

PLURALISM AND PROCEDURALISM

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INTRODUCTION: DEMOCRATIC PLURALISM

In his review of John Rawls's *Political Liberalism*, Stuart Hampshire criticizes Rawls's assertion that "under reasonably favorable conditions that make democracy possible, political values normally outweigh whatever nonpolitical values conflict with them."¹ Hampshire finds this "alarming," and says that it "brings political liberalism, supposedly not itself a comprehensive morality, into direct conflict with many comprehensive moralities that are likely to flourish in a modern democracy."² Proceeding from these observations about the plurality of "comprehensive moralities," Hampshire arrives at pessimistic conclusions about the prospects for consensus on any "substantive" conception of justice, whether its content be liberal or traditionalist.³

This alarm and pessimism stand in striking contrast to Hampshire's assessment of the consistency of moral pluralism with agreement on *fair procedures*:

If [the] distinction between procedural and substantive justice is understood, between fairness in the process and fairness in the result, the claims for political liberalism and public reason and for the duty of civility become plausible. Within different moralities, liberal and conservative, the fairness of the actual outcome of a conflict will be evaluated differently, even though both sides recognize the fairness of the adversarial process. Outcomes are by their nature open to dispute, but processes need not be. . . . Rawls is implicitly recognizing the distinction between fairness in the procedure and fairness in the result when he makes democracy an essential element in the structure of political liberalism. Democracy is a procedure⁴

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1. Stuart Hampshire, *Liberalism: The New Twist*, N.Y. REV. BOOKS, Aug. 12, 1993, at 44 [hereinafter Hampshire, *The New Twist*]. Rawls says roughly what is attributed to him by Hampshire in the text in JOHN RAWLS, *POLITICAL LIBERALISM* 139, 155-56, 168-69, 209 (1993) [hereinafter *POLITICAL LIBERALISM*].

2. Hampshire, *The New Twist*, *supra* note 1, at 44.

3. *Id.*

4. *Id.* at 46.

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The distinction between procedural and substantive justice and the associated criticism of Rawls's surfeit of substance echo a complaint in Hampshire's *Innocence and Experience*: "Rawls's political or procedural justice is, as he defines it, not narrowly procedural enough."⁵

These criticisms suggest three important claims about moral pluralism and its implications for an account of justice.⁶ By way of background, let's say that a society is morally—as distinct from ethnically, culturally or organizationally⁷—pluralistic if it features a set of moral views whose members are both comprehensive in scope and incompatible in at least some of their important claims.⁸ Hampshire, then, makes the following points:

(1) Contrary to the extravagant predictions of an end of ideology associated with theories of social and political modernization, any modern democracy will be morally pluralistic.⁹ I assume this to be correct, and will not say anything more about it.

(2) Moral pluralism does not defeat hopes for consensus on political procedures. It is compatible, in particular, with common acceptance that justice requires fair, democratic procedures for resolving disagreements.¹⁰

(3) Moral pluralism inevitably generates disagreements about non-procedural issues of political justice—for example, issues of fair distribution—making it unrealistic to hope for agreement on a substantive conception. The relevant disagreements are not simply matters of negotiable differences of preference or interest; they are matters of intrinsically zero-sum conflict about what, beyond fair procedures, justice demands.¹¹ Put otherwise: any substantive account of justice—for example, any account of fair distribution—de-

5. STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 187 (1989) [hereinafter *INNOCENCE AND EXPERIENCE*].

6. Each of these themes is developed in detail in *id.*

7. On the role of organizational pluralism in a substantive conception of democracy, see Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 *POL. & SOC'Y* 393 (1992).

8. A moral conception is comprehensive "when it includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole." *POLITICAL LIBERALISM*, *supra* note 1, at 13.

9. I do not want to suggest that Hampshire thinks—or that I think—that moral pluralism is either peculiarly modern, distinctively democratic, or a bare, unexplained fact. In *Innocence and Experience* he traces pluralism to the imaginative powers that are essential to human nature. See in particular chapters one and four. I believe that Hampshire's discussion (especially in chapter four) ties moral pluralism too closely to the good of individuality, but I cannot pursue this point here.

10. "Universal agreement can be expected, in the name of rationality, only on the methods of fair argument which will arbitrate between the different answers to these questions [of substantive justice], when an answer is needed for public purposes and social arrangements." *INNOCENCE AND EXPERIENCE*, *supra* note 5, at 108. For an important defense of this assertion, see *id.* at 142-46.

11. See *INNOCENCE AND EXPERIENCE*, *supra* note 5, at 61, 141.

pendes for its justification on a comprehensive conception of the good.¹²

I will use the term "democratic pluralism" for views that endorse these three claims: in a nutshell, that moral pluralism is compatible with agreement on rules of a democratic political game, but not with more substantive agreement.

I disagree with the democratic pluralist view. Procedural and substantive values come, I will argue, as parts of a package; contrary to Hampshire's claim, moral pluralism does not drive a wedge between them. In making this case, I will side with Rawls against Hampshire. For Rawls's view is centrally committed both to a substantive conception of justice¹³ and—in *Political Liberalism*—to accommodating the moral pluralism that allegedly undermines agreement on such a conception.¹⁴

To clarify the terms of the argument and locate the issues on a wider landscape, though, I need first to fill out the democratic pluralist position. For democratic pluralism is a familiar view, suggested in conceptions of American constitutional design advanced by a tradition extending from Holmes¹⁵ to Ely¹⁶ to Ackerman¹⁷, and in the normative pluralism of democratic theorists from the early Harold Laski¹⁸ to Robert Dahl.¹⁹

Take the constitutional variant of democratic pluralism. Putting to the side the many disagreements among its proponents, it states that the U.S. Constitution is a design of democratic process. The Constitution establishes a framework of democratic procedure; it falls to

12. In discussion, John Rawls has emphasized this formulation of Hampshire's position.

13. See *infra* text accompanying notes 34-37.

14. See *POLITICAL LIBERALISM*, *supra* note 1, at xvi-xviii.

15. See for example Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 74 (1905).

16. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

17. See 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991) [hereinafter 1 ACKERMAN, *WE THE PEOPLE*] (especially see chapter one). Ackerman's important distinction between monist and dualist democratic interpretations of the U.S. Constitution does not affect my discussion here.

18. See the essays by Laski in *THE PLURALIST THEORY OF THE STATE* (Paul Q. Hirst ed., 1989) (especially see *Law and the State*). Laski was principally concerned to reject the modern conception of sovereignty, and to encourage administrative decentralization. But along the way he suggests a view of the kind described in the text.

19. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989) [hereinafter DAHL, *DEMOCRACY*]; ROBERT A. DAHL, *PREFACE TO DEMOCRATIC THEORY* (1956) [hereinafter DAHL, *PREFACE*]. *Preface to Democratic Theory* emphasizes the importance of background consensus "on policy" in a pluralistic democracy. *Id.* at 132. But it is not clear what "the underlying consensus on policy" includes, and in what ways it is procedural. The connections of, distinctions between, and institutional consequences of procedural and substantive agreement are central themes in *Democracy and Its Critics*. DAHL, *DEMOCRACY*, *supra*, at 163-92, 280-310. On the relationship between the earlier normative pluralism and modern pluralism, see Earl Latham, *The Group Basis of Politics: Notes for a Theory*, 46 AM. POL. SCI. REV. 376 (1952); ROBERT A. DAHL, *Pluralism, Polyarchy, and Scale*, in *DEMOCRACY, LIBERTY, AND EQUALITY* 226 (1988).

the people, acting within that framework, to make substantive value choices, which are legitimate so long as they have a permissible procedural pedigree.²⁰ Rights, principles, and standards that are not ingredients in the ideal of democratic process—whether guarantees of religious liberty or norms of fair distribution—are not as constitutionally fundamental as those that are—for example, rights of voting and political speech, or norms of fair representation.²¹

A similar outlook informs the tradition of democratic pluralism in political theory.²² Dahl, for example, holds out the possibility of a consensus extending to the democratic process, to a principle of equal consideration that provides the normative foundation for that process, and to certain rights—e.g., the right to a fair trial—rooted in the idea of equal consideration though not required for a democratic process. But the range of that extension is uncertain: it is unclear whether it covers nonpolitical speech, privacy, or the free exercise of religion. And it excludes the possibility of agreement on a conception of the common good—for example, Rawls's difference principle—that extends beyond the good of having a democratic process.²³ Given pluralism, Dahl argues, conceptions of the common good are inevitably "too limited to be generally acceptable or too general to be very relevant and helpful."²⁴

Different versions of democratic pluralism are advanced for different purposes, and we may find it compelling as constitutional the-

20. More precisely: for Ely, the government, acting in the name of the people, is to make the substantive value choices; the Supreme Court, acting in the name of the Constitution, is to ensure that those choices are made through a genuinely representative process. ELY, *supra* note 16. For Ackerman, the people themselves make substantive value choices in periods of heightened political engagement (exemplified by the New Deal); the role of the Court is to police the processes of normal politics and to ensure that the government acts within the bounds set by the people in periods of constitutional politics. 1 ACKERMAN, WE THE PEOPLE, *supra* note 17. But for both Ely and Ackerman, the Constitution is fundamentally a design of democratic process. So there could, for example, be no doubt about the constitutional validity of a partial repeal of the First Amendment establishing Christianity as an official religion. See 1 ACKERMAN, WE THE PEOPLE, *supra* note 17, at 3-16; ELY, *supra* note 16. In defending his account of the Constitution, Ackerman emphasizes that the U.S. Constitution—unlike the German—does not include entrenchment clauses protecting substantive rights from constitutional amendment. 1 ACKERMAN, WE THE PEOPLE, *supra* note 17. This point is of uncertain significance, since the Constitution has no clauses entrenching procedures either.

21. For example, we ought not to appeal to them in interpreting the open-ended clauses of the Constitution.

22. This paragraph summarizes themes in DAHL, DEMOCRACY, *supra* note 19, at 163-92, 280-310.

23. For criticisms of pluralist skepticism about the common good, see THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979).

24. DAHL, DEMOCRACY, *supra* note 19, at 283.

ory without endorsing it as political philosophy.²⁵ Still, the many variants of it are animated by a common thought about the implications of moral pluralism for modern politics: that the only political consensus we can reasonably hope for is confined to democratic political procedures, say, "the right to vote and freedom of political speech and association, and whatever else is required for the electoral and legislative procedures of democracy"²⁶

Borrowing terminology from Rawls, democratic pluralism endorses (as consistent with moral pluralism) the idea of *constitutional consensus*—an agreement on the "political procedures of democratic government."²⁷ But it rejects the possibility that Rawls holds out—a *deeper and broader overlapping consensus*. A consensus is *broader* if it extends beyond political procedures and the rights required for them, to matters of liberty of conscience and freedom of thought, fair equality of opportunity, and fair distribution; it is *deeper* if it reaches conceptions of the person and such abstract values as fairness, rather than simply rules and principles.²⁸ Democratic pluralism, then, rejects depth and breadth not as intrinsically unattractive, but as incompatible with moral pluralism.²⁹

My disagreements with democratic pluralism extend to issues of breadth and depth. To present those disagreements, I will sketch (in Part I) some background about Rawls's conception of justice as fairness, which will serve as an illustration of a view committed to both procedural and substantive norms. Here I will outline the substantive elements of Rawls's view, trace his path to the idea of an overlapping consensus on a substantive conception of justice, and locate the precise force of Hampshire's objection. Then (in Part II) I will present a response to the democratic pluralist view, explaining—to use Rawls's terms—the connections between constitutional and overlapping consensus. I will suggest that the distinction between procedure and substance is not a fundamental distinction in political justification, and

25. Ely's case for democratic pluralism is based centrally on its alleged fit with the Constitution, not on general considerations about justice or political legitimacy. See ELY, *supra* note 16, at 87-101. For criticism of the case, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J 1063 (1980).

26. POLITICAL LIBERALISM, *supra* note 1, at 159.

27. *Id.*

28. On breadth and depth, see *id.* at 149-50, 158-59, 164-67. Rawls presents his discussion as a response to Kurt Baier, and does not connect the distinction between constitutional and overlapping consensus with the broader tradition of democratic pluralism. These connections are suggested, however, by his remarks on Ackerman and the idea of constitutional breakdown in *id.* at 237-40.

29. This statement requires certain qualifications in the case of Dahl's view as presented above, though the qualifications do not undercut the central point of contrast.

that, contrary to Hampshire's assertion, democracy is a substantive, not simply a procedural, ideal.³⁰ More precisely, I will argue that *if*—I underscore the conditional—*if* moral pluralism is consistent with procedural or constitutional consensus, then it is consistent, too, with substantive, overlapping consensus. Procedural and substantive concerns stand on a common footing in democratic thought.

I emphasize that my skepticism about the depth of the procedure-substance distinction is equally friendly to three quite different political philosophies, which might loosely be called "nihilist," "communitarian," and "democratic-egalitarian." The nihilist affirms that procedure and substance are on a par, accepts moral pluralism, and argues that moral pluralism undermines both procedural and substantive consensus.³¹ The communitarian agrees that they are on a par, is concerned that moral pluralism undercuts both, but, with an eye to affirming both sorts of consensus, resists moral pluralism—either denying it as a fact or urging moral consensus as an attractive and reasonable ideal.³² The democratic-egalitarian thinks that they are on par, accepts moral pluralism, but denies that such acceptance defeats the possibility for substantive consensus. Despite their differences, however, these three views converge in rejecting the democratic-pluralist claim that moral pluralism drives a wedge between procedural and substantive values.

I. SUBSTANTIVE JUSTICE AND MORAL PLURALISM

To this point I have followed Stuart Hampshire's practice—the conventional practice—of using the terms "procedure" and "substance" without much explanation. I propose now to give some content to the distinction, and to that end will make a few remarks about the conception of justice in *A Theory of Justice*.³³

30. See JOSHUA COHEN & JOEL ROGERS, ON DEMOCRACY 146-83 (1983); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17 (Alan Hamlin & Philip Pettit eds., 1989); Joshua Cohen, *The Economic Basis of Deliberative Democracy*, 6 SOC. PHIL. & POL'Y 25 (1989).

31. See, for example, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

32. Michael Walzer's emphasis on the role of shared understandings in procedural and substantive political argument might be understood as denying moral pluralism as a fact; Michael Sandel's account of the limits of justice, and Alasdair MacIntyre's concerns about interminable moral disagreement, suggest that moral consensus is an attractive and reasonable ideal. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984).

33. JOHN RAWLS, A THEORY OF JUSTICE 204 (1971) [hereinafter A THEORY OF JUSTICE].

A. Reconciling Liberty and Equality

A Theory of Justice proposes a conception of justice for a constitutional democracy that would allow, as Rawls puts it, "a reconciliation of liberty and equality."³⁴ Rawls's first principle calls for *equal basic liberties*, political and civil, and for assurances of a *fair value for political liberty*—guarantees that inequalities of income and wealth do not translate into unequal political influence.³⁵ His second principle requires that life chances not be affected by social class at birth—*fair equality of opportunity*—and that socioeconomic inequalities work to the maximal advantage of the least advantaged, mitigating the effects of the natural lottery—the *difference principle*.³⁶ Assume that the value of the equal liberties to a person is an increasing function of that person's absolute command of resources.³⁷ Then since the first principle assures equal liberties, and the second principle maximizes the minimum command of resources, the two together require maximizing the minimum worth of liberty. Thus the reconciliation of liberty and equality.

Let's return now to the distinction between procedure and substance. The best way to draw that distinction is controversial; but on any way of drawing it, Rawls's reconciliation of liberty and equality—his concern to present a conception of justice that draws on the central political values of liberal and egalitarian traditions in modern democratic thought³⁸—includes elements of substance as well as procedure.

Take the first principle. It includes guarantees of religious liberty, and liberty of conscience more broadly—not matters of fair proce-

34. See *id.* at 204.

35. On the basic liberties, see POLITICAL LIBERALISM, *supra* note 1, at 294-99; on the fair value of political liberty, see *id.* at 324-31, 356-63. Rawls sharply criticizes the Supreme Court's claim in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), that regulations to ensure fair value represent impermissible abridgements of expressive liberty, that, in the Court's words, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." See POLITICAL LIBERALISM, *supra* note 1, at 359-63. The Court has now taken an important first step in rejecting the claim in *Buckley*. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding a Michigan law prohibiting corporations from using general treasury funds for independent expenditures in connection with state candidate elections) represents a fundamental break with the *Buckley* framework. It expands the conception of "corruption" beyond *quid pro quo* to concerns about unfair influence.

36. A THEORY OF JUSTICE, *supra* note 33, at 56-83.

37. That is, not dependent on their relative position in the distribution. This is not true for the political liberties. See the discussion of the "limited space" of the political process in POLITICAL LIBERALISM, *supra* note 1, at 324-31 (especially see 328-29). Thus the special requirement of fair value. For a more general discussion of relative positions, see A THEORY OF JUSTICE, *supra* note 33, 530-41.

38. As is suggested in POLITICAL LIBERALISM, *supra* note 1, at 9, 22, 34-35.

dure.³⁹ To be sure, some aspects of freedom of thought and expression arguably have procedural value. Consider expression that is, in Cass Sunstein's sense, political: "*intended and received as a contribution to public deliberation about some issue.*"⁴⁰ Even in the case of political expression, however, it is not clear that procedural considerations provide a compelling rationale for stringent protection.⁴¹ And in any case the procedural rationale is limited: much artistic and scientific expression is neither intended nor received as a contribution to public debate.⁴² Same for rights of bodily integrity and for the liberties associated with the rule of law. The right to a fair trial is, in a way, procedural, but the procedure is not political democracy. Moreover, while the fair value of political liberty is arguably procedural, it is not intrinsic to democracy, understood simply as a system with universal suffrage and regular, competitive elections.

Or consider the second principle. Fair equality of opportunity is a substantive, egalitarian ideal, condemning differences in chances that trace to differences in social position. It is not a matter of fair procedures of conflict resolution or collective choice. And the egalitarian conception of the common good expressed in the difference principle,⁴³ too, is fundamentally a matter of substance, not procedure.⁴⁴

39. See 1 ACKERMAN, *WE THE PEOPLE*, *supra* note 17, at 14; ELY, *supra* note 16, at 94. According to Ely, attributions of nonpolitical functions to the First Amendment's free speech guarantee suffer from the "smell of the lamp." But he also says that "the obvious cannot be blinked: part of the explanation of the Free Exercise Clause has to be that for the framers religion was an important substantive value . . ." *Id.* This combination of views is puzzling. Why insist that the Free Speech Clause must be interpreted procedurally, given the substantive basis of the Free Exercise Clause?

40. This is Sunstein's definition of political speech in CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 130 (1993). Variations on the idea that the Constitution's free speech guarantee is about democracy have been advanced in ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (Oxford Univ. Press 1968) (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Owen M. Fiss, *Why The State?*, 100 *HARV. L. REV.* 781 (1987); ELY, *supra* note 16.

41. For criticism of the procedural rationale, see RONALD DWORKIN, *The Forum of Principle*, in *A MATTER OF PRINCIPLE* 33, 61-65 (1985).

42. I believe that it is more limited than Rawls thinks appropriate, but his discussion of freedom of expression in *POLITICAL LIBERALISM*, *supra* note 1, at 331-40 is not clear on this issue. In places, he emphasizes the connection between speech, the capacity for a sense of justice, and politics. *E.g.*, *id.* at 335, 337. But the general framework of argument about basic liberties draws on both the capacity for a sense of justice and the capacity for a conception of the good, *id.* at 331-40, and this provides the basis for wider guarantees. Aspects of expression that are not connected to politics will sometimes be linked to the capacity for a conception of the good. See my discussion of the deliberative and expressive interests in Joshua Cohen, *Freedom of Expression*, 22 *PHIL. & PUB. AFF.* 207 (1993).

43. On the egalitarianism of the difference principle, see *A THEORY OF JUSTICE*, *supra* note 33, at 100-08. For criticisms, see G.A. Cohen, *Incentives, Inequality, and Community*, in *13 THE TANNER LECTURES ON HUMAN VALUES* 263 (Grethe B. Peterson ed., 1992).

44. I say "fundamentally" because of the role of the idea of pure procedural justice in the account of the difference principle: a distribution satisfies the difference principle just in case it is

In short, the proposed reconciliation of liberty and equality is crystallized in five elements of substantive justice:

- (1) rights of conscience;
- (2) rights of expressive liberty (not confined to political speech);
- (3) fair equality of opportunity;
- (4) the fair value of political liberty (perhaps); and
- (5) the difference principle.

The first two are associated with liberalism; the next three with egalitarianism. Put them together, and you have the promised reconciliation of values of liberty and equality.⁴⁵

It might be said that all these elements of substantive justice are, in Rawls's own theory, fundamentally procedural. The justification for them appeals to the original position, a fair procedure of collective choice. I cannot explore this in detail now. Suffice it to say that it is misleading to think of the original position as procedural rather than substantive.⁴⁶ The parties in the original position have, for example, various higher-order interests—including the interest in forming and revising a conception of the good—and those interests are the sources of some of the requirements of substantive justice (e.g., liberty of conscience and expressive liberty).⁴⁷ But it is not clear that the original position would be less procedurally fair if the parties were not assumed to have those interests. Moreover, it would be no objection to the view I am presenting if procedural ideals issued in substantive requirements of justice: that would prove, not disprove, that procedural and substantive values come as parts of a package, and that moral pluralism does not drive a wedge between them.

the outcome of playing the political-economic game according to fair rules. So fairness in the rules translates into fairness in the result. See *A THEORY OF JUSTICE*, *supra* note 33, at 83-90. But the rules are not standards of collective choice, and—more to the point—the case for the fairness of the rules is made by reference to expected outcomes, in particular the expectations under the rules for the least advantaged. Because the justification appeals to expected outcomes, it is misleading to think of the difference principle itself as procedural.

45. Moreover, this reconciliation is supposed to proceed in a way that also achieves the "good of community." I have in mind the ideal of a well-ordered society as a social union of social unions with a consensus of principles of justice and the shared end of upholding justice, as defined by those principles. On the connection between a well-ordered society and the values of community, see *A THEORY OF JUSTICE*, *supra* note 33, at 395-587 (especially the summary at 577-87).

46. As Rawls suggests in *A THEORY OF JUSTICE*, *supra* note 33, at 120, 136.

47. On these highest-order interests, see *POLITICAL LIBERALISM*, *supra* note 1, at 29-35, 72-77, 299-315.

B. Reconciliation and Moral Pluralism

I have drawn my sketch of the elements of substantive justice in Rawls's view entirely from *A Theory of Justice*. According to *Political Liberalism*, the more recent modifications of his views do not require any change in those elements.⁴⁸ Nor do they require any substantial change in the arguments for them, beyond emphasizing that the arguments are political: that the principles are designed for the basic structure, that the case for them is to be presented independently of any comprehensive moral view, and that they express values and ideals implicit in democratic practice.⁴⁹

The difference in *Political Liberalism* is its emphasis on the moral diversity characteristic of a just society. With liberties of conscience, expression, and association, and the resources needed to exercise those liberties, citizens will endorse the axioms, so to speak, of different religions and first philosophies⁵⁰ (many people of course will have, as now, more loose-jointed views with no axioms).⁵¹ Practical reason, operating under the favorable conditions provided by the basic liberties, does not produce convergence in evaluative conception.

Hampshire's concerns enter here. Consider a society regulated by Rawlsian principles, or any substantive conception. Why should we expect the moral views that flourish in such a society to support those principles: why will the principles be derivable from within or even consistent with those diverse systems? We can ask a parallel question about the ideal of a fair system of cooperation among free and equal moral persons.⁵² Citizens in a democratic society may be *familiar* with those political ideas and values from the "political institutions of a constitutional regime and the public traditions of their interpretation"⁵³ associated with constitutional democracy. But familiarity famously breeds many things. Why expect that those political values will be embraced by the moral conceptions that find favor among the members of such a system? In sum: why expect an overlapping con-

48. See POLITICAL LIBERALISM, *supra* note 1, at 6-7 & n.6; see also Joshua Cohen, *Moral Pluralism and Political Consensus*, in THE IDEA OF DEMOCRACY 276, 277-78 (David Copp et al. eds, 1992).

49. On the idea of a political conception of justice, see POLITICAL LIBERALISM, *supra* note 1, at 11-15.

50. The protection of these liberties is sufficient, not necessary. The suppression of liberties does not eliminate (or perhaps even limit) moral diversity; it drives such diversity underground.

51. On loose-jointedness, see STEPHEN HART, WHAT DOES THE LORD REQUIRE?: HOW AMERICAN CHRISTIANS THINK ABOUT ECONOMIC JUSTICE (1992).

52. POLITICAL LIBERALISM, *supra* note 1, at 13-22.

53. *Id.* at 13. This familiarity is required for a political conception of justice.

sensus, broad enough to encompass substantive principles, deep enough to include conceptions of person and society?

This is not, I emphasize, the same as asking whether our values endorse the principles, or whether most moral views endorsed over the course of history have endorsed the principles, or whether reasonable moral views, however defined, converge in accepting the principles and the political values that they articulate. The question instead is about the legitimacy of the basic institutions in a society regulated by a conception of justice that embraces liberal and egalitarian political values. Formulated as a test for an acceptable conception of justice (a necessary but not sufficient condition), the question is: would the comprehensive views that flourish within a society regulated by a conception of justice that aims to reconcile values of liberty and equality uphold that conception? Would they endorse a rationale for the conception that draws on certain abstract ideas of fair cooperation and of persons as free and equal? And would they accept the requirement that political justification proceed on the ground made available by that conception and the abstract ideas associated with it?

C. *Revisiting Hampshire*

According to Hampshire, the answer to each of these questions is: *no*. The fact that "moral and religious sentiments . . . are in their essence exclusive and divisive" requires that we give up on the ideal of a consensus on substantive principles of justice.⁵⁴ Different views—not unreasonable, except in a question-begging sense—converge only in acknowledging such great evils as "murder and the destruction of life, imprisonment, enslavement, starvation, poverty, physical pain and torture, homelessness, friendlessness,"⁵⁵ and in recognizing the need for fair procedures of negotiation to avoid those evils and ensure a "peaceful and coherent society."⁵⁶ But in the face of disagreements on substantive justice that follow (he supposes) from moral disagreement, not all views about the requirements of justice can be simultaneously satisfied: someone must lose by the lights of his/her own views

54. Hampshire, *The New Twist*, *supra* note 1, at 46.

55. INNOCENCE AND EXPERIENCE, *supra* note 5, at 90.

56. *Id.* at 73. More precisely, Hampshire's thought is that the evil of the conditions and practices noted in the text is not so much acknowledged as presupposed by conventional moral reasoning: "These are some of the constancies of human experience and feeling presupposed as the background to moral judgments and arguments," *id.* at 90, in the way that the absence of spontaneous disappearances of middle-sized objects is a constancy presupposed as background to perceptual judgments. This is the core of Hampshire's response to Humean subjectivism about value. *Id.* at 81-110.

of justice. That, together with an acknowledgement of the great evils and the need for fair procedures to avoid those evils, suggests that we can—in a slogan that I will be returning to later—reasonably demand only to be heard. By contrast, it is fanaticism to insist as a general matter on winning, to place one's own substantive views—whether liberal or traditionalist—above the requirements of fair bargaining.⁵⁷ And it also betrays fanaticism, or perhaps an allegiance to the Platonic myth “of a sovereign reason which can secure a consensus,”⁵⁸ or maybe simple wishful thinking, to expect agreement on a conception of justice that embraces and reconciles values of liberty and equality (and community!). Egalitarian and liberal elements must both be dropped in favor of the more minimal conception of justice as fair process. That is the force of the democratic pluralist critique of substantive justice.

II. CONNECTING PROCEDURE AND SUBSTANCE

I want now to explore this claim about the different relations that procedural and substantive principles bear to pluralism. I will argue that democracy is, in its *preconditions*, *implications*, and *rationale*, a substantive as well as procedural ideal. So if—note again the conditional—pluralism does not defeat a procedural consensus, then neither does it exclude a deeper and broader overlapping consensus. By the end, I hope to have made the case that the ideal of democracy provides a basis for substantive values of liberty and equality of the kind that justice as fairness aims to reconcile⁵⁹—that democracy is not simply, as Hampshire says, a matter of procedure, and that the prospects for overlapping consensus are on a par with the prospects for constitutional consensus.

A. *Preconditions*

To begin with, then, consider some of the substantive preconditions of democracy. I will distinguish three categories of such preconditions⁶⁰:

- (1) rights implicit in the idea of democratic process;

57. The fanaticism consists in requiring “other persons to observe duties and obligations, and to develop specific virtues, without providing them with any reasons for abandoning their previous conceptions of the good” and for accepting an alternative. INNOCENCE AND EXPERIENCE, *supra* note 5, at 146.

58. Hampshire, *The New Twist*, *supra* note 1, at 46.

59. See five elements of substantive justice *supra* p. 597.

60. On the first two categories, see DAHL, DEMOCRACY, *supra* note 19, at 163-75.

(2) rights and other conditions that are not implicit in the idea but required as a supporting framework for an open democratic process; and

(3) rights and other conditions required to encourage consent to democratic outcomes.

I emphasize that these categories do not correspond to particular rights and conditions, but instead specify the abstract roles of rights and other background conditions.⁶¹ A single right may, then, play several roles, and this will be an important source of complexity in the right itself.⁶²

1. Implicit Rights and Conditions

Rights of suffrage are, in one way, *transparently* procedural. Without such rights, we have no democratic procedure; limit them, and you limit the inclusion (participation) and perhaps also the contestation (competition for office) essential to democracy.⁶³ But a variety of political liberties that are less transparently procedural might also be described as implicit in the democratic process: they can be provided with a rationale that connects them reasonably directly with procedural ideals.⁶⁴ Take, for example, the ideal of "an open and effective democratic process,"⁶⁵ and the associated conception of political legitimacy: that outcomes are legitimate if they trace to such a process. Arguably, liberties of political expression and association are implicit in this ideal; while their connection with the democratic process is less transparent than the connection of suffrage rights, they must be in place for a political process to be open and so for outcomes to be legitimate.⁶⁶

This point is of course welcome to democratic pluralists: indeed I take it from them, and do not suggest that rights of expression, for example, are substantive. (They do not fall into the five categories noted earlier.⁶⁷) Agreement on procedures is in part agreement on rights that are, as Dahl puts it, "part of the very conception of the

61. I thank Oliver Gerstenberg for stressing this point in correspondence.

62. See my discussion of the right of freedom of expression in Cohen, *supra* note 42.

63. On contestation and inclusion as two dimensions of democracy, see ROBERT A. DAHL, *POLYARCHY* 1-16 (1971).

64. Of course, the procedures themselves may have a substantive rationale. When I say here that a right, for example, has a procedural rationale, I mean only that it is required for a procedure. I am not addressing the rationale for the procedures, though *see* discussion on rationale *infra* pp. 612-15.

65. ELY, *supra* note 16, at 105.

66. Thus Ely says that the "central function" of the First Amendment is to "assur[e] an open political dialogue and process." *Id.* at 112.

67. *See* five elements of substantive justice *supra* p. 597.

democratic process.”⁶⁸ But it is important to note that if the democratic pluralist rests the case for rights of political expression and association on the claim that they are part of the “very conception” of democracy, then that conception must be richer than the minimal idea of democracy as a process characterized by regular elections, competing parties (political contestation), and universal suffrage (political inclusion). The conception must also include the idea that the political process is *open*, in ways that supplement those requirements. To explore the implications of this openness, consider the second category of preconditions: the rights and conditions that provide a supporting framework for democratic process.

2. Supporting Framework

One reason for thinking that the democratic process ought to be open—in the ways that are advanced by rights of political expression and association—is rooted in the value of fairness. For example, a process may fail to be open because it includes viewpoint-based restrictions on political expression. Such restrictions, though they apply to everyone, are unfair because they effectively disenfranchise those whose views they exclude.⁶⁹ Recall a central idea of democratic pluralism: that in the face of moral pluralism it is unreasonable to insist on winning, but reasonable to insist on being heard. People are effectively disenfranchised—not heard—when their views and interests do not count for anything because they are barred, despite their political rights, from exerting influence on the results of the political process.⁷⁰ Given effective disenfranchisement, it is not true that “interested parties have reasonable access.”⁷¹

Suppose, then, that the rationale for an open democratic process—the kind of process that democratic pluralists endorse—is based on a concern for fair influence. Then the commitment to openness has implications that extend beyond protections of the rights of political expression and association that are required to give substance to rights of participation. Considerable controversy surrounds the precise statement of a requirement of fair influence. Proposals might range from a requirement of *equal influence*, to an *assured minimum*

68. DAHL, *DEMOCRACY*, *supra* note 19, at 167.

69. They “might just as well be disenfranchised.” ELY, *supra* note 16, at 84.

70. Hampshire mentions a requirement of “reasonable access” as one element in the idea of procedural justice. INNOCENCE AND EXPERIENCE, *supra* note 5, at 141.

71. *Id.* The passage I quote from in the text suggests one element in a set of conditions on fair process.

value of political rights guaranteed, for example, by providing public support for education, or decent welfare minima,⁷² to a ban—as with Rawls's own *fair value* of political liberty—on inequalities of political influence that derive from unequal resources, achieved by supplementing education and welfare minima with floors under political expenditures or ceilings on them.⁷³ What seems undeniable, though, is the case for moving from democratic process to openness, then to fairness, and finally to fair influence—that is, for broadening a constitutional consensus to include some assurances of a supporting framework of rights and conditions that are neither transparently procedural, as are suffrage rights, nor directly required for openness, as are rights of political expression.

A different route will take us to a similar conclusion. I just suggested that an open political process is required to ensure fairness. But it is also important for informed and intelligent collective decisions, with “genuine argument and counter-argument.”⁷⁴ Consider again the case against viewpoint-regulation in the area of political expression. Such regulation is not simply unfair to those whose views are restricted; it is also troubling from the point of view of reflective and deliberative collective choice. In Meiklejohn's terms, it impairs “the thinking process of the community.”⁷⁵

This deliberative case for free expression again provides a rationale for broadening the constitutional consensus, extending it to substantive assurances of, for example, an educated citizenry and the public good of well-conducted political debate. As the Massachusetts Supreme Judicial Court said in a recent decision:

[T]he Commonwealth has a duty to provide an education for *all* its children, rich and poor [and] this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government⁷⁶

72. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), rejects the claim that local financing of school districts violates a Constitutional guarantee of the worth of citizenship rights. But the Court did not reject the claim that the Constitution sets a threshold below which the worth of those rights cannot fall. They argued instead that there was no showing of a failure to come up to that threshold: “no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.” *Id.* at 37.

73. See Rawls on the fair value of political liberties in *POLITICAL LIBERALISM*, *supra* note 1, at 324-31, 356-63; Dworkin on the political leverage that would be guaranteed by ensuring equality of resources, in Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 21-22 (1987).

74. *INNOCENCE AND EXPERIENCE*, *supra* note 5, at 141.

75. *MEIKLEJOHN*, *supra* note 40, at 27 (emphasis omitted).

76. *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516, 548 (1993).

3. Conditions of Consent

The third category of preconditions I will call "conditions of consent." Intuitively, the idea is that consent to the outcomes of a democratic process requires that certain fundamental interests not be effectively "up for grabs" in that process.⁷⁷

Consider a religiously pluralistic society, with a constitutional consensus. Everyone agrees to resolve their disagreements through democratic processes, and all the rights that are plausibly required for the democratic process are in place and form part of the consensus. Assume, too, that there is no consensus on the free exercise of religion, no overlapping consensus, as Rawls defines it.

Suppose now that a constitutional amendment is passed requiring Sunday worship. The amendment does not impose a religious test for office; that would directly implicate the democratic process, inconsistent with the assumption of constitutional consensus. Despite the amendment, then, universal political liberties and liberties of political expression remain fully in place, permitting opponents of the amendment to argue for its repeal.

So we have a case in which limits on rights of free exercise do not directly implicate the fairness of the procedures of collective choice. Of course the members of the religious minority might say that those limits do raise issues of fairness—urging that a *fair* procedure is a procedure that yields fair outcomes, and that, since the outcome is not, the procedure is not. Assessments of the fairness of procedures—from race-conscious districting to requirements of supermajorities—are, of course, commonly assessments of the merits of the procedures at protecting important interests and values. But if a charge of unfairness is raised, then there is not really the consensus on the fairness of the procedure, which, for the purposes of the example, I have stipulated to hold. (I will say more on this issue below.)

Now there is much to be said about what is wrong with the Sunday worship amendment. I want here to confine myself to the following question: Is consensus on a democratic process that permits this result really more plausible than consensus on a democratic process that rules it out? Let me fill out the example. I am assuming that members of the different religious traditions take their religious views to impose obligations on them, including obligations about the day of

77. See, for example, the discussion of "immunity rights" in ROBERTO M. UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 524-30 (1987).

worship; seen from the inside, so to speak, the requirements are not matters of preference or choice. But how, then, could they possibly consent to a process which might realistically issue in regulations of their day of worship? The prospects of procedural agreement—of a shared willingness to accept a constitutional scheme of collective choice—are increased, then, when that constitution also works to “reduce the stakes of political battles.”⁷⁸ And such reduction must proceed in part by ensuring that certain nonprocedural rights and interests will not be subject to political interference.⁷⁹

One response to this, institutionally speaking, is a court with powers of judicial review which has the responsibility to protect religious liberty.⁸⁰ But I am not making a case here for judicial review, and other institutional possibilities may do as well—including a less majoritarian, more consensual (say, consociational or super-majoritarian) form of democracy that effectively institutionalizes a requirement of general approval of legislation touching on religious exercise.⁸¹ Pointing to this latter possibility, the democratic pluralist might say that the example does not really show a need for an agreement on something other than a fair democratic procedure but rather shows what form of democracy is fair, given circumstances of religious division.

But that gives away the game. Let me explain.

78. See ADAM PRZEWSKI, *DEMOCRACY AND THE MARKET* 36 (1991). Przeworski uses the point in the text as part of an argument for a purely procedural constitution. Constitutions that reduce the stakes of political battles “define the scope of government and establish rules of competition, leaving substantive outcomes open to the political interplay.” *Id.*

It is not clear what Przeworski means by “substantive,” but it is hard to find an interpretation that fits the U.S. case, with constitutional protections of religion and of different sorts of substantive due process rights, or the entrenchment provisions in the postwar German Constitution.

79. See Rawls’s discussion of the value of taking certain matters off the political agenda. *POLITICAL LIBERALISM*, *supra* note 1, at 151, 157, 161. “Faced with the fact of reasonable pluralism, a liberal view removes from the political agenda the most divisive issues, serious contention about which must undermine the bases of social cooperation.” *Id.* at 157. To remove an issue from the political agenda is, of course, not to forbid people from discussing it, writing books about it, or forming organizations to promote a particular outlook on it. For this reason, Seyla Benhabib’s concerns about removing issues from the agenda seem misplaced. See SEYLA BENHABIB, *Models of Public Space*, in *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 89, 106-07 (1992).

80. The virtues of a court as a device for protecting rights are a matter of controversy. See DAHL, *DEMOCRACY*, *supra* note 19, at 187-91; Jonathan D. Casper, *The Supreme Court and National Policy-Making*, 70 *AM. POL. SCI. REV.* 50 (1976); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. PUB. L.* 279 (1957).

81. On consociationalism and the general distinction between consensual and majoritarian democracies, see AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* (1984); Arend Lijphart, *The Southern European Examples of Democratization: Six Lessons for Latin America*, 25 *GOV'T & OPPOSITION* 68 (1990).

Democratic pluralism appeals to the idea of a procedural consensus. We can think of such a consensus in either of two ways. According to the first, the domain of the procedural is defined by certain practices, say the practice of proportional representation, or of judicial review. According to the second, it is defined by certain values. Let's say that a procedural value is a value used for the assessment of procedures without regard to the results of those procedures. For example, "fair influence" is a procedural value if we understand it as requiring that differences of influence not be explained by class position, and do not defend this value by reference to its importance for equitable outcomes.

I am taking the idea of a procedural consensus in the second way, as a consensus on procedural values. But—coming back to the point about giving away the game—if we say that, for example, a more consensual (consociational or supermajoritarian) democracy is procedurally more fair *because* it better protects interests in the free exercise of religion, then we are agreeing that procedural agreement depends in part on substantive agreement: not, to be sure, on religious agreement, but agreement on the importance of the interest in free exercise (the interest in fulfilling what a person takes to be his or her religious obligations). Or suppose it is argued that a form of democratic process that protects nonprocedural liberties is not more fair as a process, but simply more likely to be stable. Even that suffices for the purposes of the argument about the substantive preconditions of democracy. For that argument aims to show that agreement on the value of fair democratic process is, morally speaking, no more demanding than agreement on what are conventionally understood as nonprocedural matters. So if agreement that justice requires fair procedures is consistent with moral pluralism, then—given the connections between procedure and substance—agreement on substantive requirements is also consistent with moral pluralism: e.g., requirements ensuring basic liberties of conscience and the fair value of political liberty.

B. Implications

I now turn to a second line of argument, focused not on the substantive preconditions of democratic process but on its implications, that is, on the appropriate outcomes of a democratic process. To introduce the second category, I will start with a detour through a point about procedural and substantive justice that Hampshire makes in *Innocence and Experience*.

1. Hampshire on Substantive Justice

Hampshire distinguishes procedural justice, which imposes "absolute duties," from substantive moralities, including substantive conceptions of justice. Duties to support procedural justice—by normally complying with fair procedures—are absolute in two ways: they are not derived from or dependent upon particular substantive conceptions and, though not always overriding, they normally take precedence over the values of such conceptions.⁸² An acknowledgement of the values of procedural justice might arise from a recognition that pain, suffering, cruelty, humiliation, starvation, and misery are great evils;⁸³ an awareness that fair procedures of dispute resolution are required to prevent such evils; and a general unwillingness to subordinate a concern to avoid those great evils to any of the substantive values of one's own moral conception.⁸⁴ The duties are absolute, then, in part because that recognition, awareness, and unwillingness are available to people who endorse a wide range of substantive moral doctrines—to the proponent of liberal justice, who also attaches special weight to individual rights, perhaps for reasons of autonomy or self-improvement; and to the proponent of a traditionalist conception, troubled about the corrosive effects of rights on the community's way of life.⁸⁵

The conjunction of the fact of moral diversity⁸⁶ with the absolute value of fair procedures might suggest that all questions of substantive justice are, so to speak, up for grabs: the justice of a practice would depend on the society one is asking about and what its members would agree to. That, in turn, would rest on the substantive moralities prevalent in the society.

82. *INNOCENCE AND EXPERIENCE*, *supra* note 5, at 140.

83. That these are great evils is not controversial; indeed it is presupposed by conventional moral reasoning. *INNOCENCE AND EXPERIENCE*, *supra* note 5, 81-110.

84. Hampshire appears to advance three arguments for the absolute duty of justice. One is the argument from the great evils sketched in the text. *Id.* A second is an argument from individuality, *id.* at 113-36, while a third treats fairness itself as a fundamental value. *Id.* at 153-54. See Joshua Cohen, Hampshire on Morality and Justice (Jan. 7, 1994) (unpublished manuscript, on file with the author).

85. Hampshire acknowledges that there are moral views—associated, for example, with extreme forms of religious fundamentalism—that lack the resources for supporting the great value of justice, even in "all normal circumstances." *INNOCENCE AND EXPERIENCE*, *supra* note 5, at 140, 144-46. Hampshire calls such views "evil moralities," distinguishing them both from views that accept the absolute duty of justice and from the Nazi rejection of morality. *Id.* at 66-72, 76-77.

86. *Innocence and Experience* also emphasizes the positive value of such diversity, which is rooted in human imagination—standing alongside reason as a "fundamental power of mind," *INNOCENCE AND EXPERIENCE*, *supra* note 5, at 48,—and an associated "drive to radical diversity and individuality." *Id.* at 33. See generally *id.* at 32-38, 41-48.

But Hampshire rejects this relativism.⁸⁷ He mentions five practices, not themselves matters of fair procedures for dispute resolution, each of which is unjust under all circumstances. Slavery is one, but so, too, are royal absolutism, unregulated factory labor, the absence of fair opportunities for women, and the unlimited accumulation of vast fortunes.⁸⁸ Of course, people have not always regarded them as unjust. But the failure to recognize their injustice must be understood as “the blindness of reasonable persons.”⁸⁹

Hampshire’s thought seems to be that the survival of certain practices—for example, slavery—is contingent on the common perception of them as natural and unchangeable and so not proper topics for a *practical* reason concerned with what is attainable through action. But the scope of practical reason is not permanently fixed. And once these practices are subjected to practical challenge, they become proper topics of public discussion, depriving the metaphysical rationale of its force. But no other rationale is available for them.⁹⁰ Put together, then, the idea that justice is a matter of fair procedure with the power of deliberative reason to dissolve false necessities, and you have the conclusion that certain practices are unjust because they could not ever be the *outcome* of a fair procedure of dispute resolution, in which the participants are not blind to real possibilities.⁹¹

It is not clear from Hampshire’s account precisely why they could not emerge—how the conjunction of an expanded sense of possibility with a procedural view of justice yields the injustice of slavery, absolute monarchy, unregulated factory labor, the exclusion of women, and the unlimited accumulation of wealth. And that uncertainty reflects the fact that Hampshire—as is commonly true with defenders of procedural views—does not explain what makes a procedure fair.⁹² If, for example, unconstrained majority rule is a fair procedure, then any of the unjust practices could be approved of, given the right distribu-

87. Amy Gutmann appears to attribute such relativism to Hampshire in Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. & PUB. AFF. 171 (1993).

88. INNOCENCE AND EXPERIENCE, *supra* note 5, at 55-59, 63.

89. *Id.* at 58.

90. Hampshire does not explain why this is so. One natural explanation is that the practices put such great burdens on some people that they cannot be justified except if those burdens are understood to be naturally necessary.

91. Hampshire’s view of historical possibility is, I think, too simple. For an interesting and more subtle view of the terrain, and the complexities it raises for ethical thought, see BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 160-67 (1985).

92. A rough sketch of the “minimum decencies of procedural justice” is provided (implicitly) at INNOCENCE AND EXPERIENCE, *supra* note 5, at 140-41.

tion of preferences; similarly if bargaining from a Hobbesian state of nature is a fair procedure.⁹³

I assume, then, that Hampshire has in mind a richer and more attractive conception of a fair procedure: not simply as an institutionally tamed conflict of interests, but as a procedure in which people advance reasons in favor of outcomes, reasons reflecting their own comprehensive moral conceptions. His point, then, is that certain practices, once subjected to challenge, are revealed as wholly lacking in rational defense. However much some people may like and benefit from them, no adequate reasons can be given for the burdens they impose.

This, then, gives us another basis for rejecting a fundamental procedure-substance distinction: begin with a conception of fair procedure and a consensus on that conception. Practices are unjust if they could not be the *outcome* of that procedure because they could not be given a rational defense by those who accept the fairness of the procedure, given a correct understanding of real possibilities. Their injustice is, in principle, no more controversial than the justice either of the procedures, or of the preconditions that must be in place for those procedures themselves to obtain. In particular, it can be established without relying on any specific conception of the good, if the justice of the procedures can be so established.

2. Democratic Procedure and Depth

The claims of substantive justice that Hampshire thinks are not socially relative are of very great historical importance; but they are also rather limited: in particular, they are not sufficiently broad to cover the five elements I identified earlier in my remarks on Rawls's reconciliation of liberty and equality (liberty of conscience, etc.). Moreover, on the dimension of depth, they do reach down to the conception of citizens as free and equal. These limits on breadth and depth are, however, partly a result of the very abstract description of the procedure that constrains substantive justice: thus far, we have said only that it is an institutionalized, fair process of reason giving. This abstractness can, however, be remedied. For recall that we are assuming a constitutional consensus. So our concern is not merely with the substantive implications of fairness or reason giving generi-

93. On the chaotic character of majority rule, see Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); on bargaining from a Hobbesian state of nature, see JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975).

cally understood, but with the substantive implications of consensus on a specifically democratic procedure of conflict resolution.

Think, then, of the democratic process as one kind of institutionalized process of reason giving. What distinguishes it is the requirement of openness, of universal and fair access to political institutions: a strong condition of inclusion, which makes political access independent of social position or natural endowment.⁹⁴ Democracy, in short, is a procedure that institutionalizes an idea of citizens as equals. Agreement on the democratic process—a constitutional consensus—must also, then, constrain what can count as an acceptable reason within that process. For if one accepts the democratic process, agreeing that adults are, more or less without exception, to have access to it, then one cannot accept as a reason within that process that some are worth less than others or that the interests of one group are to count for less than the interests of others. And that constraint on reasons will limit the substantive outcomes of the process, in ways that supplement the limits set by the generic idea of a fair procedure.

Of course people can and often do violate this constraint. My claim is that moral pluralism causes no more trouble for the idea of a population who agree with the deeper political ideal of treating people as free and equal, and see their acceptance of the results of a fair democratic process as simply one aspect of that more comprehensive ideal, than it does for the idea of a population who accept the results of a democratic process because the process is open. In short, moral pluralism does not divide a more superficial constitutional consensus from a deeper overlapping consensus.

3. A Process of Deepening?

I have presented the point about equality and deepening as, in the first instance, simply an analytical matter, a claim about the implicit commitments of constitutional consensus. But reflection on the conduct of political argument under conditions of constitutional consensus suggests that it may have some practical force as well. A stable democratic process, in which individuals and parties seek to win support for their views and projects, puts some pressure on views to endorse the deeper idea of citizens as equal persons.

Dahl, for example, claims that the rationale for democracy lies in part in the idea of the intrinsic equality of human beings and the asso-

94. Hampshire counts "reasonable access" for "interested parties" as one of the "minimum decencies of procedural justice." *INNOCENCE AND EXPERIENCE*, *supra* note 5, at 141.

ciated requirement of giving equal consideration to the interests of citizens.⁹⁵ And he emphasizes that this requirement limits acceptable outcomes of the democratic process: it condemns discriminatory practices and mandates protections for a variety of rights and interests that are not preconditions for democratic process. Moreover—and this is the crucial point here—he discerns a “rough pattern” in the evolution of public opinion in stable polyarchies: “the idea of Intrinsic Equality . . . has steadily gained strength as an element in the constitutional consensus and political culture.”⁹⁶ Dahl urges that stable democracy requires constitutional consensus: a widespread belief in the value of democracy and “habits, practices, and culture” suited to that belief.⁹⁷ But he suggests as well that constitutional consensus tends to deepen: “public opinion in democratic countries tends to move toward an ever more inclusive commitment to ideas like intrinsic equality and equal consideration.”⁹⁸ And the strengthening of those ideas as elements of the public culture leads in turn—as an empirical matter, and not simply as a matter of analytical argument—to constraints on substantive outcomes of the democratic process, greater protections of nonpolitical rights and interests.

Dahl does not describe mechanisms that lead to this strengthening. But it is not hard to see how the deepening he describes might be generated by norms and practices of political argument under conditions of constitutional consensus. Consider the evolution of the political rhetoric and project of socialist parties in this century.⁹⁹ They begin the century with a class project, presenting themselves as agents of the industrial working class; they expect the maturation of capitalism to turn the working class into a majority of the population; and they understand that they can only sustain their claim to serve as an agent of the working class if they participate in democratic politics, winning near term gains by winning elections.

But the identification of the industrial working class with the emerging majority is overturned by events. And that sharpens the electoral dilemma of socialist parties: to win gains through elections they need to win elections. But winning elections means extending

95. On the points in this paragraph, see DAHL, *DEMOCRACY*, *supra* note 19.

96. *Id.* at 187.

97. *Id.* at 172.

98. *Id.* at 179.

99. Here I follow the discussion in ADAM PRZEWORSKI, *Social Democracy as a Historical Phenomenon*, in *CAPITALISM AND SOCIAL DEMOCRACY* 7 (1986).

their political appeal beyond the working class.¹⁰⁰ The result is that socialist parties—those that preserve electoral commitments—universalize their appeal, addressing themselves to all citizens as equals. They reinvent a universalistic politics, addressed to citizens generally, regardless of social position.¹⁰¹ According to Adam Przeworski, from whom I have borrowed this sketch:

Differentiation of the class appeal . . . reinstates a classless vision of politics. When social democratic parties become parties of "the entire nation," they reinforce the vision of politics as a process of defining the collective welfare of "all members of the society." Politics once again is defined on the dimension individual-nation, not in terms of class.¹⁰²

Perhaps, then, political argument under conditions of constitutional consensus itself encourages the conception of citizens as equals, thus deepening the terms of agreement. Moreover, to return now to the issue of fair process and permissible outcomes, this deepening in turn sets constraints on what can be agreed to in a fair procedure by limiting what can count as a reason within such a procedure. I have not yet examined the precise implications of these constraints. But that must wait, since those implications will be best understood after we have set out the third link between procedure and substance: the connection I have labelled "rationale."

C. *Rationale*

In motivating a substance-procedure distinction, democratic pluralists say—as I noted earlier—that given the diversity of interests and values, it is unreasonable to insist on winning, but acceptable to insist on being heard. But why is it reasonable to insist on being heard, as that requirement is understood under democratic conditions? Why is it reasonable to insist on access to open arenas of authoritative, collective decision-making? Addressing these questions—understanding the rationale of democratic procedure—will carry us, once more, beyond process to substance.

100. "This fact makes it rational for them to move out of the narrower circle of their own views and to develop political conceptions in terms of which they can explain and justify their preferred policies to a wider public so as to put together a majority." *POLITICAL LIBERALISM*, *supra* note 1, at 165.

101. What makes this a dilemma is that widening the appeal and redefining the nature of politics threatens socialist parties with a loss of working class support. For a discussion of the structure and dynamics of the resulting political calculus, see ADAM PRZEWORSKI & JOHN SPRAGUE, *PAPER STONES: A HISTORY OF ELECTORAL SOCIALISM* (1986).

102. PRZEWORSKI, *supra* note 99, at 28.

1. Expression and Recognition

Without making any claim to completeness, I want to mention two especially important considerations that support the reasonableness of a demand to be heard. They arise out of basic interests in expression and recognition.¹⁰³

The interest in *expression* is an interest in articulating thoughts, attitudes, and feelings on matters of personal or broader human concern, and perhaps through that articulation influencing the thought and conduct of others.¹⁰⁴ One aspect of the expressive interest is an interest in stating views about public affairs because of strongly held moral, religious, or political convictions about the proper conduct of politics, broadly understood. We do not all hold such convictions with the same intensity, scope, or determinateness. But most citizens have conscientiously held convictions that, in at least some cases, provide them with compelling reasons for addressing public affairs. And, I suggest, claims to equal political rights are in part rooted in the fact of those convictions. To be sure, under conditions of moral pluralism, citizens sometimes have opposing convictions and the reasons that some regard as compelling, others reject as insubstantial. Still, the failure to acknowledge the weight of those reasons for the agent—even if one does not accept them—and to acknowledge the claims to participate that emerge from them reflects a failure to accept the terms of an open democratic process, to endorse the constitutional consensus and the deeper idea of citizens as equals.¹⁰⁵

Claims to equal political standing are fueled, too, by the connection between such standing and a sense of self-worth, a connection rooted in the *public recognition* associated with equal standing.¹⁰⁶ Rousseau urged this point in his argument for direct democracy: "Once the populace is legitimately assembled as a sovereign body, all jurisdiction of the government ceases; the executive power is suspended, and the person of the humblest citizen is as sacred and inviolable as that of the first magistrate."¹⁰⁷ Rousseau's affection for a

103. The discussion of the expressive interest draws on Cohen, *supra* note 42, at 224-28.

104. I say "perhaps" because expression often has nothing to do with communication. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 51-54 (1989).

105. Hampshire's discussion of the fundamental value of individuality suggests a rationale, within a variety of comprehensive moralities, for the importance of the expressive interest. See *INNOCENCE AND EXPERIENCE*, *supra* note 5, at 113-34.

106. See Rawls on self-respect and the political liberties in *POLITICAL LIBERALISM*, *supra* note 1, at 289-371; CHARLES R. BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* 109-10, 123-213 (1989); Dworkin, *supra* note 73, at 4-5.

107. JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT*, bk. 3, ch. 14 (Judith R. Masters trans. & Roger D. Masters ed., 1978) (1762).

democracy of popular assemblies is not widely shared. But even if we reject his critique of representation, we can accept the force of his point: that rights of participation, political expression, and association are important in part because they provide public support for a sense of self-worth by providing public recognition of the equality of citizens, whatever their differences in human and social circumstances.¹⁰⁸

2. Extension

Suppose, then, that these expressive and recognitional interests contribute to the rationale for an open democratic process—the object of constitutional consensus. We need to ask now whether the implications of the expressive and recognitional interests can be confined to political procedures, or if instead they have substantive implications as well.

Take first the expressive interest. Recall that the expressive interest is implicated in open democratic procedure because important reasons, as identified by a person's moral, religious, or political convictions, require that person to address public matters. But such convictions also provide important reasons for expression on nonpublic matters: the expressive interest is not confined to speech that is "intended and received as a contribution to public deliberation about some issue."¹⁰⁹ Because the reasons require expression on nonpolitical matters, the case they provide for expressive liberties is not confined to discussion of issues of public concern. Moreover, given the role of religious and other conscientious convictions in setting a person's obligations, they provide a case for rights of conscience and religious liberty in areas with no special bearing on public affairs.

In short, the expressive interest, which provides part of the case for an open democratic process, also provides a rationale for substantive rights that are not implicit in or required for democratic procedure, and it strengthens the case noted earlier for basic liberties required to encourage consent to a democratic process.

A parallel case can be made about the interest in recognition, particularly when constitutional consensus deepens along the lines suggested earlier to include a conception of citizens as equals and associated conditions on acceptable political reasons.¹¹⁰ Beyond an open democratic process and the requirement of equal standing within

108. As Rawls urges in his discussion of the social bases of self-respect. See *POLITICAL LIBERALISM*, *supra* note 1, at 318-20 & nn.28-30.

109. SUNSTEIN, *supra* note 40, at 130.

110. See *supra* text accompanying note 90.

that process, the interest in recognition suggests the importance of nonprocedural norms—of a public understanding about equal opportunity and the fair distribution of resources that severs the fate of citizens and the worth of their liberties from the differences of social position, natural endowment, and good fortune that distinguish the free and equal members of a well-ordered society.

Take the difference principle as an illustration.¹¹¹ Assume that it is a matter of public understanding that justice demands maximizing the minimum, that inequalities can only be justified by the benefits they confer on the least advantaged, that citizens must forgo advantages when they would reduce expectations at the minimum. That understanding—part of a public sense of justice—serves as a way to express respect for those at the minimum and fully to affirm their worth as equals, supplementing the affirmation that is provided by rights to political liberties and a fair value of those rights. The difference principle does not simply require that departures from the distributional status quo work to the advantage of the least advantaged—that a rising tide lift all ships from their current positions. Instead it treats equality itself as a baseline, requiring that existing inequalities themselves are to the maximal advantage of the least advantaged. In this way, the difference principle provides an especially strong affirmation of the interest in recognition, suited to an understanding of the equality of citizens that, I suggested, a commitment to constitutional consensus itself encourages.

In short, start from a consensus on an open political process. Now constrain the process leading to agreement and the reasons that can figure in it by an idea of equality that emerges from the deepening of constitutional consensus. Add in the interest in recognition, which is itself part of the rationale of democratic process. The result is a case for the substantive norms of equal opportunity and fair distribution—a case that is no more dependent on appeal to a comprehensive conception of the good than is the case for the process itself.

CONCLUSION

That completes the case for connecting constitutional and overlapping consensus. I have sketched some links between procedural

111. See A THEORY OF JUSTICE, *supra* note 33, at 75-83. For discussion of the connections between the difference principle and the interest in recognition, see Joshua Cohen, *Democratic Equality*, 99 ETHICS 727, 736-43 (1989). Another view that might be used to illustrate the points in the text is Dworkin's equality of resources. See Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

values and important elements of substantive justice, and indicated as well how a constitutional consensus might deepen. More precisely, I have argued that an attractive conception of democratic process must include ideas of openness and reason giving. But any conception of democratic process that includes those ideas will also provide the resources for an account of substantive, and not only procedural, justice.

To conclude, I want briefly to consider three objections. I address these because they articulate a residual sense that there *must be* something right about the democratic pluralist's claim that moral pluralism forces the procedure-substance distinction on us. That claim can, I think, seem intuitively obvious in ways that immunize it from complicated (nonintuitive) considerations of the kind advanced in this paper. So I need to say something about what prompts people to find the democratic-pluralist view so intuitively plausible, and to respond to those promptings.

The first objection emphasizes that substantive agreement is more *demanding* than procedural in the perfectly straightforward sense that the substantive supplements the procedural; as comprehensive moral disagreement grows, then, the range of political values that can be supported by an overlapping consensus must correspondingly narrow. And as it narrows, the plausibility that we will be able to preserve the "surplus" of agreement on substance over and above a more minimal agreement on procedure must diminish.

It is certainly true that, as comprehensive moral disagreement grows, the range of political values that can be supported by an overlapping consensus correspondingly narrows. But this observation fails as a defense of a fundamental procedure-substance distinction. In fact, it assumes what needs to be shown: that disagreement might plausibly drive a wedge between procedure and substance, that procedural commitments are, in some relevant sense, more minimal than substantive commitments. Consider an analogy. Suppose the proposal is made to confine the term "theorem" to propositions whose provability is not in dispute between constructivists and realists in the philosophy of mathematics. Take someone who now endorses a realist philosophy and accepts this proposal; he/she will start to use the term "theorem" more narrowly. And as we extend the range of constructivisms that need to be accommodated (as they endorse increasingly strict forms of finitism), the class of theorems, according to the new usage, will narrow. But we can be sure of one thing: it cannot happen that we will end up with theorems about even numbers and not about odd. The underlying disagreements may grow; but they will never produce a cut

between odd and even numbers. By analogy, moral pluralism may reduce the range of possible agreement, and it will certainly exclude certain substantive ideas. But it will not yield a fundamental cut between procedure and substance. That simply is not a deep distinction.

The thought that it is—and here I come to the second objection—derives from the fact that people say, truthfully, that there are outcomes they find objectionable but which they would be willing to tolerate if they were given a fair chance to make their case. They do not regard the fact that a fair political process produces a bad legislative outcome—even a deeply morally objectionable outcome—as sufficient reason for condemning the process as unjust and for urging its replacement with an alternative.

But that is simply to assert what is not in dispute: that assuring fair procedures is an important political value, and that outcomes can sometimes be justified by being shown to result from a fair procedure. It does not follow from this undisputed truth that the only fundamental political values are procedural.

A final reason for thinking that the view I have advanced cannot be right—or anyway, cannot capture what Rawls is now arguing—is that I have not really taken moral pluralism seriously. I have not started from divergent moral conceptions, aimed to find points of convergence among them, and sought to show in particular that they converge in accepting substantive norms of justice.

This third objection reflects an unnecessarily narrow picture of how political argument is to accommodate moral pluralism, and an important confusion about Rawls's idea of a political conception of justice. Such accommodation need not deny the autonomy of political argument and turn political philosophy into a search for points of convergence among comprehensive moral views. Put otherwise, Rawls's idea of political liberalism is not that reasonable moral views converge on a common understanding of justice. Instead, the idea is to present, in the first instance, a complete political conception of justice, without drawing on or referring to comprehensive moral views. Then, with such a complete conception on hand, we can consider whether it would be supported by the range of reasonable moral conceptions that we expect to arise in a society governed by it. This paper has operated solely at the first stage—the stage of freestanding political argument that articulates and works out the implications of a set of ideas without presenting them as dependent on or rooted in any com-

prehensive moral view.¹¹² Whether these ideas can be supported by an overlapping consensus is another matter. But for my purposes the freestanding argument suffices. For my point, as I indicated at the outset, is that moral pluralism causes no more trouble for agreement on substance than for agreement on democratic procedure. Since the democratic pluralist does not exclude such a consensus—Hampshire finds nothing alarming in it—this suffices as a response to the democratic pluralist.

112. The idea of a freestanding conception of justice—and of what I am calling the autonomy of political argument—lies at the heart of *POLITICAL LIBERALISM*, *supra* note 1, at xvii, 11-14.