preference that is hardly surprising given liberalism's original and abiding interest in protecting individuals from state or publicly sanctioned tyranny. This preference, however, renders democracy incapable of satisfying its own legitimating conditions: not just resolution of conflict and coordination of action around shared values, goals, and strategies, but *also* protection against tyranny.

It therefore comes as no surprise that libertarians like William Mitchell (1983), who equate rationality with utility maximization, should argue that, in comparison to markets, democratic rule is both inefficient and unfair. According to him, the combination of monopolistic power and self-interest on the part of public servants and the combination of rational ignorance (as Cohen and Rogers put it) and self-interest on the part of the electorate conspire to encourage irresponsible fiscal behavior on the part of all. Elected officials interested in maintaining their popularity with voters are encouraged to tax and regulate rather than transfer existing funds, and so logrolling—creating new benefits for groups that feel slighted by the benefits received by others—and hence deficit spending go unchecked. Meanwhile, bureaucrats interested in expanding their programs are encouraged to ignore the marginal cost-benefit ratio of their services—a condition further abetted by their collusion with private suppliers, beneficiaries, politicians, and others who demand such services, and by the government's capacity to meet its budgetary needs through sale of bonds, printing additional money—in short, by incurring new debt, inflation notwithstanding.

Of course, it is wildly exaggerating to suggest, as Mitchell and other libertarian-minded thinkers do, that imperfect markets—with their externalities, consumer ignorance, advertising, monopoly, oligopoly, nonoptimal provision of public goods, and so forth—are fairer, more efficient, less coercive, and by comparison to the negative-sum game of democratic politics, generally beneficial for all. The reality, as Cohen and Rogers argue, is that both capitalist market and capitalist democracy are aspects of one and the same welfare state. Symbiotically interdependent, they both structure "rational" behavior in ways that facilitate the efficient satisfaction of short-term interests at the expense of the public good—this latter *in*efficiency facilitating as well majoritarian tyranny and bureaucratic despotism.

The legitimation crisis besetting liberal democracy is only half the story, of course. As we shall see in chapter 6, the crisis also extends to adjudication; a system of compromised legislation cannot but issue in a judicial practice lacking integrity. Since democracy remains key for legitimation generally, we will have to see whether a different model than the one I have just sketched is logically possible within liberalism. Such a model would have to comport with a rationale richer than that implied by SR; it would have to embody CR.

As noted above, there are democratic countertrends—exemplified, for example, in the writings of J. S. Mill and John Dewey—that approach a liberal communitarian vision based on CR. Instead of drawing on these utilitarian and pragmatic sources, however, I will attempt a more rigorous grounding of the communitarian vision based on Habermas's discourse ethic, which sees itself as a deontological alternative to contractarianism. Before taking up this topic in chapter 5, let me broadly explain why I think that the democratic communitarian alternative is not without standing in liberal society—in spite of the rather deficient way it exists there.

2. The two hundred years of American legal history illustrate well the tension between libertarian and democratic communitarian strands of liberal thought. The Founding is as good as any place to begin. It is worth recalling that the delegates attending the Philadelphia convention were attempting to salvage a confederation of states out of the debris of economic chaos. Besides disputes over tariffs, boundaries, currencies, and other issues affecting interstate commerce, the delegates were also distressed about the refusal of state and local municipalities to honor contracts and loans between bankers and indebted farmers. Shays's Rebellion, which liberated scores of debtors from prison and prevented foreclosures on land by the hated banking and commercial interests, transpired only a few months

before the convention. Hence it is hardly inconsequential that many of the debates prior to the ratification of the Constitution centered around competing conceptions of public reason and contractual inviolability. These debates, in turn, expressed conflicting visions of democracy—the Republican vision was premised on premodern civic virtue; the Federalist vision, on modern commercial egoism. The former was exemplified in a yeoman democracy solidified by popular legislation of *common* mores and substantive notions of contractual equity; the latter, in a federal democracy that contained divisive commercial interests and moral passions by means of formal legal protections—including enforcement of contractual obligations as stipulated in Article I, Section 10 of the Constitution.

In working out their solution to the problem of pluralism, the Federalists were most concerned about protecting religious minorities and propertied classes from local democratic tyrannies dominated by envious levelers, desperate debtors, and other opponents of commerce. Federalism would prevent state legislatures from abrogating contracts and regulating interstate commerce. Indirect and virtual representation—bicameral establishment of an upper house of appointed senators, indirect election of the president, appointed judgeships, property qualifications for voting, and large, amorphous voting districts—would limit popular participation and strengthen the power of the propertied classes. Finally, the separation of powers would establish a system of mutual checks designed to thwart the influence of democratic legislatures in altering the Constitution.[21]

Underlying this vision, of course, was the notion that reason resided in experience—"the least fallible guide of human operations," as Hamilton put it in Federalist Paper No. 6. More precisely, to cite Madison, reason involved intuiting "the permanent and aggregate interests of the community" (*The Federalist*, No. 10). In contrast to this indubitable intuition of universal rights, popular assemblies were held to be breeding grounds for irrational passions. In the words of Hamilton, they were "subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities" (*The Federalist*, No. 6).

If Federalists aspired to a liberal concept of the state that Madison himself insisted should remain "neutral between the different interests and factions,"[22] antifederalist Republicans aspired to a communitarian one. They clearly understood that the federal state was partial toward commercial interests and biased against participatory democracy. Federalists, of course, also subscribed to the principle of democratic legitimacy. But their belief in the doctrine of virtual representation enabled them to reconcile this principle with limited democracy. Hamilton stated it best when he

said that the new government "will consist of proprietors of the land, merchants, and members of the learned professions, who will truly represent all those different interests and views of the community" (*The Federalist*, No. 36).

In the introduction I adverted to the paradoxical elitism of individualist conceptions of public reason. Locke's belief in differential rational capacities insinuated itself into eighteenth-century social contract theory, despite that theory's own original hostility toward elitist conceptions of teleological reasoning. The same paradox enters into the Federalists' theory of democracy, whose endorsement of virtual representation assumes that only some persons are capable of discerning the public good. Antifederalist Republicans, by contrast, were largely predisposed to a different view of reason, one that was inherently democratic. In short, they believed that virtue and knowledge of the public good could emerge only in political discussion. Like Montesquieu and Rousseau, Brutus felt that virtues of solidarity and mutual respect, not to mention consensus on the public good, required cultivation in a republic of limited size whose inhabitants were basically alike in "manners, sentiments, and interests." For, he noted, "in a large extended country it is impossible to have a representation, possessing the sentiments, and of integrity, to declare the minds of the people."[23]

To a certain extent what I just said about the Federalists' endorsement of democracy could be said of the Republicans' as well. Both were torn between locating the ground of legitimation in democracy on one side and individual reason on the other. For the communitarian Republican, however, the issue boiled down to a somewhat different question: Does the voice of reason reside in transient legislative majorities or in common legal traditions? As we shall see, the history of American constitutional interpretation has often been divided on just this question (Arthur 1989, 26). Indeed, alongside the liberal's appeal to transcendent moral intuition (natural law) one detects at least two other grounds for legitimating decisions: tradition (common law, case law, and ethical custom) and procedure (statutory law).

In subsequent chapters I will argue that each of these rationales plays a role in democratic legitimation. At this juncture, however, I would like to show how the Federalists' libertarian vision continues to dominate American constitutional interpretation, in spite of the democratic communitarian vision contained in key New Deal legislation. The point of this exercise is to suggest that the revolution inaugurated by the New Deal expanded certain areas of individual autonomy—namely, those rights to privacy, freedom of speech and association, and freedom of conscience deemed essential to the cultivation of political aptitudes—while limiting others pertaining to

contract and property. In so doing, the New Deal appropriated the Federalist ideology of legal neutrality to justify a Republican vision of democracy.

2.1 The three main areas of public law that impinge on the integrity of a democratic system pertain to labor law (under the guise of public interest), procedural law (affecting campaign financing and congressional reapportionment), and social law.

For reasons that will soon become apparent, let us begin with labor law. During the Lochner era (named after a 1905 Supreme Court decision invalidating a New York law limiting bakery employees to ten-hour workdays and sixty-hour weeks) the Supreme Court upheld the contractual freedom of *men* by striking down federal and state laws regulating wages, hours, and work conditions.[24] This extreme deference to contractual freedom did not officially end until 1938, when Justice Harlan Fiske Stone ruled in footnote number 4 of *U.S. v. Carolene Products Co.* that courts would henceforth give a higher level of protection to personal rights like those contained in the First Amendment than to property rights:

> It is . . . unnecessary to consider whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly searching judicial inquiry. (Quoted in Ackerman1991, 128)

As Bruce Ackerman points out, *Carolene Products* initiated a veritable revolution by displacing the organizing core of the Constitution from the ideal of market freedom to that of egalitarian democracy. In effect, this undercut the classical liberal distinction between public and private law that supported inalienable property rights. It therefore also contravened the notion that private law rested on purely formal, rationally intuitable grounds that precede political agreements on substantive goods.

I will address the implications of this revolution for adjudication in chapter 6. Suffice it to say, the New Deal revolution underscores a new legitimation crisis. If the meaning of the Constitution cannot be eternally

fixed by reference to some transparent and indubitable evidence, be it transcendent moral idea or original authorial intent, then a new legitimating rationale—one based on CR instead of SR—will have to be invoked to explain the legitimacy of changing interpretations.

As we shall see, it would be precipitous to see the peculiar change wrought by the New Deal as a subordination of the libertarian ideal as such to the principle of democratic community. Rather, the loss of contractual freedom under the New Deal—a freedom that had previously been invoked to justify (however inconsistently) the "political" right of newspapers to print what they wanted—had to be compensated for by a new libertarian doctrine. Because basic rights were now to be interpreted in light of specific political aims—that of securing public welfare—and because individuals had lost a right that had guaranteed them freedom in the marketplace of ideas, it was now necessary to extend the protection afforded by other rights to secure equal and effective political participation by all (Ackerman 1991, 125).

We might say that the New Deal redefined individual freedom and the libertarian ideal in terms of democratic self-determination. Lower standards of judicial scrutiny have been applied to limits on commercial speech, while higher ones have been erected to protect political speech. Due process has been strengthened in criminal proceedings to protect against arbitrary arrest and prosecution. And rights to privacy have been invoked to extend individuals' control over their personal lives. Indeed, when properly reconstructed, the Federalist (or libertarian) contribution to democratic communitarianism extends further than even the above list of rights.

This revolutionary filling of old libertarian bottles (or functions) with new social democratic wine will be the focus of my treatment of historical progress in chapter 8. However, to return to the example of labor law, it more often happens that the Federalist legacy comes back to obstruct democratic reform rather than further it. This obstruction can be clearly witnessed in the history of the Wagner Act of 1935.

The explicit aim of the Wagner Act was to promote industrial democracy as well as industrial peace, bargaining equity, economic recovery, and freedom of choice. Yet, with the exception of industrial peace, the goals stated above were undercut by the court's subsequent emphasis on contractualism and public interest doctrine. From 1937 to 1941 the courts refused to inquire into the substantive justice of labor contracts *(NLRB v. Jones and Laughlin Steel Co.),* allowed employers to offer permanent positions to workers hired to replace striking employees *(NLRB v. Mackey Radio & Telegraph),* and prohibited workers from threatening midterm work stoppages while permitting employers to unilaterally impose terms and conditions of

employment upon concluding lawful negotiations to impasse *(NLRB v. Sands Manufacturing Co.)*.[25] The first of these rulings also redefined employee rights as public rights, thereby condoning bureaucratic intervention by the NLRB. Having subsumed labor law under the doctrine of public interest, this decision removed labor disputes from *democratic* oversight by the public at large. It instituted a corporatist solution that transferred power from rank-and-file workers to union leaders, redefined the union as a trustee of public interest, and thus restricted union activity to negotiating wage and benefits. While workers were denied the right to engage in sitdown strikes—a tactic that underscored their right to the means of production—they were also deprived of an effective voice within the union.

Subsequent decisions continuing up to and beyond the Taft-Hartley Act of 1947 repeatedly testified to a class compromise that was as hostile toward employee collective action as it was friendly toward long-range economic planning.[26] Thus, although the history of labor law in the United States bears witness to a willingness to implement industrial democracy, it does so inconsistently and in a highly truncated form. In the wake of the Reagan-Bush administration's insistence on using "cost-benefit" calculations to determine the scope of public interest doctrine, Justice Blackmun's candid remark that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise" underscores the extent to which the old libertarian ideal of market autonomy continues to dominate.[27]

In chapter 5 I will offer a deeper philosophical justification for workplace democracy than that entertained by the Wagner Act. In general, recent Supreme Court decisions have been unfavorable to egalitarian democracy even at the level of partisan politics. For example, in *Buckley v. Valeo* (1976) the Court struck down two of the provisions of the Federal Election Campaign Act of 1971 that would have created fairer competition for media coverage by limiting the total amounts that candidates could spend in running for national office, including the amounts coming directly from their own pocketbooks. In justifying this decision, the Court held that such limits violated the First Amendment by restricting freedom of speech—in this instance, the dissemination of ideas. However, in a footnote the Court allowed that government could regulate the time, place, and method of speech by, for example, limiting the decibel levels on sound trucks. But in asserting that the latter restrictions limit only the "manner" and not the "extent" of speech, the Court not only argued speciously, it also discriminated against candidates whose main vehicle for disseminating their message is less formal and direct. As John Arthur notes, "[L]ess well-heeled candidates who must pass out leaflets, use sound trucks, and put up signs

are subject to a variety of regulations designed to maintain peace and quiet, respect private property, or protect the beauty of a roadway . . . [yet] the Court says, Congress cannot regulate those who can afford more expensive methods of communication, even if its purpose is to make the political process more fair and to focus debate on the merits of the candidate's position rather than the talents of her advertising agency" (Arthur 1989, 83). Arthur concludes that the unacknowledged reason underlying the Court's discrimination is *property*, or "the assumption that people should be allowed to spend their money as they wish" (84). Combined with the Court's upholding limits on individual campaign contributions–limits that have been rendered moot by PACs–this recrudescence of the older, libertarian version of a marketplace of ideas suggests–to cite Arthur again–"that, although it is unacceptable to buy a candidate, there's nothing wrong with buying an office" (84).

This is not the only area where the goal of democratic equality has been forfeited. There is the Court's resistance to aiding minorities in their struggle for fair representation. To cite a recent decision, *Shaw v. Reno* (1993), a 5–4 majority of the Supreme Court ruled unconstitutional North Carolina's attempt to comply with the Voting Rights Act of 1965 by gerrymandering the newly created 12th congressional district. In her majority opinion, Justice O'Connor held that North Carolina's attempt to procure minority representation through this device violated the equal protection clause of the Fourteenth Amendment. She argued, in effect, that equal protection extended to individuals, not to groups. In her opinion, the presumption that African-Americans "share the same political interests" (529), and that such interests can be assured adequate representation by apportioning districts based on their demographic distribution, undermines "the goal of a political system in which race no longer matters" (530).

Few would cavil with the desirability and justice of a color-blind protection of political rights as a *goal* to be striven for. But can a color-blind method of apportionment that protects only the *individual's* equal right to representation be just and workable in a society in which "race"–however socially constructed a category it might be–*still* matters? *If* the exclusionary logic of racism is essentially more insidious and systematic than other–religious and ethnic–forms of discrimination that once marred America's political landscape, and *if* its past and present effects can be compensated for and mitigated only by public policies aimed at erasing its systemic causes, must not the *groups* victimized by these effects be assured of the same political remedies now guaranteed to individuals? Even if we reject the notion of group rights as a dangerously blunt instrument for defending the legitimate use of otherwise suspect racial classifications in affirmative action

remedies, and prefer instead to speak of individuals' rights as members of certain oppressed communities (or classes), the point remains the same. In neglecting the long history of confining African Americans to politically inconsequential ghettos surrounded by white majorities, the color-blind approach forgets that white racism is the reason why, despite their individual differences, an overwhelming number of African Americans living in those areas share *common* interests that can only be convincingly represented by members elected by their own community.

A careful study of this problem, I think, would show that racially based apportionment of voting districts, cumulative voting procedures, supermajoritarian ratification of proposals, rotation of executive offices, and other substantive remedies are necessary for combating white majoritarian tyranny. However, implementing these procedural changes will not be easy. One need only mention President Clinton's failed bid to appoint Lani Guinier to head the civil rights division of the attorney general's office in 1993 as a sober reminder of the obstacles facing reform. In part, the controversy generated over her nomination was fueled by her 1991 *Michigan Law Review* article, in which she argued that pluralist conceptions of democratic fairness—giving every individual the right to influence political bargaining through voting and interest-group affiliation—neglect the systemic inequalities in bargaining power between whites and nonwhites. More strongly, she argued that the election of nonwhites alone did not adequately address two other kinds of procedural injustice: the powerlessness of legislators from nonwhite districts in setting the legislative agenda and their powerlessness in influencing the passage of crucial pieces of legislation beneficial to their constituents. As she herself put it, for "those at the bottom, a system that gives everyone an equal chance of having their political preferences physically represented is inadequate" (Guinier 1991, 1135–36). To effect real policy changes in remedying systemic racism, she concluded, "a fair system of political representation would provide mechanisms to ensure that disadvantaged . . . groups also have a fair chance to have their policy preferences satisfied."

Aside from the problem of implementing a fair system of representation that would include all disadvantaged minorities, the use of group (or community) based schemes of apportionment—to take the most often cited remedy for combating white majoritarian tyranny—raises profound questions about the moral and philosophical interpretation of "equal protection." In what does democratic fairness consist? Democratic theorists allied with the so-called process (or procedural) school answer this question by appealing to the fairness of the rules governing the democratic "game" rather than to the fairness of its outcomes. Minimally, these rules mandate that

each individual be given a single vote. However, more stringent models require the equal weighing of votes across geographic and demographic regions. According to the most stringent models, the influence voters have on campaign financing and, perhaps more importantly, the opportunities they have to shape public opinion (or the political agenda) should also be equal. In contrast to this position, democratic theorists such as Guinier, who are proponents of the outcome-based justification of democracy, contend that procedures guaranteeing individuals voting access, impact, and leverage are not necessarily fair if they still permit other, racially based inequalities to skew the outcomes in a way favoring a permanent, white majority/nonwhite minority balance of power.

It is easy to see how the distinction between procedural and outcome-based justifications of democracy maps on to the distinction between formal and substantive conceptions of due process. Justice O'Connor interprets the equal protection clause as an instance of procedural due process, which she believes accords with the color-blind, or rational neutrality, of justice. Guinier, by contrast, interprets it as an instance of substantive due process, or the assignment of a substantive right to have one's partial, policy preferences satisfied. In Guinier's opinion, the formal right to express one's preferences through voting does not sufficiently guarantee its effective exercise unless other mechanisms are present that ensure that voting will lead to a substantive representation of those preferences in legislative debates and outcomes.

My own view (see part 3) is that democratic procedural justice is dependent on the long-term production of equitable outcomes. Beyond showing that, I will argue that a substantive reading of the Fourteenth Amendment's due process clause is not fundamentally incompatible with a procedural reading, and may well follow from it. That unequals ought to be treated unequally in order to procure each individual (or group) his or her equal dignity under the law is readily distinguishable from the invidious principle of discrimination used to perpetuate the economic, political, and cultural inferiority of racial minorities. Even from a purely procedural standpoint, it is hardly obvious that racially based apportionment schemes are any less justifiable than other methods of assuring equitable power sharing (such as the nonproportional representation of state and regional interests in the Senate). However, to defend the impartiality of this communitarian view would require a mode of concrete philosophizing that privileges historical interpretation and sociological explanation over the abstract ratiocination favored by liberals like Rawls.

Another area that illustrates the continued dominance of the old libertarianism and the unfulfilled aspirations of democracy is welfare law. From

the very beginning states and local municipalities were permitted broad discretion in establishing eligibility requirements, determining both quantity and quality of relief distributed and overseeing the behavior of clients. In the 1960s welfare was finally recognized as an entitlement; one no longer forfeited other constitutional rights in being an eligible recipient. However, during the 1970s and 1980s states were once again permitted to establish punitive ceilings in the dollar amount of stipends, to send caseworkers into homes, and to impose restrictive work requirements (workfare).

Thus, on one hand courts have interpreted the relationship between employers and employees, providers and clients, in accordance with contractual assumptions. Employees and recipients of aid do not have unqualified entitlements to work and welfare, because the latter are still under the private control of business and government. On the other hand, the law tacitly recognizes entitlements to work and welfare based on equity—rights that, in principle at least, cannot be exchanged or contractually forfeited.

Social law, then, ostensibly provides the material resources requisite for autonomous citizenship while functionally compensating for the weakness of the system within acceptable contractualist parameters. It thus faces a familiar dilemma: by processing "clients" through the contractual channels of bureaucratic administration, it defeats its own purpose—to foster autonomy, self-respect and democratic inclusion.

Moreover, the contradiction is spread over a two-tiered system of provisions skewed along gender lines (Pearce 1979). Unlike social security, disability pay, and medicare—social insurance schemes largely funded by the contributions of male wage earners and employers—Aid to Families with Dependent Children, welfare and Medicaid have been targeted at domestic households that are mostly (60 to 80 percent) headed by women. Whereas the former have been regarded as entitlements, the latter—funded by general tax revenues—have not, at least not entirely.

The fact that provisions drawn from public insurance schemes are regarded as full-fledged entitlements clearly indicates the contractualist assumptions embedded in this kind of aid. It thereby illuminates the peculiar kind of contradiction at the heart of unemployment and, to a lesser extent, disability compensation. Workers—mostly males—who have staked their identities as autonomous, dignified breadwinners are now placed in the position of having to accept monetary compensation for something that has no market-based monetary equivalent: their own self-respect. Their entitlement to compensation is based on something they no longer possess; lacking bargaining power, they cannot force the settlement of compensation in a way that would fully match what they are entitled to: a safe,