

## *The Isolation of the Political*

The separation of a political domain from other aspects of social life is fundamental to liberal accounts of justice. The isolation of a political domain sets a limit to the aspects of social life that are of public concern and anything that falls outside this domain is thought to be beyond the scope of justice. It is certainly nothing new to be critical of naive attempts to isolate the political domain by limiting it to matters of formal civil and legal rights of individuals while ignoring the effects of social and economic structures on the effective exercise of those rights. In this part of the book I want to argue that even though this naiveté is not characteristic of the most highly sophisticated theory of justice yet presented within the liberal tradition, that of John Rawls, his approach to questions of justice remains crucially flawed in this regard.

### SOCIAL JUSTICE AND IMPARTIALITY

Rawls takes the primary subject of justice to be the basic structure of society. Each of us is born into a particular position in relation to the political system and the major economic and social institutions of our culture. Our starting position has profound effects on our life prospects and it is clear that some people are privileged over others in this regard. Rawls wants to defend principles of justice that test the acceptability of such deep inequalities by allowing us to "regulate the choice of a political constitution and the main elements of the economic and social system."<sup>1</sup> These main elements of the basic structure of society certainly include aspects of life that would be taken by earlier liberals to be beyond the scope of public concern. They incorporate economic institutions such as the competitive market and private property in the means of production as well as social institutions such as the monogamous family.

Many critics have failed to note the extent to which Rawls shares with socialists many serious and compelling objections to rampant free market capitalism. This becomes very clear if Rawls's egalitarian liberalism is contrasted with the influential libertarianism of Robert Nozick.<sup>2</sup>

While Nozick simply disregards structural constraints on individual autonomy, Rawls is concerned that the cumulative effect over time of isolated, historical, and supposedly free transactions between individuals, can lead to intolerable structural limitations on the possibility of autonomous living for some citizens. This indicates that for Rawls, as for Marx, formal freedom is of questionable worth if it is not supported by effective means for each individual to live a dignified, creative, and autonomous life. Rawls is therefore keenly aware of the fact that in a well-ordered society the basic structure of society must consciously be controlled to the extent that nobody can be denied the chance to live autonomously because of bad fortune with regard to social circumstances or the distribution of natural talent. It is for this reason that the basic structure is the primary subject of justice.

So Rawls's theory provides critical standards for a public evaluation of the basic structure of society understood in an impressively broad sense. In spite of this, however, Rawls's defense of his account of justice as fairness depends, in his later work at least, on an implausible attempt to separate the political from the nonpolitical by dealing with questions of political morality in isolation from the comprehensive moral views of citizens. One implication of this that I hope to clarify here is that Rawls's procedural test of moral justification is not sufficiently rigorous to ground effectively principles of justice appropriate to a modern democratic society. I will suggest that the attempt to isolate the political involves an unnecessarily restrictive conception of moral reasoning about justice, one that is insufficiently sensitive to the differing perspectives among the diversity of social groups that will be present in any modern society.

The intention here is to offer a critique of the procedural test of justification that Rawls defends in his theory rather than a detailed critical assessment of the two substantive principles that Rawls believes to be justified according to that procedural test.<sup>3</sup> The critique will focus on the consequences of Rawls's attempt to isolate the political. I argue that the boundary between the political and the nonpolitical, that sets a limit to the scope of justice, can never be assumed in any convincing procedure of justification. Rather it must always be treated as an on-going matter of public debate and democratic contestation. Rawls's procedure is not adequate to our democratic needs as an account of relevant conditions of fairness, or an impartial point of view.<sup>4</sup> Furthermore, by ruling out the explicit articulation of different perspectives in the choice of substantive principles of justice, Rawls runs the risk of failing to take account of the particular concerns of marginal social groups.

The main thrust of my argument against Rawls is that his conception of an impartial point of view does not have a central enough role for political discourse. It presents an account of public reflection on the justification of principles of justice in a rather static and restrictive manner. If the always present potential for unjustifiable political bias against marginal groups in a democratic society is to be tested with the required rigor, then we will need a more dynamic and interactive conception of what it means to adopt an impartial point of view in our considerations about the demands of justice. In other words we will need an account of impartiality that is more adequately discursive.

Liberalism has often been accused of failing to overcome certain biases in its understanding of justice. Marxism has presented a powerful challenge to liberalism by highlighting the potential danger of bias involved for any theorist who seeks to construct theoretically an account of justice that claims to be acceptable to all.<sup>5</sup> Marxism concerns itself with the potential danger of a class bias being built into such a construction. This bias may, of course, be rooted in certain assumptions that the theorist brings unwittingly to the task. Such a bias would render the account of justice an ideological, and therefore partial, account, in spite of the theorist's best attempts to remain impartial. In this respect at least, Marxism can be thought of as a precursor of the two perspectives that I will consider as significant challenges to Rawls's conception of an impartial point of view. In political theoretical debates of recent years, communitarianism and feminism have eclipsed Marxism as the most influential critical perspectives on liberalism.

Communitarian and feminist critics concern themselves in different ways with potential biases in Rawls's account of justice. Both claim to represent distinctive, and often marginal, voices in public debates about justice in the context of a modern society. I will consider the possible objections that could be raised from these perspectives in relation to certain key features of Rawls's theory. In this chapter I will assess the impact of communitarian objections to the way that Rawls defends the Kantian claim that the right is prior to the good. The next chapter is concerned with feminist objections to Rawls's neglect of issues of justice within the family and also with the relation between justice and solidarity.

My own strategy in both of these chapters will be to assess the extent to which the criticisms that I reconstruct can be sustained against Rawls. While I seek to underline the importance of the procedural task that Rawls has set for himself, that of offering a philosophical justification of an impartial point of view that can test the acceptability of substantive principles of justice, I reject the procedure that he himself proposes. The

most damaging criticisms of Rawls's procedure that can be reconstructed from both communitarian and feminist perspectives converge in highlighting the theoretical difficulties involved in the attempt to isolate the political.

The main problem for Rawls is that this strategy of isolating the political relies on an unhelpful and restrictive notion of political discourse. Differences in perspective must be overcome, in his account, prior to the choice of principles of justice. This means that the procedure itself is static, whereas what democratic legitimation would seem to require is a dynamic, interactive procedure of justification. Furthermore, the basic theoretical assumptions that Rawls builds into his construction are not self-evidently open to question within the framework of the procedure of choice itself. In later chapters I hope to show that a procedure of justification that is adequate to the critical task required of it in a modern society must incorporate, more successfully than Rawls does, the concerns of the communitarian and feminist critics whose work I examine in this part. Before we assess the challenge of feminism in the next chapter, let us turn to the concerns of communitarian critics of Rawls's political liberalism. In order to put these concerns in perspective we will first need to say something about the general character of Rawls's theoretical approach to questions of justice.

#### POLITICAL CONSTRUCTIVISM AND THE IDEA OF AN OVERLAPPING CONSENSUS

The Kantian claim that the right is prior to the good is one of the striking characteristics of Rawls's theory. In contrast with teleological theories, such as utilitarianism and various forms of perfectionism, in Rawls's account of justice as fairness there is no reason to suppose that the right will maximize the good. The right, as represented by principles of justice, is not dependent on any one particular conception of the good. In fact it imposes "restrictions on what are reasonable conceptions of one's good."<sup>6</sup> Justice defines the scope within which we can choose a reasonable plan of life and it limits us to a conception of the good that will not violate the principles of right.

It follows from this that while a well-ordered society depends on its citizens reaching some agreement about justice, those citizens do not have to share a full conception of the good.<sup>7</sup> Neither do they all have to affirm the same comprehensive religious, philosophical, or moral doctrine in order to reach an agreement about justice. Agreement on com-

prehensive doctrines is an unreasonable expectation under modern democratic conditions. Within free democratic institutions such a comprehensive moral consensus is not only impossible but it is also both unnecessary and undesirable. This is because of what Rawls refers to as the fact of reasonable pluralism.<sup>8</sup> A plurality of reasonable comprehensive moral doctrines is the inevitable result of the workings of practical reason through free political institutions under modern conditions. While this fact of reasonable pluralism is not to be considered as an unfortunate and regrettable condition of modern life, it does imply that an agreement on principles of justice could not be derived from a comprehensive moral doctrine but it must rather be affirmed by a plurality of reasonable comprehensive doctrines in an overlapping consensus.<sup>9</sup> This affirms the priority of right since it indicates that in a well-ordered society it is the principles of justice, and not a full conception of the good or a comprehensive moral doctrine, that form a basis of social unity.

As I have already indicated, the particular way that Rawls seeks to separate issues of justice, about which we must agree, from moral questions that are not susceptible to agreement, reflects an attempt to isolate political aspects of morality from other comprehensive aspects of morality. Matters of justice fall within the domain of the political in Rawls's sense to the extent that we can make legitimate claims on each other, and on our public institutions, if we believe that some principle of justice has been violated. On the other hand, there are many questions about which we cannot in principle agree, due to the fact of reasonable pluralism. These must be considered to be outside the political domain and, so long as they do not violate the principles of justice, they can be treated as matters for individuals to decide on for themselves.

The aim of this present chapter is to assess critically Rawls's strategy of defending the priority of right by attempting to treat matters of political morality in isolation from other aspects of citizens' comprehensive moral views. Some communitarians have questioned Rawls's assertion of the priority of right and have accused him of supporting that priority on the basis of an untenable atomistic ontology.<sup>10</sup> I want to defend Rawls from this charge by arguing that his work is best understood as a version of what I will call liberal holism. Nonetheless, the discussion leads to the suggestion that a liberal holist defence of the priority of right is undermined by Rawls's attempt, in his recent work, to isolate political aspects of morality.

The initial communitarian challenge to Rawls's work was based on the claim that the priority of right, as expressed through the original

position, produces an account of justice that is arbitrarily biased toward certain conceptions of the good.<sup>11</sup> Rawls excludes from the original position information about the particular conceptions of the good that each party is to have.<sup>12</sup> He argues that, given the fact that there is a plurality of reasonable conceptions of the good, such a restriction is necessary if unanimous agreement is to be secured. Rawls also maintains that the parties are to be thought of as being mutually disinterested.<sup>13</sup> These conditions of choice are said to favor liberal conceptions of the good that are content with the loose social bonds characteristic of highly individualistic cultures over conceptions that depend on a stronger basis of social unity. Indeed the implication is that this restriction could only be justified with reference to some such liberal conception of the good.

Furthermore, Rawls's account of primary goods is also said to constitute an arbitrary bias toward individualistic conceptions, as it is blind to the significance of irreducibly common goods, such as solidarity. The primary goods can, it is argued, be thought of as being of greater value to those individuals for whom such common goods do not matter greatly. The outline of the original position presupposes highly fragmented social conditions and the individualistic bias in the account of the primary goods undermines whatever bonds of social solidarity actually do exist.

Rawls has responded to these criticisms by stressing the central role that the Kantian conception of moral personality plays in providing a normative justification for both the outline of the original position and the account of the primary goods.<sup>14</sup> According to this conception we view each person as

a moral person moved by two highest-order interests, namely, the interests to realise and to exercise the two powers of moral personality. These two powers are the capacity for a sense of right and justice (the capacity to honour fair terms of cooperation), and the capacity to decide upon, to revise and rationally to pursue a conception of the good.<sup>15</sup>

Rawls accepts that this is an historically specific conception of the person. It is a conception that he believes to be embedded in the institutions and practices of modern liberal democratic societies. The constructivist method that Rawls adopts sets itself the practical task of securing agreement on the first principles of justice that are to specify fair terms of social cooperation.<sup>16</sup> It is intended to reveal how a workable conception of jus-

tice can be supported with moral reasons that can be affirmed by all those who hold reasonable comprehensive moral views. In this way justice as fairness is itself grounded in the public political culture of modern democratic societies. Rawls assumes that there are embedded in this public culture certain political beliefs that all reasonable citizens can share.<sup>17</sup>

The elaboration of this constructivist method allows Rawls to respond to the criticism that the original position is arbitrarily biased toward individualistic conceptions of the good. Since we are to assume the conditions of modern pluralist democracies, justice as fairness is not defended as a true conception of justice but rather as one that is reasonable. Political constructivism does not employ the notion of truth but rather leaves the "concept of a true moral judgment to comprehensive doctrines."<sup>18</sup> In summing up the advantages of such an approach Rawls points out that

there can be but one true comprehensive doctrine, though as we have seen, many reasonable ones. Once we accept the fact that reasonable pluralism is a permanent condition of public culture under free institutions, the idea of the reasonable is more suitable as part of the basis of public justification for a constitutional regime than the idea of moral truth. Holding a political conception as true, and for that reason alone the one suitable basis of public reason, is exclusive, even sectarian, and so likely to foster political division.<sup>19</sup>

The implication here is that grounding our principles of justice on any one comprehensive moral doctrine that claims to be true, or indeed one conception of the good, would lead to intolerable coercion by the state of those who hold reasonable yet different comprehensive moral views.<sup>20</sup>

We might note at this point that while Rawls's political constructivism draws on ideas he believes to be embedded in the public culture of democratic societies, his position should not to be thought of as a contextualist one.<sup>21</sup> This is because the political conception of justice is constructed not out of one particular democratic tradition but rather from ideas of practical reason. It develops, in other words, out of ideas that can be shared by citizens of any and every democratic society "by using the principles of their common practical reason."<sup>22</sup> Furthermore, political constructivism aspires to present, in the outline of the original position, an objective point of view.<sup>23</sup> Rawls's political conception of justice could, he suggests, satisfy the requirements of objectivity if it can be defended with reasons "sufficient to convince all reasonable persons that it is reasonable."<sup>24</sup>



But what of the communitarian objection that Rawls's procedure is biased toward individualistic conceptions of the good? It is now clear that the original position is to be thought of as a device of representation that "serves as a means of public reflection and self-clarification."<sup>25</sup> It models our two moral powers in a way that prioritizes the reasonable, our capacity to act according to general principles of justice, over the rational, our capacity to pursue a conception of the good.<sup>26</sup> The reasonable is prioritized by the requirement, introduced by the veil of ignorance, that in choosing principles of justice that are fair, we must adopt the perspective of every citizen.

Since the thrust of the original position is to guarantee an agreement about justice that is acceptable to all, it is not intended to favor any particular conception of the good. The assumption that the parties are mutually disinterested is to be thought of in the context of Rawls's claim that in a pluralist society principles of justice cannot reasonably be based on one particular conception of the good or on one comprehensive moral doctrine. Two persons with opposing religious beliefs can be mutually disinterested once they can agree on a framework of justice based on a shared notion of moral personality. It does not follow that they are self-interested nor can we assume that they pursue individualistic ends.<sup>27</sup>

It is clear that what motivates the parties in the original position to choose the primary goods are in fact the two highest-order interests. Rawls wants to rule out any interpretation of the parties as merely egoistic rational consumers of goods who are motivated to accept the principles of justice solely in response to external constraints.<sup>28</sup> The primary goods are to be understood as the necessary conditions for realizing the powers of moral personality and as all-purpose means for a wide range of final ends.<sup>29</sup> This is the practical nature of the primary goods. They cohere with the conception of the person to provide a framework of social cooperation that is both workable and stable as a basis of social unity in spite of the wide range of reasonable conceptions of the good. This is, according to Rawls, the most reasonable manner of proceeding in the practical task of securing fair terms of cooperation and so it cannot be charged with being arbitrarily biased in favor of individualistic conceptions of the good.

#### JUSTICE AS POLITICAL AND THE CHARGE OF ATOMISM

While this emphasis on the two powers of moral personality does seem to allow Rawls to deflect the charge of arbitrary individualistic bias,



some ambiguities remain. The constructivist approach has been interpreted as a shift toward a form of perfectionism where this ideal of moral personality is held up as a moral goal that is actively to be pursued. The institutions of the basic structure are judged according to the extent to which they facilitate our highest-order interests in exercising our two moral powers. The basic structure is to express our nature as free and equal rational beings.<sup>30</sup> Rawls does not want to accept such a perfectionist interpretation, as it is based on a comprehensive moral view involving controversial personal ideals that are not likely to be shared by all reasonable citizens. On the other hand, Rawls insists that justice as fairness is not to be interpreted as a *modus vivendi*, a conception based merely on a convergence of interests. That approach would seem to presuppose some form of moral scepticism since such a basis for agreement is prudential rather than moral.<sup>31</sup> Rawls's constructivism seeks to steer a course between perfectionism and scepticism.

Rawls maintains that justice as fairness is to be thought of as a political and not a metaphysical conception.<sup>32</sup> Although, as I have already pointed out, Rawls argues that justice as fairness is not dependent on any one comprehensive moral view, he is keen to stress the fact that it is a moral conception both in its aim and on the grounds that support it.<sup>33</sup> A political conception of justice for the basic structure of society is itself a freestanding moral conception.<sup>34</sup> Furthermore, justice as fairness is affirmed as an overlapping consensus in that all citizens who affirm it do so on the basis of their own reasonable comprehensive moral views. Their comprehensive moral views coincide in the moral conception of the citizen as free and equal and the notion of a well-ordered society as a fair system of cooperation that is characterized by the principles of justice and by political virtues such as tolerance and reasonableness.<sup>35</sup> Justice as fairness is affirmed for its own sake and so it is more stable than a *modus vivendi* that is always vulnerable to a shift in the balance of power between different social groups.

In his writings since the publication of *A Theory of Justice*, Rawls has used an impressive range of arguments to defend the priority of right as one of the essential elements of the account of justice as fairness that he now presents as a conception of political liberalism.<sup>36</sup> At the same time he has, with some sophistication, managed to use a number of ideas of the good in the construction of his theory that serve to reveal that he understands the right and the good to be complementary.<sup>37</sup> However, his recent defense of the priority of right is deeply flawed in one crucial respect. It depends on the implausible attempt to treat questions of political morality in isolation from the rest of our comprehensive moral

views. From Rawls's point of view, it would appear that for each of us morality has a political aspect that relates to questions regarding the regulation of the basic structure of society, and a nonpolitical aspect that relates to other dimensions of our lives.<sup>38</sup> This key element in Rawls's recent strategy leaves him vulnerable to a number of arguments that can be supported by the work of his communitarian critics. These arguments undermine Rawls's attempt to isolate the political in his efforts to ground the priority of right.

Perhaps the most celebrated critique of Rawls from a communitarian perspective was put forward by Michael Sandel.<sup>39</sup> According to Sandel, the Kantian conception of the person, on which Rawls's account of justice is constructed, presupposes an idea of an unencumbered self that is prior to and independent of its purposes and ends. The values and ends espoused by the individual are thought to be chosen voluntarily and are never constitutive of the identity of the self. It is the capacity for choice rather than the ends that are chosen that is of importance in Sandel's reconstruction of this Kantian conception of free and equal moral personality. Furthermore, it is assumed that any attributes I have, my talents, my physical appearance, or any of my idiosyncratic psychological dispositions, are accidental and contingent to my identity. For Sandel this conception of the person lacks any depth of moral character. Our character comes from our being situated historically within a particular network of social ties. Each of us interprets our individual identity in a context that we did not choose and under circumstances that we cannot fully control. The issue here is an ontological one between atomistic and holistic conceptions of the self.<sup>40</sup>

An atomistic conception of the self, such as the unencumbered self Sandel describes, is indeed quite untenable. Holists are right in so far as it is impossible to imagine a recognizably human being whose identity could be said to be prior to and independent of all constitutive ends. Each person's values and ends, and therefore the person's identity, are conditioned and shaped, to a greater or lesser extent, by attributes that are not chosen (family, nationality, sex, race, natural talents, and limitations). The person's identity is formed, in many ways, independently of the will. An identity is never chosen by a free-floating individual but rather it emerges through a dialogical encounter of recognition with others. Self-understanding always depends to some degree on the recognition of people who matter: parents, friends, lovers, a community of scholars, or even perhaps, for believers, God.<sup>41</sup>

The formation of an identity involves some degree of acceptance of the recognition we receive as well as a certain degree of struggle. If we

struggle against the recognition, of our parents for example, we will want to move away, to draw on encounters with new significant others who can help us to become human beings that we could not have been had we not engaged in that struggle. We are never simply encumbered with whatever values and ends our communities of origin happen to espouse. But nor are we ever unencumbered. We never change our ends or alter our identity without some struggle with or acceptance of the recognition of significant others.

The citizens of a liberal democracy are, in most circumstances, members of a particular political community that few have chosen voluntarily. Many citizens do come to identify with the other members of their political community of origin. They will accept the recognition of their compatriots as constitutive of their identity. The fact that they are British, Irish, French, or Portuguese becomes for each of them a part of their answer to the question "Who am I?" The good of their political community is in part constitutive of their own conception of the good. This is usually true even of those citizens who consider themselves to be entirely apolitical.

However, in an extreme case, even if I were to leave my nation of origin, because I do not identify with its ends even to a minimal degree, I would want to find some new significant others on whom I could draw in the formation of a new political aspect to my identity. This might involve immigration or naturalization and this process is obviously more common in a predominantly immigrant society like the United States. Yet even in such cases, for those who come to identify with their new political community, the community's good will in part constitute their own personal good. So it would seem reasonable to assume that the personal identity of each individual citizen depends, to a greater or lesser degree, on the common good of the political community. If, for example, a political community were to be invaded by an aggressive foreign power, the personal identity of each individual citizen, as well as the political identity of the community, would be under some threat.

Of course, ruling out atomism does not rule out liberalism. It would rule Rawls's theory of justice out if Sandel were right, that it depends on a conception of an unencumbered self.<sup>42</sup> In fact, Rawls's position would best be described as that of a liberal holist. There are two main reasons for interpreting Rawls in this way.

First, he can allow for the fact that individual identities are in part constituted by moral ties, such as ties, within the family and various associations, that are not chosen voluntarily. By locating such associations beyond the scope of justice, Rawls assumes that he can disregard them in developing a political conception of justice.<sup>43</sup>

Second, and more importantly here, Rawls points out that the establishment and successful maintenance of just democratic institutions is itself a common good. Rawls insists that the citizens of a well-ordered society do have final ends in common.

While it is true that they do not affirm the same comprehensive doctrine, they do affirm the same political conception of justice; and this means that they share one very basic political end, and one that has high priority: namely the end of supporting just institutions and of giving one another justice accordingly.<sup>44</sup>

The extent to which we realize and exercise our two moral powers depends, at least in part, on the achievement of this common good. The good of political society also guarantees for each citizen the satisfaction of fundamental needs in that it secures for them justice and the social bases of self-respect. This good is also fundamentally a social good in that it is achieved and realized "through citizens' joint activity in mutual dependence on the appropriate actions being taken by others."<sup>45</sup> Democratic institutions are quite appropriately a source of pride and a cause for celebration among the peoples who enjoy them.

It would appear therefore that the common achievement of just institutions is a necessary constituent of the identity of each of the citizens of a well-ordered society. In this sense Rawls is clearly a holist. He is a distinctively liberal holist to the extent that he continues to assert the priority of right by defending his conception of justice as a political conception that is not dependent on any one comprehensive moral view.<sup>46</sup> This reading of Rawls obviously contradicts the communitarian claim that the outline of the original position depends on an atomistic conception of the self. But it also contradicts Rawls's own view that the original position has "no specific metaphysical implications concerning the nature of the self."<sup>47</sup> Rawls's defense of political liberalism is incompatible with an atomistic ontology. The holistic ontology that underlies his work has itself certain implications that undermine the attempt to isolate political aspects of morality. I will consider two of these here.

## NEUTRALITY AND ITS LIMITS

As we have already seen, communitarians have been critical of the liberal view that the state can, and should, be neutral with regard to the plurality of competing conceptions of the good in a modern society. This

is taken to be one implication of the assertion of the priority of right. Rawls is, with good reason, exceptionally careful about the use of the term "neutrality."<sup>48</sup> He maintains that his conception of justice as fairness is not neutral in a strictly procedural sense. This is because the principles of justice it defends, as well as its political conceptions of the person and of society, involve substantive commitments to particular values.<sup>49</sup> Nor is it neutral in attempting to ensure that all citizens are free to pursue any conception of the good. Only some conceptions of the good, those that are reasonable to the extent that they can affirm the principles of justice, are permissible in Rawls's well-ordered society of political liberalism. Nor again is justice as fairness neutral in effect since Rawls believes that the basic structure of a just constitutional regime will "inevitably encourage some ways of life and discourage others."<sup>50</sup> What the "neutrality" of justice as fairness does require is that the state refrain from acting in any way that intentionally favors one comprehensive moral doctrine or one particular conception of the good. It seems to me however, that within the context of any one state, even this ideal of neutrality has its limits.

First, a particular liberal democratic state is not neutral, for example, between on the one hand, those patriotic citizens who count as a constitutive aspect of their own good the justness of that state's institutions, as they have been shaped historically in a distinctive cultural context, and on the other hand, antipatriotic citizens who, for whatever reason, have come to despise those same institutions and who long for their destruction. These need not be actively involved in attacking the institutions of the state, whether by violent or other means. They may be relatively passive and simply resigned to the fact that they have been unfortunate enough to live in a political community for which they feel much resentment but no loyalty. For personal or historical reasons their identity precludes that loyalty.

Every democratic state has a particular history and lays claim to a certain territory. It is not unusual to have some citizens within that territory who do not identify with the political community in which procedural justice for them is to be embodied historically. These antipatriots may not despise liberal democracy or principles of justice as such but only liberal democracy and justice under the British state or the Spanish state or whatever.<sup>51</sup> In other words, it might be the case that they can embrace the ideals of political liberalism but not the historical embodiment of those ideals in their own context.

Citizens typically, even constitutional liberals, are loyal not to an abstract form of political justice as such but to a distinct cultural and

historical embodiment of the principles of justice. They identify with the historical reality of a particular democratic community and that identification is, at least in part, the source of their allegiance to the state and their acceptance of its claim to legitimacy. The state cannot but favor patriotic citizens over its antipatriots. In any society divided in this way, the state can never be neutral between the conceptions of the good of those who identify themselves with its historical constitution and those who do not.<sup>52</sup>

This does not mean that the state should discriminate against minority cultures. On the one hand, the state cannot but promote one particular conception of the good, a conception that celebrates the historical achievements of its people. It would appear therefore that state institutions embody principles of justice in ways that will inevitably express the cultural distinctiveness of a particular democratic community. On the other hand, the real challenge facing culturally divided societies is not simply to guarantee rights for their minorities but rather to create an inclusive political culture with which all citizens can identify.<sup>53</sup> If this were achieved, then there would be no reason to fear that the historical constitution of the state could generate antipatriotic feelings among certain groups of its citizens. We will leave aside for now an examination of the implications of this point so that we can turn to the other reasons that can be offered in support of the view that Rawls overestimates the extent to which a liberal state can be neutral.

Rawls accepts that the assertion of the priority of right means that only some conceptions of the good are permissible in a well-ordered society. It is enough that the overlapping consensus be supported by a substantial majority of its politically active citizens.<sup>54</sup> We recall that to support the overlapping consensus one need not endorse liberalism as a comprehensive moral view, by affirming the doctrines of say Kant or Mill, but only as a political morality. The question that this claim raises however is whether or not political liberalism could be compatible with comprehensive moral views that are not themselves comprehensively liberal.

Rawls admits that justice as fairness does affirm a particular set of virtues, the liberal political virtues of tolerance, reasonableness, and fairness.<sup>55</sup> He maintains that what is required of citizens who hold comprehensive moral views that are not themselves comprehensively liberal, is that they recognize the great significance of these liberal virtues to the extent, for example, that they accept that they will be promoted in the education of their children.<sup>56</sup> While there may be other virtues, such as religious ones, that are encouraged at home, it is the political virtues that prepare the young for citizenship in a well-ordered society.



But surely this is so demanding that the variety of comprehensive moral views that could accept it is quite limited. There will arguably be many citizens of modern democratic societies who would find this unreasonable in so far as it clashes too sharply with certain important aspects of their comprehensive moral views. Take, for example, anybody who adheres to a religious conception of the good of all humanity in a fundamentalistic way. For them to accept that the promotion of the liberal virtues as a central aspect of the education of their children is to ask them to risk something that may matter to them a great deal, that the religious upbringing they give to their children will be undermined at school.<sup>57</sup> The comprehensive moral views that could affirm an overlapping consensus begin to look pretty comprehensively liberal. Not only does this reflect quite dimly the diversity of moral views that are actually held in modern societies but, more importantly, it leaves a great number of people outside of the overlapping consensus. They will be expected to accept the political morality of Rawls's constitutional state not as a matter of conviction but rather merely as a *modus vivendi*.<sup>58</sup>

The problem here can be illustrated somewhat differently with reference to divisive moral issues that are part of the political agenda in contemporary democratic societies. These include abortion, euthanasia, animal rights, and questions such as the criminalization of sado-masochistic sex or the right to freedom of expression in the light of the Salman Rushdie affair. Take abortion, for example. Every modern state has to take some political position on this question and it must reach some conclusion about what rights are involved. Could the state do this by avoiding controversial comprehensive moral claims? If the state were to reach its conclusion by affirming only the liberal virtues of tolerance, reasonableness, and fairness, what are we to make of its expectation that these considerations should override the comprehensive moral views of dissenting citizens?

Rawls suggests that with regard to the question of abortion, a reasonable balance of the relevant political values "will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester."<sup>59</sup> At an early stage of pregnancy, the political value of the equality of women as citizens overrides other values, such as due respect for human life, and the ordered reproduction of political society over time. Any other conclusion would be unreasonable and it might also be "cruel and oppressive." This is hardly a convincing response as it merely asserts the reasonableness of one position in this controversy.<sup>60</sup> It favors certain comprehensive moral doctrines over others and these others might well be considered not to be unreasonable.



It seems clear that there is no way that convinced pro-life campaigners could accept that a distinctively liberal virtue such as tolerance should override their conviction that a mother and her unborn fetus are of equal moral value from the moment of conception, without radically changing their most fundamental moral beliefs. In other words, if they were to be able to digest political liberalism to the extent that they could accept that it would be unreasonable for the state to ban abortion, then they would already have swallowed a fairly large dose of comprehensive liberalism. Accepting that legal abortion is reasonable is incompatible with the comprehensive moral view that abortion is murder.<sup>61</sup> Political liberalism is only compatible with comprehensive moral views that are themselves thoroughly liberal.

Nor could Rawls dissolve this difficulty by claiming that the question of the liberal state failing to be neutral, even in his favored sense, is not at issue in the dispute about abortion, since this is a matter of political right and not a question of morality in a more comprehensive sense. The problem with a moral issue such as abortion is that we do not agree on a conception of the right. There is no consensus on who has rights nor on the matter of which rights have priority. But the disagreements involved will always be premised on and informed by disagreements between competing comprehensive moral claims.<sup>62</sup> For one party, perhaps the fetus has equal rights with the mother because it is loved equally in the eyes of God. For another party, the fetus may have a right to life in a qualified sense but this right can be trumped by the rights of the mother, depending on her circumstances. For a third, the woman's right to choose always takes priority over other considerations. Even among those who hold this position there is a no agreement on the time scale involved. The reasons given in support of these various positions as to what is right with regard to abortion will depend on the range of moral resources that could be drawn from the comprehensive moral commitments of the participants. An appeal to a conception of rights does nothing to avoid the moral controversy involved.

A state that permits abortion cannot but favor conceptions of the good that are comprehensively liberal. The attempt to avoid comprehensive moral commitments in political discussion runs the risk of allowing for the imposition, without any attempted public justification, of a particular comprehensive morality. It fails to facilitate a critical public assessment of constitutional essentials or matters of basic justice.<sup>63</sup> Such a critical public assessment cannot mark out in advance the issues that must be avoided for the sake of affirming an overlapping consensus. It must allow the relationship between the politically right and the

comprehensively moral to be the subject of deliberation in an open democratic encounter. Controversial moral views, even those on abortion on which agreement seems to be most unlikely, must not be excluded from the political agenda, but rather they must be worked through politically.<sup>64</sup> However, while there can be no shirking away from difficult moral issues, these matters must not be decided simply on the crude basis of majority rule. Given the fact of reasonable pluralism, we must continue to defend the priority of right. This is not best achieved by the attempt to avoid moral controversy and the assertion of a rigid isolation of the political domain. We need rather to defend procedures of justification that can facilitate more easily an open and critical assessment of the ways in which the politically right and the comprehensively moral relate to one another.

This brief analysis of one divisive moral issue should make it clear that it is not as easy as Rawls seems to think to isolate a political morality from other comprehensive moral views. It is never obvious which aspects of our morality are political and which are not. Only comprehensive liberals could accept that their moral views on abortion should be trumped by the claims of political liberalism. The limits of a state's neutrality between conceptions of the good can once more easily be underestimated. Not only must the conception of a patriot be privileged over that of an antipatriot, but a politically liberal state must, by promoting the virtues of tolerance, reasonableness, and fairness, also privilege comprehensively liberal moral views over comprehensive moralities that are not themselves thoroughly liberal.

## CITIZENSHIP AND THE PUBLIC SPHERE

A second implication of liberal holism, which is related to the first, is the need to stress the centrality of democratic will-formation as the only guarantee of securing the basic liberties that justice as fairness defends. Some of Rawls's communitarian critics emphasize the bonds of solidarity among citizens that are essential to the flourishing of the common good of just institutions. The political rights provided by those institutions could only prove to be of fair value to all citizens, as Rawls suggests they should be, if they can be exercised within the context of a vibrant and vigilant public sphere where open and unrestricted discussion can take place about questions of the common good. Rawls's attempt to isolate the political domain does not lend itself very easily to such a conception of democratic politics. This is connected to Rawls's

understanding of individual rights as a means of removing certain controversial issues from the political agenda. In seeking to balance individual rights to privacy with the political rights associated with democratic will-formation, Rawls continues to give undue weight to the former at the expense of the latter.

Communitarians who are concerned to revivify modern democratic life tend to stress the need for structures of power that encourage citizens to participate actively in the public sphere.<sup>65</sup> The idea is that all citizens, or at least their genuine representatives, can actively inform and shape political decisions on matters of common concern. This participatory model of citizenship with its complementary notion of a vibrant public sphere can be contrasted with the strong emphasis on individual rights within certain strands of the liberal tradition.<sup>66</sup> The communitarian model of citizenship is based on the republican ideal of citizen self-rule. In contrast, the individualistic, liberal model of citizenship is based on the power of the individual to assert rights that are intended to protect an area of private interest from the possible encroachment of an intrusive political domain. These rights delimit the scope of public concern and they are retrieved by the individual through the judicial process.<sup>67</sup> Crudely put, communitarians are primarily, but not exclusively, concerned with political rights of participation, while liberals are primarily, but not exclusively, concerned with individual rights to privacy.

It is apparent that both of these sets of citizenship rights, private and political, are equally central to any theory of justice that is presented in liberal holist terms.<sup>68</sup> Political rights are presupposed by any defense of private individual rights since these latter rights can only be securely guaranteed within the context of a self-ruling democratic community. At the same time, private rights are presupposed by any defense of political rights of participation since no community could be genuinely democratic if it did not respect the dignity and the personal autonomy of each individual citizen. I have suggested that a liberal holist approach to justice involves the claim that the identity of each citizen is constituted in part by the achievement of the common good of just institutions. This is necessarily an achievement of democratic citizen self-rule. If the notion of democratic citizen self-rule and the liberal commitment to individual rights are thought of as two sides of the one coin, then it would not be possible to give an account of political justice either solely in terms of the private rights of isolated individuals nor solely in terms of the democratic will of a political community. While the former depends on an untenable atomistic ontology, the latter cannot adequately facilitate the views of dissenting individuals. A liberal holist theory of justice must

instead be presented as a normatively justified procedure that is grounded in intersubjectivist terms. Neither private nor political rights can be given priority over the other.

Although I have suggested that Rawls is a liberal holist, he does tend to stress an individualistic model of citizenship, one that is given in terms of private rights that set limits to the scope of political discussion. This leads to a conception of democratic self-rule that is inadequately vigilant in seeking to secure fair value of the political rights of each citizen.<sup>69</sup> I think that the following passage makes it clear that Rawls does give priority to private individual rights. He maintains that

liberal principles meet the urgent political requirement to fix, once and for all, the content of certain political basic rights and liberties, and to assign them special priority. Doing this takes those guarantees off the political agenda and puts them beyond the calculus of social interests, thereby establishing clearly and firmly the rules of political contest. To regard that calculus as relevant in these matters leaves the status and content of those rights and liberties still unsettled; it subjects them to the shifting circumstances of time and place, and by greatly raising the stakes of political controversy, dangerously increases the insecurity and hostility of public life.<sup>70</sup>

There are obvious attractions in what Rawls is seeking to do here but there are also reasons to worry about this approach to the defense of individual private rights.

Again the attempt to isolate political aspects of morality from other comprehensive moral views is crucial here. This sets a limit, once and for all, to the scope of open political discussion by excluding issues about which it is presumed that we will not agree. I have already suggested that this method of avoidance that Rawls has adopted, fails to isolate political morality as neatly as he seems to imply. Furthermore, the method does not do justice to the diversity of conceptions of the good that could be represented in the public domain since, as we saw in the discussion about neutrality, it marginalizes conceptions that are not comprehensively liberal.

In a holist account of liberalism the common achievement of just institutions is thought of as a necessary constituent of the identity of each citizen. But this achievement is an ongoing historical project that must not be confused with some particular agreement at any one time that seeks to exclude certain issues from the political agenda, for once and for all! By seeking to take issues of private concern off the political

agenda, Rawls makes the unwarranted assumption that the line between political and nonpolitical aspects of our identities can be fixed.<sup>71</sup> Not only is it not fixed but, as the example of abortion illustrates, it is constantly being called into question. It is challenged and contested in every moral dispute where political claims are informed by more comprehensive moral views. It is also challenged whenever a social group that had previously been marginalized begins to articulate its own needs and interests. The scope of the political domain must be left as an open question so as to leave room for the potential voices of social groups who have not yet articulated their own needs and interests.<sup>72</sup>

Rawls's emphasis on the liberal political morality that forms the basis of the overlapping consensus does not reflect very satisfactorily the kind of differences that characterize a vigilant public sphere in a modern society. The equal opportunity of all social groups to participate in public discourse must be incorporated into any procedural account of justice that is to be adequate as a test of the legitimacy of substantive principles that are to regulate the basic structure of a modern society. Rawls's procedure, by limiting political discussion, does not give the central role to the notion of a vigilant public sphere that an adequate version of liberal holism would require. Basic principles are after all, on Rawls's account, agreed upon before any real public discussion even begins to take place.<sup>73</sup> This causes a further problem, as to how the procedure that Rawls defends is itself to be assessed critically and legitimated.<sup>74</sup>

The importance of the communitarian model of citizenship that stresses political rights and active self-rule should not be overlooked. Within the framework of liberal holism, citizens are committed to the common good of their shared achievement of just institutions and the vigilant maintenance of those institutions over time. Only this will secure their individual rights and the effective value of the liberties they guarantee.<sup>75</sup> From this perspective all of our moral claims must be open to question since there is no reasonable way to decide in advance which claims are matters of political morality and which are not. The boundary between the political and the nonpolitical is constantly under negotiation in the ongoing democratic debates that are informed by our moralities. It seems to me that this is unavoidable as our comprehensive moralities, and therefore our conceptions of the good, always underpin our political moralities.

If we wish to question and to assess critically the presuppositions of those political moralities, then we are inevitably drawn into democratic deliberation about morally controversial issues. Given the plurality of reasonable conceptions of the good, it does not of course follow that a

shared comprehensive morality should be the aim of our deliberation. There is no viable alternative to theorizing justice in a modern societies but to start by defending the priority of right. In this respect, I fully endorse Rawls's crucially important project. What I have argued here is that Rawls himself has not provided us with a convincing defense of that priority. In the third part of the book, I will argue that Habermas provides us with the basis for constructing a more convincing alternative.

A rejection of the method of avoiding public discussion over comprehensive moral views is necessary if we want to ensure that our democratic practices can be engaged in a self-critical assessment of their most fundamental moral presuppositions.<sup>76</sup> Rawls's recent strategy of avoidance gives sufficient evidence to suggest that he has not yet abandoned the unhelpful isolation of the political domain that dominates liberal thinking about justice. The most persuasive communitarian criticisms of liberalism can be used to highlight the inadequacy of that aspect of his procedural account of justice. I have argued in this chapter that if a convincing defence of liberal holism is to be mounted, then Rawls's attempt to isolate the political must be abandoned. In the next chapter I hope to strengthen this claim by assessing the work of some of Rawls's feminist critics.