

I have had to deal with trade-offs between accessibility and thoroughness. To help make the points where accessibility trumps thoroughness more bearable for the academics, I have tried to flag the spots where crucial issues have been bracketed, and in some places I include in the footnotes some of the requisite detail. Where the discussion makes unavoidable the introduction of some nuance or complication that could test the patience of a non-academic reader, I try to slow down and raise a few examples. Unsurprisingly, neither of these strategies is perfect with respect to appeasing the incompatible demands of the different audiences that I am trying to address simultaneously, but this might be the best one can do. In any case, if this book stimulates reasoned criticism and counter-arguments from those who oppose my claims, I will have achieved some measure of success.

## CHAPTER I

*The problem of deep politics*

In the Introduction, I characterized the problem to which this book is addressed as that of finding an alternative to a Hobbesian war of all against all under conditions of moral pluralism. This characterization of the problem is, of course, very rough and imprecise. In order to make headway in understanding, and hopefully solving, the problem that moral pluralism sets for democratic politics, we will need to begin from a more detailed and nuanced analysis of that problem. This is what I provide in this chapter.

## I THE PARADOX OF DEMOCRATIC JUSTIFICATION

*Framing the paradox*

Imagine a society in which the legitimacy of the government – its institutions, procedures, laws, decisions, office-holders, and policies – is held to rest, at least indirectly, upon the consent of those it governs. Imagine further that action on the part of both the government and the citizenry is constrained by a set of rules specified in a public constitution. This constitution contains procedural provisions not only for holding regular elections, dividing political authority, checking political power, and punishing abuses, but also for its own criticism and revision. Additionally, let us say that the constitution specifies a set of protections for individuals from interference by the government, by foreign governments, and by other individuals, what is often referred to as a “menu” or “schedule” of rights and liberties. This menu specifies rights to hold and exchange property, to privacy, to equal protection under the law, to due process, and so on. In addition to these, the constitution also identifies rights of individual conscience. That is, individuals in our imagined society enjoy freedoms of thought, expression, assembly, petition, and religion, all within the constraint that each is entitled to as extensive a share of such liberties as is consistent with there being an equal share for all.

Under political conditions secured by such a constitution, it is natural to expect there to emerge a bustling and vibrant civil society of multiple organizations and groups directed to a diversity of ends. Accordingly, we may imagine that our citizens belong to, or participate in, a range of voluntary and affective associations, from religious groups, ethnic organizations, and political alliances to social clubs and cliques. One result of this is that a variety of moral doctrines will flourish in the society. We should expect that our imagined citizens will not share a common collection of moral commitments; instead, a diversity of such commitments should be expected to thrive among citizens.

It seems suitable to further suppose that citizens will generally take certain percepts among these commitments to be *basic*. That is, each citizen will take the core of his moral or religious doctrine to specify values, aims, and ends that are *fundamental* to living a proper life, both individually and in relation to others. Moreover, we should expect that the varied moral and religious doctrines that thrive among citizens do not form a consistent set. Accordingly, our imagined citizens will *disagree* over fundamental matters of right, obligation, duty, value, good, virtue, happiness, and justice. Of course, we should expect that many, if not all, of the doctrines endorsed by citizens will include a conception of toleration and will accordingly prescribe or require toleration with respect to a certain subset of opposing views. But we should also expect the notion of toleration to be interpreted differently by each doctrine, such that within every doctrine there will be a discrimination made between opposing doctrines that are acceptable objects of tolerance and those that are not.

A distinction is called for here. I have said that every doctrine which contains a conception of toleration will distinguish between opposing doctrines that deserve to be tolerated and those that do not. In this latter category there will be, on the one hand, opposing doctrines that, while not deserving of toleration, nonetheless may be tolerated under appropriate circumstances; on the other hand, there will be opposing doctrines that not only do not deserve toleration but must be *not tolerated*. In other words, every doctrine that contains a conception of toleration will nonetheless identify certain opposing doctrines as beyond the pale and, therefore, *intolerable*; in the case of intolerable opposing doctrines, what is morally required is *intolerance*.

Thus, it is possible to specify for each doctrine the *scope* of its conception of toleration. On some doctrines, toleration will be construed very broadly; very few opposing doctrines will be taken to be undeserving of tolerance and fewer still will be taken to require intolerance. Other doctrines will

contain a narrow conception of toleration, extending tolerance only to those opposing doctrines that are very close relatives to themselves. There will, of course, be a wide variety of positions in between these two poles. Many doctrines will endorse the roughly Millian standard of toleration: one must tolerate anything that does not constitute harm to others. Others will draw the line between the tolerable and intolerable differently and on the basis of different considerations. And even among those that accept a roughly Millian standard, there will be considerable disagreement about the scope and nature of the concept of harm.

Accordingly, the citizens I have been asking you to imagine will differ not only at the level of their substantive doctrines of the good; they will also disagree about which sub-optimal moral and political arrangements are even tolerable. Given this, there will be not only *disagreements*, but *conflicts* among citizens holding different doctrines.

In addition to this, let us suppose that conditions of *moral pluralism* obtain. That is, let us suppose that there is a plurality of moral doctrines – religious, secular, what have you – that conflict with each other but nonetheless individually meet some rather loose conditions for minimal plausibility. Let us say that a doctrine is at least *minimally plausible* if it is internally coherent, is able to speak to the normal range of moral phenomena, seems based in a reasonable conception of human moral psychology, can proffer moral prescriptions that are able to guide action, and is supported by a range of considerations typically thought to be relevant to the justification of a moral doctrine. As I said, we need only a loose conception of plausibility here. The presumption of moral pluralism, then, comes to this: for every citizen holding a plausible doctrine, there are other citizens holding opposing but also plausible doctrines. We need not worry over different degrees of plausibility, or whether and when opposed doctrines are *equally* plausible. Further, we need not take a position concerning citizens holding implausible doctrines, or whether and when such doctrines deserve toleration. We are simply concerned to say that the fact of persistent and deep disagreement over fundamental moral doctrines is not in itself an indication of deeply entrenched irrationality; in other words, we are committed to the idea that sane, intelligent, sincere, and informed persons can come to hold different (and opposing) moral doctrines.

To be clear, moral pluralism in this sense is not moral relativism. In supposing that moral pluralism obtains, I am not thereby committing to the idea that all moral and religious doctrines are true (despite their being inconsistent with each other), or that their truth is relative to an agent's beliefs, interests, community, or culture. Moreover, moral pluralism is not

skepticism. By accepting moral pluralism, one is not committed to the claim that all moral and religious doctrines are false, or nonsense, or non-cognitive, or unjustified. One can acknowledge moral pluralism while being committed to the final, objective, universal truth of one's own moral doctrine. All that moral pluralism requires is that one countenance the possibility of what might be called *honest moral error* – well-intentioned, sincere, informed, and rational agents doing their epistemic best can still wind up with false moral beliefs. This is simply the recognition that getting moral matters right is *difficult*. We can say, then, that moral pluralism, as the term is being employed here, is not itself a moral theory or a theory about morality; it is rather a claim about moral theories. More precisely, it is a claim about the travails of moral theorizing. And it is a rather mundane claim at that. Moral pluralism is the strictly descriptive claim that, at present, there are many minimally plausible moral doctrines, both secular and religious. To deny moral pluralism, then, is to assert that those who hold moral doctrines that are different from your own are not only mistaken, but necessarily inept, benighted, stupid, and perhaps insane. In other words, to deny moral pluralism is to deny that there is a distinction between being *wrong* and being out of one's mind. Only the most extreme fanatics take such a view.

I will have something further to say about fanatics below and in a later chapter. For now the point is this: given that moral pluralism obtains, conflict among citizens over fundamental commitments is not only inevitable, but many such conflicts are, at least at present and for practical purposes, rationally irresolvable. To repeat, the fact that citizens disagree at the level of plausible doctrines does *not* entail that at least some citizens are irrational, foolish, or benighted. Moral pluralism means instead that reasonable, intelligent, and sincere persons operating under favorable epistemic conditions can come to different but plausible conclusions about fundamental questions. Indeed, it is widespread consensus at fundamental moral levels, not moral disagreement, that is a symptom of irrationality, insincerity, or even, as John Rawls held, oppression (2005: 37).

Thus, we have before us an imaginary society. Let us say that the constitution I have asked you to imagine instantiates a kind of political and social order that can be called *constitutional democracy*, or just *democracy* for short.<sup>1</sup> If you are willing to allow that this imagined democracy resembles our own in the relevant respects, then we must confront a potentially

<sup>1</sup> I shall use the term *democracy* in this way throughout this book. Some would insist that I have described a *liberal* democracy. Depending on the details regarding what is meant by the term, I would

crushing dilemma: the core democratic idea that legitimacy of the democratic state rests upon the consent of those governed by it requires us to articulate principles that supply the justification for our government; however, the fact that citizens are deeply divided over fundamental commitments renders any such principles essentially contestable and, therefore, unlikely objects of widespread agreement. It seems, then, that the very liberties that constitute the core of democracy render the democracy's own conception of legitimacy unsatisfiable. This is the paradox of democratic justification.

It may appear that the paradox of democratic justification is a puzzle of merely academic interest and, therefore, of little consequence for the real world of democratic politics. But this is not the case. The paradox of democratic justification pervades our politics; contemporary democratic societies are plagued with controversies and clashes that emerge from the need for a democratic political order to justify itself to a morally and religiously conflicted citizenry. Let us consider briefly a few examples.

#### (1) *The science curriculum*

Throughout the United States, citizen groups and various religious organizations have fought to introduce referenda regarding the state-controlled science curriculum in public schools. According to many citizens, the theory of evolution, the cornerstone of modern biology by any reasonable measure, conflicts with their fundamental commitments concerning the origins, nature, and purpose of human life. In fact, according to some citizens, the theory of evolution is not simply *incorrect* in its account of life, but, in addition, is morally and intellectually corrupting. Given the compulsory nature of primary and secondary education, citizens demand that the curriculum of the public schools reflect – or at the very least not *undermine* – the values and commitments of the communities they serve.

Biologists and other science advocates contend that the evidence in favor of evolution is overwhelming, and that the duty of a science curriculum is to impart science's best understanding of the truth. Opponents have countered that the theory of evolution is in fact *not* the best understanding of biological life, and have contended that a competing theory, the theory of intelligent design, is a viable competitor; they have thus called for a curriculum that gives equal time to intelligent design theory, insisting that the biology curriculum should "teach the debate." Biologists have

not resist this. However, I think the terms *liberal* and *liberalism*, as they are employed in the academic literature (to say nothing of how they are used in popular discussion of politics), have become nearly useless, and so I avoid them when possible.

responded that intelligent design is *not* properly a scientific theory and hence *not* a viable alternative to the theory of evolution; hence, they contend, there is no debate to teach.

### (2) *Gay marriage*

In 2004, twelve states in the United States placed on their election ballots referenda calling for amendments to their respective state constitutions to officially define marriage as a relationship between one man and one woman, thereby blocking marriage among same-sex couples. Much of the opposition to gay marriage is driven by the moral commitment, shared by many religious citizens, that homosexuality is a grave moral evil and, therefore, something that the state should not endorse. According to such citizens, extending marriage to same-sex couples is tantamount to *morally validating* homosexual relationships, something they feel morally compelled to oppose.<sup>2</sup>

Advocates of gay marriage contend that the issue has nothing to do with the morality of homosexuality, but is instead a simple question of justice. Advocates hold that legal equality demands that the same rights and privileges available to heterosexual couples by way of the institution of marriage must be available to all citizens, regardless of sexual orientation. To restrict marriage to heterosexual couples is to discriminate against homosexuals on the basis of a morally irrelevant characteristic, which is blatantly unjust.

### (3) *The jury and the Bible*

In May 2003, Judge John E. Vigil of Adams County District Court in Colorado overturned the death sentence of a convicted rapist and murderer after discovering that jurors had consulted the Bible during deliberations. According to Vigil, “Jury resort to biblical code has no place in a constitutional death penalty proceeding.”<sup>3</sup> Vigil’s reasoning has it that since not all citizens accept the moral authority of the Bible, and are in fact not legally required to do so, the jury’s appeal to the Bible in sentencing deliberations is tantamount to *imposing* a moral authority on the convicted. In March 2005,

<sup>2</sup> Compare the Vatican’s 2003 statement, “Those who would move from tolerance to the legitimization of specific rights for cohabiting homosexual persons need to be reminded that approval or legalization of evil is something far different from the toleration of evil. In those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to marriage, clear and emphatic opposition is a duty.” *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, II.5 (www.vatican.va/roman\_curia/congregations/cfaith/documents/rc\_con\_cfaith\_doc\_20030731\_homosexual-unions\_en.html (accessed May 5, 2008)).

<sup>3</sup> *New York Times*, “Bible Reading Voids Death Sentence,” May 24, 2003, p. A-13.

the Supreme Court of Colorado upheld Vigil’s judgment, holding that jurors acted inappropriately in consulting “extraneous prejudicial materials” during deliberations, which is explicitly forbidden in the instructions given to jurors.<sup>4</sup>

Critics maintain that the rulings violate, or at least disrespect, the most fundamental commitments of most US citizens. The courts’ requirement that jurors must not introduce into deliberations moral considerations drawn from their deepest convictions creates for many citizens a conflict of conscience. On the one hand, they are charged with the task of discerning justice; on the other hand, they are forbidden from bringing their fundamental commitments concerning the nature of justice to bear on their deliberations. The demand that jurors omit from their deliberations what they take to be morally authoritative texts seems to some *itself* a violation of justice.

### (4) *Pharmacists and emergency contraception*

Pharmacists in several states in the United States have refused to fill prescriptions for emergency contraception, the so-called “morning-after pill.” Believing that such forms of contraception are abortifacients, pro-life pharmacists have appealed to a supposed right of conscience to refuse to dispense them. They argue that to dispense emergency contraception is to be complicit in the unjust ending of a human life, a complicity which violates their deepest moral convictions.

Critics claim that since emergency contraceptives are legal, pharmacists may not legitimately refuse to fill legally obtained prescriptions for them; to do so, the critics claim, is to unjustly interfere with the rights of those to whom the contraceptives have been prescribed. Pharmacists have responded that their refusal to dispense emergency contraceptives does *not* interfere with anyone’s rights, since they are not preventing people from filling their prescriptions with another pharmacist; at worst, the pharmacists say, they are making the procurement of the contraception less convenient. Critics reply that since the effectiveness of emergency contraception is in part determined by how soon it is taken after an unprotected sexual encounter, a pharmacist’s refusal to fill a prescription could seriously interfere with a woman’s rights.

These examples are by no means exhaustive. Consider also that similar analyses can be produced regarding controversies surrounding affirmative

<sup>4</sup> *People v. Harlan*, Colorado Supreme Court, Case No. 03SA173, p. 2. www.courts.state.co.us/supct/opinions/2003/03SA173.pdf (accessed July 14, 2005).

action, abortion, stem-cell research, euthanasia, public displays of religious symbols, the “under God” phrase in the Pledge of Allegiance, Catholic bishops denying Holy Communion to pro-choice Catholic politicians, confirmation proceedings and so-called “litmus tests” for Supreme Court nominees, and governmental intervention in end-of-life decisions. Additional examples are easy to cite.

I introduce these cases not with a view to settling the disputes they describe. Surely these issues are too complex to be captured adequately in the brief glosses above, and I strongly suspect that no single book can reasonably hope to address even one of these issues in any comprehensive or final way. I raise them instead for the purpose of demonstrating the pervasiveness of the paradox of democratic justification.

To be sure, there are many important respects in which these cases differ. For example, some deal directly with legal issues, others are focused on public policy, and some concern the private sphere of individual relations. Despite these and other important differences, however, the cases described above share the following common structure. In each case a political decision must be made that will impact persons on all sides of the dispute. And in each case the legitimacy of the decision reached rests ultimately upon the success of the justification for the decision that can be offered to all affected parties. However, each party to these disputes understands the controversy in question to implicate some value that they hold as *fundamental* and hence *inviolable*; accordingly, they see the violation of the value in question to be *intolerable*. For example, in the debate over teaching evolution in the public school biology curriculum, each side sees the other as an opponent, indeed, an enemy, of proper education. According to many religious anti-evolutionists, a proper education must bring one closer to the truth that is contained in the Bible. Any proposed account of life which contends that it can be explained without direct reference to God’s act of creation is, on this view, therefore, anti-educative. Biologists by contrast are more inclined to see the proper aims of education – especially *science* education – in strictly secular terms. The aims of scientific explanation, and of science education, are, on this view, different from the aims of religion and religious instruction, and, indeed, these different aims must be kept distinct. Hence one party to the debate takes its fundamental commitment to be the dissemination of the best scientific understandings of the world, whereas the other takes the salvation of souls to be the most basic objective. When these two objectives clash, the conflict is intractable unless at least one party is willing to compromise its fundamental commitments. The situation is similar in the cases of gay marriage and emergency

contraception. According to the advocates, in matters of public policy, justice always trumps sectarian moral codes; opponents contend that there could be no justice outside of the proper moral code, and that since proper morality forbids homosexuality and abortion, so too does justice demand that it be forbidden or at least discouraged. Again, the conflict is intractable without compromise.

But for those who are embroiled in these conflicts and understand them in this way, no resolution that does not fully reflect their own values is morally acceptable or tolerable, and hence no compromise position is morally available to them. Yet *something* must be done – even a decision not to decide constitutes a decision to allow the status quo to stand – and in each case *some* party’s most fundamental values will lose out. How can this arrangement be justified to those whose fundamental commitments must be compromised? Hence, the paradox: legitimacy requires that democratic decisions be justifiable to all citizens, but when citizens are deeply divided at the most fundamental moral levels, they are also divided over what constitutes a successful moral justification. And so it seems that democratic justification – and thus democratic legitimacy – is impossible when citizens are deeply divided at the level of basic moral commitments.

#### *Is the paradox pseudo-problematic?*

Before proceeding, it may be helpful to dispose of two likely first-blush responses that propose to show that the paradox of democratic justification is pseudo-problematic. First, one may argue that in framing the paradox I have cast democratic citizens as uncompromising fanatics. The critic will continue that it is, *of course*, true that democracy cannot exist among fanatical individuals, because it is a precondition of democracy that citizens be willing to *compromise*. However, the critic continues, it is simply not the case that citizens in existing democracies are divided over fundamental commitments in the way my descriptions have supposed. So, the critic concludes, the paradox of democratic justification is of no serious concern, it is at best an academic puzzle.

But this criticism is too hasty. It is certainly true that citizens in contemporary democratic societies are not fanatical, and most are willing to accept democratic compromises on the majority of issues. However, for every democratic citizen there are limits to morally tolerable compromise and, therefore, there are certain issues concerning which they feel morally bound *not* to compromise. For example, no democratic citizen believes that one must compromise with persons holding tyrannical, authoritarian, or

fascist doctrines. To be sure, democrats must *tolerate* Nazis marching in Chicago, for example. But tolerance is due only for as long as the marching Nazis operate within the constraints specified by democratic law. The marching Nazis must apply for the requisite permits, they must obey all local regulations governing street demonstrations, they must remain orderly, they must not make threats to onlookers or destroy property, and so on. However, there is an important sense in which Nazis operating within the requisite democratic constraints are *not* Nazis at all, but people merely *playing* at being Nazis (Macedo 1990: 260).<sup>5</sup> Real, *bona fide* Nazis do not recognize the authority of democratic law, and are committed to using force to undermine or destabilize non-Nazi regimes. Accordingly, democratic citizens cannot tolerate *real* Nazis in their midst, and cannot compromise with real Nazis without thereby abandoning their own democratic commitments. So, to respond to the objection, most citizens of contemporary democratic societies recognize that democracy requires them to compromise *with other democrats*. But where there are deep divisions among citizens regarding fundamental matters, there is likely to be deep disagreement over who is and who is not a true or “in good faith” democrat and, therefore, there is likely to be deep disagreement about who is and who is not tolerable.

The critic may concede these points, but insist that democratic citizens are in general not divided to the degree that is required to generate the paradox. Perhaps the critic is correct. Let us for the moment grant that he is correct. However, there surely are cases of controversy that seem very close to the kind of division I have been discussing. Consider, for example, the abortion debate in the United States. The radical anti-abortion organization, Operation Rescue, refers to legalized abortion as the “American holocaust,” likening medical facilities that perform abortions as “death camps.”<sup>6</sup> By using language that compares the system of legal abortion in the United States to Nazi Germany, Operation Rescue means to call into question the *democratic* legitimacy of legalized abortion. A similar position has been articulated by James Dobson, founder of the conservative Christian group, Focus on the Family. Although Focus on the Family officially condemns violence against abortion doctors, the organization

<sup>5</sup> I hasten to add that this does not imply that neo-Nazi organizations operating in the United States today do not pose serious threats.

<sup>6</sup> Operation Rescue, “American Holocaust: Inside an Abortion Death Camp,” [www.operationrescue.org/?p=55](http://www.operationrescue.org/?p=55) (accessed July 29, 2005).

nonetheless supports other acts of disobedience, such as physically blocking entrances to abortion clinics. Explaining this posture, Dobson writes:

To those Christians who feel prohibited from stepping across a property line to save a baby, I would ask ... What would you have done as a citizen of Germany in World War II? The Nazi extermination camps were legal. Would you have broken your country’s unjust laws in order to protect millions of people marked for death?<sup>7</sup>

Again, Dobson’s envisioned analogy between abortion and the Holocaust is telling. His explicit claim is that standing abortion laws are illegitimate and, therefore, may be – perhaps, morally speaking, *must be* – disobeyed. This, of course, leaves one to wonder about the grounds upon which Dobson condemns violence against abortion doctors, but we will not investigate this here. Consider instead the further implications of Dobson’s analogy. If, indeed, the system of legal abortion in the United States is analogous to the system of legal extermination in Nazi Germany, then those in the United States who seek to maintain or expand protections of a woman’s right to choose to terminate her pregnancy are analogous to *bona fide* Nazis. Hence, on Dobson’s view, individuals who are pro-choice are *not* fellow democratic citizens, but rather agents of an unjust, illegitimate, and anti-democratic political order. Accordingly, for members of Operation Rescue and Focus on the Family, pro-choice advocates are not proper democrats and thus, at the very least, do not deserve toleration.

The critic will next claim that my examples prove his point. He will say that organizations like Operation Rescue and Focus on the Family are *fringe* groups and thus are *not* representative of mainstream political sentiment in the United States. That I have drawn my examples from these organizations confirms that, in general, citizens are not as deeply divided as the paradox of democratic justification requires.

But the critic now seems to have misunderstood the nature and intended force of the paradox. The issue that I am confronting is not simply a sociological one regarding the number of citizens who take themselves to be deeply divided from other citizens regarding fundamental moral commitments.<sup>8</sup> The issue is rather that of *justifying* the democratic requirement that citizens must tolerate – or at least not judge *intolerable* – a wide range of moral and religious doctrines and be willing to accept democratic compromises in cases where their fundamental values conflict with standing

<sup>7</sup> “Why does Focus support the rescue movement?,” [family-topics.custhelp.com/cgi-bin/family\\_topics.cfg/php/enduser/std\\_adp.php?p\\_faaid=1240](http://family-topics.custhelp.com/cgi-bin/family_topics.cfg/php/enduser/std_adp.php?p_faaid=1240) (accessed July 29, 2005).

<sup>8</sup> I am inclined to think that the sociological data speak in favor of my view, but will not engage the issue here.

democratic outcomes. So, I can grant the critic's sociological point that, despite extremist rhetoric and other exaggerated portrayals on offer by fringe organizations, contemporary citizens are generally willing to accept democratic compromises. But the question that is central to our concern is this: *why should they?* What *reasons* can be offered for upholding democratic commitments at the expense of other, perhaps more important, values? That a great many citizens of contemporary democracies accept the necessity of political compromise as a matter of course and, therefore, do not demand such justifications is entirely beside the point. Whether demanded or not, democratic politics stands in need of justification.

Let us turn now to a second criticism that aims to dismiss the paradox of democratic justification. The second critic might pick up where the first critic left off and argue that there is an easy and obvious resolution to the paradox of democratic justification. Citizens have reason to uphold democratic commitments, even in cases in which those commitments clash with their more basic moral or religious doctrines, for the simple reason that the cost of defection is too high. Opponents of abortion could engage in acts of violence to promote the pro-life cause, and, from their point of view would be morally justified in doing so, but, alas, this course of action would be imprudent because the democratic state has the power to prosecute and severely punish those who break its laws. Thus, citizens have an obvious reason to uphold democratic commitments: if they do not uphold such commitments, they will be punished. Accordingly, the critic concludes, the paradox of democratic justification is resolved by power.

This criticism has the familiar, confident air of a Hobbesian political realism. However, it raises many problems, not all of which can be canvassed here. The most obvious difficulty with the criticism is that it requires us to understand political legitimacy as simple stability. Of course, stability is a desideratum of any political regime; however, the critic has construed stability simply as the power to force compliance. The difficulty with this view lies in the fact that there is a clear and intuitive difference between exercises of power that are *legitimate* and those that are merely *effective*. Likewise, one can easily cite historical examples about which it would be correct to say that power was *successfully* but *unjustly* wielded. Doubtless the critic will want to deny these distinctions. Yet if one follows the critic in relinquishing the distinction between legitimate and illegitimate (yet effective) power, one also relinquishes the normative ground which enables us to *criticize* power. Moreover, one relinquishes the normative ground which enables us to judge that a particular act of government – the desegregation of the public schools, for example – constitutes *moral progress*

in the direction of justice. Hence the imagined response proposes to resolve the paradox of democratic justification by rejecting the idea of political justification altogether. This hardly seems an acceptable democratic response.

There is a further difficulty facing the political realist response to the paradox. Borrowing some nomenclature from Rawls which I shall appeal to more systematically in later chapters, one may say that the power-based resolution to the paradox makes political justification a matter of striking a mutually acceptable *modus vivendi*, or truce, among opposed parties (2005: 145). Where a political order is accepted as a *modus vivendi*, each contending party sees it as a less than optimal compromise to be tolerated only for as long as the relative balance of power among the contending parties precludes any one party from dominating the others. But as power relations are unstable and prone to fluctuation, so too is a social order whose justification lies exclusively in power. Under such conditions, it is reasonable to expect the contending parties to not acquiesce in the democratic status quo, but to attempt instead to manipulate the existing balance of power. Again, this seems an unpromising response to the paradox.

Thus, it seems that there is a strong *prima facie* reason to think that paradox of democratic justification stands, and lies, at the root of some of our most divisive political controversies. Given democracy's own conception of political legitimacy, a response to the paradox is called for. We turn, then, to an examination of a standard democratic resolution.

## II A STANDARD SOLUTION

### *Democracy as procedure*

On a standard account, the paradox of democratic justification is resolved by an appeal to the idea that democracy is essentially a *procedure* or *process*. The procedural account begins with an insight, well-captured by Rawls in a paraphrase of Isaiah Berlin, that there can be no social world without loss (2005: 197). That is, the procedural response begins with the claim that compromise is a condition of living with others in a political and social order. The next step is to draw the inference that since no one can get everything he wants by way of political decisions and outcomes, choice among political systems is essentially a choice concerning the terms under which compromises will be struck. Under some regimes, political decision is entirely in the hands of some sub-section of the population. In a monarchy, for instance, political rule rests entirely with the monarch. Accordingly, in a

monarchy, compromise is a one-way street: the monarch gets his way, and the subjects compromise their way into compliance. Similarly, in an oligarchic regime, the few hold political power, and the many must compromise. In a theocracy, the priesthood gets its way, and the laypersons compromise. In a plutocracy, the rich make the rules and the poor compromise. And so on.

In a democracy, by contrast, political power is shared equally by the entire citizenry. Political decisions are made by means of a fair aggregative voting procedure in which each citizen has an equal voice and the majority rules (within certain constraints, as discussed below). Of course, contemporary democracy employs a variety of systems of representation, so democratic rule is not *direct*; nonetheless, the core idea is that, under democratic rule, the burden of political compromise is shared across the entire population. This means that no one can expect to get his way *all of the time*. The consolation is that since the democratic procedure fairly aggregates citizens' interests, as registered by votes, democracy can ensure that most people will get mostly what they want most of the time, or at least more often than they would under any of the viable alternate regimes.

This feature of democracy is supplemented by the range of constraints that are placed on majority rule. In other words, in a democracy, majority rule is constrained by a set of individual rights, specified in a constitution, that protect individuals from not only the unjust interference of the government and foreign governments, but also from the interference of the majority. In a democracy, there are certain things that a majority, no matter how numerous, cannot get (or at least cannot get easily). Accordingly, there are limits to the kind of compromises individuals are expected to endure at the hands of a democratic majority. The most extreme losses – losses of life, liberty, and property, for example – are precluded, except in certain special cases, as specified by law.

On the procedural account, then, the justification of any particular political decision lies in the fact that it was produced by a fair procedure that not only gives to all citizens an equal voice in decision-making, and protects individuals from unjust interference even by a democratic majority, but also guarantees to each citizen who finds himself in the minority on a specific issue the continuing opportunity to convince those holding the majority opinion that they are in error and should revise their view. So, even though there can be no social world without loss, in a democracy, no particular losses are by necessity *permanent*; decisions which seem to some citizen in the minority to be egregious and unacceptable errors can be, at least in principle, retrieved and corrected.

In short, the procedural view holds that the justification for democracy lies in the fact that it offers to citizens a process for making political decisions and effecting political change relatively efficiently and without violence. To employ a trope common among proceduralists, democracy replaces bullets with ballots. Hence, although democracy cannot guarantee to its citizens that they will always agree with its outcomes, it can guarantee a degree of peace, fairness, and stability that is not available under alternate regimes. And peace, fairness, and stability are crucial if one wants to change a regime non-violently from within. The proceduralist recognizes that democracy is not perfect, but will maintain, with Winston Churchill, that, even in light of its failings, democracy is better than its real-world competitors; even if it is not the best *simpliciter*, it is the best we can get.

#### *Presuppositions of proceduralism*

I shall not rehearse the most common criticisms that have been raised against the procedural view of democracy. Roughly, these criticisms attack democracy's aggregative mechanism, purporting to show that no achievable voting procedure can deliver results that can plausibly be held to represent the will of the majority; some go further to argue that the very concept of the will of the majority is incoherent. These are formidable criticisms, and they have given rise to a vast technical literature.<sup>9</sup> But they are not germane to our present concerns. I instead want to examine the question of whether or not the procedural response to the paradox of democratic justification is viable. This requires further elaboration of the procedural view.

Jane Mansbridge provides an accurate characterization of the workings of the procedural view in her description of what she calls "adversary democracy":

Voters pursue their individual interests by making demands on the political system in proportion to the intensity of their feelings. Politicians, also pursuing their own interests, adopt policies that buy them votes, thus ensuring accountability. In order to stay in office, politicians act like entrepreneurs and brokers, looking for formulas that satisfy as many, and alienate as few, interests as possible. From the interchange between self-interested votes and self-interested brokers emerge decisions that come as close as possible to a balanced aggregation of individual interests. (1983: 17)

We need not follow Mansbridge, and many other communitarians and participatory democrats, in lamenting the adversarial aspects of the

<sup>9</sup> For this kind of criticism, see especially Riker 1988. For a defense of democracy against this kind of critique, see Mackie 2003. Gaus 2003a: ch. 6, nicely surveys the issues.



procedural view.<sup>10</sup> After all, the commitment to moral pluralism entails that conflict among citizens is inevitable. Moreover, it should also be noted that even serious conflict need not involve incivility or hostility. For similar reasons, the central role of self-interest in the procedural system need not concern us here, for self-interest need not mean *selfishness*, or interest that is strictly *self-regarding* rather than altruistic or socially responsible. What is of interest is that the procedural view claims to have no deep moral aspirations or goals other than that of producing decisions in a way that treats all citizens' interests equally. On the procedural view, a democratic system is not in the business of evaluating the relative merits of citizens' interests, preferences, or opinions, nor does it aim to produce outcomes that represent the "common good." Rather, on the procedural view, democracy is essentially non-normative and "thin"; it aims only to arrive at decisions that accurately represent the aggregate of citizens' inputs. In this way, it aspires simply to give the people what they want.

The thin character of the procedural view is often considered to be its primary strength. Recall that the paradox of democratic justification arises precisely because citizens do not share a common set of normative commitments. When citizens are divided at the level of their conceptions of the good, an account of democracy that presupposes, or is explicitly aimed at realizing, some particular normative vision will fail to win widespread consent. By construing democracy non-normatively, the procedural view avoids this difficulty. Ian Shapiro formulates this aspect of the procedural view well:

Rather than think of democracy as a mechanism for institutionalizing the general will, we should recognize its claim to our allegiance as the best available system for managing power relations among people who disagree about the nature of the common good, among many other things, but who nonetheless are bound to live together. (2003: 146)

As he summarizes his point, Shapiro contends that the procedural view of democracy "embodies what those with an interest in avoiding domination share" (2003: 146). Since it is safe to assume that citizens who are deeply divided over basic moral and religious commitments share a common interest in avoiding being dominated by their moral opponents – those who are *ex hypothesi* committed to an inferior, false, or intolerable moral view – the procedural view seems a neat and clean resolution of the paradox.

<sup>10</sup> For this kind of criticism, see Etzioni 2001 and Barber 2004.

Yet there are serious difficulties with the procedural view understood as a response to the paradox of democratic justification. To be sure, the core of the proceduralist justification for democracy seems sound: when no one can get everything he wants, it makes sense for everyone to settle for the best arrangement he can get. But this justification presupposes that citizens are willing to conceive of their deepest moral commitments in a rather particular, perhaps peculiar, way. To be specific, the procedural view presupposes that we are able to regard our deepest moral and religious commitments as *wants*, *preferences*, and *interests*, entities or objects that can be individuated, quantified, and aggregated; moreover, it presumes that citizens are willing to view their commitments as *fungible* items that can be exchanged and bargained with. In this way, the procedural view emerges as a *quasi-economic* model, according to which "democracy is a kind of market" (Posner 2003: 166). This image is explicitly endorsed by Joseph Schumpeter in his description of the "democratic method" as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote" (1942: 269).

The objection I want to raise against this aspect of the procedural view will not be that the market is an inadequate model for understanding the whole of democratic society.<sup>11</sup> Again, the target of the present analysis is *not* the procedural model of democracy as such, but rather the procedural model understood as a response to the paradox of democratic justification. The question, then, is whether the procedural view can provide a justification for democracy to citizens whose fundamental values lose out in the democratic process. The strength of the procedural view as a response to the paradox depends upon the aptness of the presupposition that citizens are able to treat their deepest moral and religious commitments as the kind of entities that can be entered into a market-like system of exchange, negotiation, and aggregation.

Is this presupposition justified? I think not. There is good reason to think that citizens are *unable* to regard their commitments in this way. Consider religious commitment. Many religious believers do not, indeed, *cannot*, regard their deepest value commitments as bargaining chips with which to attempt to strike the best political deal they can in light of their interests. Indeed, according to many religious believers, their commitments are not quite *interests* at all; they are instead more like *categorical commands* or inviolable directives from God or from some other source of ultimate moral authority. Accordingly, many religious believers see their most

<sup>11</sup> For this kind of criticism, see Sandel 1998b.

fundamental commitments as *non-negotiable*, *non-quantifiable*, and *not fungible*. Moreover, they are inclined to regard as unacceptable a procedure that simply aggregates citizens' interests, regardless of their normative merits. That is to say, many religious believers are inclined to see the proceduralist's thin vision of democratic politics as *itself* morally bankrupt: to treat all interests as equal is to treat good and evil, right and wrong, and virtue and vice as equal, which is morally corrupt as such and, therefore, unacceptable.

Here the proceduralist will rehearse the Berlinian consideration that there can be no social world without loss, and repeat Churchill's insight that democracy, warts and all, is the best we can get. But this response presumes that religiously committed citizens are willing to concede that engaging in real-world politics is more important than standing up for what is right, or for what God commands, come what may. Indeed, religiously committed citizens may concede the proceduralist's point that real-world politics necessarily involve dirty hands, but they may conclude from this that one ought to reject the terms and conditions of real-world politics, and instead stand for the Truth, unflinchingly and without apology, regardless of the real-world consequences. Indeed, the holy books of our most common religious traditions are filled with heroic portrayals of people who engage precisely in this kind of principled resistance to the norms of the real world. In many cases otherworldliness is precisely the point.

In response, the proceduralist may borrow from the realist strategy discussed earlier, and argue that the religious believer has misunderstood the procedural view. Adopting the procedural view does not require citizens to *morally endorse* the values and compromises embedded in the democratic process. That is, proceduralism does not require citizens to abandon the moral truth as they see it in favor of some version of moral neutrality or moral thinness. Indeed, proceduralism is consistent with the view that democracy is, as Alasdair MacIntyre has said, "civil war carried on by other means" (1984: 254). That is, the proceduralist can maintain that his view of democracy is compatible with the religious believer's fervor to stand up intrepidly for the Truth at all costs. According to the proceduralist, democracy provides the mechanism by which one can fight for the Truth without risking one's life.

But once the proceduralist has conceded that the political world is in the midst of a kind of civil war, the religiously committed citizen has an obvious rejoinder: what warrants the presumption that the democratic process, as understood by the proceduralist, is a suitable alternative framework for civil war? One wins a war by overcoming and destroying one's enemy; thus, in a

war, power matters most. Why, then, should parties to a war over ultimate values agree to fight within a framework that aims to treat opposing points of view equally, and which, consequently, makes final victory unattainable? The point is that, according to the religiously committed citizen, there are many things that are at issue in contemporary politics, and among these is the appropriateness of the procedural model of democracy itself. And so the question of justification re-emerges.

The proceduralist will reply that the democratic process offers a *peaceful* alternative to conventional war; democracy is, again, war *by other means*. But this is to presuppose the principle that we should seek peace above all else. It is thus open to the religiously committed citizen to ask why peace should trump other important values, such as truth, or purity, or obedience to God's law. If, as the proceduralist concedes, democracy is indeed civil war by other means, why then should we not pursue civil war by the usual means? Why not engage in *real* civil war? The proceduralist will respond that civil war by the usual means involves great risks to one's life. From the point of view of the religiously committed citizen, this response reveals that the proceduralist model of democracy expects citizens to subordinate all values to that of self-preservation. Yet, according to many religiously committed citizens, nothing justifiably trumps obedience to God, not peace, not fairness, not civility, and not even self-preservation.<sup>12</sup> And so it will seem to the religiously committed citizen that the procedural model of democracy cannot make good on its promise of a fair process that treats all as equals, because it requires citizens to view their deepest commitments as mere "interests" or "preferences" that can be entered into a system of *quid pro quo* political bargaining. However, many citizens *cannot* adopt such an understanding of their deepest commitments; they hold that to do so would be to violate, abandon, cheapen, defile, or denigrate that which they take to be of ultimate value. And why should they consent to a political system that requires *this*? For, according to the religious believer, political legitimacy is itself contingent upon a society instantiating the truth or God's will.<sup>13</sup> Insofar as proceduralism precludes this, democracy as understood on the procedural model is illegitimate.

<sup>12</sup> It should be added that, for some religious believers, obedience to God, even at the expense of – or perhaps *especially* at the expense of – this-worldly well-being, is *necessary* for true, that is, other-worldly, self-preservation.

<sup>13</sup> This is the force of much of the religious political rhetoric in currency in the United States, such as the claim that the United States was founded on "Christian principles" or is a "Christian nation." See, for example, P. Buchanan 2001: 180ff. Note also Newt Gingrich, "We must reestablish that our rights come from our Creator, and than an America that has driven God out of the public arena is an America on the way to decay and defeat" (2005: xxi).

Thus, the procedural account has not supplied the needed justification of democracy; it has at best merely relocated the question of justification. Of course, this leaves entirely open the question of what the religiously committed citizen may do in *response* to the failure of justification. That the state has failed to meet its justificatory burden does not alone entail that rebellion is justified; the failure of justification merely raises the question of what should be done. This is a matter I shall take up in the final section of this chapter.

I have deliberately cast the preceding argument in the form of a dialectical exchange between a proceduralist and a certain strip of ardent religious believer. Before moving on, it should be emphasized that this was strictly a simplifying device. The presuppositions of proceduralism are easily highlighted when brought into contrast with the commitments of a certain kind of religious belief. Although certain types of religious believer perhaps provide the most obvious foil for the procedural view, similar exchanges between proceduralists and differently committed interlocutors – including proponents of various secular moral doctrines – are easy to imagine.

For example, return to one of the four glosses above. Consider the controversy over teaching evolution in public schools. Imagine how a biologist is likely to react to a recent decision by the Kansas Board of Education to eliminate the requirement that evolution be taught in biology courses in the public schools. Of course, that the decision was reached by a fair and democratic process will not convince the biologist that the decision is *correct*. But, more importantly, the biologist is likely to regard the decision as *illegitimate* and intolerable. It bears repeating that the judgment that the democratic result is illegitimate leaves open the question of what should be done in response. The point that concerns us here is that the biologist is likely to insist that *something* must be done to correct the intolerable result; that is, from the biologist's point of view, teaching evolution in a biology curriculum is *non-negotiable*, and hence the Kansas result simply *cannot stand*, despite the fact that it was produced by a properly democratic procedure.

A proceduralist might attempt to reconcile the biologist to the decision by pointing out that since the Board's decision does not *outlaw* the teaching of evolution, but only abolishes the *requirement* that evolution be taught, the result coerces no one and furthermore implies no evaluative judgment whatsoever concerning what the biologist takes to be most valuable with respect to science education. The proceduralist may continue that, as it merely gives individual school districts the freedom to choose what material is covered in biology classes, it does not require anyone to *endorse* an anti-evolution view, or any particular view on the matter. The biologist will

almost certainly see this proceduralist reply as entirely beside the point. According to the biologist, what counts as biology, and thus what counts as a proper biology curriculum, is not a matter of choice, and it surely is not a matter that can be properly decided by means of a popular vote. That is, according to the biologist, the content of a biology curriculum is not the kind of thing that should be subjected to the democratic decision process; to decide the curriculum by popular vote is to treat science and myth, truth and nonsense, and knowledge and ignorance as equals. It is, therefore, to *misunderstand* profoundly the nature of the values and purposes of biology education. According to the biologist, there could be no proper biology education without an evolution *requirement*; in fact, the biologist may go further and argue that insofar as proper science education is a prerequisite for intelligent and effective democratic citizenship, the decision to eliminate the evolution requirement from public education is a blow against democratic legitimacy itself. So why should the biologist accept a democratically produced decision that renders instruction in the theory of evolution optional in the biology curriculum of the public schools?

Notice how this dialectic closely resembles the exchange considered earlier between the proceduralist and the religious believer. Similar interactions can be provided for the other cases glossed above. To repeat, there are important differences among the cases, but all share the following logical structure: each is a case in which the democratic process has produced a result that violates some value that one party to the dispute takes to be the *sine qua non* of democratic legitimacy. In such cases, the fact that the democratic process had been applied properly is not enough to settle the question of justification. And so proceduralism does not resolve the paradox of democratic justification.

#### *What's the matter with Kansas?*

I close this section of the chapter by raising a further critical point against the procedural view. The procedural view not only fails to resolve the paradox of democratic justification, it renders inexplicable the prevalence of the kind of disputes we have been discussing. The most obvious case in point is the issue of gay marriage. On the procedural view, public opposition to gay marriage should be more or less restricted to a few religious fundamentalists. However, it in fact strikes a large portion of the population of the United States as a crucial political issue. Why should this be? Recall that on the proceduralist analysis democratic votes are expressions of citizens' interests. It follows, then, that the proceduralist must conclude

that large numbers of citizens take it to be in their interest to restrict marriage to heterosexual couples. Yet it is difficult to imagine how opposing gay marriage serves anybody's interests. To be sure, some claim that extending marriage to homosexuals will cheapen, trivialize, or make less secure heterosexual marriages. But as an empirical matter this seems highly implausible. Others claim that allowing homosexuals to marry will dissolve traditional family bonds. But, again, this seems highly implausible. Moreover, it should be noted that if people were so strongly motivated to oppose policies which could be seen to empirically cheapen heterosexual marriage or imperil family bonds, we should find strong opposition to no-fault divorce laws, and strong support for other policies that would prevent marriage among persons not sufficiently mature or serious; but we do not. The fact is that there is no plausible story to tell to the effect that gay marriage harms others, or harms society, or obstructs the interests of heterosexual couples. Why all the fuss, then? On the procedural view, it is a mystery why anyone should care about gay marriage, other than gay couples who are denied the privileges of marriage. And yet large numbers of people *do* care about gay marriage enough not only to oppose it, but to vote in favor of amendments to their state constitutions which define marriage in strictly heterosexual terms. Many believe that the US Constitution should be amended to include a definition of marriage.

The proceduralist must conclude from this that large numbers of people are deeply mistaken about their own interests. And this in turn calls the proceduralist to develop a theory to account for the pervasiveness of the mistake. In order to address existing and prevalent political phenomena, proceduralism requires a theory of the manipulation of popular opinion. That is, the only response the proceduralist has to the prevalence of issues that defy procedural analysis is to declare that mainstream America is profoundly deluded. Consequently, the procedural view violates its aspiration to be a non-normative theory of democracy. As our imagined religious believer suspected, the procedural view is committed to a series of claims regarding the bases on which citizens ought to cast their votes, the way in which citizens ought to understand their moral commitments, and how they ought to rank their moral and material concerns. In short, the procedural response to the paradox of democratic justification denies the moral pluralism that we earlier argued is the natural outcome of the liberties of conscience that democracy protects.

To see how this works, consider Thomas Frank's popular 2004 book, *What's The Matter With Kansas?* According to Frank, the fact that conservatives have succeeded in recent elections proves that people are "getting

their fundamental interests wrong" (2004: 1) and, moreover, that individuals are suffering from an "illusion" (2004: 7), a "distortion" that leads good people "astray" (2004: 242). Frank's substantive position is that conservatives have succeeded because they have mastered the politics of false advertising. Although they continue to govern on the basis of what Frank sees as the old-fashioned Republican commitments to big business and the elimination of social welfare, the conservatives have managed to focus the attention of the working class on a set of cultural issues, such as abortion, gay marriage, "family values," blasphemous art, the arrogance of "Hollywood liberals," the radicalism of tenured university professors, and so on. Hence, according to Frank, the conservatives campaign on the basis of one platform, but govern on the basis of another. On Frank's analysis, "Values may 'matter most' to voters, but they always take a backseat to the needs of money once the elections are won" (2004: 6). And so Frank contends that average voters are duped into voting *against* what he insists are their most fundamental concerns, their true interests. He describes this phenomenon like this:

*Vote* to stop abortion; *receive* a rollback in capital gains taxes. *Vote* to make our country strong again; *receive* decentralization. *Vote* to screw those politically correct college professors; *receive* electricity deregulation. *Vote* to get government off our backs; *receive* conglomeration and monopoly everywhere from media to meat-packing. *Vote* to stand tall against terrorists; *receive* Social Security privatization. *Vote* to strike a blow against elitism; *receive* a social order in which wealth is more concentrated than ever before in our lifetimes, in which workers have been stripped of power and CEOs are rewarded in a manner beyond imagining. (2004: 7) (original emphasis)

The continuing success of this blatant bait and switch on the part of the Republicans perplexes Frank to the point of exasperation. Endorsing proceduralism, Frank writes that "most of us think of politics as a Machiavellian drama in which actors make alliances and take practical steps to advance their material interests"; however, in a revealing contrast, he acknowledges that contemporary politics rejects this framework, and is instead "a crusade in which one's material interests are suspended in favor of vague cultural grievances that are all-important and yet incapable of ever being assuaged" (2004, 121).<sup>14</sup> Elsewhere, he faults this "crusade" model for its "systematic erasure of the economic" (2004: 127).

<sup>14</sup> If it is true, as Frank claims, that "most of us" see politics in procedural – he says *Machiavellian* – terms, then it is difficult to explain why the crusade model he laments pervades our politics. One wonders who Frank takes himself to be addressing as "us."

All of this simply begs the question. Frank's analysis *presumes* that an individual's "fundamental interests" are his economic interests; moreover, Frank insists that the extent to which any individual holds that his own economic well-being may be trumped by other objectives is the extent to which that individual is deluded, or the victim of some conservative con job. But surely other explanations are available. Never once does Frank consider the possibility that an increasing number of individuals in the United States are politically moved by commitments that cannot be reduced to, or explained in terms of, "material interests," and that consequently these individuals feel called to act politically for the sake of respecting or realizing those commitments, even at the expense of their own economic well-being. More importantly, Frank never considers the possibility that the conservative voters in Kansas are *fully aware* of the bait and switch perpetrated by the Republican candidates they elect. It may be that the conservative voters in Kansas see *all* politics as a dishonest and corrupt con game, and so they vote for the candidates who at least give *lip service* to the correct value commitments, regardless of the actual material consequences of conservative victories. Or, alternatively, it may be the case that citizens who, for example, oppose abortion on religious grounds take themselves to be *morally obligated* to vote for pro-life candidates, regardless of the likely negative impact on their pocketbooks, their public schools, their small businesses, and their neighborhoods.

Frank repeatedly discusses Republican victories in terms of a "backlash" (2004: *passim*), an irrational and unreasoned knee-jerk reaction. This reveals that he takes the conservative trend to indicate that conservative voters – remember, roughly half of the American electorate! – are either the selfish beneficiaries of the Republicans' big business economic agenda that destroys middle-class America, or the benighted and foolish victims of "conservatism's populist myth" (2004: 239). According to Frank, then, all conservative voters are either despicable or irrational, and no respectable case can be made for conservatism. *This* is to reject the kind of pluralism of minimally plausible moral positions that democracy entails.

It should be emphasized that it may be the case that the conservative agenda – whatever it may be – is deeply flawed and morally corrupt. Frank does not argue this; he merely asserts that it is. But this kind of assessment is very different from the one that Frank offers, which encourages us to view more than half of our fellow democratic citizens as knaves or fools. Yet Frank's claim that half of his fellow citizens – conveniently, the half with whom he disagrees – are either too corrupt or too stupid for democratic

citizenship smacks of gross oversimplification. In any case, it is a strike against any proposed analysis of democratic politics that it requires us to characterize prevalent political phenomena in this way. A mode of political analysis that entails that millions of people who are otherwise reasonable, intelligent, and sincere are the victims of a silly and obvious deception that seriously undermines their well-being might, after all, be correct; however, given the extravagant implications of the procedural view, one should consider exploring alternate hypotheses.

### III DEEP POLITICS

Let us pause for a moment to take stock. Thus far I have argued that contemporary democracy confronts a paradox in that the very freedoms secured by democratic politics tend to undermine the conditions under which it would be possible for democracy to meet its own conception of legitimacy. To be specific, the liberties of conscience secured by a democratic constitution lead to a pluralism of moral commitments among the democratic citizenry. Yet, where there is a pluralism of moral commitments, there will be a plurality of moral conflicts, and some of these conflicts will engage the values and commitments that citizens take to be *fundamental* and hence non-negotiable. I then argued that the standard proceduralist response to the paradox cannot succeed because it presumes a particular view about the *nature* of citizens' moral commitments; it presumes that citizens are willing and able to view their deepest commitments as bargaining chips to be entered into an aggregative decision mechanism.

But there is good reason to think that citizens cannot adopt such a self-understanding without transforming and thus violating the values they hold most dear; for, according to many citizens, their moral commitments – along with their particular understandings of justice, liberty, dignity, equality, and the right and the good – are *prior* to their democratic commitments in the sense that the legitimacy of democracy is thought to *follow* from their moral commitments. Hence, in cases where democratic politics conflicts with some value that is held to be more basic, one cannot justify democracy by simply appealing to the features of the democratic process itself, because, in such cases, the legitimacy of the democratic process is precisely what the conflict calls into question. But in such cases, some decision or other must be made; something must be done and this means that some values will prevail over others. What can be said to those whose fundamental values lose out in the democratic process? Accordingly,

proceduralism merely relocates, and does not respond to, much less resolve, the paradox of democratic justification.

*From paradox to crisis*

It is, of course, possible to live with paradox. For many citizens, the procedural account of democracy serves as an adequate validation of democratic politics, and for other citizens, the question of democratic legitimacy never even occurs to them. Accordingly, the paradox of democratic justification need not result in any *practical* political crisis. However, as I have suggested above, many of our most pressing political controversies share a structure that indicates that citizens, and not just political theorists, are confronting the paradox of democratic justification. To cite the obvious example which we have already discussed, pro-life citizens see legal abortion as the state-sponsored murder of innocent citizens, and they hold that a government that does not protect the lives of its innocent citizens is *ipso facto* illegitimate; pro-choice citizens see legalized abortion as necessary for the liberty and equality of women, and they hold that a government that fails to secure these goods for all citizens thereby loses its claim to legitimacy. Obviously, there could be no political rapprochement of the sort envisioned by the procedural model between conflicting parties who each see their position as the *sine qua non* of political legitimacy. There could be no *principled* compromise between these two parties, for each sees the values at stake as identifying non-negotiable requirements for political legitimacy as such. The abortion controversy is not unique in this respect; the prevalence of similarly structured contemporary controversies indicates that citizens are increasingly turning to their deepest moral commitments for guidance and instruction in political affairs. As these commitments tend to identify sources of *ultimate* authority and *fundamental* value, they cannot be bargained with and so do not fit into the aggregative model offered by the procedural view.

What this means is that present political controversies of the sort we have been discussing suggest that the paradox of democratic legitimacy is generating a legitimacy crisis in modern democracies. Citizens are questioning why they should accept the democratic status quo at the expense of their fundamental values. Hence, democracy is losing its grip on citizens who feel increasingly that the current state of politics is morally intolerable. We confront a democratic citizenry that does not accept the morally thin market assumptions of the procedural model; we confront a citizenry that increasingly believes that democratic politics must conform to

their deepest value commitments or else lose its claim to legitimacy. We confront what I shall call a *deep politics*.

*Deep politics as a problem*

The problem posed for democracy by deep politics should be clear enough. When citizens hold opposing moral and religious doctrines, but insist that democracy must instantiate their deepest commitments or else lose its claim to legitimacy, someone must lose out. Every democratic decision concerning a controversial issue will generate discontent in some sector of the citizenry. In certain cases, this discontent will rise to the level of a denial of legitimacy. As I mentioned above, the judgment that a given democratic outcome is illegitimate and, therefore, cannot stand leaves open the question of what democratic citizens are justified in doing in response. The options run the gamut from the obviously anti-democratic and violent to various acts of protest and petition that lie clearly within the framework of democratic politics. What reason can be given to those whose fundamental values lose in a democratic decision to pursue the democratic means of response and not the anti-democratic ones?

To help clarify matters, let us consider an admittedly overused example. For many citizens, the overturn of *Roe v. Wade* would represent a serious lapse in democracy's legitimacy, and would undoubtedly incite a variety of responses. Let us consider the main lines of response that are available:

- (1) *Relocation*. Relocate to a country in which the desired rights and policies are in place.
- (2) *Rebellion*. Engage in acts of uncivil disobedience, including violence, threats, riots, destruction of property, unlawful protest, terrorism, and so on, and resist legal punishment for crimes.
- (3) *Civil disobedience*. Resist and engage in protest within circumscribed moral constraints, but publicly and openly disobey the law, and willingly accept legal punishment for crimes.
- (4) *Petition*. Obey the law, but engage in all available legal measures to effect a change in the law, including voting, campaigning, lawful protest, lobbying, consciousness-raising, coalition-building, public criticism, debate, activism, and so on.

I begin with a few observations. I trust that it is clear that options (3) and (4) represent *democratic* responses, whereas (1) and (2) do not. Of the non-democratic options, (1) is typically morally superior to (2), though it should be noted that relocation is not open to all citizens, and under certain conditions may not be open to any. Furthermore, it should be noted

that the relocation option raises additional moral difficulties concerning the conditions under which it would be immoral for a citizen of one country to relocate to another.<sup>15</sup> It also bears mention that there may be some cases in which the only morally permissible option other than relocation is petition; that is, there may be cases of legitimate complaint in which civil disobedience is not morally available. We need not dwell on these and related complications, because the moral rankings and subtleties of the options are not to the present point. The question, then, is why our imagined pro-choice citizen should pursue the options of civil disobedience and petition rather than relocation or rebellion. Put otherwise, why should a citizen who sincerely believes that a given democratic outcome violates a basic and necessary condition for political legitimacy nonetheless sustain his commitment to democratic means to social change? Under such conditions, why not pursue non-democratic means to one's political ends?

Many citizens will give the Hobbesian answer: one should sustain democratic commitments, even in cases of lapsed legitimacy, because the cost of open rebellion is too high. But the Hobbesian answer offers a reason of the wrong kind. We are not concerned with the question of why it would be *prudent* or instrumentally rational for citizens to not rebel, but with the question of why citizens *morally* ought to pursue democratic means to their political ends. For it is natural to think that the rebellion option is morally justified only when no democratic option is available, such as when the political order is democratic in name only, or not democratic at all. But what justifies this thought?

#### *Exit, voice, and loyalty*

At this point it will prove useful to introduce a framework developed by Albert Hirschman in his classic book, *Exit, Voice, and Loyalty* (1970). Roughly, Hirschman reasoned that when individuals are disappointed by the performance of an institution that is supposed to serve them, they have two options. First, they may *exit*, that is, they may withdraw from the institution and take their business elsewhere, so to speak. To return to our categories above, both relocation and rebellion are forms of exit. Second, they may exercise *voice*, that is, they may sustain their relationship with the institution in question, but voice their dissatisfactions with the expectation

<sup>15</sup> Presumably there are conditions under which it would be morally wrong to desert one's country. Though I cannot argue the case here, I contend that citizens in the United States who relocated to a foreign country because they did not endorse the results of the 2004 election acted immorally.

that service will consequently improve. Petition and civil disobedience are forms of democratic voice. Hirschman thought that voice is crucial to the maintenance and improvement of institutions; hence, he held that institutions need to discourage exit if possible. He further reasoned that exit is discouraged, and voice encouraged, if institutions can nurture a sense of *loyalty* among their members. Consequently, Hirschman argued that loyalty was crucial to the success of institutions of almost every kind, from firms, businesses, and clubs to governments and, indeed, entire societies.

A slightly modified version of Hirschman's framework can be applied in characterizing the problem posed to democracy by deep politics. It is surely the case that the health of a democracy depends on its citizens' willingness to exercise voice. This is done most typically through political participation in the form of votes and the other standard democratic channels represented by the petition option we described above, though we must add that civil disobedience is often a form of voice as well. Recall that the essence of voice is the pursuit of democratic means to redress political grievances.

In democratic politics, exit comes in many forms, though we can identify two broad categories of exit: *obstructive* and *non-obstructive*. Let us begin by identifying a few obvious forms of non-obstructive exit, remembering, of course, that these designations are neither exhaustive nor exclusive. One kind of non-obstructive exit is the kind of political *abstention* exemplified by certain insular religious sects in the United States. Abstention consists in full, or nearly full, withdrawal from democratic politics, including refraining from voting and other forms of political participation.<sup>16</sup> According to the abstentious citizen, politics under any regime is to be, insofar as possible, shunned as an unhealthy or morally inappropriate distraction. Closely related to the abstentious citizen is the *cynical* citizen. Like the abstentious citizen, the cynic non-obstructively declines to participate politically. However, the cynic's withdrawal from democracy is motivated by a general frustration with democratic politics. That is, the cynic does not exit for the purpose of more completely attending to a spiritual calling, but out of exasperation. Finally, we can add to our list of non-obstructive mode of exit the *indifferent* citizen, whose exit from democratic politics is not the result of some negative assessment of the political scene, but rather the result of a simple lack of interest.

The foregoing forms of exit are non-obstructive in that none seeks to dismantle or undermine the standing democratic regime. Those who

<sup>16</sup> Withdrawal may also involve seeking exemptions from certain democratic laws, as in the case of the Amish, who do not pay federal taxes.

engage in non-obstructive exit simply want to be left out of the political process.<sup>17</sup> Accordingly, non-obstructive exit carries with it no alternative or competing political program, and so does not involve any positive political action on the part of those who exit. We may characterize non-obstructive exit as exiting from not only *democratic* politics, but from politics as such.

Consider next two obstructive forms of exit: *revolution* and *conspiracy*. Revolution is exemplified most fully by domestic organizations that actively seek to overthrow the existing political order, typically by overt means of violence, terrorism, intimidation, and force. According to the revolutionary, the standing democratic order must be not only shunned and resisted, but abolished at almost any cost and as quickly as possible. Contrast the revolutionary with the conspirator. Whereas the revolutionary seeks to incite overt conflict in the present, the conspirator employs more covert and subtle means, taking a long-view approach to social upheaval and often working, at least initially, within the limits of established democratic law. That is, like revolutionaries, conspirators plot the overthrow of the existing democratic order, but, unlike revolutionaries, adopt a strategy according to which the successful upheaval of society must begin from *within* the bounds of democratic politics. Accordingly, conspirators, at least initially, exercise the voice option. They lobby, campaign, rally, demonstrate, canvass, protest, and petition; however, these activities are enacted with a view to building a coalition of sufficient strength to eventually overthrow or fundamentally transform the democratic order. For this reason, conspiratorial activity is, in the short run, difficult to distinguish from legitimate democratic participation, but the long-run aspirations of the conspirator are in essence no different from those of the revolutionary.

It may be said, then, that revolution and conspiracy represent a mere difference in means; they both aim to disrupt and eventually dismantle the standing democratic order and replace it with another order. To be sure, revolutionaries and conspirators frequently characterize their ambitions in democratic terms; they claim to seek democracy “in a higher sense” or a system in which people are “truly free.” But they nonetheless aspire to create a politics that differs fundamentally from the existing democratic order. Hence, we may say that, unlike non-obstructive exit, obstructive forms of exit carry with them decidedly political aspirations. Consequently, obstructive exit represents a withdrawal not from politics as such, but from *democratic* politics, at least as we know it.

<sup>17</sup> I leave aside the complication that some non-obstructively exiting groups exit for the purpose of maintaining a local form of governance in accordance with their own sectarian principles.

With this rough sketch of a modified Hirschmanian framework in place, the problem of deep politics can now be stated succinctly. As I noted above, Hirschman thought that loyalty was the key to encouraging voice and discouraging exit; however, in modern democracies, citizens are not required to share common moral or religious loyalties. In fact, as was mentioned earlier, it is thought by many that in modern democracies widespread consensus over moral and religious essentials can be maintained only by oppression, and thus should not be a *desideratum*, or even an *ideal*, of any properly democratic order.<sup>18</sup> In any case, the lack of agreement at the level of fundamental moral commitments – what I earlier called moral pluralism – seems to be a present and persistent feature of modern democracy. Therefore, citizens not only do not share common loyalties, but in fact maintain conflicting and opposed loyalties. And so the problem of deep politics consists, then, in preserving the voice option among citizens who are divided at the level of fundamental loyalties.

Our most pressing political controversies reveal that we are divided not only at the level of policy; we are also morally divided at the level of our fundamental commitments and deepest loyalties. Accordingly, there is much more at stake in contemporary politics than policy and law; for many citizens, present policy and legal issues call into question the very legitimacy of democracy itself. Unless we can formulate a compelling reason why citizens ought to pursue democratic means to their political ends in cases in which democracy threatens to fail to reflect their deepest commitments, we should expect increasing instances of exit. In many cases, exit will be of the non-obstructive kind, but in some exit will take more hostile, obstructive forms. And in certain cases, non-obstructive exit will lead to obstructive exit. In any case, both forms of exit are hazardous for democracy. Can anything be done?

<sup>18</sup> I am, of course, thinking again of Rawls, who writes, “a continuing, shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power” (2005: 37). But this thought is shared by theorists otherwise opposed to Rawls, see, for example, Phillips (1991: 131), Sanders (1997), and Young (2000: 49).