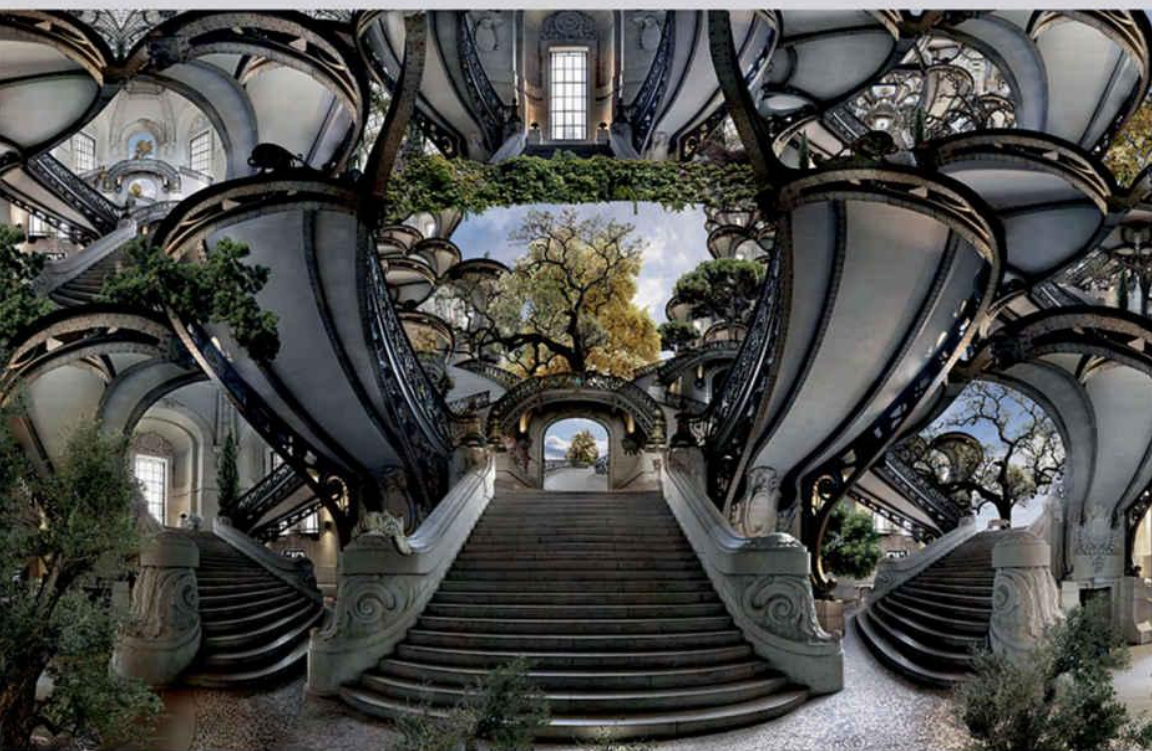


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The Principles of Constitutionalism

N. W. Barber



THE PRINCIPLES OF CONSTITUTIONALISM

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This book is dedicated to my parents, Christine
and David Barber, with gratitude and love.

Preface

States are social institutions that exist to advance the well-being of their members. Within the state, power is divided between a range of institutions—legislatures, courts, and executive bodies, amongst other entities—that interact and overlap. These institutions are constitutive elements of the state; they enable the state to make decisions and to act upon those decisions. This book examines the principles that speak to the creation and structuring of state institutions. To an extent, states must honour some of these principles in order to exist. The claims and capacity to act that are the hallmarks of an operative state require a set of institutions able to assert and, to an extent, exercise sovereignty, and this, in its turn, requires that the state possess a reasonably effective domestic legal order. Sovereignty, the separation of powers, and the rule of law are tightly intertwined; all three of these principles must be present, to some degree, in all constitutional orders. Civil society, the fourth principle discussed in this book, is also a necessary feature of the state: the creation of the public simultaneously creates the private, and, by so doing, creates a relationship between these two elements.

The requirements of constitutionalism do not stop at the point at which the state comes into existence. Rather than being framed by what is necessary for the state to exist, the principles of constitutionalism are, instead, framed by what is necessary for the state to succeed, to achieve its defining goal of the well-being of its members. Viewed in this light, the demands of the first four principles become broader and more demanding. They also connect with the final two principles of constitutionalism—democracy and subsidiarity. Whilst a state can exist without democratic structures, it is the operation of democracy that provides, in part, the justification for the existence of the state and the operation of law.

In the chapters that follow each of the six principles of constitutionalism will be examined. Any one of these principles raises enough issues to justify a book of its own—and, indeed, many books have been written on many of these principles—but there are advantages in treating the principles as a set. Conceptualizing the principles of constitutionalism as a related set of principles with a shared objective allows us to resolve some of the disputes over their contents. When discussing the principles, emphasis will be placed on their interconnections; the principles cohere, and the meaning attributed to one principle will affect the interpretation of the others.

This book is the second part of what I hope will be a trilogy. The first book in the series, *The Constitutional State*, examined the nature of the state, reflecting on the rules that constitute it, its purpose, and its capacity to act and form intentions. The third book will examine the position of the individual in the state: the role of rights—human, civil, and social—and the role of public law. This book starts where *The Constitutional State* stopped, and considers the principles that should guide the construction and operation of state institutions. Some of the questions that readers might have about the claims made in this book are addressed in *The Constitutional State*—in particular, those that relate to the point of the state and its capacity for intending and acting. Other questions relating to the place of rights and public law will be addressed in the subsequent volume.

Many people have helped with this book, and with the earlier articles on which parts of the book draw. With apologies to those I have missed, thanks are due to Richard Albert, Erika Arban, Nicholas Aroney, Mikolaj Barczentewicz, Mayling Birney, Alan Bogg, Dominic Burbidge, Maria Cahill, Josh Chafetz, Albert Chen, Andrea Dolcetti, Oran Doyle, Richard Ekins, Timothy Endicott, Jackie Fernholz, Joshua Getzler, Yicong Guo, Kirsty Gover, Hayley Hooper, Tarun Khaitan, Jeff King, Ruiyi Li, Maame Mensa-Bonsu, Adam Perry, Andrea Pin, Kate O'Regan, Ewan Smith, Leah Trueblood, Josephine Van Zeben, Adrian Vermeule, Tian Wei, Julius Yam, and Paul Yowell, all of whom kindly read chapters in draft form. Tragically, Mayling Birney died during the writing of this book. I read and profited from early drafts of parts of her book on the rule of law in China—*The Rule of Law and the Rule of Mandates*. At the time of writing this preface, I do not know whether Mayling's book will be published—I very much hope that it will.

Finally, special thanks are due to Jackie Fernholz, who has, directly or indirectly, been compelled to engage with almost all of the issues raised in this book. She read the entire manuscript, and made many valuable suggestions about its content and style. I am grateful to her for her love, toleration, and support.

Nick Barber
Oxford, January 2018

Acknowledgements

Chapter 1 draws heavily on ‘Constitutionalism: Negative and Positive’ (2015) 38 *Dublin University Law Journal* 249, but is a significantly revised version of that paper. None of the other chapters have been previously published, but parts of the following papers can be found scattered throughout the book: ‘Self-Defence for Institutions’ (2013) 72 *Cambridge Law Journal* 558; ‘The Limited Modesty of Subsidiarity’ (2005) 11(3) *European Law Journal* 308; ‘Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?’ (2004) 17(4) *Ratio Juris* 474; ‘Prelude to the Separation of Powers’ (2001) 60 *Cambridge Law Journal* 59.

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Introduction: Constitutionalism

Constitutionalism is a term that is often found in the title of books and articles, but is rarely considered in their texts. By and large, it is assumed that we know what constitutionalism entails, and that there is little need to examine it further. Constitutionalism is treated as a synonym for the legal enforcement of constitutional limits, or—perhaps—a subset of those limits; it is regarded as a desirable, maybe even a necessary, feature of a constitutional order. Attention swiftly turns to the practical difficulties involved in ensuring the effectiveness of these legal constraints. This chapter challenges this simple understanding of constitutionalism, arguing those who see constitutionalism entirely in terms of constraints on state power miss an important aspect of the doctrine. Constitutionalism also requires the creation of an effective and competent set of state institutions; it has a positive dimension. The account of constitutionalism provided in this chapter will set the agenda for the rest of the book. It will locate constitutionalism within constitutional theory, and examine the connection between constitutionalism and the principles discussed in the following chapters. It also considers one of the trickiest issues in constitutional theory: the methodological question of the criteria that a successful interpretation of these principles would satisfy.

The examination of constitutionalism will proceed in three stages. First, the common understanding of constitutionalism will be surveyed. This presents constitutionalism in largely negative terms: as a set of limits on the state. It will be argued that this understanding of constitutionalism is unattractive as it fails to recognize the positive role that states play in our communities. State institutions may need to be limited, but they also need to be effective: able to help bring about the common good. This negative understanding of constitutionalism rests on an impoverished understanding of the nature of the state and, moreover, leads to an impoverished understanding of the principles associated with constitutionalism. The second part of the chapter will contend that the negative account of constitutionalism, though widely held, is not the only understanding available to us. Making use of Charles McIlwain's classic work on the subject—*Constitutionalism: Ancient and Modern*—it will

be argued that there is an alternative, positive, understanding of constitutionalism that can be found in the literature. In the third section of the chapter it will be argued that this positive conception of constitutionalism is attractive because it can be derived from a richer and more attractive account of the state and because, in its turn, it generates a richer and more attractive set of constitutional principles. The account of constitutionalism presented in this chapter is, then, not just one that can be squared with much of the older literature on the topic, but one which is also more morally attractive than the simple negative accounts of constitutionalism that currently dominate academic discourse.

Negative Constitutionalism

The common understanding of constitutionalism—the one most often found in scholarly writing and, so far as it exists, the popular understanding of the doctrine outside of academia—treats constitutionalism in negative terms: constitutionalism is equated with a demand for limited government.¹ As Giovanni Sartori puts it, constitutionalism calls for restrictions on the arbitrary power of the state.² Others have tried to pin down these constraints with more precision. Perhaps constitutionalism binds the state to the rule of law and popular sovereignty,³ or to the separation of powers,⁴ or to the separation of powers and, also, to human rights.⁵

In addition to a commitment to some or all of these principles, it seems that these principles constrain the state in a particular type of way: through law, and, more specifically, through their application by judges.⁶ Constitutionalism

¹ See the discussion in M. Loughlin, 'What is Constitutionalisation?' in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 55–58 and T. R. S. Allan, *The Sovereignty of Law* (CUP 2013) 17.

² G. Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *The American Political Science Review* 853, 855. See also M. J. C. Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 8–9.

³ G. J. Schochet, 'Introduction: Constitutionalism, Liberalism, and the Study of Politics' in J. R. Pennock and J. W. Chapman (eds), *Nomos XX: Constitutionalism* (New York University Press 1979) 1, 4. See also J. Murkens, 'The Quest for Constitutionalism in Public Law Discourse' (2009) 29 *Oxford Journal of Legal Studies* 427, 444.

⁴ E. Barendt, 'Is There a United Kingdom Constitution?' (1997) 17 *Oxford Journal of Legal Studies* 137, 141.

⁵ J. Lane, *Constitutions and Political Theory* (Manchester University Press 1996) 25.

⁶ C. H. McIlwain, *Constitutionalism: Ancient and Modern* (New York University Press 1947) 21; M. Klarman, 'What's So Great About Constitutionalism?' (1998) 93 *North Western University Law Review* 145; Murkens (n 3) 437.

requires judges to possess and exercise the capacity to strike down acts of the state that run against these principles. On some accounts of constitutionalism, strong-form judicial review—where the courts possess the power to declare acts of the legislature to be unconstitutional—is a necessary feature of the doctrine.⁷ Constitutionalism requires the legal realm to limit and regulate the political.⁸ Relatedly, a connection is sometimes drawn between constitutionalism and entrenchment: not only do judges enforce these principles against state bodies but constitutionalism also requires that the capacity of the legislature to override judicial decisions, or to amend the constitution to alter the scope of judicial power, is constrained.⁹ The strictures of constitutionalism, it seems, apply to the legislature as well as to the executive.

Those who conceive of constitutionalism in purely negative terms might do so because of their conception of the state. Most contemporary accounts of the state are—knowingly or unknowingly—indebted to that of Max Weber. For Weber, the state was ‘a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory’.¹⁰ This account of the state combines a particular type of claim—an assertion of legitimacy—with a particular method of social control—the exertion of force.¹¹ The relationship between the state and its members starts from a position of domination, clothed in a claim to legitimacy. The state exerts power over its people and its territory, and when exercising this power it claims to be legitimate; asserting that those whom it commands ought to obey its dictates. But there is an important distinction between these two aspects. Whilst the state, to exist, must be able to secure the compliance of its people to some extent, its claims to legitimacy may be wholly false. Weber’s conception of the state did not distinguish between flourishing democracies and oppressive dictatorships; each of these forms of the state may be successful in commanding their people, each makes a claim to legitimacy. That the claim is more plausible in the first case than the second is, as regards our understanding of the state as an institution, irrelevant.

⁷ See, for example, Barendt (n 4), and see further Richard Bellamy’s powerful critique of this position: R. Bellamy, *Political Constitutionalism* (CUP 2007) chapter 1.

⁸ D. Grimm, ‘Constitutional Adjudication’ in D. Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 200–01.

⁹ L. Alexander, ‘Constitutionalism’ in T. Christiano and J. Christman, *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009). On entrenchment see N. W. Barber, ‘Why Entrench?’ (2016) 14 *International Journal of Constitutional Law* 325.

¹⁰ M. Weber, ‘Politics as a Vocation’ in H. H. Gerth and C. Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1991) 78. See further N. W. Barber, *The Constitutional State* (OUP 2010) chapter 2.

¹¹ For a contemporary version of Weber’s model, see L. Green, *The Authority of the State* (Clarendon Press 1990) chapter 3.

It is easy to imagine how a negative model of constitutionalism could emerge from this understanding of the state. The state is presented as an exercise of raw power, clothed in a claim to legitimacy; initially, at least, the state appears a threat to individuals, as a danger that needs to be constrained. The challenge of constitutionalism, on this model, is to find ways by which the state can be limited and the liberty of the individual protected; the role of law, applied by the courts, is to rein in the power of the state, to limit the dangerous capacities of the executive and legislative branches. On this understanding of the state and law it is—superficially—plausible to talk of the constitution being imposed upon the state, as a set of rules that are applied to a pre-existing, distinct, social entity.¹² To possess a constitution, to subscribe to constitutionalism, requires that law is imposed upon the state by the judges, leaving space for individuals to act, safe in the knowledge the coercive power of the state is constrained.

The negative model of constitutionalism then, in its turn, shapes our understandings of the principles of constitutionalism, providing a frame within which these principles are understood as limitations on the actions of the state. Many accounts of constitutional principles present them in negative terms. For instance, it is commonly argued that the purpose of separation of powers is to protect the liberty of the individual by making tyrannical and arbitrary state action more difficult.¹³ Power is divided between the branches of the state, with each element checking the others. Concerted state action is made harder by the existence of checks and balances between the various organs of state.¹⁴ For the state to act, agreement is needed between a number of institutions staffed by a range of different people; the constitutional structure required by the separation of powers consequently slows down the state, acting as a brake on state action.

These last few paragraphs were carefully worded. There is no necessary connection between negative constitutionalism, the Weberian model of the state, and an understanding of constitutional principles that presents them as limiters. Many theorists, tempted by one or other of these three, would not draw the connection, treating constitutionalism, the state, and constitutional principles as unconnected entities. But there is a coherence to this account

¹² D. Grimm, 'Integration by Constitution' (2005) 3 *International Journal of Constitutional Law* 193, 194, and 204.

¹³ See, eg. E. Barendt, 'Separation of Powers and Constitutional Government' [1995] *Public Law* 599, 605–06; S. Calabresi and K. Rhodes, 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1992) 105 *Harvard Law Review* 1153, 1156, where separation of powers is described as 'institutionalising conflict'.

¹⁴ Vile (n 2) 14.

of constitutional theory—and perhaps it is reasonable to assume that these features would cohere: that our understanding of the state would inform our understanding of constitutionalism, and that these would, in their turn, shape our account of principles such as the separation of powers.

This conception of constitutionalism, what I, and others, have termed negative constitutionalism,¹⁵ has come in for some trenchant criticism in recent years. Perhaps most notably, Jeremy Waldron has argued that this model of constitutionalism is fundamentally flawed.¹⁶ Waldron claims that this version of constitutionalism, enforced by the judges and protected by some level of entrenchment, is allied with a narrow political ideology: a form of minimal-state liberalism. Negative constitutionalism requires an institutional structure that prevents, or inhibits, the state from acting. For example, this understanding of constitutionalism serves to make it harder for a state to create a system of healthcare or undertake schemes to alleviate poverty. This may be desirable if all you want of the state is that it leaves you alone, but it is frustrating if you want the state to aid you in some way. Waldron consequently critiques constitutionalism for its anti-democratic tendencies: if minimal-state liberalism is to be adopted by a community, its advocates should have to win their case within democratic forums, not by constitutional *fiat*. Negative constitutionalism prioritizes one political position over others, and so runs against the egalitarianism that Waldron identifies as at the heart of democracy.

The anti-democratic aspect of negative constitutionalism is certainly one problem with this model, but it is far from its only failing. Negative constitutionalism builds upon, or implies, an impoverished account of the state. The Weberian model of the state, discussed earlier, captures the characteristic authority claims that the institution levels, but fails to place the state in a broader moral context. An ambitious alternative to this account, following Aristotle's lead, would argue that the purpose of the state is an aspect of its nature;¹⁷ the state should be understood as characterized both by its technique and by its point. Aristotle drew the defining purpose of the state broadly: it exists to advance the well-being of its members. A state that fails to advance its people's well-being is not merely a state that acts badly, but an institution that has failed to achieve its defining point, like a hospital that fails to treat the sick or a prison that fails to confine criminals. A more modest reply to the

¹⁵ Walter F. Murphy also invokes the distinction: W. F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Johns Hopkins University Press 2007) 6–10.

¹⁶ J. Waldron, 'Constitutionalism—A Skeptical View' in T. Christiano and J. Christman (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009); Bellamy (n 7).

¹⁷ As I have argued: Barber (n 10) chapters 1 and 2.

Weberian model would accept that the state has the attributes this account identifies, but go on to argue that given the capacities of the state, it ought to act towards good ends. The state has the capacity to advance the well-being of its members and, even if this objective is not an aspect of its nature, it should still seek to act in a morally attractive manner.

Weber, and those who write in his tradition, have succeeded in identifying part of the nature of the state—its distinctive mode of action—but have failed to locate this mode of action within a wider understanding of the state's purpose. A richer understanding of the state, one that brings forward its purpose or potential, illuminates a further and more profound problem with negative constitutionalism. Negative constitutionalism is in tension with the point of the state; calling for an institutional structure that would make it harder for the state to benefit its people. Like the Weberian model of the state, negative constitutionalism has only captured part of the story. Just as the state is only partly characterized by its wide authority claims and its capacity to effectively guide conduct, so too constitutionalism is only partly characterized by the need to limit the power of the state and guard against oppression.

Positive Constitutionalism

It might be argued that we should stop here; having identified the reasons why negative constitutionalism is unattractive, perhaps we should simply cease to make use of the concept. This seems to be Waldron's view: maybe we are better off without the term. But an alternative strategy would seek to rehabilitate constitutionalism, to find an understanding of constitutionalism that is morally attractive in itself and which, also, coheres with sounder understandings of both the state and constitutional principles.

A possible objection to such a project would be that it takes us too far away from the common understanding of constitutionalism. An interpretation of a doctrine such as constitutionalism needs to stay reasonably close to the common understanding in order to remain intelligible;¹⁸ an interpretation that strays too far might be criticized for not really being an account of constitutionalism at all—it might be confusing and unhelpful to insist on using this term for a very different concept. But, fortunately, the history of constitutionalism is rich enough to provide the resources for a very different version of the doctrine. Perhaps surprisingly, an alternative understanding can be identified

¹⁸ On the significance of the common understanding, see N. W. Barber, 'The Significance of the Common Understanding in Legal Theory' (2015) 35 *Oxford Journal of Legal Studies* 799.

within the classic, the seminal, work on constitutionalism: Charles Howard McIlwain's *Constitutionalism: Ancient and Modern*.

Waldron includes McIlwain as an example of negative constitutionalism,¹⁹ and, indeed, McIlwain invites this interpretation, emphasizing that constitutionalism requires, at its heart, the legal limitation of government and opposition to arbitrary rule.²⁰ But there is more to McIlwain's account of constitutionalism than simply the limitation of government.

The title of McIlwain's book suggests a dichotomy: that he proposes to contrast rival versions of constitutionalism—the ancient and the modern—and draw comparisons between them. In fact, McIlwain's project is to chart the emergence of the modern form of constitutionalism from its ancient origins and, rather than a dichotomy, he identifies a spectrum of forms of constitutionalism between these two positions. In a valuable paper Douglas Sturm identifies five successive stages in McIlwain's story.²¹ The starting point of constitutionalism—ancient constitutionalism—amounts to a stand against arbitrary rule. Perhaps the best interpretation of McIlwain's understanding of ancient constitutionalism is that it embodied a commitment to government according to *moral* rules, in opposition to the view that the powerful were entitled to exercise force whenever and however they chose to do so. McIlwain presents this as a commitment to natural law:²² ancient constitutionalism had no notion of using positive law to constrain and guide power. The earliest conceptions of the state were embedded within a broader political theory: the institution of the state was understood as part of a wider account of the proper ends of collective action.²³ McIlwain charts the evolution of the doctrine into the Roman period, where the recognition of the moral aspect of the state was supplemented by the claim that the source of its authority was located in its people.²⁴ Not only ought the state to act in the interests of its members, it was also an institution that enabled them, collectively, to act towards this goal. Between the Roman period and modern constitutionalism, states developed legal mechanisms to constrain the executive—the monarch—to the fundamental laws of the constitution. It came to be recognized that the executive was legally limited in its jurisdiction,²⁵ and, moreover, that the

¹⁹ Waldron (n 16) 271. ²⁰ McIlwain (n 6) 21.

²¹ D. Sturm, 'Constitutionalism: A Critical Appreciation and an Extension of the Political Theory of C. H. McIlwain' (1969–70) 54 *Minnesota Law Review* 215.

²² McIlwain (n 6) 28. McIlwain is using the term 'natural law' in a broader sense than most modern natural lawyers.

²³ Aristotle, *The Politics and Constitution of Athens* (S. Everson ed, CUP 1996) I.II 1252b28–30, III.IX 1280b39–40. See also C. Johnson, *Aristotle's Theory of the State* (Macmillan 1989) chapter 4 and J. Finnis, *Aquinas* (OUP 1998) chapter 7.

²⁴ McIlwain (n 6) chapter 3. ²⁵ *ibid* chapter 4.

democratic part of the constitution, Parliament, was the institution through which the people could determine the content of the law.²⁶ By this stage, to steal a phrase, constitutionalism required government of the people, by the people, for the people.²⁷

The end point of McIlwain's journey, modern constitutionalism, requires far more than just the application of the law to the institutions of the state. It requires that the state possess a set of institutions that is able to act: a strong government.²⁸ It further requires that these institutions are accountable to, and controlled by, the people they are intended to serve, requiring political processes of accountability to complement the legal side of the constitution.²⁹ In short, for McIlwain, constitutionalism was not solely concerned with limiting the power of the state, but was rather concerned with creating an institutional structure that facilitated the successful functioning of the state. This does require limitations—writings on negative constitutionalism have certainly captured part of the doctrine—but it also required the creation of effective, powerful, institutions that interact in constructive, as well as constraining, ways.

McIlwain's book is a fine example of an exercise in intellectual history, teasing out the connections between the different and developing understandings of constitutionalism. It is weaker, though, if assessed as an interpretation of constitutionalism—that is, as an attempt to provide an attractive account of the doctrine, an interpretation that we have reason to endorse. The final version of constitutionalism that emerges from McIlwain's book is underdeveloped. McIlwain does not explain how the three core aspects of modern constitutionalism he identifies—that the state's authority is grounded in its people, that it acts for their benefit, and that the people exercise control over the state—interrelate. Superficially, they appear to be in tension. If the members of the state get to determine the rules of the constitution, what confidence can we have that they will create institutions that can effectively advance their interests? And there seems to be a very obvious tension between empowering the people to determine the content of laws and ensuring those laws work for their benefit. What if the democratic processes of the state produce bad law and poor government? There may be ways of resolving these conundrums, but McIlwain does not attempt to answer them.

Despite these limitations, the understanding of constitutionalism found in McIlwain points us towards a richer account of that doctrine. That the

²⁶ *ibid* chapter 5.

²⁷ The reference is, of course, to Abraham Lincoln's Gettysburg Address: see G. Wills, *Lincoln at Gettysburg* (Simon & Schuster 1992), esp chapter 4.

²⁸ McIlwain (n 6) 144. ²⁹ *ibid* 133.

beginnings of such an account can be found in one of the classic, standard, works on constitutionalism shows that negative constitutionalism—discussed in the first third of this chapter—is not the only understanding of the doctrine on offer. Waldron is right to argue that negative constitutionalism rest on a set of mistakes, but it is possible to formulate a better account of constitutionalism—positive constitutionalism—which draws on earlier writings.³⁰ The common understanding of constitutionalism is flexible enough to allow us, intelligibly, to talk of positive constitutionalism as a superior interpretation of the doctrine when contrasted with its negative counterpart.

Constitutionalism: A Fresh Start

There are three connections that need to be considered in order to develop an attractive account of constitutionalism. First, there is the derivation of constitutionalism from an account of the state. A sound understanding of the state leads us towards a sound understanding of constitutionalism. Secondly, there is the connection between constitutionalism and constitutional principles. Constitutionalism is comprised of these constitutional principles; it is a doctrine that can be broken down into a number of discrete elements. Finally, completing the circle, there is a connection to be drawn between these principles and the state. By examining the principles that make up constitutionalism we gain a better understanding of the institutional structures that are required by a successful state.

(i) Deriving Constitutionalism From an Account of the State

The next chapter will argue that the state is not an institution every community should wish to create: small communities can, sometimes, function perfectly well without it. Rather than relying on authority, these groups can make decisions through consensus; each member can know every other member, and reputation—social capital—may be enough to ensure that the community functions successfully. There is no need for law, or for a formalized structure of coercion, in such groups. But in larger communities—communities like ours—the state is needed to co-ordinate and police people's conduct. Where we have reason to create the state, we have reason to create it with an institutional structure that enables it to achieve its defining purpose. Just as a person setting up a university should

³⁰ See also Murphy (n 15) 8.

create it with the institutional capacities necessary to advance learning, or the founder of a hospital should endow that body with the structures that will enable it to treat the sick, the founder of a state should ensure that it possesses the institutional capacities necessary for the advancement of the well-being of its members. The same also applies to those acting within existing institutions: decisions about the running or structure of a university or hospital should, normally, be decisions that protect or enhance their capacity to function. Those acting within the state should also consider the impact of their actions on the functioning of the state: the effectiveness of the state requires continuing support. We have, then, a (moral) reason to create and support the state because it is necessary—in societies like ours—for our well-being. Constitutionalism comprises a set of principles relating to the institutional structure of the state that are, in part, rendered attractive by the (moral) reasons we have for wanting the state. The principles of constitutionalism are directed towards ensuring that the state possesses an institutional structure that has the capacity to effectively advance the well-being of its members.

Two connections between the state and the well-being of its members were discussed in the previous section. The first contended that this goal was an aspect of the nature of the state. The second contended that, given the capacities of the state, this was an end it ought to pursue. In each case, if we have reason to create the state we have reason to fashion it in a manner that enables it to pursue this end. For the purposes of this chapter it does not matter which account is adopted: each drives us towards a positive conception of constitutionalism. But the first derivation of constitutionalism—which connects constitutionalism to the nature of the state—might be more faithful to the older literature on the doctrine. This is a connection made or implied by much of the literature on constitutionalism, a connection at the heart of the common understanding of the doctrine. On this account, constitutionalism is necessary not only in order for the state to achieve beneficial goals for its community but, also, in order for the state to succeed as a state. To return to the example discussed earlier, a prison that—somehow—had the capacity to improve the health of the community in which it was based might sometimes be right to pursue that goal, but no matter how successful it was in pursuing this end, it would not render it more successful as a prison. Constitutionalism is a doctrine that is morally attractive when having a state is morally attractive, but it is also a doctrine that is derived from the nature of the state, and would still be relevant for the state's success *qua* a state, even if we did not have reason to create the state in our community.

(ii) Between Constitutionalism and Its Principles

Constitutionalism is a doctrine that is derived from, or at least tightly connected to, the state. It applies to those creating states and, also, to those who act within and upon the structures of the state. It is a collection of principles—though, as the discussion in the first part of this chapter demonstrates, there is considerable disagreement about which principles should be included within the doctrine. To some extent this disagreement is misdirected: constitutionalism is more inclusive than many think. A number of the suggested principles are included within the doctrine: state sovereignty, the separation of powers, democracy—amongst others—are all aspects of constitutionalism.

The inclusivity of positive constitutionalism brings a worry: perhaps the account is too broad; perhaps we risk collapsing the whole of political philosophy into constitutionalism. Constitutionalism is certainly a subset of political philosophy, but the connection between the principles of constitutionalism, on the one hand, and the institutions and structures of the state, on the other, distinguishes these principles from other moral considerations that apply to individuals and groups. There are two aspects that serve to distinguish constitutionalism from other aspects of political philosophy. First, the principles of constitutionalism relate to the state—and to other bodies so far as they resemble the state. Other moral principles and obligations may also apply to the state, but these considerations are of wider application—often they are universally applicable, and are relevant to all groups and institutions. Secondly, the principles of constitutionalism have a distinctive structure. They present a state of affairs, a partial and idealized model of the state, that those addressed by the principles of constitutionalism are enjoined to create.

The principles of constitutionalism relate directly to the institutional structure of the state, but there are other, wider, moral principles that also help determine how the state should act. The demands of justice, for instance, apply in all communities. States ought to act justly, and ought also to ensure that their members treat each other in a just fashion. But the same is true for all other social groups: from families, through tribal groups, up to the international community, all of these bodies are bound to act justly, and all ought to apply the principles of justice. Similarly, at least some human rights are of general application. Everyone, for example, has a right not to be tortured, but this right binds interaction between individuals as much as it applies to interactions between the state and its people. Principles like justice and the moral obligations that instantiate human rights do apply to states, and do partly determine how states should act, but they do not directly address the institutional structure of the state. The principles of constitutionalism, in contrast, relate to the capacity

of the state to achieve its goals, goals that should include fulfilment of these broader moral obligations; they are concerned with the types of institution that the state needs, and the relationships between those institutions.

An alternative objection would point to constitutionalism's life beyond the state: perhaps constitutionalism applies to other forms of institution as well. Many papers have been written discussing the role of constitutionalism in the context of the European Union, for example, or the international community. To the extent that these other institutions resemble the state, constitutionalism is applicable to them. If the European Union became a state, constitutionalism would apply to it with full force: the Union would require the institutions and structures that are required by the state. However, the European Union is not yet a state, and may never gain statehood.³¹ The differences between the European Union and the state explain and justify why constitutionalism does not apply directly to that body. Some aspects of constitutionalism are relevant: the Union should adhere to the rule of law and subsidiarity, for instance. Other aspects of constitutionalism are partly relevant: the separation of powers speaks to the interaction of the court with other bodies, and illuminates the position of the European Parliament. But other parts of the doctrine are pretty much irrelevant: the Union is not sovereign, and should not—yet—seek to become so.

Secondly, the principles of constitutionalism have a distinctive structure. Moral considerations apply directly to those they address; they give us reason to act, or not to act, in certain ways. The principles of constitutionalism stand between these moral reasons and actors. They provide an idealized, and partial, vision of the form the constitution should take, and then require those working within constitutions to pursue this ideal. So, for example, an aspect of the separation of powers is the requirement that the judiciary be independent of the executive branch. Structures are needed that enable the judge to decide cases between the executive and the citizen impartially. There are a host of values that ground this aspect of judicial independence. By rendering the application of the law more predictable, judicial independence helps protect the autonomy of citizens: people can take advantage of the rights and opportunities offered by the law, and know what actions they are required to avoid. This also helps individuals to create legal relationships—through the creation of contracts and companies—which allow them to pursue valuable projects within groups. And judicial independence can also be seen as a working through of the basic moral equality of persons in the constitutional sphere. The state official and the private citizen are treated as constitutional

³¹ Barber (n 10) chapter 10.

equals before the court: any special powers claimed by the official must be shown to be grounded in law and, ultimately, conferred by collective decision of the community. Much more could be said about why judicial independence is valuable, but the point is a relatively simple one. It is a mistake to talk of judicial independence as protecting a single value. There is a host of values that make judicial independence worthwhile: this one aspect of constitutionalism is justified by a range of different values.

The principles of constitutionalism depict a state of affairs we have reason to want to bring about, but the reasons for wanting this state of affairs are many and varied. The principles of constitutionalism then act as rules, standing between the basic values that make life worthwhile and constitutional actors. When asserting that the desirability of judicial independence should guide constitutional change, or shape the conduct of officials, it is generally unnecessary to go back to ask why judicial independence was important in the first place. This mediating aspect of principles is commonly relied upon in their invocation in academic and popular discourse; people are enjoined to uphold the rule of law, or to respect the separation of powers, whilst multinationals and foreign governments are chastised for failing to honour the sovereignty of a state. In many cases, little is said about why the rule of law, the separation of powers, or state sovereignty, is valuable. They are treated as rules: it is unnecessary to constantly return to the reasons we have for embracing them.

The states of affairs specified by the principles of constitutionalism are ideals, but they are ideals that we have reason to pursue. In classical literature a divide is sometimes drawn between the theoretical ideal and the obtainable ideal.³² The theoretical ideal is one that we would pursue if we were unencumbered by limited abilities and capacities. In Aristotle's work, the example of kingship is given.³³ Monarchy is an example of a theoretically ideal form of government; if we could find a person blessed with perfect good will and omniscience, we should make them king. But the golden age has ended, and such people no longer exist; monarchy is a theoretical, rather than obtainable, ideal. A common argument for the benefits of capitalism over communism takes a similar form. If people were altruistic, and had complete knowledge of the needs of their fellows, communism would be preferable to capitalism. But given our limited altruism and limited knowledge, capitalism is a better

³² On the distinction in Plato, see McIlwain (n 6) 27–35. On the distinction in Aristotle's work, see Johnson (n 23) 162–66.

³³ Aristotle (n 23) III.XIII, 1284b28–35.

way of distributing resources within our society. Even if communism is the theoretical ideal, capitalism is the obtainable ideal.

There is a danger in pursuing the theoretical ideal rather than the obtainable ideal.³⁴ It is not necessarily the case that the obtainable ideal is simply a weaker version of the theoretical. Sometimes we will be worse off if we pursue the theoretical ideal rather than the obtainable; the quest will send us off in the wrong direction. A state that pursued the theoretical ideal of monarchy would probably find itself landed with a dictatorship rather than the republic that Aristotle identifies as the obtainable ideal. Similarly, a state that pursued communism would probably end up with widespread corruption and the inefficient allocation of resources—far removed from the obtainable ideal of capitalism.

The principles of constitutionalism are, then, ideals, but obtainable ideals. They are ideals that take account of human limitations. It is highly unlikely that any state would ever completely satisfy the demands of constitutionalism, but it is at least possible. Some of the principles of constitutionalism present states of affairs that must, to some extent, be present in order for the state to exist. A polity that completely failed to achieve the demands of sovereignty, the rule of law, or the separation of powers, for instance, would not constitute a state at all. It would lack some of the necessary attributes of that institution. Other principles—such as democracy and subsidiarity—can be completely absent from a state without imperilling its identity as a state, but the failure of the polity to honour these principles will prevent the state from advancing the well-being of its people as fully as it otherwise could.

The principles of constitutionalism are also partial: they do not seek to produce a single model of a constitution.³⁵ Whilst they depict a state of affairs that states should seek to bring about, they are under-determinative. There are lots of ways that a state could pursue these principles, and lots of forms a state characterized by constitutionalism could take. This is partly because the institutional structure that a state should adopt is, to an extent, determined by its history and local circumstances. In one state the courts might, for example, have a history of protecting citizens against oppressive executive decisions. In a second state, the courts might have acted to stall liberal legislation enacted by the legislature. The balance struck between the courts and other institutions should take account of this history. Similarly, a small state—like Iceland—may not require a federal structure to satisfy the demands of

³⁴ Adrian Vermeule makes a related point about the dangers of changing elements of a system: A. Vermeule, *The System of the Constitution* (OUP 2011) 87–94.

³⁵ This is discussed further in Chapter 8.

subsidiarity, whilst a large state—like the USA—clearly does require a constitutionally protected regional division of power. In addition to depending on these contingent factors, the principles of constitutionalism are also partial because there are a range of forms that can fulfil their demands. It is doubtful, for instance, that the presidential structure is always preferable to the parliamentary, or the parliamentary is always preferable to the presidential. Each realizes the demands of constitutionalism in different ways.

It might be objected that the principles of constitutionalism, understood in this way, are of limited utility. If they stand between the values that we should pursue and the reasons that apply to actors, can they not be safely eliminated from our account of the constitution? Perhaps Occam's Razor applies: we should reason directly from values to institutional structures without making use of these intermediate principles. Arguments of this type are common in constitutional theory. The separation of powers, it has been said, is 'a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds',³⁶ whilst the rule of law, it has been claimed, is virtually meaningless.³⁷

The principles of constitutionalism set out in this book do not have, and do not purport to have, their source in the pronouncement of an authority. Whereas legal principles present themselves as authoritative commands—asserting that those they address should behave in a certain way because the institutions of law command it—the principles of constitutionalism lie in political theory. If an objector can identify a more morally attractive version of one of the principles, we should abandon our old account of the principle and embrace this new version. The principles of constitutionalism lack the exclusionary force of law: they do not claim to bar those subject to them re-assessing the reasons on which the principles rest. They act in a similar way to what Frederick Schauer has called 'rules of thumb'.³⁸ Schauer's rules of thumb are generalized conclusions drawn from reflection on reasons that typically apply to a situation. Where these situations arise repeatedly, limitations on our capacity to reason successfully may mean that we will be more likely to achieve our goals by following the rule of thumb than by attempting to re-assess the reasons behind the rule in every case. In these situations we have reason not to look behind the rule of thumb—though the exclusionary force

³⁶ G. Marshall, *Constitutional Theory* (Clarendon Press 1971) 124.

³⁷ J. N. Shklar, 'Political Theory and the Rule of Law' in A. C. Hutchinson and P. Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Carswell 1987); M. Loughlin, *Foundations of Public Law* (OUP 2010) 314; J. Hasnas, 'The Myth of the Rule of Law' [1995] *Wisconsin Law Review* 199.

³⁸ F. Schauer, *Playing By The Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (OUP 1991) 104–11.

of a heuristic of this type may be relatively easily overcome. Even in this form, there are a number of reasons why it is useful to talk about the principles of constitutionalism, rather than ignoring them in favour of the values that underpin them.

First, a benefit of reasoning through principles is that the principles combine a number of related institutional features, presenting them as a package. There is complexity within the principles and, also, in the interaction of the principles. Within the principles, there is interplay between the values the principles seek to achieve and the institutional structures they recommend, and, also, interplay between the different institutional elements of the principles. More broadly, there are also relationships between the principles: the principles cohere and, as we shall see, our understanding of any one of the principles conditions, and is conditioned by, our understanding of the others. Using principles as a focus for reasoning is partly justified by this complexity. It means that we are not required to start afresh every time we want to examine the operation of some aspect of the constitution, and, even if it transpires that the principles do need revision, we have a basis from which we can start our critique.

Secondly, because the principles of constitutionalism play a mediating role between values and institutional structure, their claims can sometimes prove less controversial than arguments based directly on values. That there are a number of different values that justify a particular institutional arrangement may prove an advantage in establishing agreement over the principle: people may disagree over the connection between any given value and an institutional structure, but might still agree on the attractions of the principle. In Cass Sunstein's terms they may constitute incompletely theorized agreements, where people agree with a proposition but may disagree over the reasons for endorsing that proposition.³⁹ Whilst this lower-level disagreement may re-emerge in disputes over the interpretation or its application, sometimes this higher-level agreement will be sufficient to permit people to reach consensus on action.

In addition to these explanations of the value of reasoning through principles, the willingness of some communities to accept the principles as binding may, in itself, justify consideration of their content. It is worth examining the principles of constitutionalism because they are often potent features of our constitutional discourse. People commonly regard these principles as binding

³⁹ See C. Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733. See also J. Rawls, 'The Idea of an Overlapping Consensus' in J. Rawls, *Political Liberalism* (Columbia University Press 1993).

and, to an extent, this belief is self-fulfilling—because the community believes that these principles should be honoured, those acting within constitutional structures are pressured towards obedience. These principles are often manifested in social rules—or conventions—that affect how power within the state is exercised. To claim, for instance, that a proposed action violates the principle of the separation of powers, or imperils state sovereignty, is often to criticize the actor for breaking a constitutional rule. In the United Kingdom, for instance, the removal of the Lord Chancellor's judicial role was justified by the invocation of the separation of powers:⁴⁰ for a person to hold office in both the executive and judicial branch was thought to violate the principle. Which principles are embraced by the community and are then effective within the constitution will vary from state to state. In China, for example, there is broad agreement that the rule of law and state sovereignty are principles that must be respected, but the separation of powers is often regarded as antithetical to the state—and subsidiarity runs against the strong centralist ideology that underpins the constitution. Sometimes the principles of constitutionalism are found within the law of the state. They may be contained within the constitution, enshrined in statutes, or found in the decisions of judges. There is a wide range of implications that the law can then accord to these principles. They can be relied on to invalidate legislation, constrain the actions of the executive branch, or, perhaps, used as interpretive tools where the law is otherwise unclear. In these situations, where a version of the principle is found within the constitution, the constitutional instantiation of the principle of constitutionalism is, or should be, shaped by the best interpretation of that principle. Whilst, for reasons that will be explored later in this book, we would not expect these constitutional principles to mirror their counterparts in political theory, we can expect and hope that they will be informed by those principles.

The presence of these principles within the constitution gives us a reason to care about their interpretation. Those within the constitution are already committed to upholding the principle: demonstrating that a better interpretation of the principle is available may—should—shift their understanding of its requirements. The place of the rule of law within the Chinese constitution provides a powerful example of the potential force of principles. The embrace of the rule of law within China has made a difference to the lives of Chinese people, with an emerging system of administrative law shaping the

⁴⁰ R. Hazell, 'The Continuing Dynamism of Constitutional Reform' (2007) 60 *Parliamentary Affairs* 3; D. Woodhouse, 'The Constitutional and Political Implications of a United Kingdom Supreme Court' (2004) 24 *Legal Studies* 134; D. Pannick, 'Replacing the Lords by a Supreme Court' [2009] *Public Law* 723.

conduct of the bureaucracy.⁴¹ A difficult, and currently debated, question in China surrounds the role that the Party plays in deciding sensitive cases and judicial independence. By showing the part that judicial independence plays in the rule of law, reforms to China's judicial system can be presented as a working through of a principle to which the constitution is already committed; rather than the reforms being imposed upon the Chinese system from the outside, these are values that are inherent to that order. Furthermore, as the principles cohere, accepting one of the principles of constitutionalism might lead a person to accept others as well. So, for example, a person who is committed to democracy would also be led to endorse elements of the separation of powers—for democracy to function properly, an independent judiciary and a capable executive branch are required. But the path might also run in the other direction. A person who was committed to judicial independence because she valued legal certainty might also come to recognize the role that a democratically elected legislature can play in guaranteeing judicial independence—both by providing a line of protection between the courts and the executive, and by taking some politically controversial decisions out of the hands of the judges. The principles of constitutionalism are animated by a range of values, but they present themselves as forming a coherent whole, both within each principle and between the elements of constitutionalism more broadly.

Those who are sceptical of the analytical value of these principles should be careful not to overlook their practical utility. Even if it is possible to reason directly from values to institutional structure, the broad popular support that these principles enjoy may justify debates over their implications and content.

(iii) From Principles Back to the State

A successful account of constitutionalism would also enhance our understanding of the state. All of the principles of constitutionalism ultimately find their origins in the characteristic purpose of the state: the advancement of the people's well-being. As such, they amount to a working through of this claim. To achieve its goals, the state must adhere to these principles. A good state, a state that is a successful state, will possess an institutional structure that is characterized by constitutionalism. An account of constitutionalism enhances our understanding of the state by explaining the form that the state should take. Furthermore, to an extent, some of the principles of constitutionalism must be honoured in order for the state to exist. As the following

⁴¹ Q. Zhang, *The Constitution of China: A Contextual Analysis* (Hart 2012) chapter 5.

chapter will argue, sovereignty relates to the authority claims that all states make over people and territories. A polity that did not assert sovereignty or which could not, to some degree, make good on these claims would not be a state. Similarly, for the state to be able to exercise authority some aspects of the separation of powers and rule of law must be present: states require law in order to exert control within their territories. An understanding of constitutionalism is not, then, merely a development of an account of the state, it is a refinement of that account: a clarification of the nature of the state.

Conclusion

This chapter has sought to provide constitutionalism with a fresh start, but a fresh start that is faithful to older work on the doctrine. The negative model of constitutionalism is an impoverished version of the doctrine, which may find its origins in an impoverished understanding of the state. This account treats the state as a threat to the well-being of its people, and constitutionalism as a set of constraints that seek to mitigate that threat. A richer account of the state, one that recognizes its role in advancing the well-being of its people, generates a richer account of constitutionalism. This positive model of constitutionalism acknowledges the need for constitutional structures to guard against abuses of power—it is not utopian—but is focused on creating a strong state able to work for the good of its people. Positive constitutionalism contains a range of principles—the separation of powers, state sovereignty, subsidiarity, and so forth—that help determine the institutional structure of the state and the constitutional interaction of these institutions. A line can be traced from the institution of the state as a whole, through the doctrine of constitutionalism, to the discrete principles of constitutionalism, and then back to the internal institutional structure of the state.

2

Sovereignty

Is sovereignty a principle of constitutionalism? For some, this chapter will have started off on the wrong foot: for them, sovereignty is a description—or a wilful mis-description—of facts that exist in the world. On this understanding of the term, sovereignty purports to capture an attribute of states. This may be a necessary feature of the institution, a characteristic all states must possess,¹ or, more darkly, it may amount to, in the words of Stephen Krasner, a form of ‘organised hypocrisy’; a passionate assertion of the existence of certain facts that, in reality, are not attributes of states.² For some, sovereignty has become—or maybe always was—a work of fiction. There is, as we shall see, a core of truth in both of these claims: that sovereignty is a necessary attribute of states and, also, embodies an untruth. Resolving this apparent paradox will be one of the tasks of this chapter. Krasner’s characterization of sovereignty as an exercise in hypocrisy points us towards another aspect of sovereignty: its normative dimension. As has been said, hypocrisy is the tribute that vice pays to virtue: that people present sovereignty as important—even whilst aware that states routinely, and for good reasons, fail to meet its demands—suggests there is something morally valuable about sovereignty. Indeed, in political arguments sovereignty is commonly invoked as something worth preserving or strengthening: politicians routinely complain of actions that harm the sovereignty of their states.

This chapter will present sovereignty as a normative principle but, in so doing, will also explain its descriptive aspect. The first part of this chapter will connect sovereignty to an account of the state. Sovereignty captures two groups of elements that are necessary features of this institution: on the one hand, the characteristic authority claims made by the state; and, on the other, the demand that these claims be—to some extent and in some

¹ See, eg, C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (G. Schwab tr, University of Chicago Press 1985) chapter 1, and, from a very different starting point, H. Kelsen, *General Theory of Law and State* (A. Wedberg tr, Russell and Russell 1945) 383–86.

² S. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999), esp 68–72.

form—effective. On this understanding of sovereignty and states, all states are, necessarily, characterized by sovereignty. The second part of the chapter will consider the importance of sovereignty: the moral reasons that we have for creating institutions that possess its characteristics. As sovereignty is a core feature of this institution, this account will also provide a starting point for an account of the value of the state—but as an account of sovereignty is not identical with an account of the state, a defence of sovereignty is not a simultaneous defence of the state. Thirdly, the chapter will consider whether there are some situations in which sovereignty is unattractive or, perhaps, situations in which non-state institutions are preferable locations for sovereignty. The chapter will conclude by arguing that for the vast majority of people today, sovereignty, and, moreover, sovereignty mediated through the state, is of significant value.

There is a complicated relationship between the normative and the descriptive in this chapter.³ The chapter begins with the descriptive—an account of sovereignty that, it is hoped, will resonate with the reader's understanding of that term—and then proceeds to the normative—examining the reasons why sovereignty is valuable. But the ordering could have been inverted; the account of sovereignty developed in the first section is informed by the normative analysis in the second. Taken as a principle of constitutionalism, sovereignty is a moral principle and, as discussed in the last chapter, as a moral principle its best interpretation is the one that renders it most morally attractive. The theorist is limited by the broad common understanding of sovereignty—if she departs too far from this she is no longer providing an account of sovereignty, but rather of some other principle—but within this constraint there is a wide interpretative latitude. It is possible, of course, that contrary to the arguments of this chapter, and despite all this interpretive effort, sovereignty remains stubbornly unattractive. Perhaps no good moral reasons can be identified for sovereignty; if so, sovereignty may be a mistake, a constitutional fetish that lacks any merit.

A second intertwining of the normative and descriptive arises at the point of connection between the account of sovereignty and an account of the state. As I have argued elsewhere, when providing an account of a social institution, such as the state, one of the tests of the success of the account is its capacity to pick out features of the institution that are important to us; features that are

³ I have explored this at length elsewhere: see N. W. Barber, *The Constitutional State* (OUP 2011) chapter 1. Samantha Besson also examines the relationship in the context of sovereignty: S. Besson, 'Sovereignty in Conflict' in C. Warbrick and S. Tierney (eds), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (British Institute of International and Comparative Law 2006) 137–39.

morally salient. If it can be shown that the attributes of the state identified by sovereignty are morally important, this exercise will provide a justification for the inclusion of these features within the account of the state.

Finally, the justification of sovereignty will depend upon some empirical claims about human nature and human society. The claim that certain constitutional structures are needed for, or are conducive to, well-being turns, in part, on human nature and on the operation of society. Our limited capacities to gather information, to reason correctly, and to then act on the products of this reasoning are important steps in an argument for the state and, moreover, should shape the construction of that institution. An important function of the state is to provide an institutional structure through which human deficiencies in each of these three areas—knowledge, rationality, and good will—can be mitigated or cured. Moral arguments about the value of sovereignty will, therefore, rest on empirical claims about human capacities. Some of these empirical claims may be obvious—people are plainly not omniscient—but others may be more debatable. The account of sovereignty developed in this chapter may, then, be contested on both normative and empirical grounds; the argument may fail because it mistakes the proper ends of human interaction, or it may misunderstand the institutional structures that are conducive to bringing about these ends.

The Four Aspects of Sovereignty

Sovereignty is a word with many meanings, a homonym of impressive proportion. This chapter considers state sovereignty,⁴ but there are a number of related, but distinct, senses that could be accorded to the term. There is legal sovereignty,⁵ the capacity of a legislature to make law on any matter it chooses; popular sovereignty,⁶ the ultimate right of the people to decide on the government of their state; and the sovereign, his or herself—the monarch who stands at the head of the state.⁷ There are profound differences between these

⁴ When, in this chapter, I refer to 'sovereignty' without a further qualifier, I refer to *state* sovereignty, and not one of the other senses discussed in these paragraphs. For the various senses of sovereignty, see Krasner (n 2) chapter 1.

⁵ On which see J. Goldsworthy, *The Sovereignty of Parliament* (OUP 1999). See also N. W. Barber, 'Sovereignty Re-examined: The Courts, Parliament and Statutes' (2000) 21 *Oxford Journal of Legal Studies* 130 and N. W. Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 *International Journal of Constitutional Law* 144. On the interaction of legal and state sovereignty, see N. MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1.

⁶ R. Jackson, *Sovereignty: Evolution of an Idea* (Polity Press 2007) chapter 4; E. S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton 1989).

⁷ M. Loughlin, *Foundations of Public Law* (OUP 2010) 184–86.

ideas—and it would be a mistake to think of them as emanations of a single concept—but the varying meanings share a number of factors. First, they all concern purported authority relationships, amounting to a claimed, and sometimes actual, entitlement to tell others what they ought to do: the legal sovereign is empowered to enact laws that others within the system should obey; the people, under the doctrine of popular sovereignty, are entitled to set the constitutional path of the state—a path which officials and institutions are then obliged to follow; and when the head of state is described as sovereign the term implies that she occupies a position of constitutional authority, entitled to issue commands within certain areas. Secondly, they all carry an implication of finality: that the decision is ultimate, and cannot be unpicked by another body.⁸ Under parliamentary sovereignty, the laws enacted by a sovereign legislature should not be overturned by judges, unless, perhaps, the legislature has empowered them to do so. Popular sovereignty denies others in the state the right to subvert the decisions of the people; it is the people who get to decide on the government of the polity. And the *intra vires* decisions of a sovereign head of state are final within the executive decision-making structure. Finally, all three of these senses of sovereignty concern the location of constitutional power: they are concerned with the construction and operation of the state.

Like these other uses of the term, state sovereignty is concerned with authority relationships, finality, and the structuring of the state. Unlike the other three senses that are tied to institutions within the state—the legislature, the citizenry, the head of state—state sovereignty relates to the state itself, taken as a whole: consequently, whilst the other senses of sovereignty invoked claims of authority and finality, these were claims that were confined within particular constitutional fields. State sovereignty, in contrast, relates to the totality of the state and the totality of state power. It is the state, as a whole, that is sovereign, and, as an aspect of sovereignty, asserts an entitlement to determine how power is divided between its institutions—both in terms of the process by which the division of power is decided, and the ultimate scheme of division that is adopted.⁹ In treating sovereignty as an attribute of the state as a whole rather than as an attribute of an institution or person within the state, this chapter departs from many of the classical accounts of the doctrine, as found most prominently in the work of Bodin and Hobbes.¹⁰ It will be argued that it is, in part, this mistaken search for a

⁸ Jackson (n 6) 19–22.

⁹ M. Loughlin, *The Idea of Public Law* (OUP 2003) 87–93.

¹⁰ J. Bodin, *On Sovereignty* (J. Franklin ed, CUP 1992), esp book 1 chapter 8; T. Hobbes, *Leviathan* (R. Tuck ed, CUP 1991), esp chapter 19.

single sovereign body within the state that has made the principle of sovereignty seem unattractive.

State sovereignty embodies a claim about authority and, for it to be present in the world, this authority claim must have an ascertainable impact on those within the territory of the state; sovereignty embodies an authority claim that is, in some respects, effective. The claims that characterize sovereignty and the demand of effectiveness are the first two aspects of the principle. Cross cutting these is a further divide: between the internal and external aspects of sovereignty. Internally, sovereignty is concerned with the capacity of the state to effectively govern its territory and people. Externally, sovereignty requires that it is the state that does this governing; it—and not some non-state body—decides how its territory and people should be governed.

(i) The Claims of Sovereignty

The state claims authority over its people and over those within its territory; it claims to have the final say about how these people ought to behave.¹¹ Whilst there are many bodies within the state that purport to exercise limited authority—companies, unions, schools, for instance, all claim to be entitled to exercise authority in limited ways in limited areas—the state makes a far broader assertion of authority: every area of its nationals' lives, and the lives of those within its borders, comes within its reach.¹² For those writing on the state, this authority claim is one of the characteristics that define its nature. Perhaps the most famous account of the state that places authority claims at its core is that of Max Weber. Weber's characterization of the state is often the starting point for discussion of the institution; he described it as 'a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory'.¹³ Scholars have often focused on invocation of force as the central part of the definition, but, given that force need only be exerted when the state's authority is challenged, it could be argued that authority, not force, is the primary part of the definition.¹⁴ The state issues commands that are backed by force: these are distinguishable from the demands of the gunman, though, in that the state claims that it *ought* to be

¹¹ Barber (n 3) chapter 2.

¹² Though see T. Endicott, 'Interpretation, Jurisdiction and the Authority of Law' (2007) 6(2) American Philosophical Association Newsletter on Law and Philosophy 14.

¹³ M. Weber, 'Politics as a Vocation' in H. H. Gerth and C. Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1991) 78.

¹⁴ As Weber recognized: M. Weber, *Economy and Society* (G. Roth and C. Wittich eds, California University Press 1978) 903–04.

obeyed; it purports to exercise legitimate authority, and, when it resorts to force it is entitled to do so because of the failure of the individual to recognize its right to command.

The precise nature of the state's authority claim is debatable. For Weber, the state claims that *all* exercises of authority within its borders are either legitimated by it—expressly or tacitly—or are illegitimate, a threat to the state.¹⁵ Les Green, in contrast, argues that the state claims to be the *supreme* authority in its territory;¹⁶ whilst the state claims to be entitled to remove or fetter other authorities within its boundaries, it does not claim that these bodies find the source of their authority in its express or tacit permission. In this respect, Green's account is preferable to Weber's. It is possible that the state might acknowledge that authority relations within other social institutions have an independent, non-derivative, existence: the state need not claim that it has validated or established authority relations within the institution of the family, to give one example.¹⁷ Furthermore, the state need not claim that it is entitled to interfere with these other authority relationships. When other institutions are functioning properly, the state might conclude that interference with them would be unjust; that they fall beyond the state's proper jurisdiction.

Reflection on the authority claims made by the state brings us back round to sovereignty. Internal sovereignty relates to the ability of the state to exercise control within its territory. As a claim, internal sovereignty relates to the way in which the state presents itself to its members and to those who operate within its territory; as Neil Walker puts it, sovereignty is, in part, a speech act;¹⁸ if the supposed state concedes that its authority does not extend to some folk within its territory or population, its sovereignty—and its statehood—will be called into question. The most common articulation of this element of sovereignty is through the issuing of commands: when the state orders a person to act, the action is only conditional to the extent that the state permits it. So, it may be that the person is given permission not to act—or that the command can be set aside by another (non-state) body—but, according to the claims embodied in sovereignty, these exceptions must either be mandated by the state or endorsed by it. More specifically, whilst the state may recognize limits on its authority, and may recognize other bodies within its territory have non-derivative authority, it is the *state* that makes these determinations.

¹⁵ J. Hoffman, *Beyond the State* (Polity Press 1995) 35–37.

¹⁶ L. Green, *The Authority of the State* (Clarendon Press 1990) 78–83.

¹⁷ See further Endicott (n 12).

¹⁸ N. Walker, 'Late Sovereignty in the European Union' in N. Walker (ed), *Sovereignty in Transition: Essays in European Law* (Hart Publishing 2003) 6–7.

There are moral limits on the extent to which the state should interfere with bodies within its territory, and so situations in which the state should recognize the proper authority of other bodies, but, according to sovereignty, it is for the state to decide on these limits. As we shall see, it is an important aspect of sovereignty that the state claims jurisdiction to determine the jurisdiction of other institutions within its borders—even if it goes on to decide that it would have been wrong for it not to accept their non-derivative authority.

The claims of the state also speak to external sovereignty: the autonomy the state enjoys from other entities, including other states but also including powerful actors within its borders, that exist outside of its constitutional structures.¹⁹ The state's sovereign claim to exert authority over its people and territory includes a claim of independence from external control: it is the state that decides how it exercises its power. If a state cedes authority to another body, sovereignty, and statehood, is lost. When, for example, Scotland and England agreed to combine into the United Kingdom, each abandoned its old set of sovereignty claims in the joint recognition of the authority of a new set of constitutional institutions.²⁰

External sovereignty is most commonly considered in the context of international relations—the capacity of the state to act independently of other states and international organizations—but its implications are wider than this. The state also claims to act autonomously of private bodies, such as trade unions, multinational companies, churches, and the like. These bodies may lobby and persuade the state but, if the claims of sovereignty are vindicated, they may not command; the state is not subject to the control of another institution.

The claims that are characteristic of sovereignty—in both internal and external respects—have an assertion of *finality* at their core.²¹ Not only does the state purport to tell people how they ought to behave, it also asserts that the decisions of its institutions may only be legitimately challenged within its constitutional structures. The state, as a whole, has the final say about the rights and duties of its nationals and those within its territory. Other groups within the community, other states and international bodies, may debate with the state, but, ultimately, it is the state that decides. This element of

¹⁹ P. Piirimäe, 'The Westphalian Myth' in H. Kalmo and Q. Skinner (eds), *Sovereignty in Fragments* (CUP 2010) 65–70.

²⁰ The constitutional implications of the agreement between England and Scotland have long been debated: T. B. Smith, 'The Union of 1707 as Fundamental Law' [1957] Public Law 99 and N. MacCormick, 'The United Kingdom: What State? What Constitution?' in N. MacCormick, *Questioning Sovereignty* (OUP 1999).

²¹ F. H. Hinsley, *Sovereignty* (2nd edn, CUP 1986) 22–26.

finality, the assertion of the entitlement to make the ultimate decision, is crucial to sovereignty, and brings to mind the work of one of sovereignty's most controversial theorists: Carl Schmitt. For Schmitt, the sovereign was 'he who decides on the exception'.²² In the moment of the exception—a status identified by the sovereign—the sovereign steps forward to decide on the applicability of the state's legal order²³ and—perhaps as a result of this—determines the extent of the state's membership, sorting the friend from the enemy.²⁴ It is only a small exaggeration to say that for Schmitt the sovereign takes the place of God within the cosmology of constitutional thought.²⁵ It is the existence of the sovereign that permits the miracle that enables the existence of the state, defining the group that constitutes its members, and willing the operation of its legal order.²⁶

The account of sovereignty given in this chapter resembles that of Schmitt's in a number of respects: as in Schmitt's account, sovereignty is presented as a necessary feature of the state, and, as with Schmitt, sovereignty is tied to decisions and to finality. But there are important differences. First, Schmitt's model of sovereignty presents sovereignty as vesting in a person within the constitutional order. Sometimes Schmitt claimed that an institution could possess sovereignty, but the logic of the exception militates against this.²⁷ If an institution stepped forward in a moment of crisis to determine the applicability of the legal order, what if the crisis infected that institution? Then the fragmentation of the institution might reveal a smaller group or sub-institution that could make this decision—and the process could continue, until the 'sovereign' individual is revealed.

There are several difficulties with Schmitt's conception of sovereignty. Most fundamentally, perhaps, it is hard to see why we should assume that there is one person (or institution, come to that) who will possess the capacity to resolve, or identify, every constitutional crisis.²⁸ It could be that different crises will be addressed by different constitutional actors; the effective decision-maker may be identified by, perhaps empowered by, the circumstances of

²² Schmitt (n 1) 5. See the discussion in D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Herman Heller in Weimer* (Clarendon Press 1997) 40–58.

²³ Schmitt (n 1) 10.

²⁴ C. Schmitt, *The Concept of the Political* (G. Schwab tr, Chicago University Press 1996) 39–45.

²⁵ Schmitt (n 1) 36.

²⁶ G. Schwab, *The Challenge of the Exception* (2nd edn, Greenwood Press 1989) chapter 2.

²⁷ R. Cristi, 'Carl Schmitt on Sovereignty and Constituent Power' in D. Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Duke University Press 1998).

²⁸ On this point, see also P. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (Duke University Press 1997) 107–16.

the crisis.²⁹ Though Schmitt is correct to argue that the constitution cannot provide for every emergency, constitutional rules—legal rules—often succeed in heading off crises or in providing structures through which these crises can be resolved without recourse to extra-constitutional action.³⁰ Secondly, Schmitt's conception of sovereignty focuses on the extremes, whereas this chapter presents sovereignty as a day-to-day feature of the state. The invocation of finality is a common aspect of constitutional life: legislatures get to decide on the contents of statutes; courts have the final say about disputes over the legal rights of individuals; administrators, when acting within jurisdiction, get to set and apply policies. Far from being exceptional, the closure that sovereignty enables and requires is a routine, and essential, part of the activities of the state.

(ii) The Effectiveness of the Claims

Consideration of the authority claims at the core of sovereignty shows that the internal and external aspects of sovereignty are two sides of the same coin. Internally, the state claims authority over its people and territory; it asserts that it has the final say about their rights and obligations. Externally, the state claims to be entitled to exercise this power free from outside control; it is the state that decides. At this point, the reader might be reminded of Krasner's allegation that sovereignty is 'organised hypocrisy': after all, in reality even the most powerful of modern states do not live up to these claims. As a matter of internal sovereignty, all states struggle, and frequently fail, to exercise control over their people, and this failure can arise in a number of ways. Most obviously, people break the law, and often get away with their law-breaking. But the state may also fail to exercise control when people do what an apparent state says, but not because that body has said it. The European Union, for instance, makes claims that seem very similar to, if not identical with, those of the state, but its capacity to control its people depends almost entirely on the willingness of the Member States to command their citizens to obey.³¹ As a matter of external sovereignty, all states are under constant pressure from their fellow states and from other institutions.³² Even super-powers, such as America and China, are influenced by bodies outside of their constitutional

²⁹ See the discussion in E. Posner and A. Vermeule, 'Demystifying Schmitt' in J. Meierhenrich and O. Simons, *The Oxford Handbook of Carl Schmitt* (OUP 2016).

³⁰ As Schmitt might have acknowledged: Dyzenhaus (n 22) 43–44.

³¹ See further, Barber (n 3) chapter 10.

³² A recurring point in discussion of sovereignty: H. Kalmo and Q. Skinner, 'Introduction: A Concept in Fragments' in H. Kalmo and Q. Skinner (eds), *Sovereignty in Fragments* (CUP 2010) 5–7.

orders, and states of more modest means may find, on occasion, that their conduct is all but determined by powerful actors. Krasner is, then, correct to identify something paradoxical at the heart of sovereignty: the claims at the core of the principle are ones that are never completely successful and, moreover, most thoughtful members of the state know this full well. Those who protest against actions that violate or undermine sovereignty might appear mendacious for this reason; criticizing others for acting contrary to a purportedly valuable state of affairs that, they know, does not actually exist.

The apparent paradox of sovereignty can be resolved through reflection on the requirement of effectiveness. Whilst the claims of sovereignty are absolutes, the existence of sovereignty is a matter of degree.³³ It is not enough that the state makes these claims, for the state to exist in the world—and for the political ordering to be characterized by sovereignty—these claims must be effective to some extent. In this respect it is incorrect, or at least misleading, to say, as Michael Oakeshott did, that sovereignty is a form of authority and not a form of power.³⁴ Sovereignty lies at the intersection of authority claims and power; it is a particular type of authority claim that has some practical power behind it.³⁵ Where sovereignty exists the institutions articulating its claims must, to some extent and in some way, make good on these claims.

Returning to Weber's account of the state, in addition to an assertion of authority, Weber argued that the state must also succeed in persuading its subjects that it is entitled to govern them; it is not sufficient that they treat the state as an authority, they must also endorse its claim to legitimacy.³⁶ As a broad empirical assertion, there is probably something to this: states in which only a very small portion of the people accept the legitimacy of their rulers are likely to be unstable, and may struggle to maintain control of their population over time.³⁷ But governments that rely on threats and bribes to secure their power can exist for long periods of time—and may sometimes prove more stable than states that enjoy broad popular support. Les Green advances the more cautious—and more plausible—assertion that the test of effectiveness should be taken as relating to the capacity of the state to successfully alter the way people behave: people must act as the state requires and, moreover,

³³ S. Huntington, *Political Order in Changing Societies* (Yale 1968) 20–22.

³⁴ Jackson (n 6) 14; M. Oakeshott, 'The Vocabulary of the Modern European State' (1975) 23 *Political Studies* 319, 321–23.

³⁵ M. Loughlin, *The Idea of Public Law* (OUP 2003) 81–82.

³⁶ Weber (n 13) 18–19.

³⁷ T. R. Tyler, *Why People Obey the Law* (Princeton University Press 2006), esp chapters 12 and 13, discussed further in Chapter 4.

act in this way because of this requirement. In Joseph Raz's terminology, the state must be a *de facto* authority.³⁸ In contrast to Weber's account of the state, in Green's account the state's commands must generally be effective, but this effectiveness need not rest on an endorsement of the state's claim to exercise authority.³⁹

The requirement of effectiveness plays out in different ways in terms of internal and external sovereignty. As a matter of internal sovereignty, the state must succeed in exercising control over the people within its territory. For the state to exercise control, it is not enough that people simply act in the way that the state commands—a fantasist who commanded everyone to behave as they please is not exercising control over their behaviour—they must act in this way because of, at least in part, the state's commands. To foreshadow the discussion of the rule of law in a later chapter, this requires that the state's commands do, indeed, make the difference to people's conduct that they purport to make. As a matter of external sovereignty, the state must maintain the capacity to make decisions—to exercise its control over its people and territory—in an autonomous fashion. It may listen to other institutions and individuals, but, ultimately, it is the state that decides on the way it governs.

Both of these two aspects of effectiveness are matters of degree. To possess sovereignty the state must satisfy the requirement of effectiveness to some minimal extent.⁴⁰ A set of institutions that completely failed to govern would not possess sovereignty, and would not constitute a state. Similarly, a set of institutions that was completely subservient to another body—whose decisions were dictated by that other body—would also lack sovereignty; at best, it would be a 'puppet state', an entity which had the outside form of a state, but lacked its true content. Beyond this minimum, states can enjoy greater or lesser sovereignty. Some states have a firm control over their territories: their capacity to successfully command their people is very high whilst other states may possess less control.

Beyond a certain minimal level, the external sovereignty of states is, again, a matter of degree.⁴¹ All states must, and, indeed, should, listen to and consider the representations of non-state institutions before acting. As we shall see, part of the value—perhaps a very significant part of the value—of states is their capacity to facilitate and encourage the activities of non-state

³⁸ J. Raz, *The Morality of Freedom* (Clarendon Press 1986) 26–28, 46; Green (n 16) 25–28, 65–66.

³⁹ Green (n 16) 73–75, 86–88; Raz (n 38) 65.

⁴⁰ This may explain why some see sovereignty as a 'threshold' concept: Besson (n 3) 153.

⁴¹ See the discussion in R. Steinberg, 'Who is Sovereign?' (2004) 40 *Stanford Journal of International Law* 329, 332–33.

groups. The creation and enhancement of civic society, the arena of non-state institutions that exist within the state, is one of the purposes for which states exist. Similarly, at a higher level, the creation of an international community, and fostering of positive relationships between states in this realm, is also one of the state's tasks. In each of these instances, the state needs to engage with and consider the views and interests of these external groups before acting. Very powerful states may be able to act with almost complete autonomy—free to decide to what extent they consider the representations of external parties—but, more commonly, most states must take account of the views of other states and groups before exercising their power.

Politicians who protest about the violation of sovereignty may, sometimes, not be guilty of mendacity. Lobbying and pressure brought from within and outside the state do not necessarily run against sovereignty. Sovereignty is retained, unimpeded, when the state considers representations made by other bodies and is made aware of the possible repercussions of its actions. Sovereignty is threatened, though, when these other bodies are able to dictate to the state. Politicians may rightly protest if a powerful corporation or neighbouring country seeks to command action; such a shift in power would take public decision-making out of the hands of the citizenry. Politicians may also rightly warn if decisions of the state risk imperilling sovereignty: for example, it is possible that some forms of international arrangement place too great a constraint on the state.

The Value of Sovereignty

If sovereignty is to qualify as a principle of constitutionalism it must be morally attractive; there must be reasons why we should create an institutional structure that is characterized by its demands. It is worth noting at the outset that the obvious candidate for defence of sovereignty—the importance of coordination—is not quite enough for the task; it is not immediately obvious why the particular type of authority embodied in sovereignty is needed in order to coordinate communities. As we shall see, bodies that lack sovereignty can still exercise authority and, moreover, there are ways of achieving coordination that do not require authority at all—inducements and threats can be equally effective. A defence of sovereignty must show why the *finality* claims at the core of the principle are valuable, why it is advantageous to have a political structure that claims to have the ultimate say about how people within its territory ought to behave. Three connected arguments can be made for the value of sovereignty.

(i) The Argument from Subsidiarity and Democracy

A crucial question faced by democracies is: who decides who decides? Subsidiarity, examined later in this book, asserts, in part, that decisions should be made by those who are affected by them. This raises two further questions. First, how should we go about determining who is affected by a decision, and, secondly, who should decide on the application of this test. Subsidiarity and sovereignty interlock in the answering of this second question.

Like other questions about the exercise of public power, the subsidiarity question should normally be answered democratically—either by the citizenry directly or by institutions that are under their control. The bodies that decide on the subsidiarity principle will have to assess a great many factors that raise questions of both empirical and normative uncertainty. Subsidiarity raises empirical questions about the range of people affected by a decision and the extent to which they are affected. It also raises difficult moral questions about when people who are affected by a decision may rightly be excluded from taking that decision in order to enhance the democratic effectiveness of the decision-making body. Sovereignty enables the state to act as the institution that decides on the allocation of public power within its institutional structures; the state has the final say about the creation and jurisdiction of public bodies. The state may exercise this capacity in a number of ways. It may establish a constitutional convention which then creates a lasting federal structure, or—perhaps—the constitution will allocate these decisions to a central legislature, which may modify the allocation of powers to the regions of the state over time. In any event, it is at the level of the state that initial decisions about subsidiarity are made and, where the state is a democratic one, these questions will have been answered by a body that is—more or less directly—under the control of the citizenry. The finality that sovereignty confers is valuable in these instances because it prevents the decision about the allocation of powers being reopened by another body outside of the constitution, and, in turn, it prevents specific decisions, taken within the scope of those powers allocated being reopened. Sovereignty consequently allows for closure within constitutional structures: a point at which deliberation concludes, and action can begin.

There is one question engaged by subsidiarity that cannot normally⁴² be answered democratically:⁴³ the question of where the boundaries of the state itself should be drawn. The sizes of the constituencies that ought to make

⁴² Save where two democratic states are considering merging.

⁴³ F. G. Whelan, 'Prologue: Democratic Theory and the Boundary Problem' in J. R. Pennock and J. W. Chapman (eds), *Liberal Democracy* (New York University Press 1983).

decisions in the public realm form a spectrum. At one extreme lie parish councils, village-level authorities that consist of small groups of people, whilst at the other lies the international community, a political unit of enormous size. States lie in between these two extremes, and sovereignty, an essential attribute of statehood, is a capacity that should vest at some point on this spectrum. Subsidiarity tells us that states can be too big and too small. Where a state is too big, the number of issues decided at the national level is too few to support the creation of a viable democratic unit. The notion that the British Empire could—or should—develop into a fully democratic state, with an elected Imperial Parliament, failed for this reason.⁴⁴ There simply were not enough issues shared by—say—Britain and Australia to allow for the creation of a vibrant shared legislature. If one were created it would either lack legitimacy—by deciding questions that ought to be allocated to smaller democratic units—or prove moribund—deciding very little indeed. States can also be too small. Unless there are special reasons for their existence, micro-states are unjust in two respects. First, they fail to allow their citizens the capacity to exercise control over the decisions that are made about them. It is their neighbouring states that decide questions relating to foreign and domestic policy; the micro-states must fit in with these decisions as best they can. Secondly, they fail to allow their citizens to take responsibility for these decisions. The flipside of small states' failure to exercise control over these decisions is their lack of responsibility for them. The hard decisions about defence, foreign policy, and many other topics, are made elsewhere. And for the essential infrastructure states rely upon—transport, education, health-care—small states are heavily reliant on their neighbours: there are, for instance, significant limits on the capacity of small states to develop the capacities to train doctors and teachers, to establish universities, and to conduct research. The injustice of these small states is twofold: it is unjust to deny the citizens of the small states a say in these matters, and it is also unjust to allow them to escape the burdens placed on their larger neighbours.

Subsidiarity speaks to the level at which sovereignty should be allocated. As things presently stand, the creation of an international democratic unit, a world state, is implausible. Though some scholars, such as Richard Falk and Andrew Strauss, have provided tempting accounts of a body of this type,⁴⁵ it is hard to imagine the political difficulties of creating such an assembly being overcome. Indeed, even if an elected international assembly were created,

⁴⁴ On which see D. Bell, *The Idea of Greater Britain: Empire and the Future of World Order 1860–1900* (Princeton University Press 2007).

⁴⁵ Jackson (n 6) 144–50.

it is questionable whether such a body could function successfully.⁴⁶ Falk and Strauss cite the European Parliament as evidence that assemblies at an international level are possible, and can flourish, but for many within the European Union the example might point the other way.⁴⁷ The European Parliament, responsible for a far smaller constituency than a global legislature would serve, still struggles to engage voters.⁴⁸ If an international assembly were created in the image of the European Parliament cultural, linguistic, and historical factors would all weigh against its success.⁴⁹ For now, sovereignty—questions about the finality of public decision-making—needs to be vested beneath the level of the global community if it is to be exercised democratically, and it is through states—rather than directly—that peoples engage in the international realm.⁵⁰

(ii) The State as the Facilitator of Other Social Institutions Through Civil Society

The state is one social institution amongst many. Within the state there are families, companies, trade unions, charities—a vast range of other types of social institution, some of which are very similar to the state, some of which are profoundly different. An important difference between the state and most other institutions operating within its borders relates to their area of concern; the range of people whose interests the institution exists to advance. The state's area of concern is extensive, encompassing all of its members; their well-being is the defining purpose of the state. Most other institutions within the state have far narrower ranges of concern. Within the family, for example, parents care for their children—and for each other—to a far greater extent than they care for strangers or acquaintances. Within the company, the business is run to enrich the shareholders—and, perhaps, to benefit its employees.⁵¹ These organizations rely on a sort of moral myopia to function; they require their participants to set aside, at least temporarily, the essential moral equality of persons.

⁴⁶ R. Falk and A. Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty' (2000) 36 *Stanford Journal of International Law* 191.

⁴⁷ *ibid* 204–07.

⁴⁸ D. Grimm, 'Does Europe Need a Constitution?' (1995) 1 *European Law Review* 226, 295 and J. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' (2009) 9 *International Journal of Constitutional Law* 678, 679–82.

⁴⁹ See also T. Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics* 48, 61–63.

⁵⁰ D. Grimm, *Sovereignty* (University of Columbia Press 2015) 101–28.

⁵¹ On the differing conceptions of the corporation, see J. Micklethwait and A. Wooldridge, *The Company* (Weidenfeld & Nicolson 2003) chapter 5.

As we shall see when examining civil society, there are significant benefits to be gained by permitting this limitation of range of concern: sometimes restricting the range of considerations of which an actor is required to take account will serve to advance the overall well-being of the community. So, for example, forms of invisible hand arguments have been used to justify the limitation of concern in the context of both the family and the company. Plato's model of child-care—in which families are abolished and state experts raise children—has a veneer of justice: by ensuring all children would receive the same level of care and opportunity the partiality of the family, in which some receive better care than others, is either cured or mitigated.⁵² But it has been argued that the special, intimate, care found within the family is hard, if not impossible, to duplicate within the state—or charity—sector.⁵³ A state that contains the institution of the family, that permits or even encourages this partiality, may prove more successful in advancing the overall well-being of its citizenry than one which seeks to provide the same type of care directly. A similar argument can be made for the partiality of concern that characterizes the company. It is arguable that businesses pursuing profit may, through operation of the market, ensure a more efficient distribution of resources than the best endeavours of a central planner.⁵⁴ Once more, the state, by allowing this partiality to flourish, may do more good than if it sought to take over these tasks itself.

The examples given in the previous paragraph were sketches of common invisible hand arguments: situations in which the common good is better achieved when actors limit their range of concern rather than seek to advance that common good directly. Invisible hand systems, and the role of the state in their functioning, will be discussed in more detail later in this book. For now, it is enough to note that some who write on invisible hand systems see them as set in opposition to, or in tension with, the state; these are 'spontaneous orders'⁵⁵ that have emerged without any outside designer and, moreover, it is sometimes claimed, any attempt to interfere with such systems is liable to make them function less well.⁵⁶ Whilst this may sometimes be true, often,

⁵² Plato, *The Republic* (F. M. Cornford ed, OUP 1970) chapter xvi.

⁵³ J. Blustein, *Parents and Children: The Ethics of the Family* (OUP 1982) 37; J. M. Parrish, *Paradoxes of Political Ethics* (CUP 2007) 73.

⁵⁴ For a classic argument to this effect, see F. A. Hayek, *Law, Legislation and Liberty* (Routledge 1982), volume I, 14–16, 41–42, and F. A. Hayek, 'The Uses of Knowledge in Society' (1945) 35 *The American Economic Review* 519.

⁵⁵ Hayek, *Law, Legislation and Liberty* (n 54) volume I, 38–40.

⁵⁶ F. A. Hayek, 'Was Socialism a Mistake?' in F. A. Hayek, *The Fatal Conceit* (W. W. Bartley III ed, University of Chicago Press 1988) 7. Though elsewhere Hayek is more willing to accept that these systems may be improvable through design: Hayek, *Law, Legislation and Liberty* (n 54) volume I, chapters 6 and 7.

perhaps even normally, systems of this type require the existence of an external authority to regulate and supplement them if they are to be morally defensible.

Setting aside the need to establish or modify the operation of invisible hand systems themselves, states have a role to play in creating an environment in which the moral myopia of other social institutions is permissible or, sometimes, justifiable. In the context of the family the state provides, or should provide, a base-level guarantee of care for all children. It should make sure that children who are not within a family are given care and support. It should also make sure that the sorts of abuses and dysfunctions to which the institution of the family is prone are guarded against, and corrected. Similarly, in the corporate world, the state provides, or should provide, a base-level guarantee of care for actors in that arena. It should not allow members of unsuccessful companies to starve, for example, if they fail to prosper in the marketplace. And, again, it should guard against the dysfunctions that corporations can fall prey to: amongst many other things, the state should prevent the emergence of monopolies within the market. In each of these cases, the background role of the state is crucial to permitting the limitation of moral concern that makes the family and the corporation possible. It is only where people know that there is another institution that is better able than them to address these issues that they are (morally) entitled to shut them out of consideration. So, a business person is able to compete against other companies, knowing that the success of her enterprise will not lead to the ruination of the owners and employees of other businesses, and parents can prioritize the care of their own children, knowing that other children will be cared for in other ways.

In these instances, the state acts as what we might term ‘the group of groups’. The social group that is the state encompasses most of the members of the social groups that make up families and companies within its territory. Part of the task of the state is to ensure that the non-state bodies within its territory and population, even those—which comprise the vast majority—that have constricted areas of concern, contribute towards the overall well-being of state members. Whilst parents and company directors enjoy the benefits brought by the limitation of their range of moral concern, in their role as citizens their area of concern broadens: as citizens, they should consider the well-being of the citizenry as a whole. As citizens, they are responsible for the functioning of the state. And, through the state, they have a responsibility to ensure that the structures are in place that allow them to benefit from a restricted area of moral concern in other contexts.

The role of the state in establishing and regulating invisible hand systems will be considered in the chapter on civil society. For now, it is sufficient to note the connection between this task and sovereignty. In order to regulate

and support the institutions that operate within the state, the state must assert jurisdiction over them. The state must claim—and must, if it is to be effective, be successful, in some sense—the authority to shape and limit these bodies. It determines, for example, what types of power relationships are acceptable within these institutions—how parents should treat their children, the controls that shareholders should exercise over the board of directors—and how these institutions should engage with each other and with other bodies in society. It is sometimes argued that institutions such as the family are primary: that they take precedence, in some sense, over the state.⁵⁷ There may be some historical truth in this—it could be that the institution of the state emerged from the institution of the family—but reflection on the range of concern of these institutions suggests the opposite in terms of the hierarchy of authority. Members of families and companies should—when the state is functioning reasonably well—recognize that it is the institution with the broader, encompassing, reach of concern that ought to have the final say about the structuring of bodies with a more limited range of concern. And it is for them, in their capacity as citizens, to decide how these powers should be deployed. It should be noted that the state's decisions can, of course, be foolish or unjust: merely because the state has the final say about the structure and functioning of families and companies, it does not follow that the decisions it makes about these bodies will always be correct.

(iii) The State as the Medium of Engagement at the International Level

The previous section discussed the moral myopia of institutions within the state, and the role of the state in mitigating or curing this limitation of concern. But it could be argued that the state itself is characterized by a form of moral myopia. The state's range of concern is tied to the well-being of its members, but what of non-nationals, foreigners who are not members of the state? At first blush, the focused concern of the state appears to run against the basic moral equality of persons. The life of a Russian is as morally significant as the life of an American, so why should the Russian state pursue the interests of the Russian, largely ignoring the American, whilst America pursues the interests of the American, whilst largely ignoring the Russian?

⁵⁷ See the discussion in M. Cahill, 'The Origin of Anti-Subsidiarity Trends in the Regulation of the Family' (2013) 4 *International Journal of the Jurisprudence of the Family* 85, 95–100. This is discussed further in the chapter on subsidiarity.

Once again, the answer is found in the benefits of limited concern. First, each state is better placed to minister to its own nationals than to members of other states. One of the most powerful arguments for subsidiarity is that decisions should be made by the people affected by them because—all else being equal—this group has the information and motivation to make the best possible decision. It is far from a universal truth, but it seems likely states are better placed to look after the well-being of their own members than to look after the well-being of members of other states. Secondly, when the state is functioning properly, citizens exercise control over the state: the decisions of the state are, more or less directly, their decisions. There is value in people having a voice, and a vote, in collective decisions that affect their lives. As Jeremy Waldron puts it, participation is ‘the right of rights’; it is an expression of the equal importance of those subject to the state, and an affirmation of their rational capacity to engage in decision-making.⁵⁸ It is therefore problematic, and it at least requires an explanation, if the citizenry of one state make decisions that affect the people of another—even if the decision works to the benefit of those others. The intervention may have reduced the capacity of the people of that other state to govern themselves. Whilst intervention in the affairs of other states without the agreement of those states may sometimes—perhaps even quite frequently—be justified, these interventions should be undertaken with caution.⁵⁹ Just as a state should recognize the moral value of sovereignty for its own people, it should also recognize the moral value of sovereignty for the citizens of other states.⁶⁰

These arguments resemble the arguments developed for the attractions of institutions within the state, discussed in the previous section, but there is an important difference. In the previous section the state was able to act as the group of groups, ensuring that the restricted range of concern of institutions within society worked towards the overall good and, partly because of the authority claims central to sovereignty, was able to correct problems that arose within and around these institutions. The presence of the state permitted, and sometimes justified, this narrowness of concern. The international arena lacks a governing entity with wide-ranging powers to review how states interact and—given the implausibility of creating an effective elected body at the global level—there are good reasons why it would be a mistake, at present, to seek to create one.

⁵⁸ J. Waldron, ‘Participation: The Right of Rights’ in J. Waldron, *Law and Disagreement* (OUP 1999). The phrase originates with William Cobbett.

⁵⁹ Jackson (n 6) 128–34.

⁶⁰ P. Pettit, ‘Legitimate International Institutions: A Neo-Republican Perspective’ in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP 2010).

In the absence of a central sovereign global authority, it falls to the state to determine how and when it should interact with other states (and non-state entities outside of its territory); or, to put the point another way, the citizenry should decide how justice, fairness, self-interest—considerations which should include respect for the sovereignty of other states—condition the international activities of the state. One of the points of sovereignty is to create a vehicle—the state—through which members of the polity can engage with other people and entities beyond the state’s borders.

In a valuable recent paper, Timothy Endicott discusses the apparent paradox of sovereign states acting in international law: the paradox that sovereignty appears to connote a lack of external limits and yet states appear able to bind themselves through treaties under international law without losing sovereignty.⁶¹ As Endicott shows, this supposed paradox rests on a misunderstanding of the nature of sovereignty. States possess sovereignty because they need sovereignty in order to succeed as states; to achieve the purposes that the state exists to pursue. Binding itself through treaties is a way of achieving some of the tasks that face the state. The ability to create binding duties helps the state acquit the (moral) duties it owes the peoples of other states, and helps the state advance the well-being of its own people by ensuring peace and facilitating trade, amongst other things. The nature of sovereignty must be understood in the context of these objectives: it is not lost when the liberty of the state to act is restricted in order to achieve these valuable objectives.

Consequently, as Endicott explains, part of the value of sovereignty is that it enables the people of the state to participate in international relations.⁶² To put the point in the terms used in this chapter, sovereignty is valuable because it allows the citizens to exercise control over decisions that transcend the highest democratic unit: the state. Where there are decisions that need to be taken that span states, these decisions should be the product of agreements between institutions that are controlled by the citizens of those states. Endicott suggests that when states enter into treaties they limit their sovereignty, in that they lose their unfettered capacity for action. To a certain extent this is correct: having signed a treaty, the states are now bound as a matter of international law.⁶³ But in a more fundamental sense, the state’s freedom of action remains: states can break treaties.⁶⁴ Within their own constitutional structures, their sovereign nature implies that there is no higher authority

⁶¹ T. Endicott, ‘The Logic of Freedom and Power’ in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP 2010).

⁶² *ibid* 255. ⁶³ See also Besson (n 3) 143–44.

⁶⁴ M. Troper, ‘The Survival of Sovereignty’ in H. Kalmo and Q. Skinner (eds), *Sovereignty in Fragments* (CUP 2010) 143–45.

outside of the constitution that can compel them to honour the undertakings they have given. In this respect—as a matter of the domestic constitution—international obligations are like promises: generally, they ought to be kept, but it is down to individuals to decide when they ought to be broken.⁶⁵ Like the attitudes of individuals towards promise-breaking, different states may allow themselves different latitudes towards the breaching of treaties: some constitutions may make it hard for state institutions to break treaties, other constitutions may make it comparatively easy.

Parenthetically, it is worth noting that the capacity to break treaties illuminates one of the crucial differences between a confederation and a federation.⁶⁶ A state can enter into either of these arrangements through a treaty, but only retains its identity as a state—and its sovereignty—in a confederation. In a confederation any one of the constituent states could withdraw, irrespective of the terms of the treaty that bind them together. In a federation, in contrast, the constituent elements lack sovereignty, and only have the power allocated to them by the constitution. This may give regions the power to secede from the federation, but the fact that the constitution needs to confer this power is a tacit recognition of the non-sovereign nature of the regions: they can only leave the federation through these procedures. When the Lisbon Treaty created a structure through which Member States could withdraw from the European Union this may have appeared to be a concession to the Eurosceptics, a formal recognition of the possibility of exit.⁶⁷ Looked at another way, though, this provision nudged the Union towards a federalist model, a constitutional structure in which states have become regions of a sovereign entity which require the permission of that entity to secede.

Is the Creation of a State Always Desirable?

In one of the most quoted passages of constitutional theory, Thomas Hobbes wrote that in the absence of a state there is:

... no place for Industry, because the fruit thereof is uncertain: and consequently no Culture of the Earth, no Navigation, nor use of the commodities that may be

⁶⁵ This sense of constitutional autonomy may explain the claim that states are 'equal' in international law: Krasner (n 2) 14–16.

⁶⁶ As I have explained elsewhere, the line between federations and confederation is sharp in principle, but soft in practice: Barber (n 3) chapter 10.

⁶⁷ The infamous Article 50, Treaty on European Union. See the discussion in C. Hillion, 'Accession and Withdrawal in the Law of the European Union' in A. Arnall and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.⁶⁸

This is the supposed state of nature, the situation that, on Hobbes' account, should be contrasted with the order normally brought by the state. There are a number of different ways we could understand Hobbes' use of the state of nature in *Leviathan*.⁶⁹ In part, it acts as a thought experiment: it is the contrast between the state of nature and submission to the sovereign that explains why individuals should (morally or, if a distinction can be drawn, prudentially) accept the authority of a sovereign and, in so doing, bring into existence the state. But it also is presented as an historical tale; as the process by which the state emerged.⁷⁰ It is the instability, the patent unattractiveness, of the pre-state world that motivates the creation of the state,⁷¹ and it is arguable that Hobbes thought that before the state—or absent the state—people really did live in a condition of war against all.⁷² These two readings of Hobbes are not as far apart as might first be supposed. After all, the attractions of the moral argument for the shift from the state of nature to the acceptance of the authority of the sovereign depend on the unattractiveness of life without a state. If life without a state is not as bad as Hobbes paints it, the force of the argument for the creation of a state is reduced. Indeed, if some communities function better without the structures of the state, the argument is turned on its head: perhaps there are some situations in which people ought not impose the trappings of the state upon their community. A more nuanced understanding of life outside of the state may reveal that the state is far from a universal blessing.

Robin Dunbar has documented a correlation between primate group size and the neo-cortex. Roughly speaking, the larger the average neo-cortex, the larger the social group the primates tend to form. Applying this correlation to humans, Dunbar has argued that we have the capacity to have a meaningful

⁶⁸ T. Hobbes, *Leviathan* (R. Tuck ed, CUP 1991) 89.

⁶⁹ K. Hoekstra, 'Hobbes on the Natural Condition of Mankind' in P. Springborg (ed), *The Cambridge Companion to Hobbes's Leviathan* (CUP 2007).

⁷⁰ T. Sorell, 'Constitutions in Hobbes's Science of Politics' in D. J. Galligan (ed), *Constitutions and the Classics* (OUP 2014) 109–11.

⁷¹ See also T. Hobbes, *On the Citizen* (R. Tuck and M. Silverthorne eds, CUP 1998) 29–31, in which Hobbes presents the Americas as an actual example of the state of nature.

⁷² Hoekstra (n 69) 117–20.

relationship with about 150 people.⁷³ Perhaps not coincidentally, this is the same number as found in the form of social grouping labelled by some anthropologists as ‘bands’; a grouping that is likely to have been the earliest form of human community and one which still exists in some areas.⁷⁴ It seems likely that Aristotle was right and Hobbes wrong on at least this issue: we are born ‘fit for society’.⁷⁵ As with other social animals, it appears humans possess an evolved mental capacity that enables us to cooperate with our fellows. Within these bands of up to about 150 people the type of relationships existing between members goes beyond mere recognition; we can know these people reasonably well, and relatively reliably assess their characters. In such a group each individual could, then, possess a good knowledge of each of their fellows. These groups lack the formal structures of the state simply because they do not need them: the same work is done through shared knowledge, common expectations, and social capital. At the most basic level, collaboration within these groups may rest on a ‘tit-for-tat’ attitude: group members who help others are rewarded by assistance in turn, whilst those who act selfishly are denied this benefit. Actions that benefit the group are encouraged, whereas those that benefit the individual at the expense of the group are discouraged. But the interaction within the group may become far more sophisticated than this simple model suggests. Members may be able to gauge the skills and capacities of their fellows with some accuracy. Some individuals within the group may be regarded as possessing expertise within particular areas of life—they may be especially good at treating illness, hunting, or manufacturing tools—whilst others may exercise a broader leadership role. Lines of authority may, then, exist within these small groups, and these may be backed by coercion: the group may pressure its members to accept the decisions of these experts and leaders.⁷⁶

⁷³ R. Dunbar, *The Human Story* (Faber & Faber 2004) 70–72; R. Dunbar, ‘The Social Brain Hypothesis’ (1998) 6 *Evolutionary Anthropology* 178, 186–89. See further D. Oliver, ‘Psychological Constitutionalism’ (2010) 69 *Cambridge Law Journal* 639, 657–58.

⁷⁴ T. C. Lewellen, *Political Anthropology: An Introduction* (3rd edn, Praeger Publishers 2003) 22–26. See further, F. Fukuyama, *The Origins of Political Order* (Profile Books 2011) chapter 2, and Hinsley (n 21) 2–15.

⁷⁵ Hobbes (n 71) 22–25; Aristotle, *The Politics* (S. Everson ed, CUP 1996) 1.2, 1253a3. Surveying the contemporary literature, see: M. Lieberman, *Social: Why Our Brains Are Wired to Connect* (OUP 2013).

⁷⁶ Even small groups need authority structures. In the early days of the Soviet Union, buoyed by talk of the withering of the state, conductor-less orchestras were formed. They did not last long, with one collapsing after ideological fights broke out between the string and the wind sections. See R. Stites, *Revolutionary Dreams: Utopian Vision and Experimental Life in the Russian Revolution* (OUP 1989) 138.

Small communities, like bands, may have complex structures of authority, shaped and determined by social rules applied within the group, but these groups are not states. They may lack both formalized institutional structures and also the capacity to craft, adjudicate, and apply formalized rules. Consequently, such groups may not make the type of authority claim characteristic of sovereignty. It is a standing error to think that these small groups are unable to provide for the well-being of their members. Many lawyers overestimate the need for formalized rules and adjudicative institutions. Jeremy Bentham, for example, thought that property—and, by extension, the market—required their existence.⁷⁷ But evidence of the institution of property—and the institution of trade—long predate evidence of law and the state.⁷⁸ These institutions can exist without law, instead being created through the operation of social rules that have developed within the group over time.⁷⁹ And the monuments and earthworks of the prehistoric world may show that these small groups were able to act cooperatively—perhaps negotiating agreements at the group level—to undertake large, labour-intensive, projects.

In some situations it might be a mistake for groups like these to seek to, or be pressured to, become more state-like. Small communities may lack the resources and the need to develop the features of a state. The sort of informal social structures that are characteristic of small groups may work well in some situations: shared expectations and mutual knowledge can be powerful organizational mechanisms. When everyone knows everyone else, the need for institutions like courts and legislatures that set and apply formalized rules for the group is vastly reduced. Small groups may be able to reach decisions through consensus without requiring any special, pre-determined, institutional structures to reach this outcome. It may even be that attempting to create a more formal institutional structure would make it harder for the group to respond to changing circumstances, and might make decision-making less transparent and inclusive, as a small portion of the group exercised control over the new institutional structures.

The last few paragraphs were carefully phrased. Many small communities will possess features that resemble those of states and legal orders. Hobbes'

⁷⁷ J. Bentham, *Theory of Legislation* (R. Hildreth tr, Trübner & Co 1864) 111–13. Felix Cohen made a similar claim: F. S. Cohen, 'Dialogue on Private Property' (1954) 9 Rutgers Law Review 357, 374. See also S. Shapiro, *Legality* (Harvard University Press 2011) 36.

⁷⁸ See, eg, C. Renfrew, *Prehistory* (Weidenfeld & Nicolson 2007) chapter 8; P. Wells, 'Trade and Exchange in Later Prehistory' in A. Jones (ed), *Prehistoric Europe: Theory and Practice* (Blackwell 2008); M. Ridley, *The Origins of Virtue* (Penguin 1997) chapter 11.

⁷⁹ S. Bowles, *Microeconomics: Behaviour, Institution and Evolution* (Princeton University Press 2004) chapter 2. F. A. Hayek, 'The Evolution of the Market: Trade and Civilisation' in F. A. Hayek, *The Fatal Conceit* (University of Chicago Press 1988) 39.

account of the emergence of the state presented it as springing fully-formed out of the state of nature; people in that unhappy condition resolving to submit to a sovereign to escape their fate. Aristotle's account of the emergence of the state, in contrast, presented it as the end point of a developing series of social institutions. Aristotle's story started with the family, an institution that exists to benefit its members, but which is (normally) characterized by a shared biological connection between those individuals.⁸⁰ As time goes by, the limitations of very small groups becomes evident, and families joined together into villages, an institution that, again, exists for the benefit of its members but no longer requires a biological link between them.⁸¹ And then, villages, in their turn, united into large communities: the city-states, in which people, according to Aristotle, could achieve their fullest flourishing.⁸²

As an historical account of the emergence of the state, Aristotle's model is open to question. States may be formed for lots of reasons, and we should not assume that there is a single story that explains the emergence of the state at different times and in different places.⁸³ But it is a strength of Aristotle's account that it shows how small groups can accrete state-like attributes; that there is a spectrum of social institutions, one that starts with the family and ends with the state, and groups can progress along this spectrum. The small bands, discussed a few paragraphs ago, may sometimes completely lack the attributes of a state—they may resemble large family groups—but the line between these bands and tribes—a collection of social institutions that do possess some state-like features—is a soft one.⁸⁴ In some instances the group may possess the internal structures that enable the authority claims of sovereignty to be made, even if the group still lacks all of the features of a state.⁸⁵ Indeed, there can be situations where it may be impossible, or at least unproductive, to decide whether an institution should be thought of as a tribal group or as a state. Where on this spectrum a group should stop, how many of the features of the state it ought to seek to acquire, will depend on its particular circumstances.

⁸⁰ Aristotle (n 75) I.II 1252b12–14.

⁸¹ *ibid* I.II 1252b16–18.

⁸² *ibid* I.II 1252b28–32.

⁸³ Lewellen (n 74) chapter 3. Though James Scott has recently argued for a tight link between the emergence of states and the emergence of agriculture: J. C. Scott, *Against the Grain: A Deep History of the Earliest States* (Yale University Press 2017), esp chapter 4.

⁸⁴ Lewellen (n 74) 26–36.

⁸⁵ Unlike Loughlin, I do not equate the possession of sovereignty with the existence of a state: see M. Loughlin, *The Idea of Public Law* (OUP 2003) 73–76 and M. Loughlin, *Foundations of Public Law* (OUP 2010) 183–84.

A Note on the Supposed Passing of State Sovereignty

Claims of the death, or at least the transfiguration, of sovereignty are commonplace, with scholars queuing up to write its obituary. Some have argued that sovereignty is now obsolete, that we live—in Neil MacCormick’s term—in post-sovereign states.⁸⁶ Others have argued that, at least in Europe, there is ‘shared’⁸⁷ or ‘pooled’ sovereignty,⁸⁸ or, perhaps, that sovereignty has been ‘limited’ through the agreement of the Member States of the European Union.⁸⁹ In some respects these claims are less novel than they might first appear. A number of early twentieth-century scholars drew attention to the importance of other social groups within and outside the state, and the impact these groups have on the state’s capacity to act.⁹⁰ Long before the creation of the European Union, much was made of the ways in which other international bodies, such as the Roman Catholic Church, influenced state policy.⁹¹ Whilst the earlier generation of sovereignty sceptics wrote about the role of churches and trade unions, and speculated on the possible role of the League of Nations, their successors now write on multinational companies⁹² and international bodies such as the European Union and the United Nations. The implications for sovereignty are similar: in light of these changes, the old finalities of sovereignty appear *passé*, a relic of a stage of constitutional development that the state has now out-grown. These authors either reconceptualize sovereignty as something that can be partitioned—shared or divided between different constitutional structures—or argue for its abandonment as a principle of constitutionalism.

To an extent, these attacks on sovereignty may be motivated by a restricted understanding of what the principle of sovereignty entails. As we have seen,

⁸⁶ N. MacCormick, ‘On Sovereignty and Post-Sovereignty’ in N. MacCormick, *Questioning Sovereignty* (OUP 1999) 131–33; N. MacCormick, ‘Beyond the Sovereign State’ (1993) 56 *Modern Law Review* 1, 16–18.

⁸⁷ W. Wallace, ‘The Sharing of Sovereignty: The European Paradox’ (1999) 47 *Political Studies* 503.

⁸⁸ R. Keohane, ‘Ironies of Sovereignty: The European Union and the United States’ (2002) 40 *Journal of Common Market Studies* 743, 746–49.

⁸⁹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.

⁹⁰ A. Vincent, *Theories of the State* (Blackwell 1987) chapter 6; E. Barker, ‘The Discredited State’ in E. Barker, *Church, State and Study* (Methuen & Co 1930) 166–70; H. Laski, *Authority in the Modern State* (Yale University Press 1919); H. Laski, *Foundations of Sovereignty* (George Allen & Unwin 1921); P. Lamb, *Harold Laski: Problems of Democracy, the Sovereign State, and International Society* (Palgrave 2004) chapter 5.

⁹¹ Laski, *Foundations of Sovereignty* (n 90) 238.

⁹² R. Vernon, *Sovereignty at Bay* (Penguin Books 1973).

an account of sovereignty that focused entirely on the *claims* characteristic of sovereignty without considering the element of *effectiveness* could make the principle appear unrealistic. No state, at any point of time, has either exercised complete control over its territory and people, or has been completely free of all external pressure when making decisions. Once it is recognized that whilst the claims at the core of sovereignty may be unqualified, the effectiveness of those claims is invariably constrained, some of the challenges raised by the sovereignty-sceptics become explicable within the existing structures of the sovereignty principle. So, for instance, the recognition that there might be multiple and competing sites of constitutional authority is—at least from the perspective of sovereignty—unremarkable.⁹³ The state is sovereign, but within the state constitutional power is normally divided between institutions, and these institutions can, and often do, disagree about the extent of power they possess. Equally unremarkable, international organizations, such as the European Union, to which the state belongs, may not fully accept the state's sovereignty. Reasoning within the boundaries of international law, these bodies may well argue that the obligations of international law are inviolate, that the state is debarred from breaching its obligations.⁹⁴ But these assertions advanced by international bodies do not, in themselves, bring to an end the sovereignty of the state; as a matter of the domestic constitution it is down to the state to decide the extent to which these international obligations bind.

Even when the autonomy of the state is under serious challenge, sovereignty may still remain. The criteria of effectiveness allow for a great deal of flexibility. A set of institutions may assert sovereignty over an area and a people, and yet only be effective within a subset of these: the boundaries of the state may not be synonymous with its boundaries under international law or with its own understanding of its boundaries. Both North and South Korea claim sovereignty over the whole of the Korean peninsula, but neither succeeds in issuing commands that are effective in the other's territory. In times of invasion and civil war there may be rival contenders for statehood within the territory: the former state may find itself shrinking, as its capacity to control land and people is lost. In some instances, indeed, there may be areas within the supposed territory of the state where no state exercises control: areas of anarchy, perhaps, or places in which other systems of social ordering operate.

⁹³ See the discussion in N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317, 337–40.

⁹⁴ H. Kelsen, *The Pure Theory of Law* (M. Knight tr, University of California Press 1967) 328–44.

Perhaps more interestingly still, this model of sovereignty provides an explanation of how a form of ‘constitutional pluralism’ can emerge. The question of when a set of institutions is sufficiently effective to amount to a state is a matter of degree, and there might be situations in which two sets of institutions claim to exercise sovereignty over the same territory and each are sufficiently effective to satisfy its demands. Two states could, then, overlap: it might be impossible to say which is the ‘true’ sovereign within the region. At some points in history this may have been a common phenomenon, with overlapping claims made by rival institutions.⁹⁵ It is possible that some form of constitutional pluralism may be emerging once more within the European Union. As I have discussed elsewhere, European institutions advance jurisdictional claims that amount to claims of sovereignty within the terms of this chapter,⁹⁶ and for some supporters of the Union the move towards statehood is an attractive, perhaps even a necessary one.⁹⁷ On the other hand, the Member States have remained noticeably reluctant to cede their statehood. It is possible that, at some future date, both of these sets of institutions may make the type of claims characteristic of sovereignty, and both may be sufficiently effective to count as states. Such an overlap might prove an attractive middle way between the rival claims of the Member States and the Union, leading to what Joseph Weiler has termed a form of ‘constitutional tolerance’, in which the success of each entity depends on it respecting and accommodating the other.⁹⁸

Conclusion

The last section argued that the state is not a universally desirable form of social institution. Some groups, at some points in time, should not seek to create a state: they do not need an institution of this type, and it might be counterproductive to seek to create one. Other groups may (rightly) create an institutional structure that possesses the attributes of sovereignty, but one that has yet to acquire all the attributes of a state. But for communities like ours, in societies such as we live in, people do have reason to create states and, as

⁹⁵ Hinsley (n 21) chapter 3; P. Glenn, *The Cosmopolitan State* (OUP 2013) chapter 4.

⁹⁶ Barber (n 3) chapters 9 and 10. See also N. W. Barber, ‘Legal Realism, Pluralism, and Their Challengers’ in U. Neergaard and R. Nielsen, *European Legal Method: Towards a New European Legal Realism?* (DJOEF Publishing 2013)

⁹⁷ F. Mancini, ‘Europe: The Case for Statehood’ (1998) 4 *European Law Journal* 29.

⁹⁸ J. Weiler, ‘In Defence of the Status Quo: Europe’s Constitutional *Sonderweg*’ in J. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 15–23; J. Weiler, ‘The Reformation of European Constitutionalism’ (1997) 35 *Journal of Common Market Studies* 97.

a corollary of that, to create a set of institutions characterized by sovereignty. The authority claims—and the more limited requirement of effectiveness—that are embodied within sovereignty are needed in order to divide public power within the polity, to enable interactions between different peoples and finally—and perhaps most importantly—to support, regulate, and render morally defensible, those non-state institutions that exist within the boundaries of the state.

Sovereignty is a principle that must be present, to some extent, for the state to exist. Whilst institutions need not understand themselves through the concept of sovereignty to be sovereign—that is, sovereignty may be a characteristic of an institution without its community having an understanding of sovereignty—to be sovereign the institutions need to make the claims characteristic of sovereignty and, to an extent, these claims need to be effective. Whilst a state that has lost sovereignty ceases to be a state—its presence or absence is a binary matter—the requirement of effectiveness within sovereignty is a matter of degree: states can be more or less able to make good on their sovereignty claims. All other things being equal, the more that sovereignty is manifested within the constitutional structures of the state—the greater the capacity of the state to make good on its claims—the better. But, of course, it is rarely the case that all other things are equal, and sometimes the failings of the state in other areas will make its diminished effectiveness attractive.⁹⁹ In extreme cases, it might be fortunate if a state prone to abusing human rights found its capacity to act constrained, or a state riddled with corruption found it hard to apply the law; in these instances a weak bad state might be preferable to a strong bad state. In more common cases, ambiguity may be built into the constitution to allow beneficial tension between constitutional institutions, as a means of enabling one part of the constitution to defend itself against another.¹⁰⁰

Where the state is functioning reasonably well, though, its institutional structure should be crafted so as to advance the principle of sovereignty. The capacity of its institutions to act effectively, and decisively, should generally be fostered and preserved. It is at this point that the account of sovereignty connects with other principles of constitutionalism: in particular, with the separation of powers and the rule of law. For the older writers on sovereignty, those who took it as a feature of a body within the state rather than the state itself, sovereignty appeared in tension with these principles. Jean Bodin, in particular, strove to show that there was no division of power within the

⁹⁹ A. Vermeule, *The System of the Constitution* (OUP 2011) 87–94.

¹⁰⁰ See Chapter 3 of this volume.

state—that the sovereign was both the highest legislative and judicial actor—and that the law could not bind this constitutional institution.¹⁰¹ Sovereignty, on his account, amounted to a rejection of the separation of powers and the rule of law. Treating sovereignty as an attribute of the state, and not as an attribute of an institution within the state, both explains Bodin's reluctance to allow for division and limits on sovereignty and, also, permits the separation of powers and the rule of law to be manifest within the constitutional order. At the level of the state, Bodin was correct: there is a unity of constitutional power. The state embodies the totality of executive, legislative, and judicial power. And as these powers are embodied in the state, it is that institution—the state itself—that decides both on the content and practical force of the law. In this sense, the state is free to decide what its domestic law requires of it, and the extent to which it is compelled to obey that law. However, within the state, power is divided between institutions, and the law binds these bodies in a similar way to binding of non-state actors. State institutions are partly created by legal rules. Like private institutional actors, state institutions may sometimes be able to act outside of, or even contrary to, the law—but, like private institutional actors, sometimes the law will successfully limit their conduct or impose effective deterrents against unlawful behaviour.¹⁰² Indeed, rather than being opposed to the rule of law and the separation of powers, for sovereignty to be manifest in the state both of these principles must be present within the constitution to a significant extent. For the state to make the claims characteristic of sovereignty, and for it to be able to act effectively, it requires the existence of a functioning legal order—and so requires the presence of both the separation of powers and the rule of law: these principles are complementary to, not in tension with, sovereignty. And, with this in mind, it is to the principle of the separation of powers that we now turn.

¹⁰¹ Bodin (n 10) 66–78. See the discussion in Loughlin (n 7) 69–73.

¹⁰² Barber (n 3) chapter 7.

The Separation of Powers

The principle of the separation of powers only has meaning within an account of the state. It is through reflection on the point of the state that we gain an understanding of the structures, instruments, and skills that are required for the state to function successfully. And it is only through consideration of what is necessary for the successful functioning of the state that we can appreciate the wisdom of the divisions and connections that have long been held to characterize the separation of powers.

This chapter starts by considering the point of the separation of powers. It argues that accounts of the principle that identify liberty as the guiding purpose of the principle are flawed, and are the product of an unattractive account of the state. A richer understanding of the state produces a correspondingly richer account of the principle. The second and third parts of the chapter provide an outline of such an account. The second section considers the institutional framework required by the separation of powers: the divisions and connections that the principle demands. The third section examines the types of institutional interaction required by the principle. Rather than requiring conflict between institutions it will be contended that the normal demand of the separation of powers is comity: the state should be structured in such a way as to encourage cooperation between its different elements. Different types of state institutions are well-placed to identify different aspects of the common good and, through their differing skills and instruments, well-suited to modify the policies of the state in light of these assessments. The constitution then serves to combine these decisions into a single state action. The chapter will then consider apparent exceptions to the separation of powers—those occasions when an institution is correctly given a capacity that seems to fall outside the principle.

The Point of the Separation of Powers

Many discussions of the point of the separation of powers begin by identifying two objectives that may determine the aim of the principle: the protection

of liberty and the promotion of efficiency.¹ These are often regarded as rivals, competitors to be regarded as the sole or main animator of the principle—but, as we shall see, there is also a degree of compatibility between the two objectives.

The linkage of the separation of powers and liberty is a long-standing tenet of constitutional thought.² One of the clearest modern statements of the connection, and a statement that is reflected in the work of many others, is found in the work of Eric Barendt.³ Barendt argues that the purpose of separation of powers is to protect the liberty of the individual by making tyrannical and arbitrary state action more difficult. Power is divided between the branches of the constitution, with each element checking the others. This interpretation picks up on the well-known observation of Justice Brandeis who, in *Myers v US*, wrote that the purpose of separation of powers ‘was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy’.⁴ Concerted state action is made more difficult by the existence of checks and balances between the various organs of state.⁵

Liberty models of the separation of powers probably capture the popular understanding of the principle outside of academia. The separation of powers acts as a brake on the state, protecting the individual from the might of Leviathan. When the state acts against a person it needs each of the three branches to act in concert: the legislature to write the law, the executive to police it, and the courts to apply it in the particular case. By dividing up these institutions, tasks, and officials, the principle ensures that the exertion of state power requires the agreement of a number of agencies comprising

¹ W. B. Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution* (Tulane University Press 1965) chapter 1; W. C. Banks, ‘Efficiency in Government: Separation of Powers Reconsidered’ (1984) 35 *Syracuse Law Review* 715; M. P. Sharp, ‘The Classic American Doctrine of the Separation of Powers’ (1935) 2 *The University of Chicago Law Review* 385.

² See the discussion in J. Waldron, ‘Separation of Powers and the Rule of Law’ in J. Waldron, *Political Political Theory* (Harvard University Press 2016) 53–55.

³ E. Barendt, ‘Separation of Powers and Constitutional Government’ [1995] *Public Law* 599.

⁴ *Myers v US* (1926) 272 U.S. 52, 293; see also C. Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller, and H. Stone eds, CUP 1989) book 19, chapter 27; Barendt (n 3) 605–06; S. Calabresi and K. Rhodes, ‘The Structural Constitution: Unitary Executive, Plural Judiciary’ (1992) 105 *Harvard Law Review* 1153, 1156, where separation of powers is described as ‘institutionalising conflict’.

⁵ M. Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Press 1998) 14.

a considerable number of people. This complexity and diversity creates the potential for, even the likelihood of, friction. And this friction, in its turn, protects liberty.

There are a number of difficulties with this simple liberty model. Some of these are internal to the model itself. Accounts of the separation of powers that focus narrowly on slowing down the state, creating friction, cannot explain the broad contours of the standard model of the principle. Why should states create a legislature, courts, and executive? Why should these be staffed by people with differing skills, who act through different types of legal instrument? If the only aim of the separation of powers was to build friction into the system, we could, in conformity to its dictates, allocate these elements at random. If the legislature were tasked with deciding cases and the judges charged with enacting statutes, the constitution would have succeeded in creating friction between its institutions, and would certainly have slowed state action, but the outcome appears far removed from our normal understanding of the requirements of the separation of powers.

Indeed, there is a tension within the liberty-focused model of the separation of powers: it is not obvious that the protection of liberty necessarily favours a constitution that aims to create debilitating friction between institutions. First, this assumes that liberty and a strong state are inevitably opposed to each other, that the citizen can only be truly free within a state whose power for concerted action is limited by institutional conflict. Whilst there are some theorists who treat liberty in purely negative terms, as the absence of state constraint, most modern philosophers would also draw attention to the claims of positive liberty.⁶ The state's task is not just to avoid placing unwarranted limits on the actions of individuals, but also to ensure that there are valuable options available to them.⁷ A recognition of the value of state action is, perhaps, at the core of the modern welfare state. Secondly, and developing this first point, even if liberty is understood in its crudest terms, threats to liberty come from bodies other than the state. One of the tasks of the state is to protect its citizens from harm, harm that can come from powerful bodies, such as other states or simply from other private actors. To undertake this task, the state needs to be able to act; it requires the institutional capacity to regulate the exercise of power within its territory. A constitution that created

⁶ I. Berlin, 'Two Concepts of Liberty' in I. Berlin, *Four Essays on Liberty* (OUP 1969).

⁷ See, eg, J. Raz, *The Morality of Freedom* (OUP 1988) chapter 15, and J. Waldron, 'Constitutionalism—A Sceptical View' in T. Christiano and J. Christman (eds), *Contemporary Debates in Political Philosophy* (OUP 2009).

so much friction that state action became extremely difficult would prevent the state from protecting its citizens.

A final, and more general, objection to the liberty account of the separation of powers lies in the model of the state that it implies or presupposes. As we saw in the first chapter of this book, this version of the separation of powers forms part of ‘negative constitutionalism’, an account that treats the state as a threat, and regards the constitution as a way of mitigating that threat. As I have argued elsewhere, this account of the state fails to recognize the guiding point of the state—the advancement of the well-being of state members—and, as was discussed in the previous chapter, fails to appreciate the necessity of effective states in societies like ours if we are to achieve this end.

These considerations point us towards a second collection of models of the separation of powers, often presented as an alternative to the liberty model, those accounts that take efficiency as their guide.⁸ John Locke is commonly regarded as the starting point of this tradition in separation of powers.⁹ Locke attempted to fashion a vision of the state that would be so great an improvement on individuals’ rights within a state of nature that they would voluntarily surrender these rights in order to participate in the common good.¹⁰ Consequently, Locke believed it was a prerequisite of state legitimacy that the constitution must be sufficiently effective to provide positive protection for citizens and promote the public good; it was not enough that the constitution prevent the state harming its citizens. On Locke’s account, pre-empting much of contemporary institutional analysis, the apparent restrictions required by the separation of powers rested on the limitations of human capacity and the need for institutional structures that ameliorated those limitations. So, for example, the legislature ought not to pass judgment on particular cases because it was structurally ill-equipped to undertake this task; even if it acted in good faith it was unlikely to adjudicate as fairly or as impartially as a court. Locke warned that legislators would struggle to distinguish between their law-applying and law-making functions,¹¹ and would be unlikely to show sufficient care when deciding issues that did not directly concern them.¹² There

⁸ See further A. Kavanagh, ‘The Constitutional Separation of Powers’ in D. Dyzenhaus and M. Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 229–33 and Waldron (n 2).

⁹ Barendt (n 3) 602; D. Morgan, *Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell 1997) 4; W. B. Gwyn, ‘Separation of Powers and Modern Forms of Democratic Government’ in R. Goldwin and A. Kaufman (eds), *The Separation of Powers—Does it Still Work?* (American Enterprise Institute 1986) 70.

¹⁰ J. Locke, *Two Treatises of Government* (P. Laslett ed, CUP 1988) book II, paras 1–123.

¹¹ *ibid* book II, para 137.

¹² *ibid* book II, para 125.

was a relationship between what institutions should be empowered to do, and the tasks they were structurally well-suited to achieve.

A similar analysis can be undertaken of the role of the principle in the origins of the United States Constitution.¹³ It is sometimes claimed that the point of the United States Constitution was to fetter the state—but this common belief is mistaken. The modern United States Constitution was created in reaction to the weakness of the previous constitution, found in the Articles of Confederation, ratified in 1777. This document failed to establish a distinct executive branch or a judiciary at the national level: sovereignty, and almost all effective government remained in the hands of the states. The capacity of the Confederation to act internationally was limited, and it was unable to prevent tariffs on inter-state trade, and even witnessed military skirmishes along state borders.¹⁴ The 1787 Constitutional Convention at Philadelphia was animated by a desire for a stronger, more effective state, an aim that is clearly and powerfully articulated in *The Federalist Papers*. Whilst James Madison recognized the need for a division of powers in order to protect the people from tyrannical government, he also regarded its strictures as essential to the establishment of effective government.¹⁵ Though the doctrine made it harder for an oppressive regime to rule, it also enhanced good government. Madison asserted that ‘energy in government ... [was] ... essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government’.¹⁶ Or, as one delegate at the Convention put it: when all the powers of state were vested in a single body ‘none of them can be used with advantage or effect’.¹⁷ The model of the separation of powers found in *The Federalist Papers* and which came to underpin the United States Constitution had efficiency, rather than liberty, as its guide.

The division between liberty models of the separation of powers and efficiency models can be overstated. There is a danger in presenting efficiency as the guiding point of the separation of powers: any constitutional order is efficient by some criteria; something is maximized, even if it is just waste,

¹³ A. Anderson, ‘A 1787 Perspective on the Separation of Powers’ in R. Goldwin and A. Kaufman (eds), *The Separation of Powers—Does It Still Work?* (American Enterprise Institute 1986) 145.

¹⁴ G. S. Wood, *The Creation of the American Republic 1776–1787* (University of North Carolina Press 1969) chapters 10 and 11; I. Kramnick, ‘Introduction’ in J. Madison, A. Hamilton, and J. Jay, *The Federalist Papers* (I. Kramnick ed, Penguin Books 1987) 24–31.

¹⁵ J. Madison, A. Hamilton, and J. Jay, *The Federalist Papers* (I. Kramnick ed, Penguin Books 1987), esp No. 47 (Madison).

¹⁶ *ibid* No. 37 (Madison) 243.

¹⁷ M. Farrand, *The Records of the Federal Convention of 1787* (Yale University Press 1966) volume III, 108 cited in Anderson (n 13) 145.

corruption, and folly. To be worthwhile, the stuff being maximized must be attractive.¹⁸ So, having determined, rightly or wrongly, that the central purpose of the state was the protection of property, Locke created a constitution that was effective in securing this goal. And, as part of the process of protecting property rights requires, or includes, the protection of certain aspects of liberty, part of the test of a successful constitution, for Locke, includes an assessment of the extent it protects liberty. Similarly for Madison part of the objective of effective government was its promotion of liberty, protecting its people from internal and external danger.¹⁹ Given that liberty is part of what the state exists to preserve, the efficiency model of the separation of powers incorporates aspects of the liberty accounts.

Approaching the Separation of Powers

This section will outline an account of the separation of powers that is grounded in efficiency. In so doing, it places the separation of powers within the context of the wider discussion of the nature and point of the state found in this book and in *The Constitutional State*.²⁰ This section will not attempt to provide a complete account of the separation of powers—such an account would, by derivation, require a complete account of the nature and role of constitutional institutions. Its ambitions are more limited: the outline provided here will show the power of the efficiency account of the separation of powers. As we shall see, this approach to the separation of powers both requires and explains the standard model of the principle, discussed below, and, moreover, coheres with a number of other principles of constitutionalism.

There are numerous versions of the separation of powers, but perhaps the standard understanding of the principle presses for three types of division between three branches of state.²¹ The three branches are the legislature, the courts, and the executive. The three divisions are between institutions, between powers, and between the officials in those institutions. These nine elements can be seen in Table 3.1 below.

Even though many of those who argue for the standard model of the separation of powers would not recognize themselves as part of the efficiency tradition, it will be argued that the standard model is compatible with the

¹⁸ E. Carolan, *The New Separation of Powers* (OUP 2009) 25–37; B. Ackerman, ‘The New Separation of Powers’ (2000) 113 *Harvard Law Review* 634, 639.

¹⁹ Madison, Hamilton, and Jay (n 15) No. 37 (Madison), 243.

²⁰ N. W. Barber, *The Constitutional State* (OUP 2010).

²¹ See generally Vile (n 5) chapter 4; Montesquieu (n 4) book 11, chapter 6; Gwyn (n 1) chapter 1.

Table 3.1 The Elements of the Separation of Powers

Institution	Legislature	Courts	Executive
Power	Legislative	Judicial	Executive Power
Official	Legislators	Judges	Executive Officials

efficiency account. Indeed, it is only through reflection on the point and needs of the state that the standard model can be articulated and defended. An attractive account of the separation of powers would explain why, or be part of an explanation as to why, the nine elements of the standard model are needed in a constitution. It would also explain why the elements listed in the columns should be united and why there should be divisions between the rows; so, for example, it would explain why the legislature should exercise legislative power, and why the courts should not, normally, legislate. It is, of course, impossible to provide a complete account of the demands of the separation of powers in this chapter, but an outline can be sketched—and this outline is sufficient to show the power of the efficiency account of the separation of powers and the core truth in the standard model. This section casts some light on the different institutional forms, skills, and instruments required by the separation of powers. The following section, discussing the relationships between the three branches of state, builds on this discussion, seeking to explain why a state requires these different elements within the constitution, and argues that they serve to pick out, and respond to, different aspects of the common good.

(i) The Legislative Column

Legislatures exist to enable the citizenry to set the policy direction of the state. Given that modern states are too large to allow public issues to be decided by the citizenry as a whole, some form of representative institution is necessary to allow for democratic government.²² Legislatures are a feature of almost all constitutions, but they can take a wide range of forms. Their size, composition, and role vary widely. But, with caution, there are a few general structural remarks that can be made that follow from the role that legislatures play within the constitution.

First, legislatures tend to be large.²³ Sir Kenneth Wheare estimated that most lower houses range from around 100 to about 300 members.²⁴ In the

²² This point will be explored at far greater length in Chapter 6.

²³ J. Waldron, 'Representative Lawmaking' in J. Waldron, *Political Political Theory* (Harvard University Press 2016) 130–34.

²⁴ K. Wheare, *Legislatures* (OUP 1963) 5.

United Kingdom, the House of Commons consists of about 650 members and the House of Lords contains about 800; in international terms, Parliament is comparatively large. The size of chambers ensures that they will include a considerable range of different opinions and experiences. On any given topic it is likely that the chamber will include a number of people with some understanding of the issue being debated. This will often mean that the chamber contains the expertise to produce an informed debate about the topic. However, the experts within the legislature will normally be in the minority. Though the debate may be informed, those who vote on the resolution are not required to demonstrate any expertise. The size of legislatures makes it likely that someone within the chamber will know something about the issue being discussed; it also makes it probable that she will be in a minority.

These thoughts take us on to a second structural point that can be made about legislatures: their amateur nature. Though some members of the legislature may possess specialist knowledge relevant to the question before them, the majority almost certainly will not. The amateur nature of the legislature is one of its strengths; it is a collection of individuals who have been, in some significant way, chosen by the population of the country. The constitutional legitimacy of the representatives in the legislature is normally gained through election, not through professional qualification. It would be regarded as odd and undemocratic if only those members who were experts on the subject of the debate were permitted to speak about it; odder still if members were only entitled to vote on matters within their expertise. Consequently, the legislature is not primarily a forum for arguments between experts, though expert argument may be presented to the chamber through witnesses to committees and through reports. The structure of the legislature is such that expertise is controlled; the expert must try to convince her amateur fellows of the strength of her position.

These structural comments have functional implications.²⁵ The legislature is a good forum for enabling representatives of the population to test expert opinion. It is a bad forum for the initial formulation or refinement of expert opinion. When John Stuart Mill described the Commons as a 'Congress of Opinions' he did not intend the phrase to be taken pejoratively.²⁶ One of the most important functions of a legislature is the discussion, and challenge, of proposed legislation, and the scrutiny of the executive. The executive,

²⁵ On the wide range of possible functions of a legislature see R. Packenham, 'Legislatures and Political Development', reprinted in P. Norton (ed), *Legislatures* (OUP 1990).

²⁶ J. Mill, 'On Representative Government' in J. Mill, *On Liberty and Other Essays* (J. Gray ed, OUP 1991) 282.

fortified by technocrats, is forced to justify and explain its actions to the amateur chamber.

Though the legislature is well-placed to challenge the decisions of government and set the broad policies of the state, it is not, generally, well-placed to draw up the detail of those decisions for itself. Mill criticizes, perhaps to the point of parody, the treatment of detailed legislation within committees of the Commons.²⁷ Legislatures are poor drafters of legislation for two reasons. First, the bulk of representatives lack the technical knowledge required to formulate detailed public policy.²⁸ There will be many matters of which they are ignorant, and sometimes, perhaps frequently, the representatives will be ignorant of the scope of their ignorance.²⁹ Secondly, the majority within the legislature is constantly shifting; if each member voted on their own judgement of the merits of legislation, there is little likelihood that legislation would be internally consistent, or even non-contradictory. A majority might be found for one clause of a bill, yet be lost when the second, counterbalancing, clause was being debated. As we shall see later in this book, the party system, which has an ambiguous relationship with the legislature, can be key to the formulation of coherent policies, and in many legislatures it is the government, controlled by parties, which draws up bills, and then places them before Parliament for approval.³⁰

An obvious objection to the preceding discussion can be made; in presidential systems legislatures sometimes have a bigger role in drafting statutes. In the USA, Congress has a significant role in the drafting of legislation, and the USA does not seem to have significantly suffered from this. There are two answers to this challenge. First, Congress is an example of an institution that changed its form in order to accommodate the functions allotted to it. The rise in the role of committees within Congress has enabled the production of coherent laws. In the same way the British constitution entrusts the initial drafting of bills to the Cabinet, legislative initiative in the USA is often in the hands of various congressional committees. Both of these devices narrow down the number of people involved in the bill's drafting, allowing the politicians with control of the process to develop expert skills and providing them with the support of professional policy advisors and legal draftsmen.³¹ A second development can also be perceived: perhaps in response to these difficulties the executive has taken an increasing role in the formulation of

²⁷ *ibid* 277–78.

²⁸ The role that political parties play in the detail of policy formation will be discussed later in this book.

²⁹ Mill (n 26) 271. ³⁰ Wheare (n 24) 148.

³¹ M. J. C. Vile, *Politics in the USA* (6th edn, Routledge 2007) 132–34.

legislation.³² To an extent, Congress has lost its role as initiator and formulator of laws, and, like almost all other legislatures, has shifted towards being an institution of scrutiny, rather than initiative. Both these developments can only provide a partial solution; the involvement of the legislature in the drafting of statutes has significant implications for the nature of those statutes and for the balance of power between the courts and the legislature. It has been argued that the American method of statute creation leads to documents that are less detailed and precise than their British counterparts, and, as a result, American judges are compelled to adopt a more purposive reading of statutes than is ordinarily the case in Britain.³³

Whilst the legislature lacks the skills and organization to draw up the detail of laws, it is well-placed to set the broad policy direction of the state and review the plans proposed to reach these goals. It is, then, unsurprising that the principle instrument of law-making in the legislature is the statute. Statutes are broad, general, statements of the law. They should be written to be read—at least, that is, they should be written in a form that permits ordinary people to understand their content.³⁴ For the legislature to play its part in the constitution, its non-legally qualified, non-expert, members must be able to understand the changes to the law found within the statutes. The line is a soft one, but as the changes to the law become more complex and technical, the appropriateness of primary legislation as a vehicle for these changes decreases.

That legislatures exist to establish and facilitate the democratic government of the state explains the connection between their structure, type of official, and the powers that they exercise. They are, normally, characterized by a large number of members, chosen by election and not selected for their technocratic merits. They lack the capacity to craft the detail of legislation, but are well-placed to set the broad policy objectives of the state and scrutinize the processes by which these policies are pursued.

(ii) The Judicial Column

Courts exist to resolve legal disputes and to adjust the law where adjustment is needed. It is their dispute-resolving function that has shaped their structure. Courts possess a triadic structure: a judge adjudicates between two disputing

³² W. McKay and C. W. Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (OUP 2009) 383–87; K. Bradshaw and D. Pring, *Congress and Parliament* (Quartet Books 1972) 259–60.

³³ P. S. Atiyah, 'Judicial Legislative Relations In England' in R. Katzmann (ed), *Judges and Legislators: Towards Institutional Comity* (The Brookings Institution 1988) 158–59.

³⁴ T. Endicott, *Vagueness in Law* (OUP 2000) chapter 9.

parties.³⁵ Though this model is deviated from in interesting and significant ways, there is a core truth to the description: institutions adopting this form can be found in almost all societies and cultures. The judge acts as representative of the state or community, providing the disputing parties with a forum in which their disagreement can be authoritatively resolved—and this resolution is backed by the power of the state.

The first, and most obvious, structural feature of the courts is the limited number of judges who hear each case compared with the total number of judges operating in the state as a whole. It is rare to find a court with more than a dozen judges, and far more common to find between one and three judges in the court. It follows from this that it is practically impossible for a single judge to hear all the cases arising within a system. Whilst there may be multiple legislatures in a constitution, these bodies normally possess distinct jurisdictions; different legislative tasks are assigned to different legislatures. In the court system, in contrast, there are multiple institutions with identical jurisdiction. An individual hoping to persuade a legislature to change the law through statute will normally have one legislature comprised of a single set of legislators to approach. An individual seeking to raise a legal case before a court may be directed to one of a number of courts, with the judge or judges drawn from a pool of officials.

A second structural point about the court system is its reliance on the parties who bring actions before it. The triadic structure is premised on the consent of at least one of the parties to the adoption of the court as a conflict-resolving forum; even in criminal proceedings the court cannot proceed without the state bringing a prosecution. It is hard to imagine a system in which parties were compelled to bring their cases before the court; the state cannot expose a dispute where the parties are not willing to admit their differences.³⁶ Two consequences flow from this. First, the court will not hear cases where the parties to a dispute either do not wish, or are not able, to bring the case before the court. Secondly, the court's understanding of the case is largely confined to the submissions of the litigants before it; other interested parties may not be heard.

³⁵ M. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981) chapter 1.

³⁶ Contrast K. Llewellyn and E. Hoebel, *The Cheyenne Way* (W. S. Hein 1941) 48, cited in L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; Shapiro (n 35) 13. As with all the comments made in this section there may be qualifications to be made in some circumstances: for instance, when a settlement is made in a dispute involving a minor or an incapacitated person the court may demand the right to approve the agreement.

A third, and final, structural point about the courts may be made: their decisions turn on the past actions of the litigants, but the implications of their rulings extend into the future. Most obviously, this applies to the parties before the court—the judge’s decision may require them to pay money, determine land rights, or spend time in prison—but, especially in the higher courts, it may also impact on the legal position of others who are not involved in the case. The law-making function of courts is clearest in Common Law systems, where the decisions of higher court judges are legally binding on lower courts and large parts of the law have been created by judges, but in Civil Law systems the higher courts often play a similar role. Whilst the rulings of higher courts may not bind as a matter of law, they are strongly persuasive, and are sometimes, in effect, as constraining as their Common Law counterparts.³⁷

The triadic structure of the courts reflects their dispute-resolving function. Their further law-making role is partly a consequence of this function and partly set in tension with it. As dispute-resolving institutions, the courts make law where the rules applicable to the case before them are unclear—whether because the rules were vague, in conflict, or perhaps where there was a gap in the law. If the judges were not able to make decisions about the law in these cases, they would not be able to bring closure to the dispute. The law-making function of the courts may begin as a response to uncertainty in the law, but shades into situations in which the law is clear, but the judges wish to modify it, perhaps in order to adapt the law to changing situations or, more bluntly, because they believe it to be mistaken. Here, the law-making function of the courts is sometimes, though not invariably, in tension with their dispute-resolving function. The judges’ capacity and willingness to alter the law may reduce the extent to which parties can rely on pre-existing rules, and may raise questions over the legitimacy of the judges.

Although the point of the courts propels the judges towards law-making, the structure of the courts shapes and limits the way that law-making power is exercised. It is unsurprising that, in both Common Law and Civil Law systems, judges reason case by case, focus on the parties before them, and that their decisions often constrain future judges. Though judges do make law, they make it in a significantly different way to the legislature. Their capacity to make law is shaped and constrained by the institutional structure of the

³⁷ J. Komárek, ‘Reasoning with Previous Decisions: Beyond the Doctrine of Precedent’ (2013) 61 *American Journal of Comparative Law* 149; M. Jia, ‘Chinese Common Law? Guiding Cases and Judicial Reform’ (2016) 129 *Harvard Law Review* 2213.

court. The structural points discussed above limit, or should limit, the creative latitude of the judge in a number of ways.

First, the information before the judge is, generally, limited to that supplied by the parties in the court.³⁸ Whilst there have been attempts to mitigate this deficiency, through ‘Brandeis briefs’ and the like, even if the judge is supplied with broader information about the impact of the decision before her, she will often lack the skills to critique and process this information successfully. The judge is unlikely to be a policy expert in the issue the case raises—even if she is an expert in contract law, she is unlikely to be an expert in the industries shaped by those contracts. So, whilst the judge’s law-making decisions may have significant social impact, she is far less well placed than the legislature—or, indeed, the executive—to assess what that impact will be. This institutional constraint provides a qualified justification for the constitutional myopia characteristic of the courts, discussed in the latter part of this chapter, in which the judge focuses narrowly on the impact of the rule on the parties before her, leaving the broader social implications of the rule to other institutions.

Secondly, the diversity of courts creates its own constraints on judicial law-making. The sheer number of courts and judges operating within a legal order requires that each judge find some way of coordinating her decisions with those of her fellow judges. Whereas in the legislative branch there are, normally, single institutions with specific jurisdictions, and those institutions contain internal structures designed to produce a single, coherent, decision—a statute—courts are more diffuse. Even at the highest level of the judicial hierarchy, where there is often a single supreme court, these institutions include a number of judges and often lack formal structures for integrating their different opinions. The final product of the court may include dissents, or judges who base their decisions on different reasoning. This plurality becomes even more pronounced further down the legal order, with a multiplicity of courts, often containing a multiplicity of judges. Even if we set aside legal rules of precedent, previous judicial decisions provide a guide to a sitting judge of the type of reasons and arguments that are likely to cohere with her fellow judges: these are the arguments that are likely to resonate with her colleagues. And such coherence is likely to prove desirable to judges not just because it promotes legal certainty but, also, because it increases the chances that the changes to the law that the judge wishes to make will be effective. The more a judge can convince her fellows that her decision was the product of the collective views of the judiciary—their collective view, not

³⁸ P. Yowell, *Constitutional Rights and Constitutional Design* (Hart Publishing 2018) chapter 4.

just her view—the more likely it is that other courts and other judges will endorse it. A cynical activist judge, contemplating handing down a radical decision, would be well-advised to season the decision with plenty of past authority: indeed, it could be argued that the more novel a decision, the greater the need to make it appear to square with past jurisprudence.

Thirdly, the diversity of judges and courts also raises questions of fairness in the face of judicial creativity. Why should the litigant lose her case before this judge, when she would have won it if another judge had been allocated to her case? The rhetoric of judicial reasoning, discussed in the previous paragraph, serves to reassure litigants: the decision handed down in their case is consistent with the decisions that would have been reached by other judges. Less cynically, this rhetoric, this mode of presentation, will often constrain the creative latitude of the judge. The need to show that the decision is in line with past decisions and the likely decisions of current judges, restricts what a judge can do. Whilst the current decision may change the law, it does so in a predictable manner, building on the decisions of past cases. The dictates of the rule of law, discussed in the next chapter, weigh against surprising decisions. Part of the point of law is to guide conduct—to avoid disputes arising in the first place—and surprising judicial decisions impair this capacity. If judges change the law frequently and unpredictably, it will be hard for people to plan their lives under the law.

Judicial reasoning, legal reasoning, often turns on wilful blindness. Lawyers are trained to reason about law in predictable and limited ways. They learn rules that rank sources of law and legal instruments, doctrines of interpretation that help render legislation clear and coherent, and, where the law is open to question, they learn how to identify and extract reasons from earlier legal decisions that can then be relied upon in the development of the law. This is the type of reasoning that will prove successful in court. Sometimes this aspect of legal education is too successful: some fiercely doctrinaire lawyers forget that legal reasoning remains a form of moral reasoning, and that, to be justified, both the rules that shape legal reasoning and the rules about which this reasoning is undertaken need to be morally justified. But for the judge, the limitations of legal reasoning are invaluable, and, in part, flow from the structure of the legal order. When the constraints of legal reasoning are justifiable, the judge is directed away from the sort of broad policy issues she is ill-placed to consider, and directed towards considering the narrower impact of the law on the parties before the court. Furthermore, by being required to ground judicial creativity in past decisions—in the principles found in previous cases and statutes—judicial law-making is rendered more predictable. As the law changes incrementally, it is possible for parties, and other judges, to predict how it will change. The contours of legal reasoning are set

by the institutional form of the court. Where the constitution is functioning well, the law-making role of the courts is constrained and predictable—the further question of when, and how far, these constraints in reasoning can be justified will be considered later in this chapter.

(iii) The Executive Column

In older accounts of the separation of powers, the role of the executive was largely characterized as the embodiment of force. The executive existed to carry out the decisions of the legislature and the courts, applying statutes and upholding court judgments. But even the earlier discussions of the separation of powers gave the executive a role that extended beyond mechanical application of these rules, in particular noting the role of the executive branch in foreign affairs. Whilst Locke distinguished between executive and what he termed federative powers—powers relating to foreigners and other states—he acknowledged that a single institution would exercise both sets of tasks.³⁹ In *The Federalist Papers*—and subsequently in the United States Constitution—the head of the executive branch, the president, was accorded many of the prerogative powers of the British monarch. The president possessed the power to negotiate treaties, nominate ambassadors, and appoint other public officers. These powers required the consent of Congress, but the initiative was to be taken by the head of the executive. She was also head of the armed forces, had the power to issue pardons, and could veto congressional legislation.

Whilst one of the characteristic modes of executive action is the exertion of force, its role in the constitution extends beyond this, even in these early models of the separation of powers. These early accounts recognized that the executive should, and normally did, possess technical capacities that the legislature lacked. The executive is divided into offices: teams of officials who focus on achieving particular tasks within the state. Whilst the deliberations of legislators—normally—range over the whole spectrum of state action, and judges—normally—hear cases that span a wide range of different legal areas, officials—normally—have a narrow focus of concern. As a result, it is likely that there will be some degree of professionalization of executive officers.⁴⁰ Those undertaking executive tasks are often appointed because of their technical knowledge of the area they work in, or will develop such knowledge by virtue of their experience in that area. It is, perhaps, unsurprising that foreign

³⁹ Locke (n 10) book II paras 146–48.

⁴⁰ See also M. Weber, *Economy and Society* (G. Roth and C. Wittich eds, California University Press 1978) volume II, 951–52.

affairs and the direction of the military—areas in which technical ability is clearly necessary—were amongst the first areas to be regarded as within the province of the executive. The skills we would expect of executive officers—managerial expertise and knowledge of the technicalities of the area they engage with—contrast with the amateur nature of legislators and the legal skills of the judiciary.⁴¹

One of the most significant distinctions between types of constitution lies between presidential and parliamentary forms of constitution. In presidential systems the head of the executive—the president—is elected, is not reliant on the support of the legislature for her position, and directs the government that she appoints.⁴² In parliamentary systems the effective head of the executive is the prime minister, who is dependant upon the continued support of the legislature, and is drawn from that body.⁴³ Walter Bagehot argued that parliamentary systems were based on a fusion of powers, not a separation of powers.⁴⁴ It could be argued that the separation of powers is only applicable to presidential-style constitutions. It is only in a presidential system that the executive has its own, discrete, source of authority and a constitutionally protected area of power. In parliamentary systems the legislature selects the political part of the executive branch, which then remains dependent on the legislature for its position and power. Perhaps, it might be thought, applying the separation of powers to a parliamentary constitution makes a category error: it applies a standard applicable to one type of constitution, the presidential, to an alternative type, the parliamentary. But if we look more closely at the executive in parliamentary systems, it is arguable that the split between the executive and legislature is as profound as that found in presidential models—indeed, in some respects, the division is even more marked.

If we take the United Kingdom as an example of a parliamentary system, a deep divide can be identified between the British executive and its legislature. The executive branch in the United Kingdom is very large: depending on how you calculate it, there are hundreds of thousands, perhaps even a million, people working in the executive. There are civil servants, soldiers, policemen, nurses, all of whom could be considered officials within this branch of the state. For the most part, they do not sit in Parliament. Indeed, in a clear instance of a legal rule instantiating an aspect of the separation of persons, civil servants are barred from sitting in the House of Commons.⁴⁵ In their working

⁴¹ On different types of expertise, see J. King, *Judging Social Rights* (CUP 2012) 220–29.

⁴² G. Sartori, *Comparative Constitutional Engineering* (2nd edn, New York University Press 1997) chapter 5.

⁴³ *ibid* chapter 6.

⁴⁴ W. Bagehot, *The English Constitution* (Watts & Co 1964) chapter 1.

⁴⁵ House of Commons Disqualification Act 1975, s 1(1)(b).

life, these state employees are expected to be apolitical: following the policies set by the political branch of the state.⁴⁶ The role of British ministers in the appointment and promotion of civil servants is significantly more limited than that of the American president. British ministers can veto candidates who have been recommended by the Civil Service Commissioners, but only have a constrained power to engage with the process of selection. The prime minister's power over the selection of permanent secretaries (the highest rank of civil servant) is greater, but she can still only pick from a group selected by the Commissioners. In contrast, the American president has a wide power to appoint senior civil servants.⁴⁷ Some of these posts require Senate approval, but a significant number can be made by the president acting alone. The power of the president—and, sometimes, the involvement of the Senate—brings a far greater degree of political control to the appointment of the civil service than is found in the Westminster system. The Westminster system seeks to insulate civil servants from political interference—their legitimacy is grounded in their apolitical, technocratic, ability—whereas the American system seeks to establish political control over senior appointments—here, the legitimacy of the appointments is grounded in the authority of the president, or of the president and Senate.

It could be argued, against Bagehot, that in respect of the civil service, the separation of powers is more fully realized in parliamentary systems, such as that of the United Kingdom, than their presidential counterparts. Setting aside the government—those members of Parliament with ministerial positions—there is a marked divide between the basis of legitimacy and the processes of appointment and promotion between the apolitical and technocratic executive and elected legislative branch. The fusion, which Bagehot invokes, right at the very top of the executive, is a fusion of only a tiny portion of the two branches.

The technocratic capacities of the civil service are only part of the role of the civil service. There is a core truth in the older models of the executive: crucially, these technocratic capacities are backed by the capacity to exert force. Whilst the legislature and the courts make laws and decisions, they have little or no capacity to compel people to follow and act on these pronouncements; they rely on the executive to render these effective. The officers of the executive have the ability to get things done. This is achieved through a wide variety of means—the executive can act directly, it can contract with private parties

⁴⁶ See now the Civil Service Code, paras 13 and 14.

⁴⁷ US Constitution Art II, s 2. Following the Pendleton Civil Service Reform Act 1883, lower level federal appointments in the civil service are no longer made by the president.

to undertake tasks, or it can command people to act in certain ways. But all of these modes of action are underpinned by the possibility of coercion, that is, the potential for force to be exercised against persons or their property. Those who breach agreements with the state risk being sued for breach of contract, those who ignore the commands of the state, or obstruct its actions, risk fines or imprisonment. Even when the state offers inducements to actions, rather than the threat of sanction, the possibility of force lies deep in the background; creating the capacity to raise tax, constraining state officials to pay the inducements to the recipients. In a classic article, Robert Cover described law as constituting a system of institutionalized violence, but whilst in many circumstances it may be judges that initiate this violence, it is almost always officers of the executive that carry it out.⁴⁸

For the most part, though, the executive will not need to exercise force. When the state is functioning well, people will generally comply with the law and with the lawful commands of state officials.⁴⁹ Force may be central to the functioning and purpose of the executive branch, but it need not be common. Indeed, many people may comply with the demands of the state unthinkingly, or, perhaps, because they believe the state is entitled to tell them how to act; the centrality of force, of violence, to the operation of the state can quickly slip from view.

Whilst the role of the legislature in law-making is uncontroversial, and the role of the courts in law-making, in some form, is broadly recognized by those who study constitutions, the role of the executive in law-making is more controversial. The title of Lord Hewart's book, *The New Despotism*, captures the reaction of some to the rise of delegated law-making powers in the hands of the executive.⁵⁰ For Lord Hewart, the capacity of the civil service to make law presented a threat to the position of Parliament, whose sovereign power to enact statutes was challenged, and to the judges, who had, through gradual and incremental jurisprudence, fashioned the law of the constitution.⁵¹ But such fears are overstated. Just as legislatures and courts have their own, distinctive, modes of law-making, many constitutions also accord the executive a role in creating law, a role that reflects the distinctive institutional structure and capacities of that body.

The executive's law-making role should complement rather than undermine that of the legislature. As ever, the weaknesses of the legislature's

⁴⁸ R. Cover, 'Violence and the Word' (1985–1986) 95 *Yale Law Journal* 1602.

⁴⁹ T. Tyler, *Why People Obey the Law* (Princeton University Press 2006), esp chapter 13.

⁵⁰ G. Hewart, *The New Despotism* (Ernest Benn 1929).

⁵¹ *ibid* 14–17, 24–26; J. McLean, *Searching for the State in British Legal Thought* (CUP 2012) chapter 6.

law-making capacity are the counterpoints of its strengths. So, its amateur nature, essential for the achievement of democratic government, makes it hard for the legislature to craft, or properly scrutinize, technical rules. Its openness, the transparency of its decision-making processes that is necessary to maintain a connection between citizens and their representatives, make it hard for the legislature to effectively negotiate with other bodies. And its deliberative processes—important for discussion, reflection, and the gathering of evidence—make speedy decisions difficult. The executive is often empowered to legislate where these structural features make it difficult for the legislature to act effectively. Delegated legislation is often used to flesh out the policies set out in statutes and, in so doing, can mitigate some of the legislative limitations of the legislature. The legislature—acting for the public as a whole—sets the broad direction of the law. The executive—often in consultation with those affected by the change—then crafts a collection of detailed, technical, rules that will give effect to these goals.⁵² In response to the second limitation, the executive may be given scope to introduce and modify legislation in order to create space for negotiations with other bodies over the law. In the United Kingdom, for example, the executive is accorded power to alter domestic statutes to bring them into line with European Law.⁵³ Parliament has, in effect, created a structure that enables the British executive to guarantee that the international deals that underpin European Law will be effective in the legal systems of the United Kingdom. The executive's negotiating role may extend beyond the international realm. Sometimes the executive negotiates with private bodies within the state; regulation can be as much a matter of consent as coercion. Finally, delegated legislation enables rapid changes in the law where needed—either because of an emergency or because the existing law is misfiring in some way.

There is a further role played by the executive in the production of primary legislation: the executive supports the legislature in the production of statutes. When the constitution is functioning well, the technical skills of the executive should help shape the initial writing of laws—both by providing expert advice about the means adopted in the statute but, also, by helping ensure statutes are coherent and likely to prove effective. It will be, after all, the executive that carries forward these legislative policies, and so the executive has an interest in seeing that statutes are well-drafted and suited to their goals.

⁵² For reflection on the democratic implications of this low-level law-making, in which those directly affected by the law engage with the executive, see D. Grimm, 'Can Democracy by Bargaining be Constitutionalized?' in D. Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016).

⁵³ European Communities Act 1972, s 2(2).

(iv) Conclusion

The last few paragraphs have not sought to provide a comprehensive account of the proper roles of the legislature, courts, and executive within constitutional orders. But, hopefully, they have done enough to show that the efficiency account of the separation of powers, one located within a broader account of the point of the state, is able to explain the attractions of the standard three-part model of the principle. It has also sought to show the reasons why the standard model rightly draws together the institutional structure, skills, and modes of action of the three branches of the state. Having established the reasons for the divisions between the branches, the next question commonly raised in writings on the separation of powers asks after the relationship, or relationships, between these entities. Given that there are good reasons for the state to possess different institutional forms, possessing different modes of action, and different sets of skills, how should these bodies interact within the constitutional order?

Relationships Between Institutions

There are two broad groups of institutional interaction: those characterized by comity and those characterized by friction. Interaction characterized by comity occurs when the institutions are mutually supportive, where each works to help and render more effective the actions of other parts of the constitution. Interaction characterized by friction arises where an institution seeks to constrain another body, or prevent it from acting in some way. Whilst most accounts of the separation of powers present friction as the primary mode of relationship—the separation of powers acting as a brake on the actions of the state—efficiency accounts of the separation of powers see comity as the standard mode of interaction, with friction a less common phenomenon.

(i) Comity

Often, perhaps ordinarily, the institutional interactions required by the separation of powers are characterized by comity.⁵⁴ When the constitution is working well, there will be comity in relationship to both the aim and the means of the policies adopted by the state. In relationship to the aims, the

⁵⁴ On comity and the separation of powers, see T. Endicott, *Administrative Law* (2nd edn, OUP 2011) 14–25 and Kavanagh (n 8) 234–37.

institutions of the constitution should be striving towards a common objective. At the most abstract, all of the institutions in the constitution should be oriented towards the well-being of the citizenry; they share an overarching goal. More narrowly, the constitution then divides up the task of refining and specifying what the well-being of the citizenry entails.⁵⁵ It is, normally, given to the legislature to determine what counts as 'well-being' and, moreover, to choose between the vast range of possible aspects of citizens' well-being that the state could pursue—for a number of reasons it is impossible for even the best of states to act for all of the good all of the time.

Secondly, comity relates to the manner in which these objectives are pursued.⁵⁶ In the previous section the varying structures, skills, and modes of action of the three branches of the constitution were surveyed. When the constitution is functioning reasonably well, these differing strengths are combined towards a common goal. The legislature, through statute, identifies the broad aim of state action and sets the broad method for achieving this goal. The executive refines the statute—using delegated legislation and takes policy decisions to embellish within the statute's structure—and takes steps to implement the statute in the world. The courts resolve disputes over the meaning and implications of the statute, relying on the purpose endorsed by the legislature to clarify the meaning of the text. This depiction is, of course, a simplistic account of how the institutions of the state interact, but it captures both what the principle normally requires and, also, the boring, day-to-day, operation of many constitutional institutions. There is comity of aim—the policy objective that is shared by courts and legislature—and comity of mechanism—with each constitutional institution using their different capacities to advance this policy.

(ii) Friction

The second type of interaction is characterized by friction. In these instances, institutions are straining against each other, set in tension rather than comity. There are at least two reasons why a constitution might include mechanisms that allow for friction, and at least two forms these mechanisms may take. The two reasons for friction are: first, to guard against error and, secondly, to permit a justified limitation of the range of moral concern of an institution. The two forms that friction might take are: first, mechanisms that prevent an

⁵⁵ There is an echo of this in Waldron's claim that separation of powers articulates state power, requiring respect for the integrity of each constitutional institution: Waldron (n 2).

⁵⁶ Yowell (n 38) chapter 5.

act being carried forward and, secondly, mechanisms that serve to combine acts of different bodies.

(a) Preventing Error in the Constitution

Preventing error is the most common reason for allowing friction within a constitutional order. The state needs to guard against mistaken or immoral decisions that constitutional institutions may make from time to time. There may be some temptations towards which institutions are, because of their structures, particularly vulnerable. For example, the electoral process may render the legislature at risk of the vices of majoritarianism; appealing to prejudice might provide an easy way for legislators to win votes, and they may have little interest in protecting or representing unpopular groups. The courts are susceptible to a different collection of temptations. For instance, the judge may be tempted to make decisions on matters she knows little about. The trial process can generate limited and partial information about the law that is in dispute: the parties only have an incentive to give the judge information that supports their case. Sometimes, the judge will be tempted to make changes to the law on this partial information, unaware of the wider ramifications of her decision.⁵⁷

Just because constitutional institutions are vulnerable to such vices, it does not follow that they will invariably succumb to temptation. The need for limits on an institution to guard against error will depend greatly on local circumstances. A state in which the legislature has a history of making oppressive laws that victimize minority groups may need a powerful court to guard against these abuses, whereas a state in which the courts have a history of supporting the elite against the bulk of the citizenry might require a different balance of power. The types of friction required in a constitution will therefore vary between states.

(b) The Division of Constitutional Labour

A second reason for creating friction within the constitution—and perhaps one that is of more general application—starts from a radically different position. Rather than preventing error, creating the possibility of friction might sometimes be the consequence of a valuable division of moral labour. As we have seen, the different branches of the constitution focus on different aspects of the common good. Institutions may properly limit the range of factors they consider in making a decision because they know that another institution is on hand to weigh the considerations they have failed to assess. This licensed

⁵⁷ Fuller (n 36).

constitutional myopia may be valuable if it permits an institution to play to its strengths, to consider factors it is well-placed to consider, and leave other relevant issues to bodies better suited to their assessment. This creates a form of friction, rather than cooperation, because the institutions are pursuing different aspects of the common good and modifying the acts of another body in pursuit of these goals. It may be that this can occur without antagonism arising between the bodies, but—necessarily—the body whose measure is modified will be unable to fully appreciate the merits of the change.

Such an argument would present the separation of powers as requiring the constitution to establish an invisible hand mechanism.⁵⁸ Invisible hand mechanisms are discussed in more detail in the Appendix to this book, but, in short, they operate when parties within a system are seeking one objective, or a number of objectives, but the system is structured such that a distinct common benefit is produced through their interaction. The actors are not pursuing this good—indeed, they may be unaware of the operation of the mechanism—but the system generates this outcome.

Could an invisible hand argument be applied to the relations between constitutional institutions?⁵⁹ So, perhaps, the courts tend to be good at recognizing the value of rights, and appreciating the impact of general legislation on those rights in particular contexts.⁶⁰ The legislature, in contrast, might be good at gauging the wider public interest, and weighing the claims made by competing interest groups. If this is the case, it may make sense to place the legislature and courts into a system that ensures friction between these two institutions. Each fights for their own bit of the common good and, out of this conflict, the totality of the common good is achieved. Invisible hand mechanisms of this type are attractive where there are good reasons to limit the range of considerations that apply to an actor or institution. Whereas in mechanisms characterized by comity, each institution works towards a shared goal, now the institutions are working towards different, superficially conflicting, goals. Were each institution acting alone, such narrowness would be unjustifiable, but their presence in a system that secures friction advances the general good. Each institution is well-placed to pursue an aspect of the

⁵⁸ A. Vermeule, *The System of the Constitution* (OUP 2012) chapter 3.

⁵⁹ Richard Bellamy considers, and eventually rejects, an alternative invisible hand argument, one that harks back to the older form of the separation of powers as the embodiment of the 'mixed constitution', with different parts of the constitutional order enabling different groups to participate in the decision. See R. Bellamy, *Political Constitutionalism* (CUP 2007) 195–207.

⁶⁰ See the discussion in R. Fallon, 'The Core of An Uneasy Case for Judicial Review' (2008) 121 *Harvard Law Review* 1346 and A. L. Young, *Democratic Dialogue and the Constitution* (OUP 2017) 148–53.

common good: the constitution combines their efforts into a collective decision that pursues the common good as a whole.

A number of writers on the constitution have advanced arguments that could be interpreted as versions of this model.⁶¹ This might, for example, provide one way of understanding Ronald Dworkin's suggestive, but difficult, claim that the court is the forum of principle whilst the legislature is the forum of policy.⁶² According to Dworkin, questions of policy go to the common good whilst questions of principle go to individual rights. One possible interpretation of Dworkin would take him as arguing for some sort of division of moral labour. Because of the different institutional strengths of the courts and the legislature, these bodies should focus on different aspects of state action. The legislature, which is elected and contains a wide range of opinions and interests, has the capacity to determine the policies that will best advance the common good of the community. The courts, whose officers are normally selected for their legal expertise and which focus on disputes between parties, have the skills and the information required to protect individual rights. The bulk of Dworkin's work locates the relationship within the first argument for friction, discussed above. The courts operate to prevent error, protecting individuals from the mistaken acts of the legislature. But Dworkin could also be read as arguing for a creative friction between these bodies. Statutes form part of the material from which the judge extracts the law. Statutes, like precedents, are given weight in Dworkin's account of interpretation. When the judge resolves a dispute over law, the existing legal materials shape and constrain her decision. The decision of the court is one that incorporates the policy decisions of the legislature whilst also modifying them in light of the principles, the rights, that are also part of the law. Through the combination of these two institutions, reasons that relate to policy and those that relate to principle are considered, and integrated into the decisions of the state.

This interpretation of Dworkin is speculative. His divide between 'principles' and 'policies' is underdeveloped.⁶³ It is not clear why, for instance,

⁶¹ For an argument that James Madison was influenced by invisible hand arguments, see D. Prindle, 'The Invisible Hand of James Madison' (2004) 15 *Constitutional Political Economy* 233—though note that Prindle has a different understanding of an invisible hand mechanism to that used in this chapter. See also J. Chafetz, 'Congress's Constitution' (2012) 160 *University of Pennsylvania Law Review* 715, 772–74.

⁶² R. Dworkin, 'Hard Cases' in R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 82–100; P. Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 *American Journal of Jurisprudence* 93, 108–11; J. King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409, 416–20.

⁶³ J. King (n 41) 125–29.

individual rights should not be thought of as part of the common good—and so constitute an element of the policy direction of the state.⁶⁴ Given that these elements are intertwined, the legislature and courts will be constrained to consider each set of factors in many instances. A clearer, and more developed, approach to the division of tasks between institutions is found in the writings of those inspired by the work of political scientists on institutional competence. A good example of this is found in Eoin Carolan's recent book, *The New Separation of Powers*.⁶⁵

Carolan argues different institutions in the constitution represent what he terms 'constituent perspectives'.⁶⁶ These 'constituent perspectives' are determined by the different types of impact that state policies can have. Any policy needs to be crafted to take into account three perspectives: first, the broad collective good; secondly, its local implications in the area in which the policy applies; and, thirdly, fairness to those individuals affected by the policy. The legislature is well placed to gauge the collective good, ensuring that policies should respond to a perceived public need or demand.⁶⁷ The executive applies these statutes, and can assess their impact on the groups to which they apply.⁶⁸ Finally, the courts focus on the fairness of this modified policy to a particular person in a given case.⁶⁹ Implicit in Carolan's account is the claim that it would be a mistake for each of these three bodies to attempt to answer the questions addressed by the other bodies. They should focus on the issues they are well equipped to address. The state, as a whole, needs to consider all three areas, but it does so by parcelling out the tasks to these three bodies. One way of understanding Carolan's account would be as a form of an invisible hand mechanism: the combination of the decisions of these bodies enables the state to respond to all the reasons that apply to it.

A particular strength of Carolan's account is the way it captures the role of the separation of powers as a constitutional device that draws together a range of different skills relevant for successful state action. Another way of framing Carolan's 'constituent perspectives' would be to treat them as capacities needed by the state: the democratic capacities of the legislature, the technical capacities of the executive, and the legal capacities of the courts. One of the most important tasks of the constitution is the combination of these capacities.

⁶⁴ And in places he seems to give up the distinction entirely: see R. Dworkin, *Law's Empire* (Harvard University Press 1986) 208–15, where statutes are presented as potential embodiments of principle.

⁶⁵ Carolan (n 18).

⁶⁶ *ibid* 129, 185.

⁶⁷ *ibid* 129.

⁶⁸ *ibid* 151–52, 177.

⁶⁹ *ibid* 128.

Whilst the arguments for a division of labour in the constitution are persuasive, they must be treated with caution. The analogy of the marketplace, often invoked in literature on the invisible hand and discussed in the Appendix to this book, is an instructive one. In the real world markets often malfunction. Those who engage with them should check, from time to time, that the market really is producing the common benefits that justify a restriction of moral reasoning. They ought also to be sensitive to special cases: unusual situations where, even in a well-functioning market, actors in the system should pay regard to considerations beyond profit. Similarly, in the constitution the justifiability of limited institutional reasoning will depend on the successful functioning of the whole system: where one institution is failing, the other must attempt to accommodate this. And even where the system is working well, there will be exceptional cases where other reasons must be considered by institutions. If a successful argument for an invisible hand mechanism as part of the separation of powers could be made, it would only permit institutions to narrow the range of reasons they consider in normal situations, whereas in exceptional cases—which in some systems might arise comparatively frequently—such myopia would not be justified.

The Demands of the Separation of Powers

This chapter contends that separation of powers must be present, to some extent, for an entity to be a state, but there are some states, often those with a Leninist heritage, that purport to reject the separation of powers. Lenin advocated what is euphemistically termed ‘democratic centralism’. Democratic centralism permitted discussion within the party about the policies of the state but, once this discussion was concluded, state institutions then had to rigidly adhere to these decisions.⁷⁰ Rather than a separation of powers, democratic centralism appeared to require that a single institution, the party, would have complete control over the conduct of the state. The idea of democratic centralism lives on in a diluted form in the Chinese system, asserted as a guiding principle in Article 3 of the Chinese Constitution and the Chinese Communist Party Constitution.⁷¹ Tempered with the Maoist idea of the ‘mass line’ the centrality of the Party as the decision-maker for the state has remained, but now the Party is expected to consult with the people before

⁷⁰ A. Brown, *The Rise and Fall of Communism* (Vintage 2009) 107–11.

⁷¹ See the discussion in S. Angle, ‘Decent Democratic Centralism’ (2005) 33 *Political Theory* 518, 524–27 and G. Yang, ‘Still a Century of the Chinese Model? Exploring Dimensions of Democratic Centralism’ (2016) 1 *Chinese Political Science Review* 171.

making policy. Superficially, democratic centralism seems antithetical to the separation of powers—a radical alternative to the Western division of powers between constitutional institutions.

The discussion of sovereignty in the previous chapter identified a set of claims and capacities that a polity must make and possess to constitute a state. As we have seen, states claim to be the supreme authorities over their territory and people, and, moreover, this claim must be—to some significant extent—effective. For sovereignty to be established, the state must make and execute decisions; and, given the size of states, at least some of these decisions must be expressed through the medium of law. The state's need for law, to control a legal order, will be discussed in the next chapter; sovereignty requires the rule of law, but the need for law also brings the requirement that the state possess the distinct capacities identified by the separation of powers. It must be able to create law, apply it, and adjudicate on its breach. The state also needs at least some of the institutional structures and skills identified by the principle. It is hard to imagine, for example, how a state could function without an executive. Though some executives are fairly minimal, states require the capacity to exercise control over territory and people. At the very least, there is a need for some sort of security force—to enforce the law or, perhaps, to regulate its enforcement—and some sort of executive decision-making structure, and all this requires resources, money and property gathered and managed by the executive branch. Similarly, there is a need for some sort of court system, a system in which disputes over the law can be arbitrated. The extent of the independence of the judges from the executive branch may vary widely, but the basic structure of the courts, their triadic nature, and their focus on the application of the law, rather than a freewheeling application of whatever decision the judge thinks best, is probably a constant.

Even systems that purport to follow democratic centralism require these institutions and divisions. As Lenin quickly discovered, the state cannot manage without courts in some form—and, as will be discussed in the next chapter, China has also recognized the need for a functionally separate court system incorporating some elements of judicial independence. Unsurprisingly, both the Eastern Bloc systems and China also maintained extensive executive structures. More surprisingly, perhaps, a separate legislative branch was also maintained for much of these states' constitutional histories. Even if the existence of a legislature is not strictly necessary for the existence of a state, it seems to hold an attraction. In the later discussion of democracy we will consider why one-party states might want to maintain a distinction between the party and state institutions. States that purport to adhere to democratic centralism often come closer to the principle of the separation of powers than might first be supposed.

Whilst the separation of powers must be present to some extent in every state, it is, like sovereignty and the rule of law, a principle that can be satisfied to a greater or lesser extent. Although states need some form of executive and court system in order to exist, a legislature, though an institution found in most states in some form, is not essential.⁷² It is conceivable that a state could manage without such a body, with the executive and courts producing laws. A polity of this kind would be a state—it would clearly be an incidence of this type of social form—but it would fall short of what a state should be; it would be a state, but not a successful one. Lacking a legislature, it would not possess the structures that permit democratic government—failing to meet the demands of the principle of democracy. The separation of powers requires that those designing the state craft an institutional structure that goes beyond the minimum necessary for its existence; it requires an institutional structure that permits and facilitates a successful state.

The separation of powers requires that states possess an institutional structure that allows for effective, democratic, government. The state should possess the institutional structure needed to advance the well-being of its citizens: the array of institutional forms, skills, and instruments, that are needed by the state. And, as we have seen, these three elements are bound together by suitability: there are good reasons behind the standard model's combination of structure, skills, and instruments. It might be asked, though, if the separation of powers is an unqualified principle, if it is invariably the case that more fully the state tracks the standard model, the better, or if there are situations in which other considerations should be played off against its demands.⁷³

The first part of the answer to this question takes us back to the discussion of the force of constitutionalism, in Chapter 1. Like the other principles of constitutionalism, separation of powers can play out in a range of different ways, and is satisfied by a range of constitutional structures. It is doubtful, for example, that there is a right answer to the choice between a presidential or a parliamentary system. Both of these structures meet, or rather, can meet, the demands of the separation of powers.⁷⁴ Which is preferable will depend on the history and culture of the society that is adopting the constitution.

⁷² J. Gardner, 'The Virtue of Justice and the Character of Law' in J. Gardner, *Law as a Leap of Faith* (OUP 2012) 256–57.

⁷³ This question will be addressed more broadly in the final chapter.

⁷⁴ For discussion of presidential models and parliamentary models through the lens of the separation of powers, see R. Albert, 'The Fusion of Presidentialism and Parliamentarism' (2009) 57 *American Journal of Comparative Law* 531.

Furthermore, Adrian Vermeule's strictures about the value of second best should not be forgotten.⁷⁵ Whilst the separation of powers is an achievable ideal for the state, sometimes deviations from its demands may compensate for deficiencies elsewhere in the constitution. An extreme activist court may emerge to compensate for an exceptionally supine legislature; a competent executive may dodge enforcing the rulings of a corrupt judiciary. If the compensating institution is reformed, and brought back into line with the requirements of the separation of powers, the problem within the constitution may be exacerbated. Whilst in these systems the separation of powers should be worked towards, it should be applied carefully: the failing institution may need to be reformed first.

A second response to the force of the separation of powers adopts a different strategy: the separation of powers may sometimes make surprising demands on constitutional designers, requiring the allocation of powers to institutions that are structurally ill-suited to their exercise. The separation of powers may require surprising allocations of capacities and immunities in order to allow an institution to defend itself against other constitutional bodies. These self-defence mechanisms are immunities or powers conferred on a constitutional institution that fall outside of the normal requirements of the separation of powers, but which have the function of protecting that institution from other constitutional bodies.⁷⁶ Self-defence mechanisms may be negative or positive.

Negative self-defence mechanisms are immunities that serve to protect institutions, or officials within those institutions, from the unwarranted attentions of other bodies. These vary from state to state, but in many systems each of the three branches is given a degree of immunity from other bodies, or are given powers to regulate their own affairs that fall outside the normal allocation of powers in the constitution. For instance, in many systems debates in the legislature are often insulated from parts of civil and criminal law; libel actions cannot be brought on the basis of statements made in the course of debate or which are contained in reports published by the chamber.⁷⁷ Or, for example, the funding of the courts, and the salary paid to the judges, is protected from the parsimony of other branches. Whereas other public bodies

⁷⁵ A. Vermeule, *The System of the Constitution* (OUP 2011) 29–36.

⁷⁶ The relationship between self-defence mechanisms and the separation of powers is discussed more fully in N. W. Barber, 'Self-Defence for Institutions' (2013) 72 *Cambridge Law Journal* 558.

⁷⁷ On parliamentary privilege, see J. Chafetz, *Democracy's Privileged Few* (Yale University Press 2007). The classic instance of this is found in the British constitution: Bill of Rights 1689, Art 9.

require legislative approval for their funds, or are subject to financial control by the executive, the courts and judges are treated as special cases.⁷⁸

On other occasions, the self-defence mechanism confers a positive power, acting as a sword rather than a shield. Sometimes these powers are used quite frequently, but on other occasions, these powers stand as threats: they are weapons that could cause a great deal of harm, perhaps even causing harm that goes beyond the body they are used against. Of course, that a body has the constitutional capacity to do a thing may, in itself, help ensure other bodies within the state show respect towards it. The risk of the power being exercised is enough, in itself, to achieve the purpose of that power. Many examples of such positive powers could be given. For example, the legislature controls the flow of money into the executive branch, and can deny the executive the funds it needs to operate.⁷⁹ And where legislatures operate at different levels—in a federation, for instance—a lower legislature may be empowered to repeal the acts of a legislature of a higher level that encroach on its area of competence,⁸⁰ or given a power to force the higher body to reconsider its action.⁸¹ Whilst in some parliamentary systems, the executive is given a power to dissolve the legislature and call fresh elections.⁸²

Generally, the separation of powers requires that the constitution be structured to facilitate and encourage cooperation between institutions: the branches of state should be working towards shared goals, using their different capacities and skills for a common end. But, as we have seen, sometimes there is a need for friction within the constitution, and it is this need for friction that explains the need for self-defence mechanisms. In each of the arguments for friction—the argument from error and the argument from

⁷⁸ United States Constitution, Art III § 1. In Ireland a constitutional amendment was required before judicial pay could be reduced: J. O'Dowd, 'Judges in Whose Cause? The Irish Bench After the Judges' Pay Referendum' (2012) 48 *Irish Jurist* 102.

⁷⁹ As in Britain: Bill of Rights 1689, Art 4. See R. Weill, 'We The British People' [2004] *Public Law* 380. The tightness of the connection in the modern constitution between the legislative and executive branch entails this power is rarely used against the executive. In America, in contrast, this power is regularly exercised: Chafetz (n 61) 725–31.

⁸⁰ N. W. Barber and A. L. Young, 'Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003] *Public Law* 113.

⁸¹ In the European Union national parliaments are given a limited power to compel the Commission to rethink a legislative proposal that national parliaments believe runs contrary to the principle of subsidiarity: Art 5(3)–(4) TEU, Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality' discussed in I. Cooper, 'A Virtual Third Chamber For the European Union? National Parliaments After the Treaty of Lisbon' (2012) 35 *West European Politics* 441.

⁸² C. Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing 2011) 120–21; see also R. Young and N. Thomas-Symonds, 'The Problem of the "Lame-Duck" Government: A Critique of the Fixed-Term Parliament Act' (2012) 65 *Parliamentary Affairs* 1.

the limitation of constitutional concern—a situation is created in which one institution goes against the wishes of another. In some instances, this challenge might be accepted. The institution that has had a measure stopped or modified may acknowledge that the other body has a point: it may recognize that it made a mistake, or appreciate the advantage of the other institution's contribution. But often structures that have the potential to create friction are included in the constitution precisely because it is likely that one institution will fail to appreciate the force of the considerations relied upon by the other body. This, in turn, makes it likely that the first institution will, from time to time, disagree with the intervention, and sometimes this disagreement will be expressed in strong terms.

The self-defence mechanisms of the constitution operate to limit the ways in which this disagreement can be expressed and also to limit the level of coercion one institution can exercise over another. Negative self-defence devices act as a shield: they prevent or make less likely certain types of interference. A legislature that disapproved of a modification to the law made by a court may be able to change the law relatively easily, but the constitution may inhibit legislators expressing criticisms of individual judges and may prevent them from cutting judicial pay. Positive self-defence mechanisms act as a sword: they provide a sanction or threat that one institution can use against another. An executive faced with a legislature that consistently refuses to support its policies may be able to call an election; a legislature that believes its executive has diverged too far from its mandate may be able to constrict the executive's funds. As was discussed earlier, these measures come at a price, and are powers that should be used with caution. Often, the bare risk of their exercise will be sufficient to ensure respect between the bodies, and tolerance in the face of disagreement.

The benefits of friction within the constitution help to explain why constitutional self-defence devices are sometimes necessary, and have a place within an account of the separation of powers. Friction is needed both to guard against error and, also, to allow institutions to restrict the range of moral considerations they include in their decisions. This limitation of moral concern rests on one of the core ideas of the separation of powers: a body should only undertake tasks that it is well-suited to accomplish. By involving different institutions with different capacities in a single area, the constitution establishes an invisible hand system: permitting each institution to consider that aspect of the issue it is best placed to assess, and then integrating these different assessments into a single policy. The requirement for the creation of an invisible hand system brings with it the likelihood of friction, even within the most successful of constitutional orders. The division of constitutional

labour ensures that institutions play to their strengths—undertaking those tasks they are best suited to undertake—but also entails that they will struggle to fully appreciate the value of the work of other bodies in the system. Some, at least, of the examples commonly held up as deviations from the principle of the separation of powers should be understood as a working through of its demands, limiting the ways in which this fiction can be expressed. The applications of the suitability test, a test that is at the heart of the separation of powers, reveals that a power or immunity that initially appeared inappropriate for an institution to possess now requires its conferral.

Conclusion

This chapter has sought to provide a relatively orthodox account of the separation of powers. It has argued that the standard model of the principle—the threefold division between the traditional branches of the state, and the uniting of distinct institutional structures, skills, and modes of action within those branches—has much to recommend it. It has departed from recent discussion of this standard model in two respects. First, it has argued that the separation of powers is a principle that can only be understood within the context of the state, and by reference to the point of that institution. Older accounts of the separation of powers recognized this—the models of the separation of powers developed by Locke, Montesquieu, and Madison, were all clearly imbedded within accounts of the nature of the state—but some contemporary writing has sought to dislocate the principle, treating it as a free-standing constitutional doctrine. This approach has encouraged the view that it was liberty that lay at the core of the principle; the separation of powers existed, in some sense, to one side of the state, and operated to prevent or slow state action. But liberty-focused accounts of the principle could not explain why the separation of powers should include the features found in the standard model, or why the various institutional structures, skills, and capacities should be grouped together.

Secondly, and relatedly, the institutional dynamics of the separation of powers have been shown to be more complicated than the liberty models assume. The normal mode of interaction is characterized by comity: with the three branches working together towards a common goal. Friction is a secondary mode of interaction—but one that the constitution must be designed to accommodate. Friction most obviously arises where one branch seeks to correct the errors of another, but is also likely to be generated from

the integrative function of the separation of powers, the capacity of the three branches to see different aspects of the common good and combine them into a single action of the state. Because of this constitutional myopia, justified by the institutional capacities of each branch, it is probable that each institution will fail to fully appreciate the wisdom of the others. The separation of powers requires that the constitution includes mechanisms that enable institutions to put pressure on other constitutional bodies—encouraging them to treat each other with respect—but that it also includes mechanisms that limit the forms that this pressure can take.

The Rule of Law

The rule of law captures those features of a legal order that are needed for that order to function well. As John Finnis puts it, it exists where the legal system ‘is in legally good shape’.¹ The rule of law requires that law make the differences it purports to make; the principle focuses on the interplay between the formal demands of law—the rules found in statutes and other official pronouncements—and the reality of the rules that structure power within a community. To some extent, adherence to the rule of law is necessary for a legal order to exist; there are aspects of the principle that must be present in a system if that system is to count as one of law. Where it is desirable for a society to be governed by law—and, in societies like ours, this is clearly the case—the rule of law amounts to a normative demand, a requirement that a certain set of mechanisms for the exertion and regulation of power be established. Once we have concluded that the creation of law is desirable, the demands of the rule of law stretch beyond the bare minimum necessary for law’s existence. The rule of law consequently operates at two levels. Some of the demands of the rule of law relate to features that are necessary for the very existence of the legal order; in their absence, the community is not governed by law. Other requirements of the principle move beyond this, and speak to the flourishing of the legal order; these demands relate to elements that are needed for the rule of law, as an ideal, to be fulfilled, and there is often a range of ways that these elements might be manifested within a legal order. There are plenty of real world legal orders that succeed in meeting the minimum demands of the principle but which still fall far short of the ideal.

The chapter begins by outlining the rule of law. Drawing principally on the work of A. V. Dicey and Joseph Raz, it will argue that there are two aspects to the principle. First, the rule of law requires that laws be expressed in a way that enables people to obey the law; the law must be capable of obedience. The considerations that follow from this requirement comprise the formal aspects of the rule of law, considerations that go to the ways in which the law

¹ J. Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 270.

is structured and articulated. Secondly, the rule of law requires that the social context is such that people are led to obey the law; not only is the law capable of being obeyed, it must also, in reality, be obeyed. These are the social aspects of the rule of law, considerations that go to the institutional structure of the legal order and, more broadly, to the community in which the law operates.

The second part of the chapter examines the connection between the rule of law and the state. The rule of law is a principle that speaks to all legal orders, not just those operated by states, and, for this reason, it might be argued that the rule of law falls beyond the scope of constitutionalism presented in this book: that it forms part of a wider account of how societies should organize themselves, an account in which states are only one part amongst others. Against this view, two connections will be drawn between the state and the rule of law. First, it will be contended that states need to comply—to a degree—with the rule of law in order to exist. Like the principles of state sovereignty and separation of powers, compliance with the rule of law is an existential, and not merely desirable, requirement that states must satisfy. Secondly, in societies such as ours, non-state legal orders require the existence of the state, and state legal orders, for their successful operation. Whilst it is possible for law to exist without states—and at some points in history this may have been common—in our communities non-state legal orders are either reliant upon states for their operation or are rivals to states, points from which new states might emerge. The rule of law is, then, a principle about law that is shaped by the connection between the law and the state, though it also applies, in a modified form, to non-state legal orders as well.²

The Demands of the Rule of Law

The account of the rule of law presented in this chapter begins with that provided by Albert Venn Dicey in his *Introduction to the Study of the Law of the Constitution*. Though there are problems with Dicey's account, there is also a core of good sense to his principle: a recognition of the importance of the role of law in structuring power within society. The chapter will then turn to the work of Joseph Raz both to show the limitations of Dicey's account and to indicate a cure. Dicey and Raz tend to be considered conservative rule of law scholars—that is, their accounts are thought to be more limited and

² This is a modification of the relationship between the state and the rule of law I originally sketched out in N. W. Barber, 'The Rule of Law and the *Rechtsstaat*' (2003) 53 *University of Toronto Law Journal* 443.

cautious than some of the broader accounts of the rule of law that connect the principle to rights, social justice, and to good law more generally. However, it will be contended that even these conservative models of the rule of law become more expansive on examination. Part of the reason this chapter starts with Dicey and Raz is to show that even these, apparently limited, accounts of the rule of law have broad implications for the operation of the legal order; a broad account of the demands of the rule of law may be unavoidable, even from the narrowest of starting points.

(i) Dicey and the Rule of Law

Dicey divided his account of the rule of law into three parts.³ The first two parts embodied the demands of the rule of law, whilst the third set out the benefits that adherence to the rule of law brought the British constitution.

The first part of Dicey's rule of law demanded that individuals not be punished or penalized unless they had committed a distinct breach of the law.⁴ Part of this requirement related to the form laws should take: laws should be expressed in a manner that enabled people to predict the actions that would lead to punishment. Dicey warned against laws that gave people in positions of power 'wide, arbitrary, or discretionary powers of constraint'.⁵ Individuals should not be subjected to the caprice of officials, even if that caprice had received legal sanction. But this part of Dicey's rule of law was not merely concerned with the mode of expression of legal rules, it also engaged with the application of those rules within the community. The rule of law did not just require that people could determine when the law would permit or require the infliction of a punishment; it also required that people only suffer punishment when it had been mandated by the law. So, when Dicey recounted the story of Voltaire being beaten by the servants of the Duc de Rohan—or, as Dicey put it, 'thrashed by lackeys in the presence of their noble master'—he was drawing attention to the failure of French Law to constrain de Rohan's capacity to inflict harm.⁶ Dicey's rule of law spoke here to the social context in which the law applied. The legal rules did not permit the Duke to punish the author, but the punishment went ahead, all the same; the social context

³ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) chapter 4.

⁴ *ibid* 188–93, 202. ⁵ *ibid* 188.

⁶ *ibid* 190; J. Waldron, 'Separation of Powers and the Rule of Law' in J. Waldron, *Political Theory* (Harvard University Press 2016) 62–65. The full story is told in I. Davidson, *Voltaire: A Life* (Profile Books 2012) chapter 6.

in which the law operated allowed Voltaire to be punished even though the law did not permit this act.

There is a pair of intertwined demands in Dicey's first element of the rule of law which combine to render the exercise of force within the state predictable. The rules mandating punishment are expressed in a manner that allow people to predict the infliction of legally-sanctioned punishment and, in addition, people can be confident that they will not be exposed to non-legally sanctioned punishment.

The second part of Dicey's rule of law is the mirror image of the first. It required that everyone, including state officials, be bound by the 'ordinary law of the land and amenable to the jurisdiction of the ordinary tribunals'.⁷ Once again, there was a formal aspect to this requirement: the rule of law was set in opposition to the grant of arbitrary legal immunities.⁸ Whilst Dicey connected this aspect of the rule of law with the idea of legal equality, he did not take this to mean that the same law applied, or should apply, to everyone. Dicey recognized that people occupying different legal roles have different legal duties—state officials, for instance, may have both special legal duties and special legal rights.⁹ And, we might note, it is a corollary of the possession of special legal rights that their holders are empowered to act in ways that would not be lawful for other individuals. Though Dicey does not make this explicit, it seems that the rule of law requires that these special rights and duties be justified and explained by the legal role occupied by an individual.¹⁰ The law creates offices, institutions, which people can enter into, and any special powers granted within these institutions must relate to the point of that entity. The trustee, for instance, has special powers and duties in relation to trust property, but these powers and duties are explicable by reference to the nature of the trust. Instead, the rule of law here speaks against surprising exceptions to the law; the normal, day-to-day, law applies save where there are reasons for special treatment that are based in the particular offices fashioned by the law.

As well as not including arbitrary exceptions within the substance of the law, the rule of law further required that there not be any practical immunities from the ordinary operation of the law; that the law is, in reality, applied to those who break its demands. Once again, there is a social dimension to Dicey's rule of law. Returning to Voltaire, the Duke's capacity to inflict punishment stemmed from his practical immunity from the ordinary operation of the law. As Dicey puts it, the rule of law is imperilled where certain

⁷ Dicey (n 3) 194. ⁸ *ibid* 195, 204. ⁹ *ibid* 194.

¹⁰ T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 21–25.

people are able to 'defy the law';¹¹ they enjoy immunities based on power, even though not recognized by the law.

Dicey's two aspects of the rule of law are complementary, amounting to a broad demand that power be exercised through the law. A significant strength of Dicey's account is that he does not confine the rule of law to the conduct of state officials; the principle addresses the exercise of power within society more broadly. Threats to the rule of law can originate from outside of the state—so, for example, in Dicey's introduction to the eighth edition of his book he attacked the legal immunities granted to trade unions as running contrary to the rule of law.¹² Setting aside the fairness of this charge—there were good reasons for the immunities—Dicey's focus on powerful non-state actors is significant. Whilst the state is one location of power within society, it is far from the only such site. Indeed, as we saw in the earlier discussion of sovereignty, one of the central tasks of the state is to regulate and control non-state power. The rule of law can be imperilled by private actors just as effectively as by state actors. Often, this threat will arise at the national level. Dicey presented trade unions as an example of potentially powerful bodies that can pose a threat to the rule of law, but the list could be widened: privileged individuals, multinational companies, and wealthy pressure groups, may also present challenges. As Jeff King argues, these threats to the rule of law are frequently grounded in inequalities of power between actors in society.¹³ The vulnerability of one party to another may impede the capacity of that party to make use of its legal rights. The inequality of power is thus compounded: the initial inequality, grounded in material or physical inequalities, leads to a legal inequality. The weaker party is less able to rely on its legal rights than its stronger counterpart. More generally, the ability of those within the community to rely upon the law is reduced—they may find themselves 'punished' by these powerful groups for undertaking lawful activities—and, more subtly, their respect for the law may be undermined. After all, if the powerful are able to ignore the law, the rest of us might start to wonder why we should comply with its rules.

These macro-level threats to the rule of law are the most visible challenge to the principle, but threats can also emerge at the micro-level. On a smaller scale, challenges to the rule of law arise within private relationships. As with

¹¹ Dicey (n 3) 194.

¹² A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) xxxviii–xl; discussed in M. Loughlin, *Public Law and Political Theory* (Clarendon Press 1992) 140–62.

¹³ J. King, *The Social Dimension of the Rule of Law* (forthcoming). See also N. W. Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' (2004) 17 *Ratio Juris* 474.

the macro-level threats, these challenges arise from unaddressed inequalities of power, but this time operating within a far smaller arena. Power relations within the family, for instance, can threaten the operation of the rule of law: domestic violence and child abuse are sometimes grounded in situations in which the perpetrator enjoys a practical immunity from the law. Not only are victims subjected to criminal acts—a violation of the rule of law in itself—they may also be unable to access the law-enforcing institutions to seek protection. And if this type of private lawlessness is common in society, these intimate violations of the rule of law can factor up to present problems at the level of the state, impairing the general capacity of the law to regulate power.

This later point raises a further issue about the interplay of the rule of law and society: the rule of law needs the support of a community if it is to flourish. Much writing on the rule of law concentrates on the role of the state in building and defending the rule of law, but Dicey's account also brings forward the part played by the wider community. His presentation of the rule of law as a manifestation of the English national character may be uncomfortably exclusionary, but points towards an important aspect of the rule of law: the need for a community that is willing to uphold the legal order.¹⁴ Jane Jacobs, in her classic *The Death and Life of Great American Cities*, provided a powerful illustration of this point:

... the public peace—the sidewalk and street peace—of cities is not kept primarily by the police, necessary as police are. It is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves ... No number of police can enforce civilization where the normal, casual enforcement of it has broken down.¹⁵

Jacobs' interest went beyond the maintenance of law—her book is concerned with the ways in which urban planning can support or undermine communities—but the rule of law provides a base on which broader social objectives rest. As Jacobs argues, the primary source for the preservation of law is not the police and courts, but the community in which the law operates. The rule of law requires a community in which most people, most of the time, are prepared to comply with the law and require others to obey the law in their turn.

¹⁴ Dicey (n 3) chapter 12; R. A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (University of North Carolina Press 1980) 78–80; M. A. Walters, 'Public Law and Ordinary Legal Method: Revisiting Dicey's Approach to *Droit Administratif*' (2016) 66 *University of Toronto Law Journal* 53, 57–58.

¹⁵ J. Jacobs, *The Death and Life of Great American Cities* (Jonathan Cape 1962) 41.

It is pointless to speculate about the minimum necessary level of community support for the operation of law—save to observe that the bare minimum must be very minimal indeed. It is undeniably the case that many legal orders have existed in societies where there is broad and deep opposition to the law, where a large portion of people do not believe in the legal order's legitimacy and would bring down the legal order if they could. But a common feature of oppressive regimes is their fear of their own people, a fear that may rest, in part, on the practical limits of the regime's coercive powers. Whilst there are states that rely heavily on their armies or police to bully their subjects into submission, soldiers and police officers are people too, and there is a risk—from the perspective of the oppressor—that they will stop following orders at some point.¹⁶ In a society in which there is almost a complete lack of community support for a legal order—like, perhaps, Libya during the Arab Spring—the legal order will simply cease to function.

Oppressive regimes do not normally rely solely on enforcement institutions for the maintenance of their power, they also depend on some level of acquiescence from the general population. Even in very oppressive systems there is often a significant section of the population that actively supports the regime, accompanied by a larger portion that is prepared to go along with the rulers in exchange for a quiet life. Here, the rule of law exists, but in a significantly weakened form. Rather than supporting the legal order, many people may instead tolerate it, avoiding engagement with the law as far as possible. The support that Dicey identified as crucial to the rule of law—manifested in a willingness to use the courts, to support law-enforcement organizations, and, perhaps, more generally in encouraging obedience to the law—may be absent from significant sections of the community. Without this community support, the capacity of the law to guide conduct is reduced. In such a society the effectiveness of any given law will largely depend on the chances of the state catching those who break it, and, without the active support of the community, these chances may not be very high. And the types of law that the state can effectively enact are constrained. Those laws that seek to shift community attitudes, rather than just dictate individual conduct, are unlikely to be effective in a community that is not supportive of the law.

Over a number of years, Tom Tyler has examined the factors that lead people to obey the law. Unsurprisingly, there is a wide range of reasons for people's obedience—including fear of sanction and a general disposition to

¹⁶ The fall of communist regimes in the early 1990s is a lesson in the consequences of near-complete collapse in popular support: A. Brown, *The Rise and Fall of Communism* (Bodley Head 2009) chapter 26; A. Ostrovsky, *The Invention of Russia* (Atlantic Books 2015) chapter 3.

accept existing authority structures—but Tyler’s work identifies two further important factors. First, people are more likely to obey rules that have been made in a manner they believe to be procedurally fair.¹⁷ Secondly, people are more likely to obey when the legal order shares their moral beliefs; when the institutions make decisions that people regard, in terms of their content, as broadly just.¹⁸ As Tyler notes, grounding obedience to law in these factors may be less costly and, crucially, more effective, than the simple threat of punishment.¹⁹ Now, the law is being enforced by consent and by the community. People obey because they think it is the right thing to do—and will pressure others into compliance for this reason.

I suspect that Dicey, had he been asked, would have agreed with Tyler’s explanation of the basis for a community’s belief in the legitimacy of the legal order, and would, moreover, have argued that the British community’s support for the rule of law was animated by the considerations Tyler identified. The rule of law was supported by the British because, broadly, they regarded the manner of the production of legal decisions as legitimate—through an elected legislature and an impartial court system—and because the laws that were produced broadly corresponded with the moral values of the British people.

Our discussion of the role of community support as an aspect of the rule of law has moved some distance from the bare minimum necessary for the creation of a legal order. But Tyler’s work suggests that for the rule of law to flourish, a legal order needs to resonate with the people it seeks to regulate, that a lack of belief in its legitimacy will impair its capacity to successfully guide conduct. This is, it is worth noting, not the same as the claim that the rule of law is the rule of good law. Tyler’s point is that the law is more effective when people believe in its legitimacy, when it accords with their moral framework. There is a possibility that people’s beliefs about the moral basis of legitimacy and their beliefs about the moral values that should animate the law are mistaken; that there is a gap between the social understanding of what morality requires and what morality actually does require. It is easy to imagine parts of a racist society identifying with the legal order because

¹⁷ T. Tyler, *Why People Obey the Law* (Princeton University Press 2006) chapter 12. There is an echo here, perhaps, of Fuller’s discussion of significance of reciprocity between ruler and ruled: L. Fuller, *The Morality of Law* (rev edn, Yale University Press 1969) 19–27.

¹⁸ J. Jackson, B. Bradford, H. Hough, A. Myhill, P. Quinton, and T. Tyler, ‘Why Do People Comply With the Law?’ (2012) 52 *British Journal of Criminology* 1051. See also J. Raz, ‘On the Authority and Interpretation of Constitutions’ in L. Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 154.

¹⁹ Tyler (n 17) 162.

of its immorality—for instance, the original text of the 1814 Norwegian Constitution explicitly excluded Jews and Jesuits from the state. Such exclusions may have been popular at the time, may have accorded with the values held by many Norwegian citizens, and may even have reinforced popular support for the law, but were still grossly immoral.

Dicey's third element of the rule of law was not a further requirement of the principle, but, instead, a conclusion; the benefits that the rule of law brought to the British people. According to Dicey, the rule of law protected liberty by requiring the state to make explicit the limitations on people's allowed area of action; the legal order was structured such that whatever was not forbidden was permitted. The chapters that followed Dicey's account of the rule of law go on to discuss the freedoms of the person, of discussion, and assembly, and, in each case, liberty was presented as the space left to the individual after the encroachments of the law.

Dicey argued that this structure, found in the very ordering of the Common Law, provided a better protection for individual freedom than positive statements of rights. This was because—Dicey claimed—it was easier to suspend discrete constitutional provisions than to remove the liberties created by the structure of the Common Law. A bill of rights can easily be repealed, but the removal of the liberties created by the rule of law would require radical change to the whole English legal system. Consequently, according to Dicey, liberties such as the freedom of the person and freedom of expression were better protected in Britain than in other European countries.²⁰

(ii) **The First Thing Dicey Got Wrong: The Generality of the Rule of Law**

Dicey's account of the rule of law was influential, and, like all influential arguments, was fiercely debated.²¹ Many of the weaknesses in Dicey's account of the rule of law turn on the parochialism of his work; his belief that the rule of law was a distinctive feature of the English (and presumably Scottish) legal order that served to distinguish the British constitution from other states. Much of the subsequent writing on the rule of law has sought to broaden the reach of the principle, presenting it as a feature of legal orders more generally, rather than as being confined to the British constitution.

Whilst the rule of law is, indeed, an important feature of the British constitution its presence does not distinguish that system from other states. The rule of law—in the form articulated by Dicey—must be present, to a greater

²⁰ Dicey (n 3) chapters 5 and 6.

²¹ Cosgrove (n 14) chapter 4.

or lesser degree, in any effective legal order.²² The generality of the rule of law is brought forward in the work of Joseph Raz. Though Raz mentions Dicey only to dismiss him,²³ there is an intellectual link to be drawn between Raz's account of the rule of law and Dicey's: Raz drew inspiration from F. A. Hayek²⁴ who, in his turn, drew from Dicey.²⁵ Indeed, it is not just the content of Raz's rule of law that resembles that of Dicey's account, the value that Raz identifies as achieved by the rule of law is also similar. Raz contends that one of the most important values protected by the rule of law is that of autonomy: people can predict how power will be exercised over them, and so can plan and pursue long-term goals. Raz's discussion of autonomy is a clear echo of Dicey's account of the rule of law as the guarantor of liberty.²⁶

As Raz has argued, legal systems make a claim of supremacy; through its rules and institutions, the law purports to tell people how they ought to behave.²⁷ Other rules and considerations—including the rules of other legal orders—are only legally relevant so far as the law permits them to be. Allied to this, for a legal order to be present in a society it must, to an extent, make the differences it purports to make; it must be effective.²⁸ It is not enough that a set of rules is produced that embodies an assertion of authority—a fantasist could dream up a set of rules that makes such an assertion—these rules must actually, to a degree, be treated as authoritative by those they address. Legal orders have an existence beyond the articulation of their rules. Raz's account of the rule of law then turns—as so many other theorists' accounts turn—on his understanding of the nature of law.²⁹

The prescriptions of Raz's rule of law divide into two groups. First, there is a set of requirements about the form that law should take, including the requirements that laws be clear, stable, and prospective. Secondly, there is a set of requirements that relate to the enforcement of the law, including the requirements that the judges be independent, the courts accessible,

²² I. Jennings, *The Law and the Constitution* (5th edn, University of London Press 1964) 60.

²³ J. Raz, 'The Rule of Law and Its Virtue' in J. Raz, *The Authority of Law* (Clarendon Press 1979) 218 fn 7.

²⁴ *ibid* 210. ²⁵ F. A. Hayek, *The Road to Serfdom* (Routledge 1944) 54 fn1.

²⁶ Raz (n 23) 219–23. And, more faintly still, each echo Hobbes: T. Hobbes, *Leviathan* (R. Tuck ed, CUP 1991) 120; M. Loughlin, *Sword and Scales* (Hart Publishing 2000) 134–40.

²⁷ J. Raz, 'The Institutional Nature of Law' in J. Raz, *The Authority of Law* (Clarendon Press 1979) 118–19; J. Raz, 'The Claims of Law' in J. Raz, *The Authority of Law* (Clarendon Press 1979) 33. Timothy Endicott provides some valuable qualifications to Raz's account of supremacy: see T. Endicott, 'Interpretation, Jurisdiction and the Authority of Law' (2007) 6(2) *American Philosophical Association Newsletter on Law and Philosophy* 14.

²⁸ J. Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) chapter 9.

²⁹ See further J. Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 10–13.

and the discretion afforded enforcement agencies should not be permitted to pervert the law.³⁰ Not all of these features are made explicit in Dicey's account, but all are implied by it. For Raz, the rule of law is a feature of all legal orders, it serves to distinguish between societies that are governed by law and those that lack law: a society governed by law must possess the features identified by the rule of law, at least to some minimal degree.

The formal features identified by Raz are grounded in the capacity of rules to guide those they address. A rule that is retrospective or hopelessly unclear cannot guide. Lon Fuller recounted an engaging tale of a king, Rex, who sought to govern through a collection of entirely retrospective rules, or, later, through a set of rules so unclear that it was impossible to extract any meaning from their texts.³¹ Fuller argued that these were not merely bad laws, they were not laws at all: the king had comprehensively failed to create a legal order. Fuller leaves this argument at the level of intuition—when we examine Rex's efforts we immediately perceive the lack of law—but Raz's broader legal theory helps us unpack these reactions. Rex failed to make law because he has used forms that cut against the nature of law. Law is an action-guiding practice and where a collection of rules is expressed in such a way as to make it impossible for them to guide action, the attempt to create a legal order is sabotaged from the very start: the rules could never succeed in guiding conduct to any degree.

Fuller's king must have worked hard to produce a set of rules that was so profoundly unclear as to be meaningless and, however much effort he expended, he probably failed to create a completely retrospective set of rules—at the very least, the rules identifying him as king must have been prospective. For there to be formal defects so profound as to negate the existence of a legal order, those defects must be exceptionally widespread. Real world legal orders can accommodate a significant number of laws that run against the formal requirements identified by Fuller and Raz. A number of unclear, retrospective, even contradictory, rules can exist within the system without throwing the identity of the legal order, as a whole, into doubt. This is due to the systemic nature of law: these formally defective rules are recognized as law by other rules of the legal order, and remain parts of the system. To satisfy the bare minimum necessary to count as a legal order is relatively easy; all operative states require a legal order, and all of these legal orders must satisfy the rule of law to some minimal extent.

³⁰ Raz (n 23) 214–18. It is worth noting that Raz does not claim that the list he gives is definitive; it is easy to imagine further features, some of which are discussed below.

³¹ Fuller (n 17) chapter 2.

Once the minimum demands of the rule of law are satisfied, the principle becomes—like the other principles of constitutionalism—one that can be met to a greater or lesser extent. Different legal orders can match the demands of the rule of law to different degrees. Once we move away from the features of the rule of law that are necessary for a legal order to exist, and start to think about the features that are necessary for a legal order to function successfully, the requirements of the rule of law become broader and more context-sensitive. The demands become broader, because there are additional factors needed for the law to flourish, even if legal orders can exist in their absence. But these demands also become context-dependent, as the implications of many aspects of the rule of law vary depending on the specific task being undertaken by a particular area of law.

As Timothy Endicott has shown, vagueness in the expression of laws is inevitable; it is a consequence of the action-guiding nature of law that it provides general rules that apply to a range of situations.³² For law to be expressed with perfect precision is impossible, and, if it were possible, the resultant flood of rules would be so overwhelming that the precision of the law would, in itself, render the law incomprehensible.³³ The law might be precise, but its precision would have been bought at the expense of its capacity to guide action. As Endicott illustrates, the rule of law requires that law be expressed in a clear manner, but what clarity requires will depend on context. Laws addressed to the public should be expressed in a manner that non-legally qualified people can understand and act on, whilst laws addressed to companies with professional legal advisors should take a different form. So, in criminal law or consumer protection legislation the principle of the rule of law presses for broad, general rules.³⁴ The English law against theft, for example, criminalizes the dishonest taking of property with the intention of permanently depriving another of it.³⁵ Doubtless this very broad, general, rule could be replaced with dozens, or hundreds, of tightly drawn rules, but whilst it is plausible to imagine citizens grasping the general rule against theft, it is unlikely a mass of narrower rules would be equally effective. People would be confused by the multitude of rules—and might be encouraged to look for loopholes and ambiguities. In contrast, in areas of law where actors are likely

³² T. Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1.

³³ *ibid* 8. See also T. Endicott, 'The Generality of Law' in L. d'Almeida, J. Edwards, and A. Dolcetti (eds), *Reading HLA Hart's 'The Concept of Law'* (Hart Publishing 2013) 17–19.

³⁴ T. Endicott, 'The Value of Vagueness' in V. Bhatia, J. Engberg, M. Gotti, and D. Heller (eds), *Vagueness in Normative Texts* (Peter Lang 2005) 35–40.

³⁵ Theft Act 1968, s 1. The Consumer Rights Act 2015 is similarly broadly drawn.

to be guided by professionals—tax law, planning law, corporate law—broad rules can present a problem, making it difficult for these professionals to give advice with confidence.³⁶ Here, the rule of law pushes towards tight, narrow, legal rules—with the expectation that those who are subject to the rules will be able to apply them effectively.

A similar argument can be applied to other aspects of the formal side of the rule of law. For instance, the demand of stability plays out in different ways in different contexts. Some minimal level of stability is necessary for a legal order to function at all, but once this minimal level is met, the demands of stability start to shift. Stability, in the context of the rule of law, is a manifestation of the deeper requirement of certainty: those subject to the law need to have confidence that its ostensible content will be applied to their actions. What certainty requires in any given situation depends on the type of changes being considered to the law and the type of institution considering bringing about these changes. Some changes to the law increase certainty by resolving ambiguities, removing errors, or, more generally, by rendering the law more coherent, principled, and, in consequence, more predictable. Consequently, when a court hands down a decision that modifies an area of law it may have the effect of increasing rather than decreasing certainty over the content of the law. This point applies even more strongly to the legislature. Legislatures should consider the importance of certainty when changing the law, but their capacity to change law prospectively and systematically gives them even greater latitude than the courts. Legislatures can change the law in ways that accommodate people's legal expectations—by, for example, announcing a change well before it takes effect. And when a change is made, the use of statute permits the creation of clear, coherent, and structured law—once again, potentially raising the level of certainty over the content of law. There is a temptation to try to choose between courts and legislatures as appropriate means for altering the law. Some argue that legal change through statute invariably runs against the rule of law,³⁷ upsetting expectations, whilst others argue that legal development through the case law method invariably introduces obscurity into the law.³⁸ Sadly, perhaps, such absolute contrasts are impossible to defend. As our discussion of the separation of powers in the previous chapter demonstrated, courts and legislatures change law in distinctively different ways, and, when changing the law, the differing strengths and

³⁶ As Endicott points out, a vague tax law leaves people at the mercy of officials: Endicott (n 34) 39–40.

³⁷ F. A. Hayek, *Law, Legislation, and Liberty* (Routledge & Kegan Paul Ltd 1982) volume 1, chapter 6; B. Tamanaha, *On the Rule of Law* (CUP 2000) 67–70.

³⁸ J. Bentham, *Of Laws in General* (Athlone Press 1970) chapter 15.

weaknesses of these institutions may present risks to the rule of law but can also provide possibilities for its advancement.

The second strand of Raz's criteria of the rule of law brought forward the institutional aspects of law; in particular the need for an effective court system. For the rule of law to be established, a legal order needs courts, which are staffed by judges who apply the law and which are accessible to litigants. Raz's discussion of the social aspects of the rule of law is narrower than that of Dicey—Raz does not consider the role of the community beyond the courts—and, in this respect, Dicey's account is richer than Raz's. As well as functioning institutions, the rule of law requires a community that will make use of law to resolve its disputes. What this entails for a particular legal order will depend on the needs of the community in which the law operates. Whilst the demands of the rule of law are general, there is a range of different ways in which these demands may be satisfied, and the best way of meeting these demands will vary from state to state. For example, the rule of law requires a community which is able to understand its legal rights and has the capacity to present its claims to a court. This may require legal aid, some form of public education system, and, more broadly, that the people subject to the law have sufficient material resources to take an interest in their legal rights, and that they can approach the courts with confidence. In short, in many societies, at many times, the rule of law requires a strong system of social welfare if it is to flourish. As Dicey recognized, inequalities of power can act as a barrier to law that is just as harmful to the rule of law as poorly drafted laws and shoddy institutions.

One final contrast between Raz's and Dicey's accounts of the rule of law needs to be drawn. Raz, in contrast to Dicey, anchors his account of the rule of law in the minimum features needed for a legal order to come into existence, the elements that must be present for any legal order to operate. Following Fuller's approach—though not endorsing the whole of the content of Fuller's account—each of the features identified by Raz would, if wholly absent, throw into question the existence of the legal order. It is not that the legal order is functioning poorly; it is not functioning at all.³⁹ Dicey's account of the rule of law, in contrast, is drawn from his examination of a mature and relatively successful legal order. Though Dicey does not articulate his methodology, it seems that he is not seeking to identify the minimum features of a legal order but, instead, the features that are needed in order for that legal order to flourish.

³⁹ See also M. Kramer, *In Defense of Legal Positivism* (OUP 1999) 48–52.

Tying the rule of law to the ‘necessary’ features of a legal order provides a test by which the reach of the rule of law can be limited; after all, whilst there is a wide range of deficiencies that can make a legal order function poorly, there are a far smaller number that present a threat to the very existence of that legal order.⁴⁰ However, the question of what is or is not a ‘necessary’ feature of a legal order is problematic. It is a methodology that places a great deal of weight on whether people would or would not recognize an odd or radically flawed system as an incidence of ‘law’. The line between a profoundly dysfunctional legal order and a mess that it would be wrong to describe as a legal order will often be hard to draw.⁴¹ Once we move beyond the features law needs to achieve this goal to a minimal degree, and instead ask what features it needs to guide successfully—to be an effective and potent means of achieving this end—some of the methodological problems of the minimalist approach are mitigated. It may be easier to reach agreement over the features needed to help law flourish, rather than on those necessary for it to exist. It could be, for example, that Raz would be happy to concede that the social aspect of the rule of law—the role of legal aid, education, and the broader support provided by the welfare state—are often necessary for the flourishing of the rule of law, even if it is possible to have a legal order without them present. Finally, a principle that is shaped by an account of the flourishing of a legal order rather than by its necessary features is likely to be of more use to those working within constitutions.⁴² They are unlikely to be interested in the borderline between legal and non-legal orders, but are very likely to be interested in the features that will make a legal order a success.

Dicey’s, and Raz’s, accounts of the rule of law are often regarded as narrow or formalist; making few if any demands on the content of the law or on the wider social context in which the law operates.⁴³ But, as this section has contended, even these supposedly limited accounts of the rule of law push towards richer accounts. The second part of this chapter will provide a further argument for this richer account of the rule of law—once the rule of law is

⁴⁰ Raz uses the language of necessity in advancing his account of the nature of law: J. Raz, ‘Can There Be a Theory of Law?’ in J. Raz, *Between Authority and Interpretation* (OUP 2009) 21. See also M. Kramer, *Where Law and Morality Meet* (OUP 2008) 173–74. For the problems raised by the quest for ‘necessary’ features, see D. Priel, ‘Jurisprudence and Necessity’ (2007) 20 *Canadian Journal of Law and Jurisprudence* 173.

⁴¹ I explore this question at much greater length in N. W. Barber, ‘The Significance of the Common Understanding in Legal Theory’ (2015) 35 *Oxford Journal of Legal Studies* 799. See also Waldron (n 29) 13–19.

⁴² Waldron (n 29) 11–13.

⁴³ P. P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] *Public Law* 467, 467.

identified as a principle of constitutionalism, located within a wider account of the state, we are able to say more about the defining function that shapes the rule of law, and so can say more about the content of that principle.

(iii) **The Second Thing Dicey Got Wrong: The Compatibility of the Rule of Law With Administrative Law and Human Rights Law**

Once the rule of law is recognized as a feature of legal orders, rather than as a distinguishing characteristic of the British constitution, some of the contrasts drawn by Dicey between the British system and other states are thrown into doubt; after all, the continental systems he discussed clearly did possess legal orders in some form. In particular, Dicey's claims that *droit administratif* and bills of rights run against the rule of law require reassessment.

Though Dicey was an able comparative lawyer, his account of other legal systems in *The Law of the Constitution* has been criticized for being partial and misleading.⁴⁴ It has been persuasively argued that many of these systems tracked the demands of the rule of law more closely than he supposed. Perhaps most significantly, his claim that *droit administratif* is set in tension with the rule of law has been disputed.⁴⁵ This chapter is not the place to discuss the intricacies of nineteenth-century French administrative law, but Dicey's scepticism about *droit administratif* was a manifestation of his broader worries about administrative law.⁴⁶ Though Dicey recognized the emergence of administrative law within the English legal system, he gave it only a cautious welcome—in his work he emphasized the limited nature of the special rules that applied to the state, focusing largely on the procedural protections that arose when officials undertook quasi-judicial functions.⁴⁷ If this was accurate when Dicey wrote his final revisions to *The Law of the Constitution* in 1915, it was quickly overtaken by developments in the law and the state.⁴⁸ As Sir Ivor Jennings argued, Dicey's doubts about the significance of administrative

⁴⁴ J. W. F. Allison, *A Continental Distinction in the Common Law* (Clarendon Press 1996) 18–23; R. Errera, 'Dicey and French Administrative Law' [1985] Public Law 695; Walters (n 14). For Dicey's wider comparative work, see A. V. Dicey, *Comparative Constitutionalism* (J. W. F. Allison ed, OUP 2013), esp part 1.

⁴⁵ Cosgrove (n 14) chapter 5. Raz may also regard administrative discretion as contrary to the rule of law—though he makes it clear that this is not a decisive argument against its conferral: Raz (n 23) 222.

⁴⁶ Tamanaha (n 37) 63–65.

⁴⁷ Dicey (n 3) appendix 2; Cosgrove (n 14) chapter 5. See also G. Hewart, *The New Despotism* (Ernst Benn Ltd 1929) chapters 2 and 3.

⁴⁸ Cosgrove describes Dicey's ignorance of the emergence of administrative law in the nineteenth century as 'remarkable': Cosgrove (n 14) 93.

law were animated by his narrow conception of the tasks of the state.⁴⁹ As the functions of the state expanded, the scope of powers granted to state officials and public institutions grew.⁵⁰

Rather than seeing administrative law as in tension with the rule of law we should, as Jeffrey Jowell has argued, see it as a working through of the demands of the rule of law in the modern welfare state.⁵¹ The welfare state helps create the social context in which the rule of law can flourish. It may not be necessary for the flourishing of the rule of law—it could be states might find other ways of achieving the same ends—but it is one way in which some parts of the social demands of the rule of law may be satisfied.

The social provisions that the welfare state has established are both directly and indirectly supportive of the rule of law. Most obviously, the welfare state provides direct support through the provision of legal aid and advice, but, less obviously, it helps counter the types of inequalities within the community that threaten the rule of law. The practical lawlessness identified by Dicey as a threat to the rule of law often had inequality at its source—whether an inequality of resources, education, social prestige, or power more generally. It was inequality that allowed the more powerful party in the relationship to break the law with impunity, knowing that the weaker party would not be able to access the law effectively. The welfare state, by mitigating these inequalities, makes it more likely that law will regulate these relationships.

The rise of the welfare state inevitably brings with it a rise in the scope and number of discretionary powers given to state officials. It requires that the executive possess the capacity to produce flexible, detailed, often local, policies, sets of rules that could not realistically be included within primary legislation. Furthermore, it often requires that officials be given discretion on the ground: the capacity to decide who satisfies the criteria for a benefit or, even more broadly, who is the most deserving of a range of applicants. Recalling the discussion of the separation of powers in the previous chapter, the executive branch has a distinct role in the creation of law, one that maps on to its institutional character. The creation of binding policies by the executive branch to guide its exercise of legal discretion is a working-through, rather than an exception to, the principle of the separation of powers. Similarly, in the context of the rule of law, these policies bring certainty and consistency

⁴⁹ Jennings (n 22) 314–15.

⁵⁰ *ibid* 54–56. See also H. W. Jones, ‘The Rule of Law and the Welfare State’ (1958) 58 *Columbia Law Review* 143.

⁵¹ J. Jowell, ‘The Rule of Law’ in J. Jowell, D. Oliver, and C. O’Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015). See also T. R. S. Allan, *The Sovereignty of Law* (OUP 2013) 105–10 and chapter 6.

to the law, refining broad areas of statutory discretion. Rather than regarding administrative policies as a problem for the rule of law, they should be seen as assets that work towards its realization: the executive's side of the state's law-making project.

Dicey was concerned by the breadth of discretionary powers given to officials—and would, doubtless, be even more concerned if he saw the range of discretion they now enjoy—but it would have been a mistake for him to have seen these grants of discretion as necessarily in conflict with the rule of law. Dicey's rule of law was opposed to the granting of *arbitrary* discretions and immunities; it was not, or should not be understood as being, opposed to all legal discretion.⁵² Discretions and immunities have existed in private law for centuries; a trustee, for example, possesses a range of powers over the use of trust property that cannot be exercised by those who are not trustees. It is hard to imagine that Dicey would have regarded trusteeship—one of the great creations of the Common Law—as in opposition to his concept of the rule of law. The contemporary discretions granted to state officials within the welfare state can similarly be justified by reference to the purposes they play; when they are properly conferred they are not arbitrary, and are not contrary to the rule of law.

In addition to granting special powers to state officials, administrative law also regulates the ways in which these powers can be exercised. Once again, Dicey was wary of the emergence of these rules but, once again, it could be argued that judicial review of administrative action is a manifestation of his principle of the rule of law in the modern state, not a challenge to it.⁵³ Just as the broad powers accorded to trustees require the supervision of the court—through the concept of good faith—administrative law seeks to condition official discretion so as to remove personal idiosyncrasies. Like the trustee, the decision-maker in administrative law enjoys latitude in the exercise of her discretion, but she does not enjoy the latitude she would possess in private life. She is a *state official* exercising discretion, and so should exercise it in such a way that maintains her identity as an official in her dealings with others. Part of this, by implication, requires that she help maintain the constitutional identities of those with whom she engages. Constitutional relationships are two-way streets: the construction of the role of the state official is, simultaneously a construction of the constitutional roles of those who engage with that official.

⁵² T. Bingham, *The Rule of Law* (Allen Lane 2010) chapter 4.

⁵³ *ibid* chapter 6.

Perhaps the most important constitutional office that shapes, and is shaped by, the role of the state official is that of the citizen. Citizenship is both indirectly and directly relevant to the ways in which administrative law conditions official discretion. Indirectly, as for citizenship to flourish, the institutions of the constitution must flourish, too. It is these institutions that enable members of the state to exercise the types of control over state institutions that are characteristic of citizenship, and—a further feature of citizenship—enable the state to work effectively for the well-being of its people. Where the powers of the executive are conferred by statute, administrative law ties officials to that empowering legislation. In so doing, the judges help ensure that the legislature (the body which, in a democracy, creates the controls over the state that are characteristic of citizenship) is able to determine the policy of the state. But, in addition, administrative law is also directly constitutive of citizenship. By requiring that state officials treat those they engage with in a rational manner, administrative law shapes the way in which the state interacts with its members. This rationality requirement applies to the decision itself, by requiring that the decisions of state officials are grounded in an accurate view of the facts, are made for sound reasons, and embody a sensible understanding of the relative importance of the reasons that apply to the decision. Administrative law also requires that the official treat those she engages with as rational agents, entitled to participate in the formation of the decision and to be given the reasons for the decision once it is made. There are two, intertwined, demands for rationality in administrative law, both grounded in citizenship: first, that people are entitled to have administrative decisions made for sound reasons; secondly, that people are entitled to be treated as if they have the capacity to engage with those decisions that affect them. Citizenship requires that the state create structures through which its members can control and engage with the exercise of state power and, in addition, are treated by the state as rational agents whose interests deserve respect.

There is not the space here to develop an account of administrative law, but, hopefully, the previous paragraphs are enough to show that, far from a rejection of Dicey's rule of law, administrative law is, instead, a working-through of the requirements of the principle in the context of the modern state.

Dicey's parochialism might also explain his claim that bills of rights are set against the rule of law. Whilst the rule of law and bills of rights protect individuals in different ways, they are not in tension; it is not necessary to choose between them. The rule of law requires that exercises of power over people be compatible with the law, and, when the rule of law is flourishing, those within the legal order enjoy the freedom that comes from knowing the limits of others' power. Bills of rights, in contrast, start from the position that the exercise of power under consideration is at least *prima facie*

lawful (if the action were not *prima facie* lawful it would not be necessary to rely on a bill of rights provision to counter it), and then ask whether the action is, nevertheless, contrary to a person's rights. Whilst the rule of law can be present in a system that lacks a bill of rights, an effective bill of rights requires the existence of the rule of law. Although bills of rights are often supportive of the rule of law, protecting people's capacity to access independent courts, their conferral of legally enforceable rights presupposes a functioning legal order.

The Rule of Law and the State

The first half of this chapter examined the contents of the rule of law. The account was grounded in the writings of Dicey and Raz, but argued that their apparently narrow accounts of the principle broadened when explored more fully. The principle of the rule of law embodies the apparently simple demand that the rules of the legal system should make the differences they purport to make. This requires that they be expressed in a manner that permits people to obey—they should not be hopelessly unclear or retrospective, for instance—and, also, the community in which the law operates is conducive to the functioning of law—that the institutions of the legal order are working well, and, more generally, that the community is supportive of the law. This account of the rule of law was rooted in an account of law itself, beginning by reflecting on what it would mean to have law operating within a community. It might be asked, then, whether it is correct to conceive of the rule of law as a principle of constitutionalism, with a special connection to the state; just as the principles of sovereignty and separation of powers were principles that were derived from the state, shaped by reflection on the characteristic means and point of that institution, perhaps we should conceptualize the rule of law as a similar type of principle, but instead derived from the legal order? Given that legal orders can exist outside of the state—and that the rule of law applies to these orders, too—perhaps the rule of law is like justice and other moral principles: something that is applicable to the state, but only because it forms part of the background set of moral principles that should shape the broader society in which the state exists.

This section argues, against this view, that the rule of law does have a special connection with the state that justifies its inclusion in the set of the principles of constitutionalism. The section begins by examining why states need legal orders. It argues that not only do states need law, they need to exercise control over a legal order: an autonomous domestic legal order is an essential feature of the state. Secondly, the section will consider why legal orders need states.

Whilst legal orders can, and do, exist outside of states, in societies like ours, these non-state legal orders depend upon state-legal orders. The first side of this argument—why states need law—is not enough to show the rule of law as a principle of constitutionalism. There are lots of things that states need—language, probably writing, the existence of a basic level of social morality, to name but a few—that provide the background to society in general, and are not specific to constitutionalism. The second argument pushes further, and contends that states need to create a distinctive type of legal order—both in terms of its institutions and content and, also, in terms of the control that the state exercises over that content. Whilst law extends beyond the state, the rule of law is a principle fashioned in light of the needs of the state, and which, when applied to contemporary non-state legal orders, must be modified to take account of the role of the state legal order in the operation of non-state legal systems. In short, the rule of law is shaped by the needs of state law, and applies to non-state orders in a modified form.

(i) Why States Need Legal Orders

As we saw in the chapter on sovereignty, for a state to exist it must claim authority over its people and territory and, to a certain extent, must be able to make good on these claims. Law is the means through which these authority claims are articulated, and the means by which they are enforced. There are other means by which states act and make those acts effective—for example, by exhorting citizens to behave in certain ways, and using praise or rewards as incentives—but the primary method by which states shape conduct is through law.

China provides an interesting, if awful, example of an attempt to govern almost without law. During the Cultural Revolution of the late 1960s and early 1970s, the use of law as a tool for government was virtually abandoned.⁵⁴ Mao incited groups of students—groups that became known as the Red Guard—to attack ‘counter-revolutionaries’, and ordered the police not to intervene in their activities.⁵⁵ Given the wilful vagueness of the category of ‘counter-revolutionary’, the lack of control over how this category was applied, and, moreover, the lack of definition of who was and was not part of the Red Guard, the product of Mao’s decisions was the creation of something close to anarchy. The regulation of force, so prized in Dicey’s rule of law, had

⁵⁴ R. Peerenboom, *China’s Long March Toward the Rule of Law* (CUP 2002) 43–46.

⁵⁵ F. Dikötter, *The Cultural Revolution: A People’s History 1962–1976* (Bloomsbury 2016) chapter 6.

been abandoned, and almost everyone lived in fear of violence—even those who defined themselves as part of the Red Guard might find their colleagues or other factions turning against them. As Dicey might have predicted, a consequence of this was that China's governing institutions lost their efficacy: courts shut, and, in many areas, local government collapsed entirely.

Though it is far from the most important lesson to take from the Cultural Revolution, the period illustrates the interplay between the rule of law, state power, and sovereignty. By casting aside law as an instrument of government, Mao may have hoped to free himself of constraints; like Fuller's king, he was no longer fettered by the restrictions that come from governing through law. But, also like Fuller's king, the reach of his, and, more generally, of the state's, power contracted.⁵⁶ John Finnis once claimed that a tyrant has no reason to abide by the disciplines of law, but if the tyrant wishes to remain in control of the state—and remain a tyrant—she must, to an extent, accept the need to govern through law.⁵⁷ During the Cultural Revolution, the capacity of China's government to exercise authority over its people and territory was radically reduced. By rejecting law, Mao also imperilled sovereignty. At some points and in some places during this period, the Chinese state may have been absent: its institutions were no longer able to exercise the degree of control necessary for sovereignty to be established.

The collapse of the rule of law may not only affect the capacity of the state to make good on the authority claims characteristic of sovereignty; in extreme cases it may also imperil the capacity of institutions to issue commands that embody these claims. Without an operative legal order it is not possible for the institutions of the state to be constituted, let alone to act. Without the support of a legal order, there can be no courts or judges, legislatures or legislators, executives or executive officers. This is not to argue that these bodies are entirely defined by law, nor to argue that they can only act through law, but they are too complex to be solely constituted through non-legal rules. Without an operating legal order, the very institutions of the constitution cannot be brought into existence. Recalling the previous chapter, not only is the rule of law necessary for sovereignty, it is also presupposed by (and to some extent presupposes) the principle of the separation of powers.

Communists and socialists tend to be sceptical of the need for states and law in the abstract—regarding each as a tool of class oppression—but in order to exercise power over their territories and people, communist parties have been

⁵⁶ See the discussion in Fuller (n 17) 38–41. See also the discussion in M. Albertus and V. Menaldo, 'The Political Economy of Autocratic Constitutions' in T. Ginsburg and A. Simpsen (eds), *Constitutions in Authoritarian Regimes* (CUP 2014).

⁵⁷ Finnis (n 1) 273–74.

compelled to come to terms with law.⁵⁸ One of Deng Xiaoping's great initiatives in the aftermath of the Cultural Revolution was the re-establishment of the rule of law: the state, once more, sought to exercise control over the use of force within society.⁵⁹ This may have been partly motivated by a desire to protect Chinese people from the arbitrary abuses of power that were the characteristic of the Cultural Revolution, but it may, also, have been motivated by Deng's desire to reassert control over the territory. Mao's experiment with rule outside of law had catastrophically weakened the capacity of the Communist Party to govern the state.

Since 1979 China has made significant progress in creating and maintaining a legal order, but there are still profound problems facing the rule of law in China. These problems are worth briefly exploring here, as they illustrate the connections between the rule of law, the state, and other constitutional principles. China's experience of the rule of law illustrates the difficulties of pursuing only a subset of the principles of constitutionalism. The lack of democratic structures and effective regionalization of power, the failure to meet the demands of democracy and subsidiarity, has impeded China's attempts to fully realize the principle of the rule of law—and, indeed, the principle of sovereignty.

The capacity of China to follow the demands of the rule of law is limited by the absence of democratic institutions, both at the national and regional level.⁶⁰ Single party states cannot comply with the principle of democracy; even if elections are held, such states cannot offer their people a meaningful choice about the government of the country. The ruling party is invariably in power, and cannot, under the existing structures, be removed. A consequence of this is that it is hard, indeed probably impossible, to create the constitutional divisions that create genuinely autonomous institutions. In single party states where the party dominates the constitution, the creation of a fully independent judiciary and, less obviously, of autonomous regional government is practically impossible to achieve.⁶¹

⁵⁸ M. Krygier, 'Marxism and the Rule of Law: Reflections After the Collapse of Communism' (1990) 15 *Law and Social Enquiry* 633, 637–40; B. Havelkova, *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism* (Hart Publishing 2017) chapter 3; H. Collins, *Marxism and Law* (OUP 1982) 100–15; P. Solomon, 'Judicial Power in Authoritarian States: The Russian Experience' in T. Ginsburg and T. Moustafa (eds), *Rule By Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008) 267–72.

⁵⁹ Peerenboom (n 54) 56–63; A. Chen, 'China's Long March towards Rule of Law or China's Turn against Law?' (2016) 4 *Chinese Journal of Comparative Law* 1, 11–12.

⁶⁰ See the discussion in Chen (n 59) 33–35.

⁶¹ There are single party states in which the single party only dominates the legislature and executive, with other sites of political power elsewhere in the constitution. The most obvious example is those single party states in which the military possesses significant autonomous power. Here, the

Taking the courts first, the independence required by the rule of law is limited in a single party state. Whatever the formal requirements of the constitution, it is the party that picks, promotes, and disciplines the judges. The reliance of the judiciary on the Party for advancement is clear in China, where the courts are supervised by Party committees and by regional legislatures (which are, in their turn, also controlled by the Party).⁶² As well as the power that comes from selection and promotion, behind the scenes the Party can and does intervene in particular cases.⁶³ Indeed, in 1986 the Party Central Committee issued a Notice stating that in significant cases the judiciary should seek the opinion of Party committees about the content of the law, Party committees should then express an opinion, and the judiciary should then take these opinions seriously.⁶⁴ Whilst judges in China do have significant autonomy, and many cases are decided without political interference, the Party's monopoly over public power presents a challenge to the rule of law.⁶⁵ There is always the possibility that the Party will intervene, and, even if this does not occur, the possibility that judges will be influenced by their perception of what the Party would want when deciding a case.⁶⁶

It might be objected that it is at least possible for the rule of law to flourish in a single party state, even if the presence of a single party presents particular challenges to the principle. Singapore is an example that might be given of a state that is, essentially, governed by a single party, but which is often regarded as strongly characterized by the rule of law. In the area of private law, the demands of the rule of law are, indeed, closely tracked by Singapore's institutions, but when the law relates to politically sensitive matters, Singapore's record is more equivocal.⁶⁷ At the very least, the Singaporean government's capacity to manipulate the law reduces people's ability to rely on its content,

state may be poised between a single party state in which the party is dominant, and a military dictatorship.

⁶² Peerenboom (n 54) 280–81; L. Li, 'The Chinese Communist Party and the People's Courts; Judicial Dependence in China' (2016) 64 *American Journal of Comparative Law* 37.

⁶³ Peerenboom (n 54) 302–09; Li (n 62) 66–72.

⁶⁴ X. He, 'The Party's Leadership as a Living Constitution in China' in T. Ginsburg and A. Simpsen (eds), *Constitutions in Authoritarian Regimes* (CUP 2014) 252–54, citing *The Notice That The Party Must Firmly Support the Socialist Rule of Law* (Central Committee of the Chinese Communist Party 1986). See also E. Smith, 'The Rule of Law Doctrine of the Politburo' (2018) 79 *The China Journal* 40.

⁶⁵ There is also a serious problem of judicial corruption in China: Peerenboom (n 54) 295–98. On recent efforts to improve judicial standards, see Chen (n 59) 22–25.

⁶⁶ T. Moustafa and T. Ginsburg, 'Introduction: The Function of Courts in Authoritarian States' in T. Ginsburg and T. Moustafa (eds), *Rule By Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008) 14–17.

⁶⁷ J. Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (CUP 2014) chapter 8.

even if that manipulation is undertaken in accordance with existing legal rules.⁶⁸ The predictability of the infliction of legally sanctioned coercion, a predictability so prized by Dicey, is reduced. In short, the control of the state by a dominant single party presents a standing threat to the rule of law, even if that party acts with restraint.⁶⁹ In a single party state, even one like Singapore, there is always a risk that the party will use its dominant position to act in ways that bring uncertainty to the law—and this risk, in itself, is sufficient to raise problems for the rule of law by reducing people's confidence in the application of pre-existing rules.⁷⁰ Singapore meets the demands of the rule of law far more successfully than many multi-party states, but the accumulation of power in the hands of a single party continues to limit its capacity to fully satisfy the principle.

Secondly, returning to the discussion of China, the relationship between central and regional government is opaque, partly, perhaps, because of the ways in which the Party spans the divisions between the national and regional levels. As Mayling Birney shows in her important new book on the rule of law in China—*The Rule of Law and the Rule of Mandates*—the relationship between regional officials and the central government is not one that is structured by the clear and open rules characteristic of the rule of law.⁷¹ In contrast to the rule of law, Birney argues that there is 'rule of mandate' in China. Regional governments are presented with a set of priorities by the state government, and officials are told that they will be evaluated on the extent to which these priorities are fulfilled. The various priorities are given different weightings—with some marked up as essential—and the regional officials can then decide which combination of these priorities they wish to fulfil. It is, perhaps, worth noting that adherence to law is included as one of the priorities that officials can choose to pursue with more or less energy.⁷² Some of

⁶⁸ *ibid* 209–12; G. Silverstein, 'Singapore: The Exception that Proves Rules Matter' in T. Ginsburg and T. Moustafa (eds), *Rule By Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008), esp 78–83.

⁶⁹ M. Tushnet, 'Authoritarian Constitutionalism: Some Conceptual Issues' in T. Ginsburg and A. Simpser (eds), *Constitutions in Authoritarian Regimes* (CUP 2014) 38–42.

⁷⁰ Richard Bellamy makes the point powerfully: the *capacity* for arbitrary rule undermines the rule of law, even if the capacity is not, or is rarely, exercised: R. Bellamy, *Political Constitutionalism* (CUP 2007) 57–59.

⁷¹ M. Birney, *The Rule of Law and the Rule of Mandates* (forthcoming). See also M. Birney, 'Decentralization and Veiled Corruption Under China's "Rule of Mandates"' (2014) 53 *World Development* 55. Compare Havelkova (n 58), esp 76–82.

⁷² See also D. Clarke, 'Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?' in C. S. Hsu (ed), *Understanding China's Legal System: Essays in Honor of Jerome A. Cohen* (New York University Press 2003) 105–06, who argues that policies are regarded as legitimate because of their success rather than because of how they were produced, and further argues that this understanding of legitimacy has shaped the operation of the Chinese constitution: constitutionally legitimate

the priorities set by central government for the regions may be wholly ignored by the regional government—and adherence to law is one objective that can be played off against others.

These two challenges to the rule of law share a common cause: the existence of a single party state. Without effective democratic competition, there is no chance of power shifting between political parties or of a transparent division of political power between regional and national government.⁷³ Whatever the formal rules of the legal order claim, it is the Party that ultimately regulates the judiciary, and it is through, in large part, the internal structures of the Party that the relationship between the centre and the regions is regulated. The Party's governing structures enable it to operate behind the legal order, creating a parallel system of government.⁷⁴

Birney's description of central–local government relations reminds us of Dicey's concern about the grant of discretionary power, but whilst Dicey's concerns were exaggerated, the nature and the breadth of discretion conferred in Birney's system of rule by mandate does present severe challenges to the principle. The broad discretionary powers created by the mandate system have not been accompanied by a similarly strong set of administrative law rules.⁷⁵ After all, how can a judiciary that is controlled by the Party review decisions of the administration that have been shaped by internal Party negotiations undertaken outside of the overt constitutional structures?⁷⁶

That the rule of law is necessary for the establishment of sovereignty shows that it is a necessary, and not merely desirable, feature of the state. The previous paragraphs provided an example of the ways in which the weakening of the rule of law led to a weakening of state sovereignty. As China's capacity to exercise control through law over its territory and people lessened, its capacity

actions are those that work, rather than those that fall within the text of that document. See also Smith (n 64).

⁷³ J. M. Ramseyer, 'The Puzzling (In)Dependence of Courts: A Comparative Approach' (1994) 23 *The Journal of Legal Studies* 721.

⁷⁴ L. Li, '“Rule of Law” in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China' (2015) 2 *Asian Journal of Law and Society* 93, 96.

⁷⁵ Peerenboom (n 54) chapter 9. Clarke (n 72) above, 109–12, ties the relative weakness of Chinese administrative law to the absence of a western-style conception separation of powers, in which the administration is legally subordinate to the legislative branch. Things may be changing: see the recent report in *The Economist*—'See you in Court', *The Economist* 30 September 2017—which documents a doubling of administrative law cases considered by the court between 2013 and 2016 to 330,000 in 2016.

⁷⁶ As Ginsburg notes, administrative law in China functions to constrain misbehaving junior officials, those acting contrary to the Party's dictates. It rarely, if ever, enables review of senior officials or the Party itself. T. Ginsburg, 'Administrative Law and the Judicial Control of Agents' in T. Ginsburg and T. Moustafa (eds), *Rule By Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008) 67–71; Li (n 62) 49–50.

to exercise authority over them, part of the essence of sovereignty, lessened, too. At times, the very existence of the state in certain areas may have been thrown into question: the territory was still regarded as part of China under international law, but the Chinese state institutions no longer exercised control over it. Whilst China has made significant improvements to the rule of law, the domination of the constitution by a single party limits its capacity to achieve this goal, and limits the effectiveness of the law. Single party states trade *state* control, sovereignty, for *party* control: the strength of the party is, in itself, a weakening force against the state.

Sovereignty does not just require the existence of a legal order; it requires the existence of a domestic legal order, a legal order over which the state has control. Sovereignty requires finality: the state claims, and to an extent is successful in its claim, to have the final say on how power is exercised within its territory. If a supposed state is operating within another entity's legal order—most likely the legal order of another state—it lacks the autonomy characteristic of sovereignty; it is that other entity that has the final say over the exercise of force. As the British Empire slowly crumbled over the first half of the last century, it was sometimes difficult to determine when its former territories' legal orders achieved autonomy. Some states, like Ireland and India, made a clear break with Westminster—deliberately and publically refusing to ground their legal orders on British statutes.⁷⁷ Others, like Australia and New Zealand, shifted gradually away from Westminster, and, though they are now clearly distinct states, there were long periods of time when imperial institutions may have retained the capacity to trump the decisions of national bodies.⁷⁸ The potential lack of an autonomous domestic legal order threw into doubt their identity as states; it is not enough that the state is the beneficiary of the rule of law, that it makes use of a legal order maintained by some other body, it must also be in control of its legal order, responsible for its existence and flourishing.

The rule of law is also required for the state to satisfy the demands of the other principles of constitutionalism; the state needs to uphold the rule of law if it is to meet the demands of these other principles. Democracy, for instance, cannot function without an effective legal order in which courts, legislatures, and the executive can operate. Civil society—discussed further later in this chapter—similarly requires that the state has the capacity to create

⁷⁷ K. Wheare, *The Constitutional Structure of the Commonwealth* (OUP 1960) 90–92.

⁷⁸ I discuss these issues at far greater length in N. W. Barber and A. Vermeule, 'The Exceptional Role of Courts in Constitutional Orders' (2016) 92 *Notre Dame Law Review* 817 and N. W. Barber, 'Legal Inconsistency and the Emergence of States' in H. P. Glenn and L. Smith (eds), *Law and the New Logics* (CUP 2016).

rules that structure and empower private bodies. And, obviously, without an operative legal order there would be no way to divide law-making power in the manner required by subsidiarity.

(ii) Why Legal Orders Need the State

There is an energetic, if inconclusive, debate in legal theory over whether law is necessarily coercive.⁷⁹ Joseph Raz invokes a society of angels as an example of a community that would need law, but would not need to be coerced. Being of perfect good will, angels would not need divine directives to be backed by threats. This example having been sketched out, law, concludes Raz, need not be backed by coercion.⁸⁰ The constitution of the heavenly realm is beyond the reach of this book, but it could also be that there are some human legal orders that are also not coercive, or, perhaps, are coercive in an exceptionally limited way. Some legal orders depend on social pressure for their effectiveness. The effectiveness of some religious legal orders may, for example, depend entirely on the risk of social disapproval; people might accept the authority of religious rules and courts simply because rejecting them would upset their friends and families. The lack of coercion may be even more marked in some private legal orders which turn on continued consent: people can abandon the legal order at any point without any social disapproval, the only cost being they can no longer invoke the rules and institutions of that system against other participants. In both of these examples, the legal orders lack institutional mechanisms to enforce their rules, and are not able to bring force to bear against their participants or protect their participants against outsiders; they lack the capacity to confine people or to confiscate their property.

Whilst it is possible to imagine real-world functioning legal orders that are not coercive, these non-coercive legal orders depend on the existence of a coercive legal order in the background. Non-coercive legal orders can only operate effectively in societies that create, and provide protection for, property and which provide some protection against the arbitrary exercise of force. If these features are not present, the pronouncements of the non-coercive legal orders about how their members should behave will be ineffective: even if they are able to exert some control over their own members, they would not be able to stop external interference. There is little point in having a

⁷⁹ G. Lamond, 'Coercion and the Nature of Law' (2001) 7 *Legal Theory* 35.

⁸⁰ J. Raz, *Practical Reason and Norms* (2nd edn, Princeton University Press 1990) 158–59; against this view see K. E. Himma, 'Law's Claim of Legitimate Authority' in J. Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (OUP 2001) 308 fn 42.

legal structure that makes decisions about inheritance, for example, if others within the community can simply remove the property by force.

Many non-coercive legal orders function successfully because they operate within the wider context of the coercive legal order operated by the state. Sometimes, these non-state legal orders are recognized and supported by the state. The decisions of religious courts, for example, about marriage and inheritance may be upheld by the state's legal order. Similarly, the state might give effect to the decisions of private arbitrators who apply the rules of private legal systems to their members. In these instances, the state's legal order incorporates some or all of the rules of these systems, and, by incorporating them, render them legally valid. The state's institutions then prevent third parties interfering with the dispositions of these non-state legal orders, and require that those who have participated within the structures of the non-state legal orders accept the outcomes reached.

From the perspective of the state's legal order, the rules of these non-state legal orders have become subsets of the state's legal system: the state has drawn them into its orbit. Not all of these rules need to be included, and not all of the decisions need to be validated: the state may decline to validate a portion of the rules and decisions of the non-state legal order, and may even seek to place limits on the conduct and content of these entities. From the perspective of the non-state legal orders, their rules and institutions remain autonomous, able to make the final decision about the (non-state) legal rights and obligations of those subject to their authority. The support of the state's legal order may be essential for the continued existence and success of these non-state entities, but it need not challenge their self-understanding as discrete legal orders.

Even when the state's legal order does not incorporate the rules and decisions of these systems, the background stability provided by the state will sometimes be sufficient to enable the operation of some non-state legal orders. These can turn entirely on the consent of those participating in their structures, and do not need the state to enforce the decisions of their adjudicative institutions. But even these systems ultimately rely on the existence of state structures that ensure some protection for property and persons. The state's legal order may not require, for example, that a losing party before a religious court hand over disputed property, but it will normally be the state's legal order that creates the legal institution of property, and, once the property has passed, the state's legal order that prevents third parties (or even the original litigant) from interfering with it.

As will be discussed in the next chapter, one of the key tasks of the state is to facilitate private groups by creating the legal framework for civil society. The support that the state provides for non-state legal orders is part

of this process; the state creates space in which people within private groups can regulate their own affairs. This does not, of course, mean that the state should accept the rules and decisions of these systems uncritically. The state may refuse to uphold, and may even prohibit, non-state legal orders from adopting certain rules. The state might insist, for example, that basic principles of equality and procedural fairness are followed. Whilst there will often be tension between the state and private groups, the next chapter will argue that the public and private are, in essence, complementary: the state acts to support private groups, helping guard against error and abuse, and facilitating their operation.

Not all non-state legal orders are compatible with the state: some present themselves as rivals, backing their directives with exercises of force that are not sanctioned by the state.⁸¹ A criminal gang, or a revolutionary movement, could have its own internal legal order, conceivably with all of the trappings of formalized rules and institutional structures, and the rules of this order could be backed by force. In this instance, the private legal order presents a threat to the sovereignty of the state, weakening the state's capacity to exercise control over its territory. If successful, these rival systems may come to threaten the very existence of the state, as their claim to exercise authority over a people and territory begins to look as plausible, or more plausible, than that of the old order. As I have discussed elsewhere, as this shift continues, a form of constitutional pluralism is possible, with two states existing in the same territory and claiming authority over the same group of people.⁸²

Coercive legal orders can exist outside of the state. Indeed, given that it is only in relatively recent times that the state has become the normal mode of collective governance—a form of law can exist within tribal communities, too. But the ubiquity of the state as the modern form of government requires that law exist in a relationship with the state. Modern non-state legal orders are either compatible with state legal orders, present a threat to state legal orders, or, perhaps, are a mixture of these two. For almost all non-state legal orders, their relationship with the state is one of the most important aspects of their operation.

The centrality of state-law shapes the content of the rule of law. Whilst the minimal elements of the rule of law may be demands that apply to all legal orders, once we move away from this minimum content the more

⁸¹ For further discussion of this, see N. W. Barber, *The Constitutional State* (OUP 2010) chapter 10.

⁸² *ibid.*

developed features of the rule of law are shaped by the role of law within the state. The social aspects of the rule of law—ensuring that those subject to the law have the education and a basic level of material well-being such that they are able to vindicate their legal rights—are requirements that are addressed to the state legal order, and not, normally, to non-state legal orders. Moreover, the rule of law requires the creation of conditions under which outsiders do not interfere with its subjects' legal entitlements. Non-state legal orders commonly piggy-back the state in both these regards, taking advantage of the structures created by the state. As non-state legal orders, they lack the ability to produce the welfare structures that could create societies in which the rule of law can flourish and they lack the coercive apparatus to protect the legal rights they grant from outside interference. If these non-state legal orders start to acquire these capacities, they start to look more like states—and the principle of the rule of law applies in its fullest form.

A final comment should be made about the point of the rule of law. For most of this chapter law has been presented in what might be called broadly positivist terms: as a social instrument that it is used to guide conduct through the exertion of claimed authority. The model of the principle outlined in this chapter has assumed that the aim of law is to guide, and then developed an account of the rule of law that is shaped by that aim. In his essay on the rule of law, Joseph Raz memorably compared law to knives; a knife is an instrument that cuts, and, given this end, the sharpness of a knife is 'an inherent good-making characteristic' of a knife.⁸³ A good knife is a sharp knife, though it may be put to bad ends. Similarly, the capacity to guide conduct is an aspect of the nature of law, and a 'good' law, as law, is one that guides successfully, whatever ends shape that guidance. In contrast, contemporary natural lawyers, led by John Finnis, argue that law is characterized by its point, as well as by its technique. Finnis contends that an illuminating account of law recognizes that law exists to advance the common good of those communities it regulates.⁸⁴ Indeed, it is this purpose that allows us to identify the technique of law, its guiding function, as important.⁸⁵ Setting aside the nature of law in general, the location of the rule of law within constitutionalism—as one of the principles that is shaped by, and relates to, the state—and the centrality

⁸³ Raz (n 23) 225.

⁸⁴ Finnis (n 1) 276, 352–54; J. Finnis, 'Describing Law Normatively' in J. Finnis, *Collected Essays Vol IV: Philosophy of Law* (OUP 2011) 26–32.

⁸⁵ Finnis (n 1) chapter 1.

of state-law to legal orders provides an interpretation of the rule of law that is compatible with Finnis' position. State-law exists to advance the point of the state, and the state is an institution that exists to advance the well-being of its members.⁸⁶ The principle of the rule of law should be understood in this context. Whilst it focuses on the effectiveness of law, it does so for a clear moral reason: the rule of law demands that the law make the differences it purports to make so that the institutions of the state can create a community in which people can thrive.

Conclusion

One of the recurrent worries in rule of law scholarship is the expansion of the rule of law, the ways in which the rule of law moves outwards to encompass broad social and legal goods.⁸⁷ Scholars have sometimes distinguished between formal and substantive conceptions of the rule of law.⁸⁸ Formal conceptions of the rule of law are said to focus on the form that the law takes—the manner in which it is promulgated, the clarity with which it is expressed. These conceptions do not speak to the content of the law or to the broader justice of the legal order. The authors discussed in the first part of this chapter—Dicey and Raz—are commonly held up as having provided examples of formal conceptions of the rule of law.⁸⁹ In contrast, substantive conceptions of the rule of law also engage with the content of the law. Some substantive accounts include specific rights, such as property or social rights, whilst others, broader still, connect the rule of law to the practice of adjudication, embodying the principles that should guide a judge when she makes a decision about the content of the law.⁹⁰

This chapter began with those theories that have been termed 'formal', and used these accounts of the rule of law as the starting point for the principle developed in this chapter. These accounts were chosen for two reasons. First, because the projects that Dicey and Raz were engaged in undertaking complement the project undertaken in this book. In very broad terms, at the basis of each of these accounts of the rule of law is a common question; an attempt

⁸⁶ Barber (n 81) chapter 2.

⁸⁷ Raz (n 23) 211; Tamanaha (n 37) 112–13.

⁸⁸ Craig (n 43); R. Summers, 'A Formal Theory of the Rule of Law' (1993) 6 *Ratio Juris* 127; Tamanaha (n 37) chapters 7 and 8.

⁸⁹ Craig (n 43).

⁹⁰ See the discussion in Tamanaha (n 37) 112–13.

to identify the features that legal orders need if they are to guide power successfully within society. Some of the theorists commonly regarded as providing ‘substantive’ accounts seem to be answering a very different question. In Ronald Dworkin’s jurisprudence the rule of law is presented as a form of the principle of legality.⁹¹ It embodies a requirement that the state justify exercises of force to the court by reference to pre-existing community standards. Precisely how this claim plays out varies across Dworkin’s work, but, however interpreted, Dworkin uses the term ‘rule of law’ to capture his understanding of the practice of adjudication—both its purpose and the principles that should guide the judges. Similarly, in Trevor Allan’s work the rule of law becomes a discrete principle of English or Commonwealth legal orders; a legal principle found within these legal orders that requires that judges scrutinize exercises of state power to ensure that individual liberty—and other positive things—are respected.⁹² The accounts of the rule of law developed by Dworkin and Allan are distinct from that developed in this chapter. It is possible that someone could subscribe to the account of the rule of law developed here and, also, embrace Dworkin’s account of the judicial role and Allan’s account of the legal principles that structure the United Kingdom’s constitution.

Secondly, the chapter has sought to show that even if we start with thin, modest, accounts of the rule of law—such as Dicey’s and Raz’s—when interrogated, these accounts rapidly expand outwards. It was always an error to style Dicey and Raz formalists in the sense used in the previous paragraphs—their accounts of the rule of law plainly had implications for the content as well as the structure of the legal order—but as our examination of the rule of law has progressed, what began as a ‘formalist’ account has started to look more ‘substantive’. Our reflection on the features needed for legal orders to flourish, to succeed as an instrument that regulates power within society, has encompassed social welfare, the hazards raised by unaddressed inequalities of power within society, and the importance of the wider attitude of the community towards the legal order. Even if we stick to the question of the minimum features needed for a legal order—a methodological constraint that is, as we have seen, problematic—these features are still relevant; in extremes, their absence will prevent the operation of the legal order. The supposedly

⁹¹ R. Dworkin, ‘Political Judges and the Rule of Law’ in R. Dworkin, *A Matter of Principle* (OUP 1985) 27–28; R. Dworkin, ‘Hart’s Postscript and the Point of Political Philosophy’ in R. Dworkin, *Justice in Robes* (Belknap Press 2006) 168–71.

⁹² See, in particular, T. R. S. Allan, *The Sovereignty of Law* (OUP 2013) chapter 3 and T. R. S. Allan, *Law, Liberty, and Justice* (Clarendon Press 1993) chapter 2.

formal conceptions of Dicey and Raz have wide implications for the content and social context of the law.

The rule of law requires that the law make the differences it purports to make. This requires both that law is expressed in a form that permits it to be effective, and that those rules apply within a social and institutional structure conducive to the operation of law. What the rule of law requires in a particular situation will vary. Even apparently simple implications of the principle—that the rules of the law should be clear and certain—make different demands in different areas of law and to different institutions. What clarity requires of tax law differs from criminal law, whilst the capacity of the legislature to change law in a way congruent with the rule of law differs from the capacity of the courts. Once we move away from these simple demands of the rule of law to more complicated requirements, the application of the principle becomes more complicated still. The rule of law requires the creation of a community willing and able to make use of its legal rights. This creates a host of demands on the state, many of which can be satisfied in a number of ways. So, for example, the state must ensure people can access the law. This might require, may often require, the creation of some sort of legal aid system, but it might also be satisfied by the creation of ombudsmen, citizens' advice centres, and so forth.⁹³ Similarly, a flourishing legal order requires an educated population—but whilst it falls to the state to ensure its citizens receive an education, there is a wide range of processes through which this can be achieved.

Worries about the expansion of the rule of law are misplaced. It is hardly surprising that the implications of the rule of law are wide-ranging and varied. Like the other principles of constitutionalism, the rule of law has broad implications for the construction and operation of the constitution. Like the other principles, its precise requirements will vary from state to state, responding to local circumstances. This may encourage debate around the principle—people will disagree about its requirements and its application—but the breadth of the rule of law, the impossibility of confining it to a narrow, formalist, set of prescriptions about the structure of rules, may also

⁹³ Some authoritarian regimes weaken the rule of law by preventing their people accessing the law, either by limiting access to the courts or by limiting the effectiveness of the courts' remedies: T. Moustafa and T. Ginsburg, 'Introduction: The Function of Courts in Authoritarian States' in T. Ginsburg and T. Moustafa (eds), *Rule By Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008) 18–21; P. Solomon, 'Judicial Power in Authoritarian States: The Russian Experience' in T. Ginsburg and T. Moustafa (eds), *Rule By Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008).

prove a great practical benefit. Oppressive regimes will be drawn to the rule of law because their leaders wish to maintain and consolidate their power and, perhaps, wish to build their economies.⁹⁴ But the rule of law cannot be fully achieved within a dictatorship; it can only be realized to a partial degree. The desire of oppressive regimes to exercise control, to forward sovereignty, and their embrace of the rule of law are in tension. The draw of the rule of law may sometimes help mitigate the harshness of an oppressive regime, a small, but significant inducement towards constitutional progress.⁹⁵

⁹⁴ M. Albertus and V. Menaldo, 'The Political Economy of Autocratic Constitutions' in T. Ginsburg and A. Simpser (eds), *Constitutions in Authoritarian Regimes* (CUP 2014).

⁹⁵ T. Ginsburg and A. Simpser, 'Introduction' in T. Ginsburg and A. Simpser (eds), *Constitutions in Authoritarian Regimes* (CUP 2014) 4–5. Though note the sceptical discussion in H. Root and K. May, 'Judicial Systems and Economic Development' in T. Ginsburg and T. Moustafa (eds), *Rule By Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008).

Civil Society

The state is one social institution amongst many. Families, businesses, trade unions, churches, and charities, alongside many other entities, exist alongside the state, interacting with it in ways that are at times complementary and at times antagonistic. Much constitutional scholarship stops at the boundary of the state: these other bodies fall on the private side of the public–private divide and are not part of the constitutional order. But the state, every state, necessarily engages with these private institutions—even if only by resolving to leave them alone. Civil society is the interface between the public and the private: the rules and, around those rules, the dispositions that define the relationships between the state and other social institutions—and which, in so doing, shape both the state and these private entities.

Neil MacCormick identified civil society as a context, a state of affairs, in which people engage in a range of private activities within the state.¹ Sometimes engagement in this sphere involves bare agreements between individuals, but, often, it involves the creation and operation of private groups. Businesses, families, religions, trade unions, and a host of other private entities exist in interaction with civil society. Civil society exists at the points of intersection: where the state and law, on the one hand, interact with the economic and the social, on the other. Despite the best efforts of totalitarian rulers, some form of civil society must operate within all states; the creation of the public creates the private.² But whilst all states must possess some form of civil society, however enfeebled, a successful state will possess a civil society which grounds a flourishing and effective private sphere. As MacCormick argued, civil society is not merely a description of a possible state of affairs, it is normative; it embodies an obligation—or perhaps a

¹ N. MacCormick, *Institutions of Law* (OUP 2007) 58–59.

² As Mussolini notoriously declared: ‘Everything within the state, nothing outside the state, nothing against the state.’ See B. Strâth, ‘Ideology and Conceptual History’ in M. Freedman, L. T. Sargent, and M. Stears (eds), *The Oxford Handbook of Political Ideologies* (OUP 2013) 13; H. Arendt, *The Origins of Totalitarianism* (Harcourt 1973) chapter 10.

collection of obligations—addressed to the institutions of the state to create a context in which private activity can thrive.³

This chapter presents civil society as a principle that speaks to the structuring of the private realm; one that speaks to the ways in which the state should help constitute and engage with private entities.⁴ In so doing, it provides an account of civil society that returns to its classical roots. Recent models of civil society have tended to focus on charities, pressure groups, and, sometimes, religions.⁵ However, earlier models, in particular the foundational account found in the work of Hegel, placed families and corporations at the heart of the concept.⁶ In examining civil society, the chapter consequently touches on a crucial distinction in constitutional theory: the divide between the public realm of the state and law, on the one hand, and the private realm of the economic and social, on the other. This divide is sometimes presented in categorical terms, as distinguishing closed systems that interact in limited ways, but even if a sharp divide can be drawn in the abstract, the division between the public and the private is less clear—and less important—when applied to reality. As we shall see, whilst the defining point of private bodies is almost always different from that of the state, their capacity to exercise authority and to have an existence outside of law renders them structurally similar in important respects to that institution. It is this combination of difference of purpose combined with similarity of form that gives the appearance of tension between the public and private, suggesting, perhaps, that we must pick sides between the two. The first part of this chapter considers the relationship between the public and the private and their apparent tension. The second part of the chapter reflects on this tension and seeks to explain why, in contrast, the state should see the private realm as a necessary and beneficial counterpart to the public. Although the defining purposes of private bodies are, almost invariably, different to those of the state, the success of private entities is a precondition for the success of the state. This section, again taking its lead from Hegel's account of civil society, invokes the idea of 'invisible hand' systems, social mechanisms that advance the common good—the defining objective of the state—even when individuals acting within these structures are unwilling or, equally importantly, are unable to act towards that common good directly. By processing the partial

³ See generally, MacCormick (n 1) chapters 12 and 13.

⁴ For an intellectual history of the concept, see J. L. Cohen and A. Arato, *Civil Society and Political Theory* (MIT Press 1994) esp chapter 2.

⁵ See the discussion in M. Edwards, *Civil Society* (3rd edn, Polity Press 2014) 23–28, 57–62.

⁶ S. Avineri, *Hegel's Theory of the Modern State* (CUP 1972) chapter 7. G. Hegel, *Philosophy of Right* (T. M. Knox tr, OUP 1952) §§181–82, §§250–56.

reasons of individuals, invisible hand systems may mitigate or even justify their partiality. It is an argument from the invisible hand that allows us to reconcile the restricted concern that is characteristic of the economic and social realms with the broader concern of the state. The third part of the chapter considers the role of civil society, fashioned by the state and law, in the construction of these systems. Whilst some advocates of the ‘invisible hand’ saw the existence of these systems as a reason for the state to abstain from intervention, this section argues that a proper understanding of the invisible hand shows precisely the opposite: the state is needed in order for these systems to function successfully. The chapter concludes by addressing the principle of civil society directly: those institutional structures that are needed to enable and encourage success in the private realm.

States and Private Groups

Social groups range from the loose and informal—a set of friends going out for dinner on a Friday night—to the highly complex and formalized—a multinational company with many divisions and a large workforce.⁷ Private groups differ from the state on at least three related axes. First, private groups do not normally claim the same scope of authority as the state. In contrast to the state, private groups do not normally claim to exercise authority over the whole reach of their members’ lives, nor do they normally claim to be entitled to determine the boundaries of their own authority. Private groups normally only assert authority in a limited realm; a business instructs its employees on the tasks they should undertake in the course of their work, but not whom they should marry or the colour of their front rooms. And private groups normally recognize the authority of the state to define the extent of their powers and review their exercise: businesses generally accept, however reluctantly, that they must operate within the law. Secondly, and building on this point, the membership of private groups is normally based on consent.⁸ Whereas most of us have no, or little, choice about the state to which we belong, membership of private groups is almost always a matter of choice. Finally, private groups commonly possess a defining purpose distinct from the advancement of the well-being of the totality of their members. Many exist to benefit a subset of their membership: corporations exist to achieve the ends of their owners rather than those of their workers, for example. For Hegel, this was

⁷ N. W. Barber, *The Constitutional State* (OUP 2010) chapter 3.

⁸ MacCormick (n 1) 174.

the defining feature of civil society organizations: in these organizations each person worked towards her own ends, and these bodies both served to create and satisfy individual needs, whereas the state was characterized by a universality of concern, distinct from the individual interests of its members.⁹ But the ends of individuals need not be selfish: some groups are outward-facing, existing with the aim of benefiting those external to the group. Some charities and pressure groups exist to improve the lives of people whom group members will never meet, hospitals exist to benefit their patients rather than the doctors and nurses. And even when the group is inward-facing and does exist to benefit the totality of its membership—as with, perhaps, a trade union—that group is highly unlikely to be synonymous with the membership of the state. As Neil MacCormick pithily phrased it, whilst public power is for the public good, private power is directed towards the private good.¹⁰

The previous paragraph outlined some of the characteristic differences between the state and private groups, but it did so cautiously, with frequent qualifications. On all of the axes of difference between public and private groups, the distinction is a matter of degree rather than a categorical divide. Of course, all private groups must resemble the state in some ways—at a minimum, they are collections of persons bound together by rules that define membership and purpose—but some non-state groups resemble the state more closely than others. This closeness of resemblance may lie in their constitution—the type of group that they are—or in the qualities of a particular group.

In terms of resemblance of constitution, the type of private group that may be most similar to the state is the family. For children, in particular, the family resembles the state in a number of significant respects. First, for children, especially young children, membership of the family is non-optional.¹¹ A baby has no choice about its family, becoming a member of a family through birth or adoption. Furthermore, exit from the family is often difficult and sometimes impossible; just as escaping citizenship can prove tough, the family is a

⁹ Hegel (n 6) §§182–88, §256; Avineri (n 6) 142–43; Z. A. Pelczynski, 'Political Community and Individual Freedom' in Z. A. Pelczynski (ed), *The State and Civil Society: Studies in Hegel's Political Philosophy* (CUP 1984).

¹⁰ MacCormick (n 1) 172.

¹¹ On the non-optional nature of the family—and its similarity in this respect to the state—see also E. Burke, 'An Appeal from the New to the Old Whigs' in E. Burke, *Reflections on the Revolution in France and Other Writings* (J. Norman ed, Everyman 2015) 700–02; Y. Levin, *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left* (Basic Books 2014) chapter 4.

social group that can prove peculiarly difficult to leave.¹² Young children, of course, have no capacity to choose to leave the group, but even older children and adults may find exit difficult or impossible. The social and legal rules that constitute the family may not permit exit: parents and their children may find themselves stuck in a relationship of mutual rights and duties which can be broken, but which cannot be dissolved. Whilst including the family within his model of civil society, Michael Walzer characterizes civil society as space of ‘uncoerced human association’.¹³ But coercion is a central feature of the family; parents exercise a level of accepted physical coercion over their children that is rarely seen in other private groups. Parents issue commands to their children, attempting to exercise authority over them, and then back these commands up by the exertion of force, an exertion which is commonly regarded as legitimate both by the community generally—it is socially acceptable to act in this way—and by the law. Whilst many states have intervened to prevent parents from hitting their children, lesser forms of coercion—being confined to the house or a highchair, or the child being physically moved against her wishes—are not only considered acceptable but are thought of as aspects of good parenting. Like the state, the family is an institution in which commands are supported by physical force. The non-optional nature of membership combined with the exercise of coercion by parents over their children renders the family similar to the state in a number of important respects. Indeed, it is unsurprising that analogies are frequently drawn between the family and the state in political theory. The ubiquity of the family as an *instance* of a private social group might blind us to the unusualness of the family as a *form* of private social group.

Whilst the family resembles the state in terms of its structure, other private groups that are radically different in terms of structure may, deliberately or accidentally, come to possess power similar to that of a state. This may occur because of a private group’s success within the legal structures of the state or because of its actions outside of these legal structures. Monopolies provide an example of private groups which, often lawfully, have managed to acquire aspects of state-like power over those with whom they interact. Would-be customers faced with a company that has achieved a monopoly

¹² See the discussion in M. Westphal, ‘Hegel’s Radical Idealism: Family and State as Ethical Communities’ in Z. A. Pelczynski (ed), *The State and Civil Society: Studies in Hegel’s Political Philosophy* (CUP 1984) esp 78–81.

¹³ M. Walzer, ‘The Concept of Civil Society’ in M. Walzer (ed), *Toward a Global Civil Society* (Berghahn Books 1998) 7, 16. See also MacCormick’s claim that some form of legal equality is at the core of civil society—it is questionable whether the relationship between parents and children can usefully be described as one of legal equals: MacCormick (n 1) 58, 175.

do not enjoy the normal freedom of choice characteristic of private transactions: there is an element of coercion. To trade in this area requires them to engage with the monopolist. The comparison with state power becomes stronger the less avoidable engagement with the monopolist becomes. Where a company trades in an essential commodity, a buyer may have practically no choice other than to accept the monopolist's terms.

It is not just businesses that can become monopolies, organizations that control the supply of labour can also gain a similar position. Trade unions and professional associations who have negotiated a closed shop—where all employees of a company or all those working in the sector must belong to the union or association—are monopolists of this type. Employers looking to hire an employee, or workers wanting to work in the area, must deal with this supplier. In England, for example, all solicitors must be members of the Law Society. Anyone who wants to hire a solicitor must engage a person who has been approved by that body, and anyone who wants to become a solicitor must gain membership before starting to practice. These monopolies face two ways: both towards those who want to enter the trade and towards those who wish to employ such workers.

The sudden rise of the internet has produced a number of monopolist intermediaries that share a structural resemblance with the closed shop. The convenience of having a single point of contact appears to push towards monopoly. There are, for example, good reasons why a single internet taxi supplier is likely to dominate the online market, but it will then appear as a monopolist to both buyers and sellers. Those who want a taxi must log on to its site, whilst those who want to run a taxi must register with it. The element of choice that is normally a characteristic of private group interaction is absent, or restricted.

The public–private divide is often presented in categorical terms, as a sharp line that splits state bodies from private entities. But, as our discussion of monopolies shows, bodies that are clearly private may resemble the state in important respects, exercising state-like power over members or outsiders. Consequently, even when a body is unambiguously private, there may be good reasons to treat it as if it were public for certain purposes.¹⁴ Monopolies are sometimes required to consider the public interest when acting—their possession of state-like power entails that they may not behave as freely as other bodies in the private sector. Under European Law for example, a company that enjoys a dominant position in the marketplace is required to behave

¹⁴ C. Campbell, 'The Nature of Power as Public in English Judicial Review' (2009) 68 *Cambridge Law Journal* 90.

very differently to other private companies.¹⁵ Its decisions about pricing and its discretion over those it is willing to supply are constrained, and, more broadly, it should not act in ways that will drive its competitors out of the marketplace. Similarly, trade unions may find that their capacity to refuse or remove membership is limited. Competition law and trade union law regulate bodies that are clearly private, but the way they are legally regulated often resembles the way in which the law treats state entities; there are parallels between these areas of law and administrative law.¹⁶ On other occasions, though, it will not be possible to draw the line between the public and the private with any confidence. The point at which a state moves from engaging with a private body—such as a company or charity—to incorporating that body within the constitutional order is a fine one. It may be unclear whether an institution is, for example, a charity supported by the state, or a state institution operating under the guise of a charity. The line between the public and the private is often blurred and, even when not blurred, often matters much less than we might suppose.

The last few paragraphs have sought to stress not only the differences between states and private groups but, equally importantly, their similarities. And it may be the combination of the similarities and differences between the public and the private that explains the tension between these entities that is identified in the work of many constitutional theorists. States and private groups have often been presented as antagonistic: either with private groups presented as a threat to the state, or the state presented as a threat to private groups.

The first source of tension arises from a long-standing puzzle surrounding social groups.¹⁷ Social groups are clearly the creatures of people—they exist and act only because of their members and the community in which they operate—yet they are also regarded as having an identity separate from those members. The group acts and intends even when some of its members decline to participate in its actions or dissent from its intentions, and, perhaps even more remarkably, seems to have a life separate from that of its members, continuing to exist even whilst its membership changes. For these reasons, social groups are often conceptualized as persons, and yet—unless we embrace some very odd view of the world—they cannot be persons in exactly the same sense that we are persons.¹⁸

¹⁵ Treaty on the Functioning of the European Union, Art 102.

¹⁶ See N. W. Barber, 'Professor Loughlin's Idea of Public Law' (2005) 25 *Oxford Journal of Legal Studies* 157, 165–67; D. Oliver, *Common Values in the Public/Private Divide* (Butterworths 1999).

¹⁷ I discuss this at greater length in Barber (n 7) chapters 7 and 8.

¹⁸ Though see E. Durkheim, *Suicide* (J. A. Spaulding and G. Simpson tr, Routledge 2002) 275, and who appears tempted by such a view, and J. N. Figgis, 'The Church and the Secular

One of the earliest authors to engage with this question was Thomas Hobbes.¹⁹ On Hobbes' account, most private institutions are personified through an exercise of the authority of the state's sovereign.²⁰ It is the state that creates the legal framework through which collections of people are accorded a discrete identity, a legal identity that enables the group to act and to exist through changes in membership. But Hobbes' account of group identity created a further problem. Whilst private groups within the state may be empowered and established through law and through the decisions of state bodies, the state itself cannot be so constituted: it cannot have established itself through a legal order that it has yet to bring into existence. In Hobbes' writing, the birth of the sovereign is dramatic: it occurs at the moment at which there is a spontaneous subjection of the wills of a group of people to the will of another person or institution.²¹ It is this moment at which the crowd transforms into an artificial person without the authorization of some higher body. Carl Schmitt, heavily influenced by Hobbes' work, describes the establishment of the state as a secular 'miracle' for this reason.²² It is the moment at which the sovereign simultaneously comes into existence and acts; and yet, whilst being constitutionally legitimate, achieves this without any prior authorization.²³

Though legal rules plainly play an important role in the creation of private groups, Hobbes recognized the possibility of groups that exist outside of the state and the legal order. Most obviously, there are criminal groups, unlawful groups that operate within the state with malicious intent.²⁴ More intriguingly, Hobbes identified families as groups that can exist in the state of nature—and which bear a structural similarity to the state, with the father in the place of the sovereign.²⁵ As his discussion of criminal groups, families, and, indeed, the state shows—although Hobbes does not explore the

Theory of the State' in D. Nicholls (ed), *The Pluralist State: The Political Ideas of J. N. Figgis and His Contemporaries* (Macmillan 1975) discussed in D. Runciman, *Pluralism and the Personality of the State* (CUP 1997) chapter 6.

¹⁹ See the careful discussion of this point in Runciman (n 18) chapter 2.

²⁰ T. Hobbes, *Leviathan* (R. Tuck ed, CUP 1991) chapter 22; V. Muñiz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (OUP 2014) 19–23.

²¹ T. Hobbes, *On the Citizen* (R. Tuck and M. Silverthorne eds, CUP 1998) chapter 5.

²² C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (G. Schwab tr, University of Chicago Press 1985) 36–37. See further J. McCormick, 'Teaching in Vain: Carl Schmitt, Thomas Hobbes, and the Theory of the Sovereign State' in J. Meierhenrich and O. Simons (eds), *The Oxford Handbook of Carl Schmitt* (OUP 2016).

²³ C. Schmitt, *The Concept of the Political* (G. Schwab tr, Chicago University Press 1996) 27–37. See also C. Schmitt, *Constitutional Theory* (J. Seitzer tr, Duke University Press 2008) 75–82, 125–35.

²⁴ Hobbes (n 20) 155.

²⁵ *ibid* 142–43, 198–99.

idea—underneath the surface of *Leviathan* lies an account of private groups, artificial persons, whose existence does not rely on the state's authorization and the operation of state law.²⁶ Even in Hobbes' philosophy, social groups can act, intend, and exist, without the authorization of the sovereign.

The capacity of groups to exist outside of law turns on the operation of social rules. Social rules define membership, and ascribe actions and intentions to the group. Some of these social rules are internal to the group—authority relationships determined by the group's membership—but others are external, set by the community in which the group operates. Hobbes was probably correct to claim that the rights and duties constitutive of the family existed before the state.²⁷ For instance, it is likely that even before the intervention of law, parents were regarded as entitled to tell their children how to behave, an entitlement balanced by a duty to exercise this right in the best interests of the child. Once it is recognized that private groups, like the family, can be established through social rules, the full complexity of the interplay between the legal and social can be appreciated. Whilst there may be private groups that are entirely constituted through non-legal rules and others that are entirely constituted through law, most private groups will be constituted by a mix of the legal and the non-legal. These social rules allow groups authorized by the state to enjoy a second life outside of the state's legal order.²⁸ The members of these lawful groups may accord their officers and the institutions of the group greater powers, or greater obligations, than those given by the law. Sometimes the community in which these groups operate will endorse this second, social, life. As such, Schmitt's supposed 'miracle' will have occurred in these private bodies: the creation of authority relationships will have arisen without the authorization of any higher authority.²⁹

The state and private groups consequently share an important quality: they have the capacity to act and exist outside of the legal order. This capacity brings with it the possibility that private groups could rival the state. As Schmitt bluntly argues, some non-state groups have the capacity and will to become states: religious, ethnic, even economic groups can, in some circumstances, accrue sovereign capacity.³⁰ Indeed, historically private groups have transmigrated into states: the Commonwealths of Virginia and Massachusetts, for

²⁶ M. Forsyth, 'Thomas Hobbes and the Constituent Power of the People' (1981) 29 *Political Studies* 191, 197–98.

²⁷ I discuss the empirical question of the historical connection between the family and the state further in the chapter on sovereignty.

²⁸ Barber (n 7) chapter 4. ²⁹ MacCormick (n 1) 274–75.

³⁰ Schmitt, *Concept of the Political* (n 23) 37–38; Schmitt, *Constitutional Theory* (n 23) 126–29.

instance, trace their origins to corporations.³¹ More commonly, even when a private group does not seek to replace the state it may accumulate sufficient power to threaten a state's capacity to decide and act independently, challenging the sovereignty of the state.³² Though many contemporary multinationals have been accused of this, few can rival the over-mighty East India Company that kept an army, fought wars, levied taxes, ran courts, and exercised coercive power over the peoples it controlled.³³ Although Edmund Burke notoriously described the Company as a 'state in the disguise of a merchant',³⁴ even at its zenith the East India Company never achieved or claimed statehood in the modern sense.³⁵ It remained an agent of the English, and later the British, state, dependent on a Royal Charter for its operation.³⁶ But whilst Britain eventually reasserted control over the Company, its taming proved a hard struggle through the eighteenth and nineteenth centuries.³⁷ For periods of its history, the power structures within the Company and the relationships the Company enjoyed with those outsiders rivalled the authority claims of the British state, and was of such a scale as to throw into question the sovereignty of that state—at least in respect of certain peoples and territories.

Whilst large corporations present the most obvious threat, smaller private groups can also challenge the state. Families, for instance, provide an alternative power structure within the community. The strength of bonds between family members may be more powerful than those between citizen and the state.³⁸ On occasion this is acknowledged, and perhaps even tacitly condoned, by the state; as where, for example, a legal order created an exception for spouses who might otherwise be compelled to give evidence against

³¹ D. Greenwood, 'The Semi-Sovereign Corporation' in J. Smith (ed), *Property and Sovereignty: Legal and Cultural Perspectives* (Routledge 2013) esp 275–84; J. Micklethwait and A. Wooldridge, *The Company* (Weidenfeld & Nicolson 2003) 41–43.

³² J. Bakan, *The Corporation* (Constable 2005) esp chapter 4.

³³ P. Stern, *The Company-State: Corporate Sovereignty & the Early Modern Foundations of the British Empire in India* (OUP 2011) chapters 3 and 4.

³⁴ E. Burke, 'Speeches in the Impeachment of Warren Hastings' in E. Burke, *Selected Writings and Speeches* (P. J. Stanlis ed, Transaction Publishers 2006) 474. See Stern (n 33) 3–14. There is a nice echo of Burke's claim in General Motors' assertion that it was a family rather than a company. Businesses sometimes strive to seem other than they are, but General Motors definitely remained, clearly and unequivocally, a company. See Bakan (n 32) 18.

³⁵ It did claim to be 'sovereign'—but as the Company acknowledged that this supposed 'sovereignty' was conferred by Charter, the term was being used in a different sense to the meaning ascribed to it in this book: see *Nabob of Arcot v East India Company* [1793] 29 ER 841.

³⁶ N. Robins, *The Corporation That Changed the World* (Pluto Press 2012) esp chapter 6.

³⁷ *ibid* chapters 8 and 9.

³⁸ The traditional structures of Chinese society may provide an extreme example of this: see X. Fei, *From the Soil: The Foundations of Chinese Society* (G. Hamilton and W. Zheng tr, University of California Press 1992) esp chapters 4 and 5.

their partners in a criminal trial.³⁹ Furthermore, in some societies extended family structures may rival the state, providing elaborate frameworks for support and interaction, with the state playing a minor and rare role in people's lives.⁴⁰ It is the obligations that are owed between family members that enable the day-to-day life of the community to continue. In short, even if private groups are not seeking to become states themselves, their impact on the independence and capacity of state institutions—on state sovereignty—may still present a threat to the state, challenging its capacity for independent action in the face of private power.

The last few paragraphs have discussed the tensions that arise from the structural similarities between states and non-state groups. A second source of tension, which accentuates the first, arises from their differences. As we have seen, private groups almost invariably have a different reach of concern to that of the state. This has caused some to see private groups as devices that cause and protect inequalities, impeding the ability of the state to treat its members fairly. The worry is obvious in the context of businesses, organizations that compete to extract resources from the public, but it has also been argued that a similar injustice is a core characteristic of the family. Plato notoriously argued that the family unjustly narrowed the range of moral concern exhibited by its members, distracting people from fully caring for the good of the whole community.⁴¹ Some on the Left have followed Plato's lead, claiming that the family perpetuates inequality in society: some parents provide more care, education, and resources to their children than others, and these children, partly because of the unfair advantages they have received, then confer similar benefits on their offspring.⁴² This supposed injustice is sometimes combined with the accusation that the family establishes and reinforces imbalanced power relationships between adults, presenting the family as an institution that confines women to servitude.⁴³ For a mix of these reasons, the totalitarian states of the Eastern Bloc considered—briefly—abolishing the family,⁴⁴ and, in

³⁹ Police and Criminal Evidence Act 1984, s 80. ⁴⁰ Fei (n 38) chapters 9 and 10.

⁴¹ Plato, *The Republic* (F. M. Cornford ed, OUP 1970) book 5; C. Arruzza, 'The Private and the Common in Plato's *Republic*' (2011) 32 *History of Political Thought* 215, 222–30; J. Blustein, *Parents and Children: The Ethics of the Family* (OUP 1982) 31–35; S. M. Okin, 'Philosopher Queens and Private Wives: Plato on Women and the Family' in J. B. Elshtain (ed), *The Family in Political Thought* (Harvester Press 1982).

⁴² Blustein (n 41) 204–11; R. W. Krouse, 'Patriarchal Liberalism and Beyond: From John Stuart Mill to Harriet Taylor' in J. B. Elshtain (ed), *The Family in Political Thought* (Harvester Press 1982), 150–54;

⁴³ F. Engels, *The Origins of the Family, Private Property, and the State* (T. Hunt ed, Penguin 2010) 120; F. Mount, *The Subversive Family* (Free Press 1992) 47–49.

⁴⁴ S. Fitzpatrick and A. Lüdtkke, 'Energizing the Everyday: On the Making and Breaking of Social Bonds in Nazism and Stalinism' in M. Geyer and S. Fitzpatrick (eds), *Beyond Totalitarianism: Stalinism and Nazism Compared* (CUP 2009) 273–75, 281–87; Mount (n 43) 34–36; B. Havelková, *Gender*

more recent times, a few radical feminists have argued that equality can only be fully achieved once the institution of the family has come to an end.⁴⁵

Tension between state and non-state groups has led to anxiety about the position of the state, but these same considerations can push the other way too, leading to concern for non-state groups in the face of state power. This tension has led some writers to seek means of restricting the state's intervention in the private sphere, according non-state groups normative priority over the state. Catholic social thought, for example, teaches that the family stands prior to the state—both historically and ethically—and, as such, has rights and duties that are protected from the intervention by that body.⁴⁶ Some of those drawn to pluralism in the early part of the twentieth century advocated extreme measures to protect non-state groups.⁴⁷ G. D. H. Cole argued that a body consisting of a combination of private associations should govern the state: rather than the state regulating private groups, it would be private groups that regulated the state.⁴⁸

The similarities in terms of structure and the differences in terms of reach of concern have often created tension between states and non-state groups. It has also led some to conclude that this tension is not merely common and troubling, but is, at base, an ontological necessity, one which flows from the very nature of the two types of social group. For these writers, the public–private divide is, then, invariably a point of stress within society. The temptation is to pick a side, either to argue that the state should seek to subdue private groups or, in contrast, that private groups should seek to subdue the state. The remainder of this chapter contends that this temptation should be resisted. Whilst the relationship between the public and the private is often under pressure, this pressure is not inescapable. When functioning well, states and private groups complement each other: the broad authority claims of the state—the claims of sovereignty—permit and justify the narrow reach of concern characteristic of private groups. To understand how these apparently contradictory claims can be reconciled we need to examine a form of social

Equality in Law: Uncovering the Legacies of Czech State Socialism (CUP 2017) esp 36–37, 109–11. On the regulation of social groups more generally under Stalin, see R. Service, *The Penguin History of Modern Russia* (4th edn, Penguin 2015) 244–47.

⁴⁵ S. Firestone, *Dialectic of Sex: The Case for Feminist Revolution* (Bantam Books 1970) 239, discussed in J. Flax, 'The Family in Contemporary Feminist Thought: A Critical Review' in J. B. Elshtain (ed), *The Family in Political Thought* (Harvester Press 1982) 226–32.

⁴⁶ Pope Leo XIII, *Rerum Novarum* (1891) paras 13–14. This is discussed further in chapter 7.

⁴⁷ See the discussion in A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 8–15.

⁴⁸ G. D. H. Cole, 'Democracy and Representation' in P. Q. Hirst (ed), *The Pluralist Theory of the State* (Routledge 1989); Runciman (n 18) 170–73; Muñiz-Fraticelli (n 20) 92–98.

system often discussed by economists but more rarely considered by constitutional lawyers: that of the invisible hand.

Civil Society and the Invisible Hand

The nature, operation, and implications of invisible hand systems are discussed more fully in the Appendix to this book. In brief, invisible hand systems are forms of social ordering in which the actors in the system are pursuing one goal, but the system secures a broader benefit for society. The invisible hand system serves to process the partial concerns of its actors into outcomes that benefit the community as a whole. One of the sources of tension between the state and private groups, discussed earlier in this chapter, was their different reach of concern. Most private groups, and private interactions between individuals, prioritize the interests of some state-members over others. The possibility of invisible hand systems provides a potential reconciliation of this tension. It could be that a coalescence of private groups with limited concern better advances the well-being of the community as a whole than the state could, if it sought this end directly. This may be because invisible hand systems are more effective in gathering, processing, or acting on, information than state planners, or because these systems provide a more effective way of accommodating people's limited altruism than direct commands issued from the state. For these reasons, the objective of the state, the well-being of its members, may often be better served through private bodies than through direct state action. In so doing, this account of civil society once again follows the lead set by Hegel, in his *Philosophy of Right*. Hegel, drawing on the work of Adam Smith, argued that the pursuit of self-interest within civil society combined to further the common good at the level of the state.⁴⁹ The apparent tension between states and private groups then begins to dissolve: the objectives of private groups, taken as a whole, may, sometimes, be compatible with that of the state.

The most obvious example of this is found in the example of the market, discussed at length in the Appendix. If the classical economists, such as Friedrich Hayek and Adam Smith, were right—even if partially right—about the operation of the market, a case can be made for the role of businesses within the state. These private bodies, chasing profit, may do a better job of

⁴⁹ See especially, Hegel (n 6) § 199; J. Henderson and J. Davis, 'Adam Smith's Influence on Hegel's Philosophical Writings' (1991) 13 *Journal of the History of Economic Thought* 184; Avineri (n 6) 146–47.

allocating resources and extracting value from goods than the state could do if it sought to undertake this task directly. Less obviously, the institution of the family may also form part of an invisible hand system.⁵⁰ Traces of an invisible hand argument for the family unit can be found in Aristotle's rejection of Plato's account of the family; as Aristotle put it, Plato's model spreads love too thinly.⁵¹ By concentrating on rearing their own children, parents accomplish more than they could if they had tried to care equally for all the children they had come across. The partiality of the family unit is justifiable because each unit is just one of many million such units, all exhibiting this partiality.⁵² The overall result of this system is that children are better cared for than they would be in a society without the family. The structure of this invisible hand system then resembles that of the market: the actors pursue one goal (profit, the successful rearing of their children), but as a function of this a wider good is produced (the efficient allocation of resources, a well-adjusted population).

For some, the attractions of invisible hand systems might seem to provide an argument against civil society as it is set out in this chapter, rather than in support of it. There is a line of thought in political theory that presents invisible hand systems as antithetical to design. After all, the state's characteristic mode of action is through authority, and the most obvious way in which this authority is exercised is directly: the state specifies an end it wants to see achieved, and commands people to produce that result. The end produced by invisible hand systems, in contrast, cannot be specified in advance; there is a sense in which invisible hand systems must, by definitional necessity, have a non-designed element. A system in which the end result is the product of a single author is not an invisible hand system; there is single, and very visible, hand at work. It could be that we should see invisible hand systems as, in Friedrich Hayek's words, 'spontaneous orders', orders that have come into being without any outside designer.⁵³ Perhaps we should be grateful for their emergence, and resist the temptation to modify their operation.

Hayek sometimes gives the impression that the invisible hand should never be the subject of design. In his essay, 'Was Socialism a Mistake?' he accused socialists of assuming that because people have 'been able to *generate* some system of rules coordinating their efforts, they must also be able to *design* an

⁵⁰ Blustein (n 41) 37; J. Parrish, *Paradoxes of Political Ethics* (CUP 2007) 73.

⁵¹ Aristotle, *The Politics and Constitution of Athens* (S. Everson ed, CUP 1996) 1262b; Blustein (n 41) 37; Mount (n 43) 181–84.

⁵² John Parrish quotes St. Augustine: 'All people should be loved equally. But you cannot do good to all people equally, so you should take particular thought for those who, as if by lot, happen to be particularly close to you in terms of place, time, or any other circumstance.' Parrish (n 50) 73.

⁵³ F. A. Hayek, *Law, Legislation and Liberty* (Routledge 1982) volume I, 38–40.

even better and more gratifying system'.⁵⁴ In this passage, and others, Hayek appeared to argue that the rules of successful systems emerge without design; they arise 'spontaneously', the product of a sort of social evolution. A page later, though, Hayek acknowledged that we can, through the application of reason, improve the rules and institutions present within such systems.⁵⁵ Elsewhere, Hayek wrote of the capacity of judges to develop the law to improve the operation of social systems,⁵⁶ and of the role of legislatures in legislating to regulate the operation of the government and legal system.⁵⁷ Hayek's worries about design should, perhaps, be read as urging caution in changing the rules of the system. Sometimes the rules do need to be modified, but if the system is working reasonably well judges and legislators should modify them with care. Because of the non-designed nature of the product of the system, the impact of changing one of the rules of the system may be hard to predict.⁵⁸ Perhaps this explains Hayek's preference for judicial law-making over statutes: judicial law-making tends to be cautious, slow, and can be quickly reversed if it produces unattractive consequences.

The following paragraphs assume that there is a degree of truth to empirical claims that markets and families do a better job of promoting the common good than some form of central planning or some other social structure. But in what follows the absolutism of some of the supporters of invisible hand systems will be rejected: invisible hand systems are not, and should not be, immune from state structuring. Consequently, the insights of modern behavioural economists, who have identified the ways in which individuals predictably fail to act rationally within market structures, complement rather than challenge this account of civil society.⁵⁹ Invisible hand systems often require intervention in order to accommodate the needs and limitations of those who participate in them, or to mitigate the problems caused by their outputs. Sometimes, indeed, an invisible hand system may be wholly designed: established by the state for a specific purpose.

Neil MacCormick's model of civil society identified three areas of law, tools for design, that the state needed to exercise for the private realm to flourish: criminal law; private law; and public law. Along with other forms of state action, these areas of law combine to structure the private realm in four

⁵⁴ F. A. Hayek, 'Was Socialism a Mistake?' in F. A. Hayek, *The Fatal Conceit* (University of Chicago Press 1988) 7.

⁵⁵ *ibid.*, 8. ⁵⁶ Hayek (n 53) volume I, chapter 6.

⁵⁷ *ibid.*, volume I, chapter 7.

⁵⁸ A. Vermeule, *The System of the Constitution* (OUP 2011) 80–87; J. C. Scott, *Seeing Like a State* (Yale 1998) chapter 10.

⁵⁹ On which see R. Thaler, *Misbehaving: The Making of Behavioural Economics* (Allen Lane 2015).

respects. First, the state provides a background to the private, creating a community characterized by civility. Secondly, the state plays a role in constructing private actors, the entities that will engage in the private sphere. Thirdly, the state may design, in whole or in part, the structures through which private actors interact. Fourthly, the state may create institutions to mitigate or cure the likely failings of these structures, protecting those who lose out in the private realm. In all four of these areas the state, largely through law, and in exercise of its authority, designs the context for the private—but, whilst so doing, it does not seek to dictate the detailed outcome of private engagement.

(i) **Civil Society and the Establishment of Civility**

Civil society requires a society that is characterized by civility; that is, a community in which interactions are peaceful and in which people trust others to observe legally-established constraints.⁶⁰ All forms of private interaction rest on this foundation, and, all else being equal, the more a community is characterized by civility, the more successfully the private realm will operate. As MacCormick argued, a key element in the establishment of civility is the existence and operation of criminal law. Criminal law provides part of the background to civil society: it limits, or should limit, the ways in which people interact, and the ways in which power is exercised between them. Through laws on offences against the person, criminal law limits the ways in which private relationships can be formed and conducted, and the ways in which third parties can interfere in these private connections. The law limits people's capacity to exercise coercion over others; physical force is proscribed save in defined situations. Through theft and similar offences, criminal law helps to establish the institution of property, with its restrictions simultaneously acting as forms of empowerment: the rules against stealing help establish the possibility of stable possession, making people less vulnerable to the encroachments of others. More generally, as Walzer observes, civil society creates a realm in which the stakes of disagreement are lowered; people can dispute without the risk—or at least, with a greatly reduced risk—of that disagreement ending in violence towards their persons or property.⁶¹

Our discussion of the role of civility as the underpinning of the private realm links back to our discussion of the rule of law in the previous chapter. As with the rule of law, civility is not established solely through the formal enactment of laws that constrain people's interaction. As MacCormick noted, these laws are necessary, but not sufficient, conditions of civility.⁶² To create

⁶⁰ MacCormick (n 1) 207–09.

⁶¹ Walzer (n 13) 19–21.

⁶² MacCormick (n 1) 208.

a community characterized by civility, people must be able to access law and make use of its protections. MacCormick wrote that it requires people ‘interact reciprocally with each other as at least formally equal beings’.⁶³ The idea of equality is a slippery one, but MacCormick’s underlying point is important. Civility requires the capacity and willingness to make use of law. It requires an educated community, capable of understanding law and the processes of its application, and a community in which inequalities of power and resources are not such as to stop people asserting their legal rights. And finally, more nebulously, but equally importantly, civility is enhanced where the laws of a community broadly track its values. Where law is broadly respected and valued, rather than merely feared, it is likely to be more stable, more effective, and better able to enhance trust and goodwill in the communities it regulates.

(ii) Civil Society and the Construction of Private Actors

It is unusual for states to create wholly new forms of private institution. Most of the time, the state builds on pre-existing social groups, modifying existing institutions and creating variants of them, broadening the range of institutions that its citizens can choose from. Just about all of the social institutions discussed in the early part of this chapter had a form of existence that predated state intervention; they emerged because they were needed. Most obviously, the family predates the state—indeed, as we have seen, it has been argued that the family forms the historical origin of the state.⁶⁴ But businesses also emerged outside of the state—often closely tied to families—grounded in trust and social obligations rather than law and court orders. And, less obviously still, trade unions not only started life outside of the law, they emerged in the face of fierce opposition from the state.⁶⁵ Generally, social pressure ensures that the broad types of institution that a community needs already exist in some form. But this should not be taken to imply that the state has no role to play in the construction of actors in the private realm.

First, the state should ensure that there is an adequate range of valuable social institutions available to its citizens. In the unlikely event that a community lacked a core form of social institution, the state should create it; but, more commonly, the state should work with the community’s pre-existing institutions, creating diversity within these forms. Through the operation of law, the state can create a set of refinements to these social forms, expanding

⁶³ *ibid* 58. ⁶⁴ See Chapter 2 of this book.

⁶⁵ E. P. Thompson, *The Making of the English Working Class* (Penguin 2013) chapter 14.

the range of potential social groups.⁶⁶ So, for example, whilst some types of business institution can exist outside of the law, others, such as limited liability companies and not-for-profit organizations, can only exist within a legal framework.

The state can also modify these institutions to broaden their accessibility, enabling more people to take advantage of their structures.⁶⁷ The move in many countries to allow homosexuals to marry provides an example of this. Some opponents to gay marriage objected to this change on the basis that it amounts to a departure from the pre-existing social or legal conception of the institution. This objection, in itself, was misconceived. It is the role of the state, the role of the citizenry, to reflect on the constitution of institutions within the private realm. Just as a state might properly decide to alter the institution of a 'charity' by broadening or narrowing the possible set of charitable purposes, or might decide to modify the nature of the corporation by giving employees the right to become part-owners of the companies in which they work, the state can also modify the institution of marriage. Changing legal institutions such as the charity, the corporation, or marriage, in response to changing societal needs or understandings of the good is a core function of the state, one it can exercise more or less successfully.

The question of the definition of marriage raises a further question about the interaction of the legal and the social. Some legal institutions lack a social counterpart; they are recognized as creations of the law, and there are no social rules that apply specifically to their operation—though they will, of course, be shaped by broader social rules that apply more generally to the community and provide the normative background for social interaction. Many other legal institutions have a parallel social existence. The social and legal conceptions of, for example, a charity may differ. The social conception of a charity may be wider than the legal, with the public identifying some groups as charitable that are not treated as such by the law. Or, perhaps, the social understanding of the duties of those running a charity may differ from the legal requirement—it might be the case, for example, that the law requires the director of a charity to treat her employees in the same manner as the director of a non-charitable business—the charity exists to advance its charitable purposes, not to benefit its workers—but the public might think charities owe a higher duty of care and concern to those they employ. A director of a

⁶⁶ That the state engages with existing social forms and modifies them—both legally and socially—may explain the apparent paradox that these groups both pre-date the state and yet also appear to be created by the state. See Cohen and Arato (n 4) 92–94.

⁶⁷ Edwards (n 5) 53–57, 112.

charity might be legally obliged to treat its employees in one way, but then find herself subject to social criticism for her actions.

The legal institutions of marriage and family illustrate the gap between the legal and the social especially sharply. It is a relatively easy matter for the state to alter the legal constitution of marriage, but it is a harder task to shift the social understanding. If the state wishes to ensure that marriage is easily available to homosexual couples, and that they can flourish in this relationship, shifting the social conception of marriage may be just as important as altering its legal counterpart. There are a number of ways in which the state can reach beyond the legal to the social. Most obviously, the legal redefinition of marriage may, in itself, help move the social understanding. Law has, as has often been observed, an expressive function; it can act as a statement of the moral values of the community.⁶⁸ In so doing, it can provide a moral lead as well as acting as an articulation of moral consensus. Consequently, the bare fact that the law identifies some homosexual couples as married may influence the way the community, more broadly, regards these relationships. But law is not the only tool available to the state to shift popular opinion. Public figures can lead by example and exhortation, bringing gay couples into public life, making speeches supporting gay marriage, or even encouraging the media to present positive examples of same-sex relationships in soap operas and movies. In so doing, they may encourage people to make use of this institution and widen its availability.

Secondly, the state, through law, can bring stability and flexibility to these social institutions, enabling members of the institution to modify or build on the template provided by law, and then enforcing these agreements that constitute the institution.⁶⁹ Within the broad types of institution established by the state, individuals have the capacity to customize the forms they use over an extended period of time, adapting the goals of the body or its decision-making structures. The state can then act as guarantor, enabling those members who form the group to bind their successors. People can then choose structures for the group, and choose the extent to which future members can alter those structures. So, for example, a group of people setting up a charity can ensure that the funds given to that institution will always be devoted to

⁶⁸ C. Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021.

⁶⁹ It has been argued that a flourishing civil society depends on, and helps build, interpersonal trust, which, in turn, helps enhance people's confidence in their government: W. Galston and P. Levine, 'America's Civic Condition' in E. J. Dionne (ed), *Community Works: The Revival of Civil Society in America* (Brookings Institution Press 1998) 35–36.

the purposes of the charity—and that future officers cannot alter the rules to enrich themselves.

(iii) Civil Society and the Construction of Private Systems

Reflection on the role of the state in creating and structuring the actors within the private realm shades into a further area of design: design of the system itself. Once again, the market provides a very clear example of a potential invisible hand system in which the system is, in part, designed. Though some have thought otherwise, simple forms of the market—requiring the existence of the institution of property coupled with the capacity to trade—do not require the existence of law.⁷⁰ Forms of property and trade can arise without law, relying on the operation of social rules within a community.⁷¹ But whilst markets can exist without law, the types of market that Hayek describes—and the types we see in our own communities—are almost invariably partly constituted by legal rules that replace or supplement non-legal rules.

As with our discussion of marriage in the previous section, the contemporary institution of property has a social and a legal life. The state, through law, can fashion new forms of property: it may make money, loans, and insurance, possible, and allow the ownership and control of property to be divided between actors. Whilst none of these devices necessarily requires the existence of the state, the confidence that law brings can broaden the availability of these instruments; once again, the state also acts as guarantor of the obligations that are entered into between these actors.

As Neil MacCormick argued, civil society requires the state establish a system of private law; the construction of a set of structures that will facilitate social and economic activities within the community.⁷² At the core of private law are certain features that all states, through law, need to ensure are available to its people. There must be the capacity to reach binding agreements—contracting—the potential for people to hold legal rights over things—property—and the ability to form groups that have a legal identity that extends over time and is distinct from their membership. These are

⁷⁰ For the view law is needed, see J. Bentham, *Theory of Legislation* (R. Hildreth tr, Trübner & Co 1864) 111–13 and F. S. Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 357, 374. Against this view see, eg, C. Renfrew, *Prehistory* (Weidenfeld & Nicolson 2007) chapter 8; P. Wells, 'Trade and Exchange in Later Prehistory' in A. Jones (ed), *Prehistoric Europe: Theory and Practice* (Oxford: Blackwell 2008); M. Ridley, *The Origins of Virtue*, (Penguin 1997) chapter 11.

⁷¹ S. Bowles, *Microeconomics: Behaviour, Institution and Evolution* (Princeton University Press 2004) chapter 2. F. A. Hayek, 'The Evolution of the Market: Trade and Civilisation' in F. A. Hayek, *The Fatal Conceit* (University of Chicago Press 1988) 39.

⁷² See also R. Bellamy, *Political Constitutionalism* (CUP 2007) 157–59.

legal institutions that are built in symbiosis with the base set by the rules of criminal law. Precisely how the state works through these demands will vary from territory to territory—there is a wide range of different forms these institutions can take—but the basic institutions of property, contract, and legal recognition of group identity are essential.

Economic relationships are not the only types of interaction structured by the state. One of the purposes of the family is to provide focused care for children: parents are better placed than the state to work out what their children need, and to meet those needs. Even here, though, the state still has a role to play in structuring these interactions, both within the family and between the family and other entities. For example, the state commonly conditions and limits parents' choices over their children's health and education. Even when this engagement occurs in the private sphere, where no state institution is directly involved, the state may still intervene. Parents might be able to contract for their children's education, buying in tuition, but the state might still set limits on what is taught and who gets to teach it. Similarly, when buying food for their children, the state may prohibit some items entirely—perhaps making it a criminal offence to supply alcohol to children—and, more gently, may use taxes and advice to encourage parents to pick healthier foods for their children.

Criminal law and private law, in contrast to public law, are not normally considered aspects of the state's constitution. Whilst these rules clearly impact on the operation of state institutions—for example, criminal law may shape the conduct of legislative debate and contract law may affect the business of government departments—where they apply equally to public and private bodies, these rules are commonly regarded as falling outside of the public realm.⁷³ Though they shape the state, they do so as background rules, as rules outside of public law that set the normative context in which the state and other bodies operate.⁷⁴ But although the application of these rules in particular cases falls into the private realm, the architecture of criminal and private law is part of the constitutional order of the state. Criminal and private law structure the relationship between the state and individuals, and, in so doing, they simultaneously shape the conduct of private bodies and public bodies, specifying how each side of this equation should act towards the other. They construct the boundary of the state at the intersection of the public and the private. The establishment of legal institutions such as contract, property, and

⁷³ The situation is, of course, different if there are special public law rules, rules that apply directly to public bodies and officials, of contract or crime.

⁷⁴ Barber (n 7) chapters 4 and 5.

corporations—and decisions about the content of criminal law—is, then, a constitutional act which constructs part of the relationship between the state and its members—a constitutional issue—even if the application of the rules in particular instances is a quintessentially private matter.

(iv) **Civil Society and the Mitigation of the Private Realm**

A further collection of situations in which the exercise of state authority complements the invisible hand is where the system, to be morally defensible, needs to be imbedded in a wider social order that protects those who are likely to suffer from its operation; as Hegel put it, the government acts as the universal overseer and is responsible for ensuring a minimum standard of living for its people when civil society fails them.⁷⁵ The motivations that the system is predicated on, the limited moral concern required by the system, may only be defensible in a community that offers support to those who lose out under the system. In the example of the market, the successful operation of the system depended on the actors ignoring the impact of their decisions on the well-being of those with whom they traded. This limitation of concern was morally justifiable because the system produced an outcome that, overall, succeeded in advancing the community's well-being more effectively than would have been the case if the actors sought this end directly. But whilst anyone who engages in the market knows that there will be winners and losers, there are certain types of loss that would make engagement in the market hard to defend. If a trader knows that a person she is contracting with risks starvation as a result of a bad deal, rather than just becoming less wealthy, this consideration should not be excluded; the moral myopia that animates the market would cease to be defensible. In such a society, buyers and sellers should consider the consequences of their trades for themselves and for the well-being of the other party to the deal. Similarly, it is far easier to justify the narrowed concern that is characteristic of the family in a society that supports those outside of this institution. If children who are outside of a family unit are left without any care at all, there would be a strong case—at the very least—for adults to extend their care to include them. It is only in a society that provides—through the state or other means—healthcare, education, and basic social support, that the limited moral concern that animates the market can be defended.⁷⁶

⁷⁵ Avineri (n 6) 101–02.

⁷⁶ A point Hayek might have conceded: F. A. Hayek, *The Road to Serfdom* (Routledge 1944) 28.

Where the potential losses caused by an otherwise valuable invisible hand system are serious, responsibility for the existence of social structures to mitigate such risks falls on the state—and, through the state, the citizenry. The state can acquit this responsibility directly—by creating a healthcare system and a social welfare programme, for example—or indirectly—by ensuring that the private sector provides these benefits to everyone in the community. In either event, law, legislation, is needed to create the structures that provide these provisions or ensure that they are present.

Sometimes the problems generated by the system will relate to limitations inherent within the system itself; the processes of the invisible hand may not work perfectly. Hayek's account of the market, for example, assumes that there is widespread knowledge of the price of goods, knowledge that enables buyers to pick the best bargain and sellers to set a realistic price for their goods. In the real world, of course, the free flow of this information is inhibited by a range of factors.⁷⁷ As Adrian Vermeule has argued, the political system—in particular legislatures—can be regarded as an alternative way of aggregating information, one that can potentially complement, rather than rival, the market.⁷⁸ By setting standards for products, amongst other activities, the state can help overcome some of the informational difficulties encountered by the market.

On other occasions we may be able to predict that the system will misfire in certain ways. The most obvious example of this in the context of the market is the rise of monopolies. Sometimes one person will gain near total control of an important product or service, and then will be in a position to set a price that far exceeds the cost of the product. Occasionally, there are benefits to allowing such monopolies—they may act as rewards for innovation—but they can also cause enormous harm, restricting production, and unfairly enriching the already rich. A fervent supporter of the free-market might argue that monopolies tend to be temporary: they last only until other suppliers enter the market, or alternative products are developed. Nevertheless, even when the system contains the capacity to cure the problem, we might still be unwilling to wait for it to supply the solution. The harm caused in the short and medium term may justify intervention by the state.⁷⁹

⁷⁷ S. J. Grossman and J. Stiglitz, 'On the Impossibility of Informationally Efficient Markets' (1980) 70 *The American Economic Review* 393.

⁷⁸ A. Vermeule, 'Local and Global Knowledge in the Administrative State' (2013) 13-01 *Harvard Working Paper*, 3.

⁷⁹ See the discussion in A. Ogus, *Regulation* (OUP 1994) chapter 2.

(v) Civil Society and Public Law

In addition to criminal law and private law, Neil MacCormick identified public law as a further pillar of civil society. Such a claim might seem counter-intuitive—public law is not, by definition, located in the private realm; it rarely plays a direct role in regulating civil society groups. However, the constitutional structures established by public law are prerequisites for the constitution of civil society. The creation of legal institutions like corporations, contracts, and marriage, requires the existence of bodies in the constitution that can make, apply, and adjudicate upon law. And the interventions necessary to correct the failings found in civil society—failings that are inevitable within a system premised on a narrowed range of moral concern—require legal structures that regulate intervention in the private realm and an executive arm capable of undertaking this intervention. At this point our discussion of civil society ties back to two principles that have already been examined in this volume: the separation of powers and the rule of law. For civil society to flourish, the state requires an appropriate set of constitutional institutions, staffed by officials with skills suitable to those bodies, and which exercise powers appropriate to their tasks. Connectedly, the state needs an effective legal order—one in which the law makes the differences it purports to make—to establish these institutions and render their decisions effective.

**Conclusion: Civil Society as a Principle
of Constitutionalism**

The connections between civil society and the principles of the separation of powers and the rule of law are relatively obvious, but the important connection between civil society and state sovereignty is, perhaps, harder to identify. Many of the authors discussed in the first part of this chapter saw sovereignty as a threat to civil society. The different focuses of concern of states and private groups risked generating tension between civil society and the state and, it was thought, either the sovereign capacity of the state must give way to these private groups, or the autonomy of these private groups must be sacrificed for the good of the state. This tension was mitigated in the middle part of the chapter by showing the ways in which the broader ends of the state were furthered by the narrower ends of private groups, and the ways in which the narrower concern of private groups required the broader concern of the state to be justifiable.

The state needs private groups to achieve its defining purpose, but private groups—in societies like ours—also need states if they are to flourish. As we

discussed earlier in this book, the state stands as the group of groups; many of those who are members of private groups that operate within its territory will also be members of the state. In their engagement at the state level, acting in their role as citizens, these individuals should consider the broad public good of their community. In a well-functioning state this presents the possibility of ‘democratizing’ civil society, of the citizenry reviewing and structuring the relationship between the public and the private.⁸⁰ The citizenry should reflect on the functioning of the private realm, on the ways in which they engage as private individuals. Through the institutions of the state, the citizenry facilitates, regulates, and mitigates the private realm; whilst occupying this public role, the individual should broaden her range of concern beyond the area that occupies her in private life. It is this broadening of concern that provides one justification for the claims of sovereignty. In a reasonably well-functioning state, individuals should recognize that the decisions made at the state level embody a wider range of concerns than those at the private level and, for this reason, the authority claims of the state should extend over the private and, normally, be accepted by those acting in a private context. A person deliberating in their role as a citizen should consider matters relevant to their activities as a private actor, which they would not consider whilst acting privately. Rather than presenting a threat to private action, state sovereignty supports the private realm by enabling the state to establish a context for private interactions. This context—civil society—should then allow and often justify the narrowness of concern essential for the flourishing of the private realm, ensuring that the benefits of this moral myopia are directed towards the common good.

There is a final aspect of the tension between the authority claims of the state and private groups that has yet to be addressed. It is inevitable that private groups possess the capacity to generate authority relationships separate from those permitted or authorized by the state. Private relationships grounded in friendship, respect, trust, love—and fear—will always exist outside state structures, and will always possess the potential to rival the demands of the state, both by enabling groups to organize themselves in ways that are not permitted by the state and, also, by acting contrary to the law. It is, in part, for this reason that civil society is a feature of all states, however awful. The creation of the state, the creation of the public, simultaneously creates the private and compels some form of interaction between the two. The capacity of private groups to challenge the state, their capacity to break the law, is a by-product of the nature of social groups and is, for better or worse, unavoidable.

⁸⁰ Cohen and Arato (n 4) 17.

But whilst this may produce regrettable outcomes, the capacity of private groups to create relationships of this kind can also prove a strength. Most obviously, it enables private groups to challenge or avoid the actions of bad states. In oppressive regimes the existence of private relationships can provide a means of escape or opposition to the state. More commonly, even broadly good states act badly from time to time—and private groups can provide a valuable means of opposition to misguided policies, even if this sometimes involves breaking the law. The capacity of private groups to act outside of the law could be described as providing a form of institutional self-defence. Where, for example, a trade union or church concludes that the demands of the state are immoral they may sometimes be right—and sometimes the gravity of the immorality may be such that the costs of rejecting the decisions of the state will be justified.

6

Democracy

Following the methodology used in this book, this chapter does not attempt to provide a conceptual analysis of ‘democracy’. Whilst the understanding of democracy advanced here needs to be close enough to the common understanding to be intelligible, it is not an attempt to explain how people use or understand the concept. Instead, the chapter places democracy within the broader account of constitutionalism, and the account of the state that lies behind it. The principle of democracy developed here is one that is oriented towards the point of the state, requiring the creation of constitutional structures that advance the well-being of the state’s members. And, to recall the discussion in Chapter 1, whilst the principle is presented as an ideal, it is an achievable ideal, not a utopian dream. The empirical assumptions the chapter makes about human capacities and institutional operation—in terms of energy, rational ability, and good will—are plausible and modest ones.

This chapter begins by examining the version of democracy that might well come closest to the common understanding of democracy: direct democracy. This understanding of democracy will be dealt with relatively briefly: the problems that it presents are insurmountable, and it cannot give citizens the type of control over the institutions of the state necessary to ensure good government. The chapter then discusses representative democracy, those models of democracy in which decisions are made by legislatures elected by the citizenry, rather than the citizenry directly. The role of the legislature as a forum for determining the policy direction of the state, scrutinizing the executive branch, and uniting the citizenry behind the state’s decisions will be considered. The final part of the chapter examines the role of political parties. Whilst political scientists have long studied—and valued—political parties, outside of this discipline parties are frequently reviled and often overlooked.¹ This is a serious omission: political parties are, in societies like ours, necessary

¹ N. Rosenblum, *On The Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton University Press 2008) 1–3; R. Dalton, D. Farrell, and I. McAllister, *Political Parties and Democratic Linkage: How Political Parties Organise Democracy* (OUP 2011) chapter 1.

features of a representative system, and so are also, it will be contended, requirements of the principle of democracy.² When Jeremy Waldron wrote his classic work on democracy, *Law and Disagreement*, he warned reviewers that the volume lacked a theory of representation: the book was an examination of the broader merits of democracy, of letting the people govern.³ The approach of this chapter is almost the exact opposite: relatively little will be said about the broad worth of rule by the citizenry, and, instead, a great deal will be said about the necessary mediating roles of, first, legislatures, and, secondly, political parties.

Direct Democracy

The simplest, and perhaps most popular, understanding of democracy presents it as requiring the direct control of the state by its people. The attractions of this account are obvious. In a non-democratic state, members are subjects rather than citizens: governing is something that is done to them, rather than by them. It is possible for non-democratic states to be governed well—the prince may be wise and caring—and it is even possible for a non-democratic state to listen to, and respond to, the wishes of its people. But non-democratic states cannot treat their people as citizens; they can never treat them as constitutional—and, by derivation, moral—equals. The constitutional structure of non-democratic states implies that only a subset of those who would otherwise be citizens is entitled to govern. Those who are excluded are treated—by the state—as being incapable of governing themselves.⁴ Like children, they may be permitted to plead and argue with those who make decisions about them, but they are never able to take these decisions for themselves.⁵ The wishes and opinions of the non-governing group are treated as of lesser weight than those of the governors—and, crucially, this lack of weight does not turn on the content of those opinions and wishes, or the failure of their advocates to persuade others, but because the constitution

² A notable exception to this disregard is Nancy Rosenblum's excellent book: Rosenblum (n 1).

³ J. Waldron, 'Legislation, Authority, and Voting' in J. Waldron, *Law and Disagreement* (OUP 1999) 110, fn 60. On the problems this raises for Waldron's thesis in that book, see D. Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26 *Oxford Journal of Legal Studies* 733. Waldron returns to the issue in more recent writings: J. Waldron, 'Representative Lawmaking' in J. Waldron, *Political Political Theory* (Harvard University Press 2016).

⁴ J. Mill, 'On Representative Government' in J. Mill, *On Liberty and Other Essays* (J. Gray ed, OUP 1991) 328–29.

⁵ R. Filmer, *Patriarcha* (J. Sommerville ed, CUP 1991) 12—a book that, once again, uses the family as a metaphor for the state.

itself specifies that these individuals are not entitled to share in the act of decision-making.

Democracy is intrinsically valuable: that is, the decision-making processes required by the principle are the only way in which state decisions can be made in ways which respect the moral equality of persons, and instantiate that moral equality within the structures of the state.⁶ Two caveats should be made to this claim. First, the intrinsic value of democracy may well not be the most important argument for the principle; it could be that the likely instrumental benefits of democratic government are even more pressing. The claims that, for example, democratic government brings stability, produces better laws, reduces the chances of corruption, and ensures that leaders consider the interests of their electorate before acting, may be contingent—but are likely to be both contingent and commonly true.⁷ Secondly, even given the intrinsic and instrumental worth of democracy, it does not follow that democracy will be the right choice for all states at all times. Whilst some of the principles of constitutionalism—such as sovereignty and the separation of powers—must be present, to some degree, for a state to exist, democracy can be wholly absent from a functioning state. Where it is absent, states ought to work towards it—an undemocratic state is, necessarily, a failing state—but creating successful, lasting, democratic institutions can take time. Simply imposing the constitutional structures of democracy on a society is not enough: there needs to be a community that is ready and willing to make use of these structures. Although the claim that a state is not yet ready for democracy is a claim often touted by authoritarians and dictators, it may also, sometimes, be correct.⁸

The arguments for democracy appear to push towards a form of direct democracy. Perhaps most notably, Jean-Jacques Rousseau argued for a form of democracy of this type, contending that for freedom and authority to be reconciled, the laws governing the state must be the product of the ‘general will’. As individuals have consented to the social contract, their freedom is not constrained when laws enacted by virtue of that agreement are applied to them.⁹

⁶ R. Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 388–92; drawing very different conclusions from a similar starting point, see J. Waldron, ‘Participation: The Right of Rights’ in J. Waldron, *Law and Disagreement* (OUP 1999).

⁷ See D. Acemoglu and J. A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Profile Books 2012); R. A. Dahl, *On Democracy* (Yale University Press 1998) chapter 4.

⁸ J. Rousseau, ‘The Social Contract’ in J. Rousseau, *The Social Contract and Other Later Political Writings* (V. Gourevitch ed, CUP 1997) book IV chapter 6 para 1; Mill (n 4) chapter 4. It might be worth recalling F. M. Cornford’s quip that time is like the medlar: it has a trick of going rotten before it is ripe.

⁹ Rousseau (n 8) book III chapter 5 para 1.

Its rival, representative democracy, appears to cut against equality; decisions are taken out of the hands of the citizens and given to a subset of their members. Whilst citizens may have a vote once every four or five years, between elections they are excluded from the state's decision-making process.¹⁰ At this point, there are two directions the argument of an advocate for direct democracy could take. First, direct democracy may require unanimity; it might require that all of the people governed by the law have, in fact, consented to each law enacted.¹¹ The second direction, and the one taken by Rousseau, embraces some form of majoritarianism. Whilst each individual must agree, or at least acquiesce, to the basic social contract to be included within the state, it is then enough that the majority of the state's members support a proposed law for that rule to become binding.¹² It is worth noting that those who do not acquiesce to the social contract in Rousseau's model of the state would be regarded as foreigners within the territory of the state—and so, presumably, could be compelled to comply with the demands of the state in any event.¹³ For those attracted by the idea that each law ultimately depends on the consent of its people—this introduces an element of fiction into the argument. Those subject to a law may not have consented to *that* law, or even, if they are considered foreigners, to the process that produced the law. Unlike accounts of democracy that require actual consent, it is now enough that the state is entitled to treat people as if they have consented, even if, in reality, they have not agreed to the measure, or even if they have not agreed that the vote would be binding.

For our present purposes it is not necessary to explore the possible forms of direct democracy in more detail. Three levels of objections can be made against those who argue that states should be governed through such a process.

First, even in a world unencumbered by many of the human limitations that we face, it is doubtful that it is possible for a 'general will' to be freely formed and articulated. The wording of the question placed to the voters unavoidably affects the outcome of the vote. The production of an entirely 'neutral' question is all but impossible. So, for example, it has been shown that people are more likely to support a secession referendum when the question is couched in terms of sovereignty than in terms of independence.¹⁴ And, of

¹⁰ *ibid* book 3 chapter 15 para 11.

¹¹ A path taken by Robert Paul Wolff in R. P. Wolff, *In Defence of Anarchism* (University of California Press 1998). See R. A. Dahl, *Democracy and its Critics* (Yale University Press 1989) chapter 3.

¹² Rousseau (n 8) book I chapter 7 para 8; book IV chapter 2.

¹³ *ibid* book 4 chapter 2 para 7.

¹⁴ S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012) 228–33.

course, the decision of which questions to put to the people, and the order in which those questions are put, can be crucial. A proposition that might be voted down in one month might be successful later in the year and, as the Marquis de Condorcet famously demonstrated, voter preferences can ‘cycle’ through options. So, the general will may prefer A to B, and B to C, but also prefer C to A.¹⁵

Supporters of direct democracy might reply by arguing that there are ways in which these problems can be mitigated. It is certainly possible to set questions in which bias is reduced, and to structure voting in a way that avoids cycling. But any such mitigation requires a step away from the purity of direct democracy. It requires that—in one way or another—another constitutional body be established to set questions and regulate voting processes, making choices about options and procedures. In Rousseau’s model of the state the office of the ‘lawgiver’ would have filled this function.¹⁶ Rousseau’s office of lawgiver was unusual—it was neither part of the executive branch nor vested with, or sharing, sovereignty. The lawgiver’s role was to formulate laws and to steer them through the legislative process by inspiring, in some way, the people to support proposed laws that served their interests—but she was not intended to exercise a law-making power; she facilitated, rather than created. Not unreasonably, Ross Harrison has described the introduction of the lawgiver as ‘a cheat’, an attempt by Rousseau to square the decision-making power of the people with the production of those laws it would be in their best interests to make.¹⁷ It is difficult, if not impossible, to see how the lawgiver could undertake this task without playing a significant role in shaping the content of the law—which raises the question of the method by which the lawgiver would be chosen. If this body was elected in some manner, Rousseau’s system begins to resemble a form of representative democracy. If left unelected, the system would seem not to be a form of democracy at all.

Once we start to reintroduce the limitations that flow from human nature, government through direct democracy begins to look even less plausible. People’s civic virtue is limited—and perhaps rightly so. Rousseau had high hopes for the extent of people’s involvement in the running of the state. For him, in a well-functioning state, public business would drive out private business, as citizens sought fulfilment in the public sphere.¹⁸ But, as was discussed in the previous chapter, a flourishing state requires a flourishing

¹⁵ On preference cycling, see R. Ekins, *The Nature of Legislative Intent* (OUP 2012) 85–88 and P. Yowell, *Constitutional Rights and Constitutional Design* (Hart Publishing 2018) 115–20.

¹⁶ Rousseau (n 8) book II chapter 7.

¹⁷ R. Harrison, *Democracy* (Routledge 1993) 59–61.

¹⁸ Rousseau (n 8) book III chapter 15 para 3.

private sector; a community in which most of the citizens devoted most of their time to the public realm would be a radically dysfunctional one. Not only is it likely, as a matter of fact, that there is a limit to the amount of time people will spend in public engagement, it is also, as a normative matter, right that they should ensure they have adequate time for the private side of their lives, for their families, friends, and businesses. At some point, then, the deluge of decisions required by direct democracy would cause a reduction in the number of people who participate in the vote. Depending on the form of direct democracy embraced, this would either mean that the state could never take a decision—if unanimity were required—or that decisions were taken by an increasingly small subset of the electorate, possibly a subset that was at odds with the majority of the electorate as a whole.

If steps were taken to reduce the burden of voting—a daily internet poll, perhaps—this might help maintain participation, but a further limitation would remain: the risk that, with a high number of votes to be held, the electorate would have little reason to educate themselves about the issues at stake. In a provocative argument, Anthony Downs discussed the apparent paradox of voting.¹⁹ Given the size of the electorate and the tiny chance of any single vote deciding an issue, why do people bother to vote at all? After all, the time they spend voting is time that could be spent on other matters, and if we take a narrow utilitarian view of the matter, people might be best advised to skip the dull labour of voting. Downs' argument applies even more strongly to the time and effort that needs to be invested in order for voters to understand the issues that are the subject of the vote. To become adequately informed about these matters often requires a substantial investment of effort, and the payoff—the chance of influencing the final decision—is vanishingly slight. There is a risk that even if the rational citizen can be persuaded to vote, she will not be properly informed about the implications and consequences of her decision.

These worries shade into the third level of objections that can be made to direct democracy: the likelihood that it will produce successful government. It is hard to see how any form of direct democracy could produce an effective state. If unanimity were required, government and, indeed, the existence of the state itself would be all but impossible. If the majoritarian form were adopted, it is conceivable that some level of government might operate, but a number of further problems would arise. First, it is highly unlikely that the decisions of the state would prove coherent or stable. As the members of the winning majority fluctuated, all manner of contrary propositions could

¹⁹ A. Downs, *An Economic Theory of Democracy* (Harper & Row 1957) 260–76.

become law—as the general will opts first for tax cuts, then for increases in public expenditure. Producing the sort of complicated, nuanced, legislation needed to establish the institutions of the welfare state, for example, would be impossible.²⁰ Secondly, as Rousseau was compelled to acknowledge, even in a direct democracy there would need to be a separate executive branch to carry forward the peoples' policies.²¹ The form of Rousseau's executive would be chosen by the people, but without some form of representative institution it is difficult to see how, once created, this body could be scrutinized or regulated by the citizenry. The people could, perhaps, impeach members of the executive and remove them from office, but it is hard to see how they could examine, question, and investigate what goes on within the executive branch. Finally, there is a broader problem of accountability. With representative democracy it is possible to identify the group of people who made the decision, and hold them responsible for the outcome. When the people as a whole decide, the disciplining force of potential accountability is lost: in a sense, when everyone decides, no one has decided.²²

The arguments of this section have sought to show that direct democracy cannot provide the structures that allow the state to achieve its defining purpose: the advancement of the well-being of its people. Some of these arguments rested on factual assumptions—the limited energies of voters, the improbability of direct democracy producing coherent government—but others turned on tensions within the idea of direct democracy itself—the impossibility of extracting decisions from the people without some other body making decisions about which decisions should be taken and how those decisions should be made. The failure of direct democracy as the basis for the government of the state does not, of course, mean that it can never play a role in the constitution. Even if direct democracy is not the normal mode of state governance, there may be situations in which it is right to hold referendums, issues which should be put to the people rather than decided by the legislature—but, as Leah Trueblood argues, the operation of these referendums requires and presupposes representative institutions which can formulate the questions to be put to the people and determine the state's responses to the answers received.²³

²⁰ R. Ekins, 'How to be a Free People' (2013) 58 *American Journal of Jurisprudence* 162, 171–73.

²¹ Rousseau (n 8) book III chapters 1–5; Mill (n 4) 245. ²² Ekins (n 15) 148.

²³ L. Trueblood, *The Uses and Abuses of Referendums* (DPhil thesis, University of Oxford, 2017) chapter 2.

Representative Democracy

It is impossible for direct democracy to successfully create the connections between citizens and state institutions required if the state is to function successfully. The problems that we have identified with direct democracy—the need for the process of democratic decision-making to be regulated and structured, the limited energies of voters, and the difficulty of producing coherent, stable, laws—point towards a need for a legislature, an institution containing a subset of the citizenry, structured to facilitate successful decision-making. It does not, of course, follow that the failings of direct democracy entail the success of its representative cousin; each set of models could be fatally flawed. However, it will be argued in this section that, in contrast to direct democracy, representative democracy is an achievable ideal, something that states should strive to establish and maintain. This section will reflect on the contents of representative democracy and the different types of representation that it might require. In *The Concept of Representation*, Hanna Pitkin identifies a range of possible meanings that could be given to representation in the political context. For our purposes, three types of representation are significant: descriptive representation, mandate representation, and trustee representation. It will be argued that the trustee model of representation is the one that fits the constitutional role of the legislature—but that the other two models of representation contain insights that are compatible with trusteeship, and which should be included within that account.

(i) Descriptive Representation

This form of representation requires that the assembly be a mirror image of the electorate as a whole: a scale map of the citizenry.²⁴ The legislature would amount to a sample of the population; all, or almost all, of the views and interests of the citizenry would be found in the chamber, expressed in proportion to their presence in the community.²⁵ If we wanted to create such a chamber, elections would be a highly unreliable process for creating such a body. As many have argued, the process of election through choice inevitably produces a form of aristocracy.²⁶ Sometimes this will be because success

²⁴ H. Pitkin, *The Concept of Representation* (University of California Press 1972) chapter 4.

²⁵ P. Pettit, 'Varieties of Political Representation' in I. Shapiro, S. Stokes, E. Wood, and A. Kirshner (eds), *Political Representation* (CUP 2010) 66–69.

²⁶ B. Manin, *The Principles of Representative Government* (CUP 1997) 70–74; C. Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller, and H. Stone eds, CUP 1989) book II chapter 2.

breeds success: those who win elections may use their position to help further the political fortunes of family members, and the political class becomes a web of married couples, parents and children. On other occasions the ‘aristocracy’ will be characterized by shared attributes, a particular type of person may prove attractive to voters and be likely to succeed in the system—for instance, and for whatever reason, lawyers often seem to enjoy disproportionate representation in some elected chambers.²⁷ Even if, through some means or other, voters could be persuaded to attempt to pick candidates who resembled themselves there is no guarantee that they would be successful. Candidates might deceive the voters about their own, that is, the candidates’, true nature. Or, equally likely, voters may deceive themselves about their own, that is, the voters’, character. If we wanted to avoid aristocracy and create a legislature that was a mirror of the citizenry, we would not allow voters to choose from a range of candidates, but would adopt a very different system: selecting our representatives by lot.

Selection by lot has a distinguished pedigree.²⁸ The process was used in ancient Athens to select some of the officials of that state, and is still used in the selection of juries.²⁹ Indeed, within the deluge of proposals for the reform of the House of Lords, it has been argued that lot could be used to select that second chamber.³⁰ Recently, David Van Reybrouck has mounted a broader argument for the use of a lottery. He argues that all constitutions should include two legislatures: one would be elected, and the other chosen at random.³¹

For Van Reybrouck, the absence of political parties in the chamber selected by lot would be a benefit. It would mean that legislators would ‘not have to bother with party activities, campaigning or media appearances’ and so could devote themselves to their legislative work.³² But the absence of party structures—discussed at length below—would create problems for the newly appointed institutions. Exactly the same set of problems that faced a state governed through direct democracy would now apply, in microcosm, to the legislators. On many issues, most representatives would have no views and no knowledge of the problems that they raise. Working out what questions to put to the chamber, the order in which they are put, and finding some way to

²⁷ See R. Cranson, ‘Lawyers, MPs, and Judges’ and D. Howarth, ‘Lawyers in the House of Commons’ both in D. Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing 2013).

²⁸ N. Duxbury, *Random Justice* (OUP 1999) 23–41. ²⁹ Manin (n 26) chapter 1.

³⁰ A. Barnett and P. Carty, *The Athenian Option* (Demos 1998). See also R. Gordon, *Repairing British Politics* (Hart Publishing 2010) 149–53; D. Van Reybrouck, *Against Elections: The Case for Democracy* (Liz Waters tr, Bodley Head 2013) 201, 131–38.

³¹ Van Reybrouck (n 30) chapter 4. ³² *ibid* 155.

ensure that the resulting decisions are coherent and workable would prove a challenge. There are two possible cures to these ills.

First, some means of extending the life of the legislature might be found. Perhaps term limits in the chamber could be longer than is normal, or maybe elections to the chamber could be staggered, so that newly arrived representatives found themselves entering an institution that was already functioning. In these ways, the social networks that are the necessary underpinnings of legislatures—the web of personal connections and mutual understandings—could be fostered in the chamber. The cost of this, of course, would be that the virtues of selection by lot start to slide from view: the chamber would come to contain entities that resemble political parties, as like-minded people banded together to enable effective law-making. And the chamber would look less and less like a mirror of the citizenry as a whole, as negotiating and bargain occurred within these groups.

A second way of addressing this problem would be to establish an outside body that would support the legislature in reaching decisions. During the early years of this century ‘citizens’ juries’ emerged as a device to enable popular participation in politics, and this innovation suggests ways in which a chamber appointed by lot might function.³³ Citizens’ juries consist of a relatively small number of people (between twelve to twenty-four persons) who are selected to discuss an area of public policy.³⁴ The session lasts for a few days, with information on the policy area presented to the jury, and members given a chance to question experts. The jury deliberates, and produces a report at the end of the session. The process is moderated by a trained facilitator—a faint echo here, perhaps, of Rousseau’s problematic lawgiver—and, to be successful, juries need to be carefully managed: those conducting the session need to be aware of, and facilitate, developments in people’s attitudes during the course of the jury’s deliberations. Citizens’ juries shade into so-called ‘citizens’ summits’ as the number of participants increases.³⁵ A citizens’ summit may number between 100 and 1,000 people—or more—who are gathered to discuss a policy issue. Once again, the success of these bodies depends on careful and active management.

³³ L. Maer, *Citizens’ Juries* (House of Commons Paper, SN/PC/04546, 14 December 2007), 11–14; G. Smith and C. Wales, ‘Citizens’ Juries and Deliberative Democracy’ (2000) 48 *Political Studies* 51; Pettit (n 25) 68.

³⁴ G. Smith, *Beyond the Ballot: 57 Democratic Innovations From Around the World* (Power Inquiry 2005) 41–42; Ministry of Justice, *A National Framework for Greater Citizen Engagement: A Discussion Paper* (2008, HMSO) 18–19.

³⁵ G. Smith, *Democratic Innovations* (CUP 2009) chapter 3.

Introducing into a legislative chamber the types of structure necessary for the success of citizens' juries would place significant, and unusual, constraints on how the chamber could behave. It would need to be guided in terms of the subjects it debated, the flow of information it received, the way in which it brought together the shifting majorities within the chamber over different parts of the legislation. In most legislatures all of these issues are decided internally; over time, the institution develops its own structures to meet these needs, and maintains control over them. If these tasks were entrusted to an external body, that body would be given significant power over the legislature. The question of how that body would be selected and controlled is a tricky one to answer. If it, too, was selected by lot many of the problems that faced the chamber would arise, again, in that body. If it was elected from the chamber—with representatives or the citizenry more generally picking from a range of options—we begin to slide, once again, towards a legislature with some form of party system emerging, as representatives pick those whose platform is closest to their views. And, once again, the chamber would become a less accurate reflection of the citizenry as a whole.

Before setting aside selection through lot, a final, and perhaps rather delicate, point should be made. One of the arguments that is sometimes made for this form of democracy is that it would revive interest in politics. This might succeed, but, on the other hand, it might not. Opinion polls show that about 40 per cent of the British public claim they are uninterested in politics.³⁶ It is possible that a significant portion of those selected would have little or no interest in the task before them, and, perhaps not unreasonably, might resent being compelled to spend time in the legislature. The easy answer to this would be to limit the selection process to volunteers—but then, again, the mirror is distorted; those keen to be in the chamber will hardly be representative of the citizenry as a whole.

(ii) Representation as Mandate

The second form of representation treats representatives as the delegates of those who have elected them, bound to the views of their voters.³⁷ This may either mean that representatives are bound to their manifestos or, as a variant, are bound to whatever the current majority view of their constituents is on any given issue.³⁸

³⁶ Hansard Society, *Audit of Political Engagement 13* (London: Hansard Society 2016) esp 59; see also Ipsos Mori's survey of interest in politics from 1990–2010, available at: <https://www.ipsos-mori.com/>.

³⁷ Pitkin (n 24) chapter 7.

³⁸ H. Belloc and G. K. Chesterton, *The Party System* (Stephen Swift 1911) 16–18.

If we were to embrace these understandings of democracy, there are various constitutional devices that could be used to limit the latitude of representatives. If we want to tie representatives to their manifesto promises, we could make these promises legally binding. If we wanted to tie them to the shifting views of their constituents, we could make it easy for voters to recall representatives with whose actions they disagreed, and trigger a fresh election.³⁹

Placing such constraints on representatives has little support in writings on democracy.⁴⁰ Part of the point of having a legislature, rather than relying on direct democracy, is to create an institution that will reason more effectively than the citizenry as a whole. In part, this is because reducing the number of people making the decision will increase the incentive for each decision-maker to reach the best conclusion. The vote of a legislator in a chamber of 600 has far more significance than the vote of a citizen in a group of many millions and, for this reason alone, it is at least likely that the average legislator will be better informed than the average citizen, and will take greater care in reaching her decisions. Once we move away from selection by lot, and allow the electorate to pick from a range of candidates, it is reasonable to hope that the electorate will choose candidates they think will do a good job in the legislature, and reasonable to hope that voters generally manage to pick people who will do a better job as a law-maker than the average member of their group.⁴¹ If so, the legislature will reason differently to the citizenry as a whole, and will be likely to reach better outcomes.

Differences between legislators and their constituents may also arise because of the need to combine decisions into a coherent whole.⁴² As we have seen, within the citizenry there will be shifting majorities across related issues. Decisions of the legislature, in contrast, should be internally coherent within each statute and, to an extent, cohere across statutes. This will sometimes require legislators to compromise: to accept that getting what they want in one area requires they accept something they dislike in another. When forced to examine the issue carefully, legislators may discover that it is, in practice, not possible to both spend more on health and cut taxes, or that upholding food standards requires the enactment of annoying health and safety laws.

³⁹ On recall, see M. Qvortrup, *Direct Democracy* (Manchester University Press 2013) chapter 4.

⁴⁰ Mill (n 4) chapter 12.

⁴¹ E. Burke, 'Reflections on the Revolution in France' in E. Burke, *Reflections on the Revolution in France and Other Writings* (J Norman ed, Everyman 2015) 507; J. Madison, A. Hamilton, and J. Jay, *The Federalist Papers* (I. Kramnick ed, Penguin Books 1987) No. 57 (Madison).

⁴² Pettit (n 25) 74–76. And, as Kyritsis notes, on many issues many constituents may not have a view: Kyritsis (n 3) 743–44.

The need to produce coherent legislation requires that a large number of interconnecting decisions need to be taken simultaneously, and even when the resolution of these different issues is not directly connected—in that a decision about one issue does not necessitate a particular decision about another—they may need to be taken together for the legislation to be effective. So, a decision to establish a legal right to membership of a trade union requires that decisions be made about the rights of people to leave the union, the rights of unions to refuse to admit applicants, and even about what constitutes a trade union. The law comes as a package, and the representative may have to accept aspects she dislikes to get a law she broadly supports; the final decision may not be exactly what she wanted, but it may still be far better than no decision at all. More generally, to get a majority for a statute they broadly like, representatives may have to compromise—conceding unrelated points to get the legislation through. Whilst such compromises might be seen as a failure—horse-trading, rather than principled deliberation—they do serve to spread the capacity to create legislation throughout the chamber, involving more of the representatives in law-making.

Finally, and perhaps most nobly, legislatures provide a forum in which views can be advanced, attacked, and defended.⁴³ This process of deliberation should, on occasion, shift the views of the legislators. Whilst, for reasons discussed later in this chapter, it would be hoping for too much to see frequent public changes of position, it would be surprising if representatives' opinions never shifted in response to arguments in the chamber. Those supporters of models of deliberative democracy in which rational discussion drives away disagreement are likely to be disappointed by the realities of politics, but it remains the case that, sometimes, deliberation does shift opinion, and the beliefs of representatives can change as a consequence of debate.

These three groups of reasons—the superior decision-making capacity of representatives, the need for compromise, and the potential for genuine shifts in belief as a result of deliberation—entail that the decisions of representatives will not always track the wishes of their constituents, and will, sometimes, require a departure from their manifesto promises. Tying representatives in these ways would entail that they would sometimes be required to make decisions they knew to be suboptimal; they would have the chance to make a better decision, but would be compelled to pass up that chance because of the constraint.

⁴³ Mill (n 4).

(iii) Representation as Trusteeship

The last of our forms of representation is the one that may come closest to most representatives' self-understanding of their role: that is, the representative as a form of trustee.⁴⁴ On this understanding, the task of the representative is to make decisions that will best advance the well-being of the citizenry as a whole. Of course, not every piece of legislation will advance the well-being of every individual—choices must be made, and there will be winners and losers—but, overall, the well-being of all citizens is the concern of the legislature; no-one should always be on the losing side. Edmund Burke's speech to the electors of Bristol provides a classic, and eloquent, statement of this doctrine. Burke warned the electors that their representative owed them 'not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion'.⁴⁵ And, a little later in the speech, reminded them that Parliament

[...] is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.⁴⁶

Of the three models of representation, the trustee model is, it will be argued, the most attractive, and tracks the point of the state. Representatives should enact laws that will forward the well-being of the people; like all other parts of the constitution, the legislature should be oriented towards the good of the people it serves. Though trusteeship provides the overarching structure of representation within the legislature, the other models of representation—descriptive representation and mandate representation—capture important features that should, and can, be accommodated within the trustee account.

The principal attraction of the descriptive model of representation was its insistence that the legislative chamber include representatives with a wide range of experiences, interests, and views.⁴⁷ Burke's speech does not address the question of the value of diversity; reading the speech in isolation, it is possible to conclude that Burke would have been content with a legislature that consisted entirely of a single type of person, provided that those persons were doing their best to advance the common good. Indeed, Burke elsewhere argued that the emergence of a form of aristocracy—based on ability,

⁴⁴ Pitkin (n 24) chapter 8.

⁴⁵ E. Burke, 'Speech at the Conclusion of the Poll at Bristol' in E. Burke, *Reflections on the Revolution in France and Other Writings* (J. Norman ed, Everyman 2015) 151; Ekins (n 15) chapter 6.

⁴⁶ Burke (n 45) 151–52. ⁴⁷ Waldron, *Law and Disagreement* (n 3) 134–43.

not birth—was an essential part of a properly constituted people.⁴⁸ But as we move beyond Burke's famous Bristol speech, it becomes obvious that his views on representative government were nuanced: he saw, within the trustee model, the importance of the inclusion of different views and a range of different interests.

Although Burke is commonly, and rightly, regarded as an advocate of the trustee model of representative democracy, he also acknowledged the value of different interests being given a voice within the legislature. As Hanna Pitkin has shown, whilst Burke was opposed to the idea of regional representation—the claim that the representative of a constituency should speak for the interests of that group, rather than the nation as a whole—he recognized the importance of interest representation—that is, that national sectional interests be represented in the chamber.⁴⁹ In arguing for Catholic enfranchisement, Burke invoked the idea of 'virtual representation'; a form of representation where a group of electors can identify with a representative, sharing with them interests and views.⁵⁰ This goes beyond simple trusteeship—now at least some of the trustees must be people with whom the various voters can identify. At first glance, virtual representation may seem to be in tension with Burke's claim that representatives should work for the good of the nation as a whole—but the two are reconcilable.

It may be that differences in gender, wealth, race, and so forth, alter the way in which people perceive the world. These are characteristics that may affect how people are treated by others in their community, and these experiences may shape their understandings of that community. If so, even if representatives in the legislature share a common goal, their different experiences will shape the way they understand the implications of that goal, and their appreciation of the means necessary to achieve it. These differences of perspective may have at least two groups of implications for deliberation within the chamber. First, and most obviously, diversity may help to expose error, by spurring informed debate and analysis of legislative proposals; diversity may improve the quality of legislation. Secondly, and more broadly, diversity in legislative debates may render the product of the legislative process more palatable, even if the debate did not have a direct impact on the legislation itself.

⁴⁸ E. Burke, 'An Appeal from the New to the Old Whigs' in E. Burke, *Reflections on the Revolution in France and Other Writings* (J. Norman ed, Everyman 2015) 707–10; Y. Levin, *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left* (Basic Books 2014) 82–90.

⁴⁹ Pitkin (n 24) 173–80.

⁵⁰ E. Burke, 'Letter to Sir Hercules Langrishe' in E. Burke, *Reflections on the Revolution in France and Other Writings* (J. Norman ed, Everyman 2015) 766–68.

Diversity may help legislatures avoid error in two ways. First, it facilitates the operation of the legislature as an information-gathering institution. Any piece of legislation will affect different groups in different ways, and even the best-intentioned legislator may fail to appreciate how a general rule will impact in a particular context of which she is unaware. Here, diversity allows the legislature to act as an information-gathering institution, drawing together relevant experiences, and strengthening legislation as a result. Secondly, diversity might reduce the risk of 'groupthink' that can arise amongst those of a shared background.⁵¹ Groupthink arises where a group closes in on itself; its members push each other towards consensus, shutting out dissent and self-censoring any doubts they might have about the group's decision. The risks of groupthink arising may be lessened when the group includes members from a wide range of backgrounds. Not only will such a group contain people with different experiences, it will also contain people from a range of backgrounds who have been shaped by different sets of social rules and expectations.

Even if we set aside the risk of error, differences in background may also sometimes lead, perhaps even frequently lead, to good-faith disagreement over the values that legislation should pursue. This may be because our appreciation of these values, or their instantiation in the options before the legislature, is imperfect: there may be a right answer about the comparative merits of building an art gallery or a sports stadium, or on the rival moral attractions of universal free public healthcare contrasted with provision through charity and insurance, but we may lack the discernment to correctly identify it. But such disagreement may also arise because the values are incommensurable: there is no unique right answer to discern.⁵² A wise representative will conclude each of the options is valuable, each in a different way, but will not be rationally compelled to pick either. In both of these cases—whether the limitations on the well-intentioned legislators flow from constraints on their knowledge of the relative importance of value, or from the values themselves—the legislature will still have to make a decision. And in these circumstances, the different life experiences of the representatives may lead them to make different choices about the ranking of legislative options.

This second line of reasoning does not take us quite as far as we need to go to show the value of diversity in the legislature. If it is the case that background affects our moral assessment of legislative options, this does not, in itself, entail that a better choice will be made by a legislature that contains a diversity of experiences. If, to simplify to the point of caricature, all men

⁵¹ I. Janis, *Groupthink* (2nd edn, Houghton Mifflin 1982) chapter 8.

⁵² J. Raz, *The Morality of Freedom* (Clarendon Press 1986) chapter 13.

prefer A to B, whilst all women prefer B to A, this division would not, in itself, provide a case for the legislature supporting either of the options. Indeed, in terms of the attractiveness of the options themselves, this would not even provide an argument for a compromise: there is no Archimedean point from which it can be said that the compromise option is, in its content, better than the two rival proposals.

A further argument for diversity that builds on these observations, and one that is found at the core of Burke's writing on Catholic enfranchisement, is the role of diversity in the legislature in enabling that body to act as an integrating force within the state, as a body that helps bring people together behind a decision even if they continue to disagree with it. One of the easily overlooked curiosities of legislatures is the prominence they give to dissent.⁵³ In most other constitutional institutions disagreement is hidden, or, at best, tolerated. Whilst there is plenty of disagreement inside the executive branch, the government and, even more so, civil servants, strive to give the impression of unity. Within the executive, disagreement in private is valuable—and should be encouraged—but disagreement in public may weaken the executive's capacity to direct action, blurring the message the executive is seeking to send, and giving the impression its commands are contestable. The openness of the judicial branch varies from system to system.⁵⁴ Sometimes, the court is required to speak with one voice, and multi-judge panels must agree a single decision, whilst in other systems dissenting speeches are permitted. Ordinarily, the need for clarity in the law and confidence in the courts militates against dissents and whilst there are a great many strong and good arguments for allowing judicial dissents, these are arguments that show the value of an exception to the rule; generally, we want the court to speak with one voice. The legislature, in contrast, is a constitutional institution in which open disagreement is expected to occur regularly, and in which decisions that have been made without any public dissent are, perhaps, a cause for concern.⁵⁵

One of the core challenges faced by any constitution is the management of disagreement. Disagreement needs to be kept within constitutional structures, so that a distinction is drawn between disputes over particular state decisions

⁵³ G. Webber, 'Loyal Opposition and the Political Constitution' (2017) 37 *Oxford Journal of Legal Studies* 357. For a very different perspective see C. Schmitt, *The Crisis of Parliamentary Democracy* (E. Kennedy tr, MIT Press 1985) chapter 2.

⁵⁴ See the interesting studies by R. Raffelli, 'Dissenting Opinions in the Supreme Courts of the Member States' (European Parliament 2012) and K. Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14 *German Law Journal* 1345.

⁵⁵ I. Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 87.

and disputes over the bodies that do the deciding.⁵⁶ In a well-functioning constitution, citizens will accept the legitimacy of these decisions, even if they continue to disagree with their content; acceptance, if not endorsement, must be secured.⁵⁷ The capacity of the legislature to allow for public disagreement may enable it to play this role in the constitution, acting as an integrative mechanism to bring the whole of the citizenry behind decisions.⁵⁸ Not only does the legislature create a forum in which compromises may be struck, it also provides a forum in which those outside the chamber can see their interests and views being expressed within the process of decision-making. Even if these are not embodied in the final decision, they have been heard in the process that led to the decision and, at the very least, the winning majority of representatives will be aware of their disagreement. Part of the role of the legislature is, then, to create a forum in which this disagreement can be expressed, and, through the public acknowledgment of this disagreement, the losing side is encouraged to accept the result.⁵⁹ Where disagreement is rooted in diversity—which, of course, is not always the case—a legislature that reflects the composition of the citizenry may, by virtue of that diversity, help maintain the confidence of the citizenry in the system. This may be because the diversity leads to compromise—with different groups each getting a little of what they want—or, more simply, because involvement in the process by which the decision is reached makes the outcome more palatable to the losing side.⁶⁰ It could be that popular support for the state requires, rather than is imperilled by, the public expression of disagreement.⁶¹ The constitution allows for disagreement and, in so doing, the dissent is not directed against the constitution, the state, itself.⁶²

⁵⁶ A point made in an extreme form by Carl Schmitt: C. Schmitt, *The Concept of the Political* (G. Schwab tr, University of Chicago Press 1996) 45–53.

⁵⁷ Waldron, *Law and Disagreement* (n 3) 107–18; R. Bellamy, *Political Constitutionalism* (CUP 2007) chapter 1.

⁵⁸ On the integrative function of constitutions, see D. Grimm, ‘Integration by Constitution’ in D. Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016). Where constitutions fail to integrate, there is a risk that one social group will dominate the state. And where a state is dominated by one social group, there is a risk of violent overthrow by the excluded—who, in their turn, dominate the state. See S. Huntington, *Political Order in Changing Societies* (Yale University Press 1968) 195–98, 274–78.

⁵⁹ J. Waldron, ‘Principles of Legislation’ in J. Waldron, *Political Political Theory* (Harvard University Press 2016) 158–62.

⁶⁰ J. S. Mill noted the significance of democratic structures in leading citizens to identify with, and care about, the state: Mill (n 4) 240, 283.

⁶¹ Rosenblum (n 1) 46–47.

⁶² C. Schmitt, *The Concept of the Political* (G. Schwab tr, Chicago University Press 1996) 29; E. Böckenförd, ‘The Concept of the Political: The Key to Understanding Carl Schmitt’s Constitutional Theory’ in E. Böckenförd, *Constitutional and Political Theory: Selected Writings* (M. Künkler and T. Stein eds, OUP 2017) 70–73.

One way of understanding the argument from integration would treat it as a supplement to the trustee model of representation. Perhaps these are two distinct tasks the legislature should undertake: enacting statutes that advance the well-being of the community and, also, providing a process through which that community will come to accept the legislation. But the integrative role of the legislature may be implied by the trustee model. The trustee model requires that the legislature be structured in such a way as to facilitate the enactment of legislation that pursues the well-being of the people. Part of that task is to ensure that the legislation is effective—and, recalling the earlier discussion in the context of the rule of law, legislation that is accepted by the community it regulates is more likely to prove effective than legislation that is not.

The trustee model of representation is, then, able to accommodate the importance of diversity within the legislative chamber, both through a recognition of the likely advantages of diversity to the quality of decision-making and through its likely contribution to the general acceptance of the laws produced by the legislature.

The institutional implications of the need for diversity will depend on the nature of the community behind the constitution. In some systems, the normal electoral process will produce a diverse legislative chamber, but in other cases other forms of selection may be needed to complement the basic electoral structure. This could be by reserving some legislative seats for certain groups, perhaps by some form of nomination, with candidates chosen because of their connection with these groups, or by the creation of a second, revising, chamber. There is not the space in this chapter to explore the options open to constitutional designers—all come with problems, as well as attractions. But it might be worth noting that these devices must be used with caution. It would never be right, for example, to insist that a voter elect someone from a certain group (say, to require men can only elect male candidates), nor to allow certain voters to have more than one vote.⁶³

The mandate model of representation had the attraction that it tied the representatives to the voters who elected them, requiring the creation of structures that maintained the link between voters and representatives between elections. As such, it was a reply to Rousseau's claim that in representative systems voters lost their freedom between elections.⁶⁴ The trustee

⁶³ On the problems created by the functional representation system in Hong Kong, see S. Young and A. Law, 'Privileged to Vote: Inequalities and Anomalies of the FC System' in C. Loh (ed), *Functional Consistencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong University Press 2006).

⁶⁴ Rousseau (n 8) book III chapter 15.

model stands as a rejection of the mandate model—part of its attraction is that it creates space between the wishes of the voters and the decisions of their representatives—but whilst the trustee model permits representatives greater latitude, it would be problematic if the link between voters and their representatives completely vanished between elections. When the importance of diversity was discussed in the previous section, two groups of arguments were canvassed: that diversity facilitated good decision-making by helping assemble relevant information and by increasing the likelihood of productive disagreement, and that diversity within the chamber made it more likely that the legislation produced by that body would be accepted by the whole of the community. The same arguments show the value of maintaining a connection between voters and legislators in between elections. Representatives who listen to, and engage with, their voters are likely to be better informed about the issues that face them. And voters who have met their representative—or, better still, have discussed policy decisions with her—are, all else being equal, more likely to accept the outcome of the legislature. Once more, both of these are empirical claims and will depend on many local factors—but it seems reasonable to suppose they are more commonly true than false.

Whilst representatives should not regard themselves as tied to the views of the citizenry, they are still the citizenry's representatives, and should be responsive to those views.⁶⁵ To maintain this connection, the trustee model is premised on regular, and relatively frequent, elections, combined with representatives hoping for re-election. Whilst many lament the existence of 'career politicians', the presence of representatives who want to be re-elected is crucial to the continuing link between the voters and the legislature: though these members may depart from the views of the voters during the course of the parliament, a desire for re-election will encourage them to give them pause for thought before making an unpopular decision, and to explain these departures to the electorate.

The Indispensability of Political Parties

Political parties tend to receive a critical treatment in constitutional scholarship. The claim that political parties are a blight on the democratic process is a recurrent one—indeed, it is an argument that seems to resurface in British

⁶⁵ Pitkin (n 24) 166.

constitutional scholarship at regular forty year intervals.⁶⁶ The broad thrust of this critique is that political parties hamper democracy by pressuring representatives into adopting positions that they would otherwise have rejected. The legislature ceases to be a forum in which views and opinions are freely offered and contested, and becomes a venue in which groups seek to gain power within the chamber and posture to gain approval outside of its walls. Sincere political discussion by party members outside of these groups is silenced rather than encouraged. When presented in this way, parties appear ethically unattractive, encouraging representatives to trade their integrity for a chance of political power. But despite these worries, political parties are stubbornly vibrant; a significant feature of all successful democratic states. It will be argued in this section that the apparent vices of political parties are, in fact, virtues; that we should understand representative democracy as a team game, with all the disciplines and constraints that flow from that mode of composition. Indeed, many of the functions of the legislature discussed in the previous section require the existence of political parties if they are to be undertaken successfully. Political parties, it will be argued, are a necessary feature of a functioning democratic system—and if they did not exist, the principle of democracy would require the state to encourage and support their emergence.

(i) A Typology of Political Parties

Whilst many distinctions can be drawn between different types of parties and party systems, two divides are particularly important for our purposes: the divide between ideological and sectarian parties, and the divide between single-party systems and multi-party systems.⁶⁷

Political parties are organizations that aspire to the control of public power, an aspiration that goes beyond a desire to merely influence the policies of the state; these institutions wish to determine these policies.⁶⁸ When James Madison took aim at ‘factions’ in *The Federalist Papers* he was warning us against a particular type of political party—those which, in his words, are ‘united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate

⁶⁶ Belloc and Chesterton (n 38); G. W. Keeton, *The Passing of Parliament* (Ernest Benn Ltd 1952) chapter 5; A. Tomkins, *Our Republican Constitution* (Hart Publishing 2005) chapter 4. See further Rosenblum (n 1) esp chapter 4.

⁶⁷ Though many other divisions could be drawn: see A. Ware, *Political Parties and Party Systems* (OUP 1996).

⁶⁸ For a discussion of the difficulties of defining political parties, see Ware (n 67) 1–7.

interests of the community'.⁶⁹ What Madison terms 'factions' are what will here be described as 'sectarian' parties. As Madison identified, the key feature of a faction is that it is committed to the well-being of only part of the state's community; it is uninterested in or, worse still, hostile towards the interests of some of the state's members. Such narrowness of concern may be the result of 'passion' or 'interest'. Where it is the result of passion, this narrowness of concern is grounded in a belief that part of the community is less worthy of concern than those within the sectarian group, perhaps because they are members of a different national or religious unit. When it is the result of interest, the narrowness of concern turns on a desire for personal enrichment; the group bands together to skew the conduct of the state towards their own benefit.

Sectarian parties can be contrasted with ideological parties—a rival category of political association not identified by Madison.⁷⁰ Though others use the term in different ways, in this chapter 'ideological' parties will be taken to be characterized by their commitment to the good of the whole community, though such parties may disagree about what constitutes that good or the means by which it will best be achieved.⁷¹ It is worth noting that whilst the conceptual divide between sectarian parties and ideological parties is a sharp one, the reality is far softer: actual parties shift between these two over time, and contain elements of each. So, a left-wing party might start life as an ideological movement—believing that redistribution of wealth will make the community fairer, lift general well-being, and more broadly make the state a better place to live—but become sectarian, with the party seeking to fight for as much from the common pot for their members as possible. And, of course, at some points it might be impossible to say which of these two characterizations is more accurate. As Tocqueville noted, purportedly ideological parties may simply be concealing their pursuit of private interest behind their rhetoric of the common good.⁷²

The second divide lies between single-party systems and multi-party systems.⁷³ In a single-party system one party controls the institutions of the constitution and, moreover, there are no constitutional means through which this dominance can be brought to an end. In multi-party systems, power shifts between parties over time and, frequently, varies across constitutional institutions, with parties exercising different levels of control over different

⁶⁹ Madison (n 41) No. 10, 123 (Madison).

⁷⁰ One of the earliest scholars to explicitly draw the distinction was Tocqueville: A. de Tocqueville, *Democracy in the United States* (H. Reeve tr, Everyman 1994) book 1 chapter 10.

⁷¹ For discussion of a similar division, see J. White and L. Ypi, 'On Partisan Political Justification' (2011) 105 *American Political Science Review* 381.

⁷² Tocqueville (n 70) 175. ⁷³ Ware (n 67) 154–75.

institutions. Once again, whilst the division between these types of system may be sharp in the abstract, the reality is less clear. Some one-party states seek to give a false impression that they are multi-party democracies. The Chinese system, for example, allows for multiple political parties, and the National People's Congress, the Chinese national legislature, does not just consist of Communist Party members. But the reality is that these other parties exist only to support the Communist Party, offering—at best—constructive criticism, and, more often, nothing other than uncritical support. Under the thin veneer of a multi-party system, China is plainly a single-party state. Less dramatically, genuine multi-party systems may slide towards single-party rule. It is possible that a single party—or a collation of parties—might dominate constitutional institutions for a prolonged period of time, to the point at which it becomes extremely hard for other groups to take political power.

There are, then, four possible combinations. First, multi-party ideological states, where a range of different parties debate the nature of the common good and the means of achieving this goal. Secondly, multi-party sectarian states, where a range of parties contest to secure benefits for a section of the population. Thirdly, single-party ideological states, where one party determines the content of the common good and determines the means for its achievement. Finally—and worst of all—single-party sectarian states, where the state sets out to benefit a section of the citizenry and disregards—or is hostile towards—the rest. These categories should be regarded as points on a crosscutting pair of axes. In the real world, multi-party systems will include a mix of ideological and sectarian parties, with a given state being more or less characterized by one or other type of party. And the line between single- and multi-party states is also a soft one, with some multi-party states moving towards the single-party model.

(ii) **The Constitutional Role of Political Parties**

Opponents of political parties present them as obstacles to the democratic process—but this opposition rests on a dangerously romanticized view of the operation of legislatures and elections. Whilst it would be hard to prove a causal link, it is unsurprising that the rise of political parties has tracked two developments in modern states: the decline of monarchy and the expansion of voting rights.

The erosion of the position of the monarch, even in those countries that did not experience a revolution, required a shift in the location of executive power. In monarchical constitutions democratic institutions provided, at best, a forum through which state members could seek to influence the direction of the state and exercise some level of scrutiny over the operation of

the executive. The monarch generally selected the executive officers and directed the day-to-day functioning of the executive branch. As democratic institutions increased their control over the executive, the challenge of coherent decision-making increased. The existence of a monarch permitted the legislature to be relatively disunited—the monarch could, more or less, produce structured, rational, decisions within the executive to which the legislature could then respond. Once the monarch is removed from the picture, the constitution needs to create processes through which democratic institutions can operate the executive branch effectively. And whilst political parties could—and did—exist in strongly monarchical systems, they may become stronger and better defined as the constitution moves away from this model, and as the potential power of the parties increase. In parliamentary democracies this is accomplished by the legislature taking control of the executive, whilst in presidential systems this is, effectively, accomplished by electing someone to occupy the role of the monarch.

The expansion of democratic control of the executive has developed alongside the broadening of the franchise and the rise of mass media. More people—and, indeed, a broader range of people—are involved in the process of election within the state. At the same time as the legislature has become more powerful, the chances of each of the electors having personal knowledge of their representative has reduced. In modern democracies it is practically impossible for all the electorate to have a genuine personal relationship with their representative—and even more fanciful to think they could all enjoy such a relationship with a president.

It could be that political parties, in their modern form, emerged because they are necessary for the functioning of a representative democracy with a mass electorate. They create structures that enable the legislature to control the executive whilst, also, being able to engage with a mass electorate. With these thoughts in mind, political parties play at least four important roles within the state.

First, they provide structures within which people with broadly similar views can discuss political issues and work together to produce coherent policy platforms.⁷⁴ This process of discussion may help refine and improve policies, but it also permits the creation of wider coherence across policies.⁷⁵ It is unlikely that a member of a political party will have informed views about

⁷⁴ This observation lay at the heart of Burke's defence of political parties: J. Norman, *Edmund Burke* (Harper Collins 2013) chapter 8. See also White and Ypi (n 71) 387–89 and Bellamy (n 57) 232.

⁷⁵ Rosenblum (n 1) 306–11, 356–62; S. Huntington, *Political Order in Changing Societies* (Yale University Press 1968) 91.

the whole range of state activities, from healthcare to defence, from education to international aid. Working with others allows a party member to be part of a process that produces a complete policy platform, one which ranges across the whole spread of government.⁷⁶

Secondly, and relatedly, parties permit the democratic control of the administration.⁷⁷ They enable the democratic side of the constitution to produce a set of people who can supervise the administrative branch, putting into effect the decisions of the legislature.⁷⁸ In parliamentary systems, the formulation of these governing teams is done in the legislature. The government is drawn from the party, or parties, that encompass the largest number of representatives in the chamber. In presidential systems, parties select and put forward candidates who, once elected, then assemble cabinets which consist of people who are normally sympathetic to, or drawn from, their party. In each case, the party plays two roles. It selects the person who will be leader—the prime minister or president—and it then creates structures through which that leader can, with more or less latitude, select the governing team. There is a curious asymmetry between parliamentary and presidential systems in terms of the relative power of the leader and the power of the party. In parliamentary systems, the prime minister remains heavily dependent on the party throughout her time in office. She can lose her post at any time if she loses the support of her supporters in the chamber. In contrast, in presidential systems, after the election the direct power of the party over the president is very limited. Setting aside impeachment, the party cannot remove a president it comes to dislike. The weakness of the party is especially notable when the president does not want, or cannot have, a further term: in this case, the president no longer needs the party's support in future elections. It does not follow, however, that weaker party control equates to a stronger leader. A prime minister who is supported by her party (or, to put it another way, is acting in a manner in which the party approves) has very considerable power. She is able to get legislation through the legislature, and able to effect significant changes to state policy. A president who is not supported by her party may remain secure in office, but can achieve very little, with the legislature blocking her measures. In either case, a leader who wishes to accomplish change needs the continued backing of her party; in both presidential and parliamentary systems, the party acts as a link between the executive and the legislature.

⁷⁶ It could be the presence of political parties that enables legislatures to minimize the dangers of cycling: see D. Farber and P. Frickey, *Law and Public Choice* (University of Chicago Press 1991) chapter 2, esp 48–52.

⁷⁷ Huntington (n 75) 405.

⁷⁸ Mill (n 4) 271–78.

Thirdly, a party system is necessary for the operation of elections within the state.⁷⁹ Modern states are far too large—and even ancient states would have been too large, if all those who were morally entitled to vote had enjoyed the franchise—for voters to know the candidates who stand for election well enough to pass judgment on their characters and views.⁸⁰ Parties, and the leadership of these parties, stand as substitutes for these candidates. Voters make their selection on the basis of national campaigns and their assessment of the probable effectiveness of the party leadership. Indeed, given the last two functions of political parties, discussed in the previous paragraphs, such an assessment might be more rational than attempting to make a judgment on the merits of the individuals facing election: it will be the party as a whole that determines policy, and the party as a whole that selects the people who will occupy positions of power. The role of the individual candidate in this process may be quite limited.

Finally, political parties provide a conduit for public engagement in politics between elections.⁸¹ One of the recurrent criticisms of representative democracy is that it only permits public involvement at election time. As we have seen, this concern can be partly mitigated by representatives' desire to be re-elected—they will need to justify their actions to their electorate. In one respect this argument is weakened by the presence of parties—if people vote for the party, not the person, the actions of the individual candidate may not be decisive in her re-election—but sometimes, the presence of parties will strengthen the connection. The candidate's re-election will often depend on her being the party's candidate, rather than on her personal merits. Then her election—and chances of political advancement—will depend on the support of the party. There is, then, pressure on the candidate to accept the party line across a range of issues: when people vote for a candidate, they can normally be sure that the candidate will support the party the majority of the time.

Furthermore, citizens can continue to engage with the party even if their local candidate is out of sympathy with the party organization. Parties often provide continuing structures for policy-making and campaigning that members can access directly, and which do not require local candidates to act as intermediaries. Party members can, for example, sit on policy committees, take part in internal debates, and hold positions within the party. These opportunities remain open to party members even if their local representative is consistently opposed to the party line; to an extent, party structures can

⁷⁹ Dalton, Farrell, and McAllister (n 1) esp chapters 4 and 5.

⁸⁰ It could be that a focus on the operation of small city-states has distorted our understanding of the functioning of democracy: see Dahl (n 11) chapter 1.

⁸¹ To different degrees: see Ware (n 67) 150–51.

provide a means for citizens to circumvent their local representatives and engage with national politics directly.

Our discussion of political parties has contended that far from being obstacles to the flourishing of democracy, they are institutions that are necessary for democracy to function. This conclusion should cause us to reassess the ethical position of a legislator when faced with the disciplines of party membership. The standard account presents the demands of the party as, at best, a form of unavoidable annoyance the legislator should view with suspicion, or, at worst, something akin to bribery, with legislators trading their integrity for personal advancement conferred by the party. But if party structures are necessary for the realization of democracy within the state, there are sound ethical reasons, grounded in the principle of democracy, for the legislator to accept party discipline. Setting aside all considerations of career advancement, the legislator who is considering opposing her party on an issue should consider the (moral) reasons the party has for claiming her support.

The first of these considerations is found in the role the party plays in formulating coherent policy platforms and, relatedly, in its capacity to exercise control over the executive. To achieve this, parties need internal structures that can resolve disagreement and reach decisions. Sometimes, disagreement is resolved when one of the disputants realizes they are wrong—their position rested on an error—but perhaps more commonly, disagreement is resolved when one of the disputants accepts the outcome of a process; they still disagree with the content of the decision, but accept the position reached is the party's policy on the issue. These internal decision-making structures may be rendered less effective if party members openly dissent from their outcomes. As an empirical matter, it may be that the more public dissent there is within the party, the less pressure on party members to accept the outcome of decision-making. And as a normative matter, one of the reasons for party members to accept these decision-making processes and their outcomes is their efficacy: they succeed in ending disagreement and enable the group to move forward with its activities. The less they are able to achieve these ends, the less reason party members have to support them. Almost certainly, the coherence of the party's policy platform and, relatedly, its capacity to control the executive, will depend on some of its members, some of the time, supporting policies they believe to be misguided.

Furthermore, when a legislator is considering breaking from her party's policies, she should consider the link between the party and her electorate.⁸²

⁸² For a discussion from the political science literature on the extent to which electoral pressure maintains party loyalty, see C. Mereson and O. Shvetsova, *Party System Change in Legislatures Worldwide* (CUP 2013) esp 36–50.

If she was elected because of the party—if her electorate were picking a party, rather than selecting her personally—to then go against the party risks undermining the connection between the voters and the legislature. The more radical the gap, the more problematic this becomes. A voter who cast a ballot for a representative standing as a conservative might feel justifiably annoyed if the representative then decided to convert to the extreme left. And, again, if this behaviour became commonplace the operation of representative democracy would be undermined: the ability of the voters to determine the broad policy direction of the state would be significantly weakened.

These last few paragraphs have argued that politics is a team game and not—as critics of political parties seem to think—an individual sport.⁸³ Like all team activities, those engaging in the event must adapt their conduct to fit with others on their side. The (moral) benefits of being part of a team, derived from the ends that the team can achieve but the individual, acting alone, could not, will often justify the acceptance of decisions that the individual would not otherwise endorse. But it should be emphasized that these arguments are partial: they do not show that slavish adherence to the party line is always justified. Representative democracy can function perfectly well if most party members dissent from their party's platform on some occasions—and even if a few malcontents dissent on most occasions. Sometimes, indeed, when faced with a bad decision by the party representatives ought to oppose it, no matter what demands the party makes of them. But the operation of representative democracy does depend on the existence, and health, of political parties—and this gives legislators reason to support their operation.

(iii) The Regulation of Political Parties

Political parties occupy an ambiguous place within the legal order. With most social institutions it is easy to say—initially—whether they fall within the public or the private sphere. Families and companies, for instance, are private, whilst local councils and legislatures are public. Of course, as was discussed in the previous chapter, that initial assessment will often need to be qualified. Many private entities resemble public bodies in certain respects, and public entities can sometimes function like private bodies. Nevertheless, the starting point of the analysis is reasonably clear. With political parties it is far harder to know where to start.⁸⁴ Looked at from one angle, they appear to be

⁸³ On the importance of leaders understanding politics as a team enterprise, see A. Brown, *The Myth of the Strong Leader* (Vintage 2014) esp 353–59.

⁸⁴ D. Grimm, 'The Origins and Transformation of the Concept of the Constitution' in D. Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 27–30.

private bodies: entities that share more similarities with clubs and charities than public bodies. Membership of political parties is (almost always) optional. If membership is offered to them, individuals can choose whether or not to join the group and can, normally, leave at any time. And, like private entities, the authority parties claim over their members is limited; normally, the worst sanction a party can exert is expulsion. Two of the key features of private groups—the centrality of consent and the limited authority they possess over their members—are normally characteristics of political parties. But looked at from another angle, political parties resemble public bodies. Their goal is to exercise control over the apparatus of the state and—when the party is ideological rather than sectarian—to exercise this control for the benefit of the whole of the state’s population.

As constitutional orders move along the spectrum from multi-party towards single-party systems, the resemblance of parties to public bodies becomes more striking, and their commonalities with private bodies reduces. In a single-party state, like China, the Party is part of the constitutional order. There are other constitutional institutions that are involved in these decision-making processes that are formally separate from the Party—China’s legislatures, for instance, contain representatives who are not Party members—but these bodies are under the control of the Party. They only have the latitude permitted them by the Party, and the Party controls their membership. The effective state constitution—the set of rules that creates and shapes the power of state institutions—is the Party’s constitution, with the formal state constitution (the constitution with a capital ‘c’) of subsidiary importance. In some areas, this formal constitution does have effect, but only where it is permitted to do so by the structures and institutions of the Party.

It might well be asked why one-party states bother having a party at all; that is, why they keep the structures of the party separate from the structures of the state so that decisions made by the party must then be re-made, rubber-stamped, by state institutions.⁸⁵ It is possible for a state to function without any party apparatus—monarchies and military dictatorships often make do without parties—but many undemocratic regimes, including China and the old Eastern Bloc countries, maintain a formal distinction between party and state. Part of the explanation for this may be historical, a reflection of the ideology of the group that formed the state. Many one-party states were founded by groups that were Leninist in outlook, and took their lead from his book, *What is to be Done?*. That volume addressed a fundamental

⁸⁵ See the discussion in Huntington (n 75) 424–28.

tension in the Communist movement.⁸⁶ On the one hand, the advent of a socialist society was presented by Marx as historically inevitable, the product of inexorable historical forces. On the other, many who were attracted to Marx, to the communist cause, were drawn by the apparent moral appeal of his depiction of a socialist society. The question of what a dedicated Marxist should do was, then, unclear: if socialism was inevitable, there was no point in campaigning, the Marxist should sit back and watch it develop—but if it was morally attractive, surely the Marxist should be on the streets fighting for its creation? Lenin robustly rejected the seeming consequences of historical inevitability, and argued that the rising of the proletariat needed the leadership of an organized group; the Party.⁸⁷ The Party's task was to train, protect, and guide the proletariat; to ensure that the most was made of the inevitable conflicts—predicted by Marx—that arose between the exploiters and the exploited.⁸⁸ Purported Marxist-Leninist states, such as China, often grew out of Marxist-Leninist revolutionary movements, and inherited an ideological commitment to the continued existence of a party as the means to guide and facilitate class struggle.⁸⁹ The role of a party, in this system, is as combatant within society that seeks to exercise control over public power, but not as a player within the state's constitutional structures, constrained by those rules. This leaves no legitimate space for rival parties, which would only serve to hamper the work of the revolutionary movement. On this account, the Party was both sectarian and technocratic. It existed to further the interests of one part of the state, and did so by giving leadership to that section of the community.

Single-party states may dress themselves in Marxist-Leninist clothes, but it is hard to believe the durability of the party in these systems depends entirely—or even significantly—on their ideological heritage. More prosaically, a number of political scientists have ventured functional explanations for the continuation—and apparent flourishing—of parties within one-party states.⁹⁰ Though there are a number of variants of the argument, most present the party as a means through which rulers gather community support for the regime. This may be through elite bargaining: the party embraces the

⁸⁶ G. A. Cohen, 'Historical Inevitability and Human Agency in Marxism' (1986) 407 Proceedings of the Royal Society (Series A) 65.

⁸⁷ Huntington (n 75) 339–66; J. C. Scott, *Seeing Like a State* (Yale University Press 1998) chapter 5.

⁸⁸ V. I. Lenin, *What is to be Done?* (R. Service ed, Penguin 1988) 152–55, 185–88.

⁸⁹ China's ideological embrace of Marxist-Leninism is made explicit in the Preamble to the Chinese Constitution.

⁹⁰ See the discussion in B. Magaloni and R. Kricheli, 'Political Order and One-Party Rule' (2010) 13 Annual Review of Political Science 123.

powerful groups within society and facilitates agreements between them.⁹¹ But it may also enable the leaders to connect with their people directly. Membership of these parties is often extremely large—there are many millions of members of the Chinese Communist Party—and membership of the party seems to draw individuals into collaboration with the regime. This may bring material benefits—there may be social and financial advantages to party membership—but also, more generally, these individuals may regard themselves as implicated in the regime's actions.⁹² It could be that the very act of joining the party may cause them to identify with it, and, as a consequence of this identification, may make them more tolerant of the acts of the regime. It could be these systems maintain parties in order to penetrate society: they provide a means through which an undemocratic regime can engage its population and draw a significant proportion of that population into the activity of governing. In both the Chinese and Soviet systems once the governing party was well-entrenched it sought to shed its class background and sought to present itself as a party of the people as a whole, perhaps hoping to add to the stability of the state.⁹³ Whereas Lenin saw the role of the party as a means to awaken the people, these—more cynical—explanations contend the direct opposite. The party is now acting as a soporific: encouraging state members to accept a constitutional order that they should be working to change.

Whatever the instrumental advantages of parties in these systems, single-party states are inherently unattractive. Even when they work as well as possible, they still inhibit the operation of representative democracy: they prevent voters being given a genuine choice at elections and, equally importantly, prevent citizens forming their own parties and contesting elections if they dislike the ruling class. Single-party states should work towards becoming multi-party systems, but, in the absence of such a shift, the constitutional position of the party merits examination. In a single-party system, the party cannot be regarded as, in any respect, a private entity. It is a public body, and, as such, it should be (though, of course, it vanishingly rarely is) subject to the same sorts of legal controls as other public bodies. As a public body, the party should be open to all. Membership should be open to all citizens and, once a member, access to offices within the institution should be regulated by fair

⁹¹ *ibid* 126–28; A. Brown, *The Rise and Fall of Communism* (Vintage Books 2009) 132–34, 456–58.

⁹² Magaloni and Kricheli (n 90) 128–30.

⁹³ In the programme endorsed by the Twenty-Second Congress of the Soviet Union in 1961 and in Jiang Zemin's 'Three Represents' speech in 2001. See D. Shambaugh, *China's Communist Party: Atrophy and Adaptation* (University of California Press 2008) 111–15; Brown (n 91) 255–57, 455–56.

and transparent procedures. As a public body, the manner in which the party makes decisions should be subject to public involvement and public scrutiny; citizens are entitled to know how decisions are made, and to be given an opportunity to engage with this process.

Whilst China is a clear instance of a single-party state, other states that are plainly not governed by a single party may share some of the features of a single-party system. Indeed, in many countries, the diversity of parties is limited: a small number of large parties come to dominate the political scene. The difficulty of creating, and then gathering support for, new parties constrains their emergence. In the USA and, to a lesser extent, the United Kingdom, political power tends to oscillate between two large, and very broad, parties. In these systems, political parties are not part of the state; they do not monopolize public power. The parties shift in and out of power over time, and, even at a single point in time, it is unlikely that all of the elected institutions within the state will be controlled by the same party. Partly for this reason, the state's constitutional order limits what these parties can achieve. In contrast to China, the obedience of American and British parties to the state constitution is normally not a matter of choice, but of compulsion: in general, any constitutional changes they wish to make must be undertaken through the processes set by the constitution. However, the strength of the two parties' dominance over the system entails that individuals' engagement in the democratic process is largely mediated through one or other of these parties—either directly, by becoming a member, or indirectly, by seeking to persuade a party to adopt a particular policy.

In the chapter on civil society, we saw that private bodies should sometimes be treated as if they were public bodies: they had come to possess state-like power, and, for that reason, should be treated in state-like ways. On occasion, political parties may also fall into this category. The closer parties move towards the single-party model, the easier it is to justify imposing public law-type obligations on them. So, in a system like that found in America, a system that is very strongly dominated by two parties, the state might properly impose constraints on the ways that these parties treat potential members. Whilst it is conceivable that these would-be members could establish a new party, the practical reality is that their engagement with democratic institutions will be mediated through one or other of these parties. For this reason, the capacity of citizens to participate in these parties becomes a public issue, and not merely a private matter. In such a system political parties might be subject to various types of public law-style regulation. So, for example, perhaps the grounds on which parties can reject applications for membership, or deny individuals the opportunity to participate in the selection of leadership candidates could be subject to

legal control.⁹⁴ The state might refuse to permit parties to exclude members on grounds of race or sex, or it might apply a broader test of reasonableness: only those whom the party could show rejected the party's ideological stance could be excluded.

The discussion of the regulation of political parties in the past few paragraphs focused on the line between single-party and multi-party states and its implications for the relationship between parties and citizens. In single-party states, it was argued, the party is a public body, and should be treated as such. And in multi-party states that approach the single-party model, these parties are private entities, but should be treated as if they were public to the extent that these systems resemble the single-party model. A second area of regulation arises at the point of intersection between parties and the state. State institutions, including the legislature, should be oriented towards the well-being of the citizenry. Some political parties share this orientation—ideological parties are at least aspiring to secure this end—but other types of party—sectarian parties—only seek the good of a portion of the community, and do not match their goals with those of the state. Most systems, perhaps even most parties, contain a mix of sectarian and ideological elements. Regulation at the point of interaction between parties and state institutions has at least two objectives: first, to prevent ideological and sectarian parties monopolizing political power and the system slipping into a single-party state; secondly, and more specifically, to mitigate the implications of sectarianism.

James Madison argued that factions—what we have termed sectarian parties—were an inevitable part of the democratic process, and contended that the constitution should be structured to prevent such parties from dominating state institutions. Madison identified two ways in which this should be achieved: first, by creating constitutional structures that make sectarianism a less attractive option, and, secondly, through constitutional structures that will prove resilient to party control.

First, Madison argued that the disciplines of election served to reduce the dangers of factionalism by compelling candidates to appeal to the wider public interest if they want to get elected.⁹⁵ This could be seen as a forerunner of Anthony Downs' game-theory explanation of the rush for the middle ground in politics: if you want to win the vote, you cannot confine your appeal to narrow sections of the electorate.⁹⁶ Whilst elections may serve

⁹⁴ Rosenblum (n 1) 199–202.

⁹⁵ Madison (n 41) No. 10, 126 (Madison). For discussion of the extent to which this actually happens, see Ware (n 67) 226–31.

⁹⁶ Downs (n 19); K. A. Shepsle and M. S. Bunchek, *Analysing Politics: Rationality, Behaviour and Institutions* (Norton 1997) 105–11; Ware (n 67) 18–21.

to reduce the effectiveness of sectarianism in some systems, they are far from a cure. It may serve only to broaden the sectarian appeal of the party—as the party extends its area of concern to cover just enough of the electorate to allow it to win power. In deeply divided societies, sectarian politics may prove especially powerful: in Northern Ireland, Unionist parties were able to govern without interruption from 1922 to 1971, excluding the Nationalist community.⁹⁷

A further version of the argument for using political pressure as a device to mitigate factionalism turns on the interaction of parties within the chamber; political parties must cooperate in order to exercise power. There are two versions of this argument: the noble and the cynical. The noble is found in the work of J. S. Mill, and is echoed in the writings of contemporary scholars of deliberative democracy. Mill contended that the conflict of parties within the legislature could, in principle at least, constitute a form of ‘trial by discussion’ through which the better argument would be identified.⁹⁸ Listening to the debate, representatives would shift their position in response to the speeches. Perhaps unsurprisingly, Mill was disappointed by the reality of politics: the high-minded discussions he hoped for simply did not occur within the legislature.⁹⁹ Mill’s disappointment might have been lessened had he witnessed the discussions that go on within political parties—these internal discussions are unlikely to constitute paradigms of rational debate, but may well come closer than the debates on the floor of the chamber.

Adam Ferguson provided a more cynical version of this argument. Ferguson argued that political parties were motivated by a desire to secure profit and power through exercising control over state institutions—the task of the constitution was to act as a constraint on this self-interest.¹⁰⁰ To make things happen in the legislature, the parties were compelled to compromise and negotiate—and this process served to mitigate sectarianism. Mill and Ferguson provided similar arguments about the operation of the legislature, but with differing levels of confidence in the capacity of parties to be swayed by reason. For Ferguson, compromise was the result of rival parties, driven by self-interest, being forced into compromise in order to exercise power,

⁹⁷ D. McKittrick and D. McVea, *Making Sense of the Troubles: A History of the Northern Ireland Conflict* (Viking 2012) chapters 1 and 2.

⁹⁸ Mill (n 4) 282–84; Rosenblum (n 1) 148–56.

⁹⁹ Mill (n 4) 283; Rosenblum (n 1) 149–51; J. Waldron, *The Dignity of Legislation* (CUP 1999) 32–35.

¹⁰⁰ A. Ferguson, *An Essay on the History of Civil Society* (F. Oz-Salzberger ed, CUP 1995), 118–31; R. Branson, ‘James Madison and the Scottish Enlightenment’ (1979) 40 *Journal of the History of Ideas* 235.

whilst for Mill, this compromise was the product of reasoned debate, which included careful examination of the cogency and force of the arguments presented.¹⁰¹

For Ferguson's proposal to function successfully, parties must operate in a constitutional environment that requires them to cooperate if they wish to achieve a share of power. In strongly multi-party systems, this may happen without needing the constitution to be structured to encourage such interaction. In these systems, coalition government may be commonplace: if parties wish to exercise power, they must join with other parties. But even in strongly multi-party systems there is a risk that a single coalition will dominate the constitution and exclude other parties from government—after all, when we look inside a political party it can sometimes look like a coalition of groups, struggling to control the levers of party power.¹⁰² Consequently, the distinction between a coalition of parties and a party that is a coalition of groups may sometimes be hard to draw. If cooperation does not arise as a by-product of competition between parties, there are a number of constitutional devices that can be used to encourage, or even require, such engagement.

First, minority parties can be given rights within the constitutional order that compel, or encourage, the majority to engage with them. The American filibuster rule is an example of such a right.¹⁰³ The Senate's filibuster rule has taken various forms over the years, but presently requires a majority of three-fifths of those competent to vote to close debate on a measure.¹⁰⁴ The Senate's decisions on legislation are normally made through simple majority, but the filibuster rule effectively enables any group of more than two-fifths of senators to transform the voting rule from simple majority to supermajority. The filibuster rule requires a form of power-sharing—sometimes the majority may need to compromise with the minority to get legislation through. At the very least, it gives the minority a weapon it can use to protect its position within the constitutional order. To the extent that it is successful, the success of the filibuster rule depends on restraint by both the majority and minority groups. It is likely that the majority could override the filibuster rule if it wished, and if the minority decided to use the filibuster on a daily basis,

¹⁰¹ Mill (n 4) 282–84.

¹⁰² For an account of parties as coalitions, see Mershon and Shvetsova (n 82).

¹⁰³ For a discussion of examples that range beyond the filibuster, see A. Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (OUP 2007) chapter 3.

¹⁰⁴ On the origins of the filibuster rule, see E. Bondurant, 'The Senate Filibuster: The Politics of Obstruction' (2011) 48 *Harvard Journal on Legislation* 447, 470–76. See also the discussion in N. W. Barber, 'Why Entrench?' (2016) 14 *International Journal of Constitutional Law* 325.

such an override might be justifiable.¹⁰⁵ The filibuster rule can only operate in systems in which there is already a certain degree of respect between parties.

A more radical method for producing compromise creates constitutional structures that compel the creation, or the effective creation, of coalition government.

Perhaps the clearest example of this is found in consociational systems. In consociational systems the constitution is premised upon—indeed, relies upon—the parties representing sectional interests.¹⁰⁶ The institutions of government are structured so that rival ethnic or religious groups are forced to share the power of the state. In Northern Ireland, for example, the constitution establishing the devolved assembly requires that members elected to it register a designation of identity (nationalist, unionist, or other).¹⁰⁷ The Unionist group is largely Protestant and the Nationalist group is largely Catholic. Executive power must be shared, with ministerial posts shared between Nationalists and Unionists.¹⁰⁸ In some areas legislation can only be enacted with cross-community consent—this may require a majority of those voting in both the Nationalist and Unionist groups, or a weighted majority (60%) of those voting, including at least 40 per cent of those voting in the Nationalist and Unionist groups.¹⁰⁹

These devices to encourage or compel the mitigation of sectarianism bear a resemblance to invisible hand systems, discussed in the previous chapter. It has been claimed that James Madison invoked such devices in his arguments for the United States Constitution.¹¹⁰ And, more generally, some of the early work on the attractions of political parties emerged from the same intellectual environment—the Scottish Enlightenment, a movement that included Adam Ferguson—that played a significant role in formulating the invisible hand.¹¹¹ There are certainly some parallels. The previous paragraphs have discussed

¹⁰⁵ A. R. Amar, 'Lex Majoris Partis: How the Senate Can End the Filibuster on Any Day by Simple Majority Rule' (2014) 63 *Duke Law Journal* 1483.

¹⁰⁶ See generally, A. Lijhart, *Democracy in Plural Societies* (Yale University Press 1977) chapter 2, and C. McCrudden and B. O'Leary, 'Courts and Consociations, Or How Human Rights Courts May De-stabilize Power-sharing Arrangements' (2013) 24 *European Journal of International Law* 477.

¹⁰⁷ C. McCrudden, 'Northern Ireland and the British Constitution' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (6th edn, OUP 2007) and C. J. Harvey, 'The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland' in C. J. Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart Publishing 2001).

¹⁰⁸ Northern Ireland Act, ss 16–19.

¹⁰⁹ Northern Ireland Act 1998, s 4(5).

¹¹⁰ D. Prindle, 'The Invisible Hand of James Madison' (2004) 15 *Constitutional Political Economy* 233.

¹¹¹ For a fascinating discussion of the influence of Ferguson and Smith on Madison, see Branson (n 100), esp 246–50.

the role constitutional structures can play in altering the outcome of decisions: the actors entered the process wanting one thing, but, as a result of engaging in the process, many of them will have exited having agreed to something different. As with invisible hand systems, the attractions of these processes depend on the actors recognizing that it is not always possible to shift the opinions of others simply by appeal to arguments over the decision at the point of outcome. Just as a buyer is unlikely to be convinced by the seller's heartfelt belief that the object being sold ought to be valued above the market rate, a politician who cannot see the point in—for example—state funding for the arts or projects that benefit those in a rival community is unlikely to change her mind because her colleague strongly believes in its value.

But whilst there are similarities with invisible hand systems, there are also significant differences. Most importantly, there is no gap between what the actors are seeking—what they try to secure through the system—and the product of the system as a whole. The disciplines of the election and the constitutional devices to encourage compromise instead condition what the actors determine they can reasonably hope to extract from the process: they shift what actors are willing to accept. Invisible hand systems, in contrast, allow actors to engage with the process without the system re-orienting their attitudes towards the eventual product of that process—they do not need to embrace its outcome.

The second of Madison's mitigations of factionalism is broader, and complements the first: the constitution should be structured so as to prevent a faction taking control of all of the institutions of constitutional power.¹¹² There are many different ways in which this can, and should, be achieved. The principles discussed in this book identify four areas in which the constitution should be structured so as to be resilient against factionalism.

First, the principle of subsidiarity, discussed in the next chapter, requires the regional division of legislative power. This extends beyond federalism: subsidiarity speaks to the creation of modestly empowered village-level councils as much as to the creation of powerful, entrenched, regional government. As we shall see, there are a number of reasons why this is valuable, but a secondary attraction is that it creates multiple sites of democratically controlled constitutional power—the power to make public decisions. It is unlikely that a single party will control all of these regional centres of power. The regionalization of power provides a further structure that encourages compromise between parties: the lower and higher levels of

¹¹² See also Madison's later thoughts on parties, discussed in R. A. Dahl, *How Democratic Is the American Constitution?* (Yale University Press 2002) 31–39.

government can accomplish more if they work together than if they remain antagonistic. But it also permits different parties a share in the power of the state, and even if one party (or parties) tends to dominate at the national level, other parties may still be significant within the regions. Depending on the capacity of regional government to resist the encroachment of the centre, regional government may provide a bulwark against domination by rival parties. This may be because the position of the regions is constitutionally protected—by some form of entrenchment—or, more generally, because it is politically difficult to remove the power enjoyed by the regional institutions.

Secondly, the principle of the separation of powers requires the creation of structures that constrain the extent to which a party in control of the legislature controls other constitutional institutions. The principle of the separation of powers plays out in different ways in different states, but it always requires some form of executive independence from the legislature, and some form of judicial independence from the other two branches. These distinctions limit the capacity of a dominant party to control the whole of the power of the state. Of course, constitutions normally permit the citizenry to alter these structures (constitutionally unchangeable features are relatively rare) but, as with the regionalization of power, they can be resilient to change. In a well-constructed state it is, at least, hard for a single party to overturn the autonomy of these parts of the constitution.

Thirdly, civil society provides an alternative set of modes of engagement in political life. Setting aside political parties—which, as we have seen, have an equivocal place within the private realm—private bodies provide ways in which individuals can engage in politics outside of the structures of parties. Companies, charities, trade unions—even families—can lobby state institutions directly. The hazards of this were discussed in the chapter on sovereignty. The power that a private group exercises over the state can threaten the capacity of the state to make independent decisions, and the apparatus of the state can become a tool of the private group. But the influence that private groups exercise over the state normally falls far short of this. Private groups can bring actions in the courts to moderate state policy. They can engage directly with the technocratic part of the executive, perhaps by providing information that should be relevant to the application of that policy. And, of course, they can lobby representatives in the legislature, contesting the representatives' conception of the common good. Part of the point of the separation of powers is to provide multiple forums within the state that enable citizens to engage with state decisions at different levels of abstraction—from the grand questions of state policy in the legislature, through the manner of implementation in the executive,

through to the impact of that policy on individuals in the courts. Private groups can provide the structure—and the support—that is needed to engage with these issues effectively. As Burke noted, it is often in and through these groups that we develop a relationship with the state.¹¹³ These private groups can also enrich the public realm indirectly: providing forums in which people become aware of the needs and wishes of others, and providing means for mutual support.¹¹⁴ Just as the state can, and should, help facilitate and maintain these private groups, they too should help facilitate and maintain the state.

Finally, the principle of democracy itself can require the restriction of the decisions that state institutions can make, and, by derivation, political parties can attempt to achieve through the state's structures. There are various civic rights that are constitutive of democracy and which should not—normally—be interfered with by the state. The most obvious of these is the right to vote, but the right to form parties, to stand for office, to access the court, and a number of others are also features of citizenship, and necessary for democracy to flourish. All of these rights require interpretation—decisions need to be made about their scope, implications, and possible exceptions—and these decisions will be made, must be made, by constitutional institutions. But although there is a range of correct interpretations of these rights—depending on local circumstances and the different weights given to incommensurable values—there are also wrong interpretations, situations in which constitutional institutions have failed to properly understand the demands of democracy. Sometimes these will be wrong and yet should be accepted: the importance of allowing, for example, the legislature to make the decision justifies toleration of error. But sometimes the constitution should be structured to prevent these errors: individuals should be given legally enforceable rights that prevent state encroachment. In these cases, the principle of democracy helps define the content of citizenship—the set of rights and duties that instantiate that institution. In partly determining the relationship between the institution of citizenship and the other constitutional institutions, democracy itself places limits on the ends to which the institutions that establish democratic government can be put. And it serves to limit the extent to which a political party can manipulate the constitution to exclude other voices.

¹¹³ Norman (n 74) 198–200.

¹¹⁴ P. Schmitter and T. Karl, 'What Democracy Is . . . and Is Not' (1991) 2 *Journal of Democracy* 75, 79–80.

Conclusion

This chapter has come to an end at the point at which rights have been introduced. An adequate discussion of civic rights, and citizenship more generally, will require another book, for which these lines are a mere placeholder. Democracy, perhaps more than any of the other principles of constitutionalism, is closely tied to citizenship, to the relationship between the individual and the state. This chapter has argued that it is a mistake to think of democracy as requiring that this relationship be direct and unmediated. Whatever the historical discussion of the meaning and dreams of democracy, within the realities of the state democracy requires the existence of at least two complementary mediating structures. First, the impracticalities of direct democracy demonstrate the need for an elected legislature; one in which the representatives are striving to do their best for the citizenry, but are not tied to the day-to-day wishes of the citizenry on particular issues. Secondly, for the legislature to operate successfully, there needs to be a range of political parties that can act as catalyst for the formation of policy, to exercise control over the executive, and to serve as a channel between electors and the instruments of government.

Subsidiarity

The question of who gets to decide is at the heart of constitutional law. In the chapter on the separation of powers we considered the division of powers between different types of constitutional institution—classically, of course, the courts, executive, and legislature. In this chapter, the division of decision-making along the vertical axis is considered; that is, the division of decisions between democratic units. Subsidiarity addresses the question of which sets of people ought to be included in decisions relating to the exercise of public power, and, allied to this, which legislatures and their associated executives should make these decisions. Subsidiarity speaks both to the constituency that votes for a legislature and, also, to the powers that the legislature should possess. It requires that the boundaries of democratic units be drawn in a way that connects public decision-making to those who are affected by the outcome of those decisions; the group of people who elect representatives to a legislature should also be the group of people whose interests are affected by the decisions of that body. As such, it is tightly intertwined with the principle of democracy, discussed in the last chapter, but it is not contained within that principle. The questions addressed by subsidiarity cannot always be answered democratically, because, sometimes, they are questions that must be answered before democracy can start to function. Nevertheless, as we shall see, the principle of democracy—in particular that principle's insistence on the role of representative institutions—clarifies and shapes the demands of the principle of subsidiarity.

The chapter begins by examining the content of subsidiarity, presenting it as an answer to the boundary question; the question of who should be included within the democratic unit.¹ In so doing, this account of subsidiarity is contrasted with the broader Catholic version of the principle, a version that speaks to the construction of society more generally. The second part of the chapter examines the application of the principle,

¹ F. Whelan, 'Prologue: Democratic Theory and the Boundary Problem' in J. R. Pennock and J. W. Chapman (eds), *Nomos 25: Liberal Democracy* (New York University Press 1983).

considering the implications of subsidiarity at three levels: the allocation of power within the state, the creation of the state, and the implications of subsidiarity at the international level. The chapter closes by considering a rival to subsidiarity: the principle of national self-determination. It will be argued that this principle is incompatible with constitutionalism, and should not be regarded as a guiding principle for the creation and structuring of states.

The Demands of Subsidiarity

There are two versions of the subsidiarity principle that need to be considered: the constitutional principle, chiefly articulated in European Law and scholarship focusing on the European Union, and the Catholic principle, found in various papal encyclicals and writing on Catholic social thought. Historically, it is possible to trace a connection between the two: subsidiarity as a principle of constitutionalism has its origins in the Catholic principle, mediated through German federalism and ending in the European treaties.² But whilst there is a historical connection to be drawn, there are, as we shall see, significant differences between the principles. First, the constitutional principle focuses on the division of public power within the state, whereas, when it turns to the state, the Catholic principle focuses on the public–private divide, the boundaries of the proper reach of the state. In a number of respects, it is similar to the principle of civil society, discussed earlier in this book. Secondly, and allied to this, the Catholic principle is primarily concerned with protecting the position of existing private groups, presenting these as, in some sense, prior to the state. The constitutional principle, in contrast, does not regard the institutions it seeks to empower as having priority over the state, nor is it restricted to institutions that already exist: the constitutional principle can amount to an argument for the creation of new democratic units, as well as an argument for the empowerment of existing bodies. However, the two principles are not incompatible. It is perfectly possible to support the Catholic principle of subsidiarity and the constitutional principle, though subscribing to one principle does not entail support of the other.

² N. Emiliou, ‘Subsidiarity: An Effective Barrier Against “The Enterprises of Ambition”’ (1992) 17 *European Law Review* 383, 388–91; J. Peterson, ‘Subsidiarity: A Definition to Suit Any Vision?’ (1994) *Parliamentary Affairs* 115, 118.

(i) The Constitutional Principle

Whilst it will be argued in this chapter that the principle of subsidiarity is a principle of constitutionalism—and so a principle that applies to all states at all times—one of its clearest formal statements is found in European Law. This section will begin with an examination of the principle of subsidiarity found in European Law, but will use this as a starting point for a broader account of subsidiarity, one which applies beyond the borders of that entity. The first paragraph of Article 5(3) of the Treaty on the European Union reads:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.³

A complementary, and broader, expression of subsidiarity is found in Article 1 of the Treaty, which states that decisions will be taken ‘as closely as possible to the citizen’.⁴ This stands as a directive constitutional principle: a principle which seeks to guide law-makers, but which cannot be enforced by a court. As a directive principle, there is no reason to regard Article 1 as confined to those areas of shared competence covered by Article 5, nor, indeed, confined to the relationship between the European Union and Member States. Though unenforceable, it can be read as a recognition of the value of distributing democratic decision-making within states; pushing decisions down to regional levels when appropriate.

The European principle of subsidiarity, when it applies, asserts that the exercise of a power by Member States is preferable to its exercise by the European Union. The broader version of the principle, found in Article 1, goes further, pressing for the regionalization of power within Member States. Within Article 5, the demand for the regionalization of power is qualified by a form of efficiency test: powers are allocated to Member States unless their objectives ‘cannot be *sufficiently* achieved’ by those states. It is not enough that there is some benefit to centralization, that the Union will better achieve the goal set, it must also be the case that this benefit is such as to outweigh the preference for Member State action. Finally, it is implicit within Article 5

³ The second paragraph, less relevant for our purposes, continues: ‘The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.’

⁴ Discussed in G. Bermann, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’ (1994) 94 *Columbia Law Review* 331, 338–44; Peterson (n 2).

that the power should be exercised by the Member State that will be affected by the power. This seems too obvious a point to be worth labouring, but it is a vitally important qualification. Article 5 does not *just* embody a preference for smaller units over large ones: it allocates powers to the states containing the people who will be affected by the power. So, Article 5 would not provide an argument for allocating parts of the United Kingdom's environmental policy to France, even if that state had a technical superiority in the area and would acquit the task better.

There has been surprisingly little discussion about why the European model of subsidiarity is desirable. The motivation for subsidiarity's inclusion within the Maastricht Treaty was stirred by institutional rivalry with noble principles of political philosophy very much in the background. Subsidiarity was included in order to placate those Member States, and the regions of Member States, who feared that too much power was shifting from the national to the European level.⁵ This explanation may be historically accurate, but it is normatively empty—after all, protecting states and regions is not a good in itself—but implicit in this historical account are at least two putative defences of the principle—one mistaken, and one correct.

An obvious and tempting argument that might be advanced is that subsidiarity is attractive because it helps reduce the risk of tyranny by splitting governmental power.⁶ By federating power, the constitution ensures that no single group of people is given absolute control of the state and, additionally, that collective action will frequently require negotiation and compromise between different levels of government.⁷ This argument is the more attractive flip side of Dicey's accusation that federated government is weak government.⁸ This interpretation of subsidiarity falls within the doctrine of negative constitutionalism, outlined in Chapter 1. It presents subsidiarity as a principle that slows down the state and, by so doing, protects the liberty of state members. It echoes the liberty-model of the separation of powers, applied in the vertical rather than horizontal constitutional axis, and it is unattractive for many of the same reasons, which need only a brief recapitulation here. First, the interpretation is unattractive because the protection of liberty by regional division of power is contingent: it depends entirely on the relative merits of

⁵ A. Estella, *The EU Principle of Subsidiarity and Its Critique* (OUP 2002) chapter 3; M. Wilke and H. Wallace, *Subsidiarity: Approaches to Power Sharing in the European Community* (Royal Institute of International Affairs Discussion Paper 27, 1990) 3.

⁶ A. Føllesdal, 'Subsidiarity' (1998) 6 *Journal of Political Philosophy* 190, 204–05.

⁷ D. Elazor, *Exploring Federalism* (Alabama University Press 1987) chapter 3.

⁸ A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 171–73.

the centre and the regions. As William Riker acerbically commented, some of the principal beneficiaries of American federalism were the racists who dominated the politics of southern states.⁹ Here, weak central government led to oppression rather than liberty. Secondly, this understanding of subsidiarity is unattractive because it does not explain which powers should be allocated to which institutions. As with separation of powers, if our sole goal was to slow down the state, we could allocate decisions at random—perhaps even deliberately allocating them to institutions with no knowledge or interest in them.

A better interpretation of subsidiarity draws on the role the principle plays in structuring the democratic process.¹⁰ Whilst it is possible to imagine Article 5 lifted out of the Treaty and placed in the constitution of an undemocratic state, allocating power between regional bureaucrats, in the context of the European Union subsidiarity provides a distinctive answer to the question of the boundaries of democratic units. It becomes a principle that shapes the structures within which democracy operates, identifying the persons who should be included within the constituencies of these bodies. The principle of subsidiarity—subsidiarity as a principle of constitutionalism—should be understood as a development of one of the oldest and most basic maxims of democratic government: that what touches all should be approved by all.¹¹

This maxim is sometimes attributed to Edward I, who included it in one of the writs summoning the Parliament of 1295.¹² Edward I probably included the phrase to indicate that he expected delegates to come with power to bind their communities,¹³ an early invocation of the mandate theory of representation, in contrast to some earlier parliaments which were summoned solely to advise the king.¹⁴ This suggestion of limited delegated authority echoes the Roman Law origins of the phrase, where it dealt with the joint administration of property, requiring that the consent of all administrators be obtained before

⁹ W. Riker, *Federalism: Origin, Operation, Significance* (Little Brown Co 1964) 24.

¹⁰ See also the discussion in A. Føllesdall, 'Subsidiarity and Democratic Deliberation' in E. Eriksen and J. Fossum (eds), *Democracy and the European Union—Integration Through Deliberation* (Routledge 1999).

¹¹ *Quod omnes tangit ab omnibus approbetur*. On the wide range of interpretations given to this maxim, see G. Post, *Studies in Medieval Legal Thought* (Princeton University Press 1964) chapter 4.

¹² W. Stubbs, *Select Charters* (OUP 1913) 480; J. E. A. Jolliffe, *The Constitutional History of Medieval England* (2nd edn, A & C Black 1947) 349–50.

¹³ The writ also requires that delegates have 'full and sufficient power to bind their communities ... (so that) the business in hand may not be held up in any way through lack of such power'. J. B. Morrall, *Political Thought in Medieval Times* (Hutchinson 1958) 63.

¹⁴ Morrall (n 13) 61–65; M. L. Colish, *Medieval Foundations of the Western Intellectual Tradition: 400–1400* (Yale University Press 1997) 349.

action was undertaken.¹⁵ The depiction of members of legislatures as holding a defined mandate from their electors, and then negotiating with the king and other representatives in the chamber, is far removed from the account of representation given in the previous chapter; indeed, it looks more like an account of international treaty negotiation than of domestic law-making.¹⁶

The mandate interpretation of the maxim was swiftly abandoned, and, even in the mediaeval period, it appears to have shifted to a demand that those affected by a decision be able to participate in the deliberative process, rather than that they necessarily endorsed the outcome.¹⁷ Recently the maxim has been glossed as ‘what touches all concerns all’—a subtle but interesting shift in terminology.¹⁸ It is this construction of the maxim that Jeremy Waldron describes as unexceptional, an obvious and uncontroversial part of a democratic model. Waldron connects the maxim to the demand for equal counting that he sees as crucial to fairness in democratic processes.¹⁹ Understood in this way, the maxim engages with the question of the bounds of the political unit, defining the people who ought to have a say over a particular issue.

Given its broadest reading, though, the maxim would prove impractical. Does it really require that *everyone* affected by a decision is entitled to a say? Recently, Robert Goodin has argued that this is, indeed, the answer that should be given to the boundary problem: all of those possibly affected by a decision should, in principle, be included within the democratic unit making the decision.²⁰ Many years earlier, Gordon Tullock advanced a similar argument, though giving it an economic gloss.²¹ Tullock asserted that democratic government exists to internalize economic externalities—or, to put it more simply, to ensure that those who will suffer the burdens and win the benefits take the decisions. It is this group of people who are most likely to reach the most economically efficient decision, and so the boundaries of the democratic

¹⁵ Justinian’s Code v.59.5.2; R. C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (CUP 1995) 84. Other passages might also reflect the principle: Post (n 11) 168–75.

¹⁶ And so Maitland may be optimistic when he presents the Parliament of 1295, the so-called ‘Model Parliament’, as defining the outline of future assemblies where the king in Parliament was sovereign: F. W. Maitland, *The Constitutional History of England* (CUP 1931) 69–76.

¹⁷ Post (n 11) 171–75.

¹⁸ R. W. Lovin, ‘Perry, Naturalism and Religion in Public’ (1989) 63 *Tulane Law Review* 1517, 1520. See also L. Fuentes-Rohwer, ‘The Emptiness of Majority Rule’ (1996) 1 *Michigan Journal of Race and Law* 195, 224.

¹⁹ J. Waldron, *Law and Disagreement* (OUP 1999) 114.

²⁰ R. Goodin, ‘Enfranchising All Affected Interests, and Its Alternatives’ (2007) 35 *Philosophy and Public Affairs* 40.

²¹ G. Tullock, ‘Federalism: Problems of Scale’ (1969) 6 *Public Choice* 19. See also Føllesdal (n 6) 205–07.

unit should track the impact of the decision. The institutional implications of Tullock's and Goodin's positions are dramatic.

Under these proposals, each voter would be part of a number of different democratic groups, groups that would track the various collective decisions that impacted on her life. The problems that this raises are instructive. First, trying to allocate each political decision to the constituency affected by it would require the creation of a huge number of deliberative units: Tullock speculated pessimistically about a world with 5,000 or 50,000 such forums. Secondly, some issues, probably most issues, affect enormous numbers of people. To allow everyone a say would require massive democratic units that far exceed existing state boundaries. Many outwardly local issues might, perfectly plausibly, be argued to be of international interest: we all have a concern with the environment, heritage, and fair government. Goodin's proposal goes even further: perhaps most, or even all, decisions could affect anyone, alive or dead. He notes that this would 'mean giving virtually everyone everywhere a vote on virtually everything decided anywhere'.²²

As Goodin wryly continues, his proposal may not be practical 'for one reason or another'.²³ Neither Tullock nor Goodin are seriously advocating the consequences of their arguments; their purpose is to expose the difficulties raised by the boundary problem, and dodged by most writers on democratic theory. Goodin, in particular, raises the issue to lead us to think about ways we could mitigate the injustice of our present democratic structures, perhaps by compensating those who are not included within these constituencies but who are affected by their decisions. The methodology that shapes the account of the principles of constitutionalism provided in this book would not embrace an answer to the boundary problem that was unachievable, or which would prevent the state, or, indeed, a society more generally, from advancing the well-being of its people. As has been argued in earlier chapters, the principles of constitutionalism are ideals, but they are ideals we ought to pursue, conditioned by the constraints of human nature. This methodological commitment shapes the answer that subsidiarity gives to the boundary problem.

The previous chapter examined the demands of democracy. That chapter argued against direct democracy, and, instead, argued for the creation of legislatures, representative institutions. Building on that argument, the boundary question should be regarded as a question that relates to the boundaries of legislatures and their linked executive branches. This institutional aspect of the question places constraints on the answer that can be given to it. So, Tullock's suggestion that many thousands of democratic units should be created can be

²² Goodin (n 20) 68.

²³ *ibid.*

rejected for this reason. A radical increase in the number of legislatures would push civic virtues close to their limit; there is a limit, probably a very low limit, to the number of deliberative bodies that can be usefully established and operated effectively.²⁴ A proliferation of deliberative bodies would lead to confusion over the tasks and responsibilities entrusted to each, a confusion that may be cynically fanned by those holding power. And, allied to this confusion, would come a failure of the institutions to connect with their constituents: voters would find it hard to keep track of which institutions were making which decisions. These legislatures would not be responsive to the needs and wishes of voters, nor would they be able to play their crucial role in regulating disagreement within the constitution.

The creation of massive democratic units is also unattractive for institutional reasons. Goodin moots the possibility that over-inclusive democratic units may not present a problem because those who are not interested in an issue will vote at random; the non-interested voters will cancel each other out, and the vote will be decided by those with an interest.²⁵ Setting aside for the moment the worry that not everyone's interest is equal (I may well be interested in the countryside of rural France, but should my interest, resting on the occasional visit, be given the same weight as those who live there?) once the boundary question is placed in an institutional context, the broader problems of very large units becomes plain. As the deliberative body becomes larger, the input of each voter will be smaller.²⁶ And, as the remit of the chamber widens, the range of issues being decided is likely to be of less relevance to them. Even if the votes of uninterested voters balance out, the connection that voters will have with their representatives is likely to be—given the size of constituencies—comparatively weak. Though the political science literature is equivocal, it seems reasonable to suppose that these factors would make it difficult for a very large democratic unit to function successfully—especially if, having applied the principle of subsidiarity, the very large legislature delegated the bulk of its decisions to other bodies, leaving it with little to do.²⁷

This leads us back to the other element found in Article 5: the version of an efficiency test implied by the demand that powers not be sent to a smaller democratic unit when the objectives of that power cannot be 'sufficiently achieved' by that body. The question of what we should understand

²⁴ My guess is that this number is as low as three or four levels of democratic decision-making.

²⁵ Goodin (n 20) 58.

²⁶ R. A. Dahl, *On Democracy* (Yale University Press 1998) 108–14.

²⁷ M. Koenig-Archibugi, 'Is Global Democracy Possible?' (2010) 17 *European Journal of International Relations* 519, 529–31. Koenig-Archibugi notes that some very large democratic units, such as India, with over 700 million voters, seem to function reasonably well.

the objectives of the action to be should be understood within the context of the discussion of democracy in the previous chapter. That chapter argued for an understanding of democracy that required the creation of successful legislatures; bodies that give citizens control over the state, but did so in such a way as to foster good government. It is this conception of democracy that informs and shapes subsidiarity.

Sarah Song has emphasized the importance of effective democratic units in her work on the boundary question.²⁸ Song contends that successful democratic units are underpinned by social solidarity: those within the unit listen to each other, are willing to shift their claims after deliberation, and, crucially, value the interests of others within the group.²⁹ Turning the focus to the legislature, we might say that a successful democratic unit has a legislature that is democratically vibrant. It is a body that fulfils the demands of the principle of democracy, discussed in the last chapter, succeeds in engaging with citizens and, through that engagement, produces coherent, competent, legislation. The connection between a successful legislature and a well-functioning citizenry runs both ways. A vibrant legislature will be both a product of, and act as a catalyst for, the type of social interaction Song identifies as grounding democratic government. That subsidiarity requires the creation of vibrant democratic units of this type, units within which democracy can flourish, has at least three implications for the subsidiarity principle.

First, the institutional constraints imposed by the principle of democracy require the maxim—what touches all should be approved of by all—to be qualified in both whom it excludes and whom it encompasses. As we have seen, some of those who write on the boundary question in political theory assume that it would be possible to create a fresh democratic unit for every question that arises. Once the institutional context of democracy is recognized, this assumption becomes impossible to defend. The possible number of legislative and executive institutions required for the successful functioning of democracy is limited, and, given the limits on the number of institutions that can be created, decisions must be grouped. Each legislature, to be effective, will need a broad jurisdiction with a wide range of decisions falling within its competency. The lines drawn by subsidiarity will, unavoidably, be both under- and over-inclusive. They will be under-inclusive when people affected by a decision are shut out from the forum in which the decision is to be made. They will be over-inclusive when those not affected by a decision are

²⁸ S. Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should be Bounded by the State' (2012) 4 *International Theory* 39. See also D. Miller, 'Boundaries, Democracy, and Territory' (2016) 61 *American Journal of Jurisprudence* 33, 40–44.

²⁹ Song (n 28) 47–48, 59.

included within the forum. Before a power is allocated to a democratic unit, or a new democratic unit is created, subsidiarity requires us to ask whether that body will provide a vibrant democratic forum in which decisions can be made. Ascertaining the reach of the effect of a decision is only the first step of the subsidiarity principle: it would be a mistake to allocate powers to, or to create, a body that will be democratically moribund, even if the catchment area of the institution provides a good match with the constituency affected by a power. That subsidiarity requires such bodies are both over- and under-inclusive is not a qualification of the subsidiarity principle, but rather a working through of its demands.

The very rough way in which subsidiarity allocates powers, insisting that a large number of issues be gathered together, enables the maxim to escape a telling criticism advanced by Frederick Whelan.³⁰ Whelan raises an ingenious challenge to the maxim: whilst the attractions of allowing those who will suffer the burdens a say in a decision are obvious, it is harder to see why those who will benefit from the decision should be given equal consideration. Perhaps only those who will bear the burden should be permitted to participate? By creating a relatively small number of institutions, subsidiarity requires that large numbers of issues be grouped together. Each institution will exercise and regulate a range of different powers, and this may reduce the risk that some luckless folk will bear the burden of every decision by the body and will never see the benefits of any action. Hopefully, those within the catchment area of the body will find that they are sometimes winners and, only sometimes, that they are losers.

Secondly, given that the existence of social solidarity is a consideration relevant to the application of subsidiarity, where there is a group that enjoys a degree of social solidarity—whether because of the existence of a national group, or because of the existence of a successful pre-existing democratic unit—and the boundaries of this group roughly track the boundaries of a significant range of decisions, subsidiarity may require that the boundaries of the democratic unit track this group. Indeed, as Sarah Song argues, the attractions of matching decisions to communities characterized by solidarity can provide a *prima facie* argument for following the existing territorial boundaries of the state.³¹ The better that an existing state is performing—the more that its existing democratic institutions are successful, and are the focal points of solidarity and trust that can underpin democracy—the stronger the argument is for maintaining the current division of public power. Even undemocratic states and regions may prove significant: shared experience of an oppressive

³⁰ Whelan (n 1) 16–19.

³¹ Song (n 28).

regime (or of an imperial power) may draw people together. Even without a pre-existing set of democratic institutions, this shared constitutional history may lead people to accept these boundaries as legitimate ways of demarcating public decision-making. These claims rest, of course, on empirical assertions, and—as Song’s acknowledgement that this is only a *prima facie* argument makes plain—there may be situations in which existing states completely lack these features, and the existing boundaries are of little or no significance.

Thirdly, the absence of shared social solidarity may present problems for democracy. Where there are intermingled social groups, perhaps divided by religion or nationality, a territory may possess an abundance of social solidarity, but the social solidarity may be located within these conflicting groups. Any democratic unit will then include significant minority groups and, indeed, sometimes the unit may be evenly divided between antagonistic groups, with these rival groups co-existing in the same territory. The lack of common social solidarity, even the lack of a likelihood that such solidarity will emerge, does not preclude the operation of subsidiarity: the basic structures of democratic government still need to be created. In some instances, the principle of subsidiarity may have a part to play in mitigating the democratic consequences of these social divisions. In the next section, the distinction between federalism and devolution is discussed. One reason for preferring devolution to federalism is to permit the on-going supervision of a regional body by a body higher up in the constitutional chain, and where a region is characterized by ethnic division, or includes a vulnerable minority, this may provide an argument for adopting a devolved, rather than federal, structure. On other occasions, the challenges presented by conflicting social groups cannot be mitigated through the construction of the democratic unit, and must be addressed through the creation of protections within those units, some of which were discussed in the previous chapter.

Whilst subsidiarity is sensitive to the presence of pre-existing social solidarity, it does not require that social solidarity necessarily exist *before* the creation of the democratic unit. The social underpinnings required for a successful democratic unit can be the product of the creation of those units and legislatures, as well as sometimes providing an existing base on which these bodies rest. The creation of flourishing democracies is one of the central demands of constitutionalism: the principle of subsidiarity is part of the process by which this is satisfied. When the social basis of democracy is absent, satisfaction of the principles of subsidiarity and democracy requires the state to take steps to ensure its creation. This may prove to be a gradual process, but it is a process that should be begun immediately.

That subsidiarity speaks to the creation of new institutions as well as to the allocation of powers to institutions that already exist may be

controversial: some might accept the claims of this chapter as regards subsidiarity as an allocating principle, but disagree with the suggestion that the principle also has a creative aspect. But given the role subsidiarity plays in structuring the democratic system it is hard to see why it should stop at allocation: the same types of argument can sometimes require that a new body be created. When the democratic structure is overly centralized subsidiarity may demand a form of regionalization of power or the creation of a new state. The form this will take will depend on the particular territory in which the principle operates, and will be discussed later in this chapter.

(ii) The Catholic Principle

The Catholic principle of subsidiarity has a remarkably wide reach. It engages with the tasks of collective associations: encompassing states, trade unions, and families.³² The papal encyclicals expounding the principle present it as a bulwark against over-intrusive collective bodies. Pope Leo XIII's 1891 encyclical, *Rerum Novarum*, is widely regarded as one of the earliest expressions of the principle within Catholic social philosophy.³³ The document is a wide-ranging reflection on labour and property, capitalism and socialism, and even-handedly insists both that the institution of private property has value, and also that employers owe moral obligations towards their employees. Subsidiarity is not discussed directly, but the encyclical places weight on the importance of the individual and the family, demanding that the state only intervene when necessary to protect the common good or prevent injury.³⁴ It also emphasizes the value of private voluntary associations, such as charities established to help the poor and workers' associations.³⁵ In *Quadragesimo Anno* Pope Pius XI developed this principle, attempting to steer between the twin perils of individualism and collectivism.³⁶ He provided a clear statement of the meaning of subsidiarity within Catholic philosophy:

³² C. Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity' (2002) 20 *Berkeley Journal of International Law* 359, 363–66; R. Vischer, 'Subsidiarity as a Principle of Governance: Beyond Devolution' (2001) 35 *Indiana Law Review* 103, 110–16. See, more generally, M. Burgess, 'The European Tradition of Federalism: Christian Democracy and Federalism' in M. Burgess and A. Gagnon (eds), *Comparative Federalism and Federation* (University of Toronto Press 1993). The encyclicals discussed in these articles, and footnoted below, are all available on the Catholic Encyclopaedia online: <http://www.newadvent.org/>.

³³ Henkel (n 32) 363; P. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *The American Journal of International Law* 38, 40–42.

³⁴ Pope Leo XIII, *Rerum Novarum* (1891), para 52.

³⁵ *ibid*, paras 68–80. Pope Pius XI, *Quadragesimo Anno* (1931), para 30.

³⁶ Pius XI (n 35) para 46.

As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.³⁷

It is worth emphasizing the breadth of this principle. It speaks both to the state and to other associations and organizations; it is a principle that could be applied against an overbearing trade union as well as an intrusive public body.

There are many arguments that could be used to justify the Catholic model of subsidiarity but at least two broad groups can be identified within the encyclicals. First, there is a collection of instrumental arguments: that power should be left to individuals, families, and voluntary associations simply because they are more likely to exercise that power in a wise and socially useful manner. So, for example, in the context of welfare programmes, Pope John Paul II claimed that private bodies, such as charities and families, are often better care providers than the state.³⁸ State welfare institutions are often bureaucratic and impersonal, providing only for people's material needs, whereas families and charities are motivated by love and affection, providing what John Paul called 'fraternal support' that goes beyond material care. Similarly, mutual bodies, such as trade unions, are defended in instrumentalist terms: they can provide care for their members, and can defend and represent members' interests.³⁹

Secondly, subsidiarity rests on the roles states and other associations play in people's lives; it deals with the question of how far and in what ways these bodies should engage with individuals and families. Belonging to states, private associations and families, having control over your own activities, are crucial parts of a fulfilled life, and membership of at least some of these bodies is intrinsically valuable.⁴⁰ Subsidiarity demands that space is given within which all these entities can prosper and individuals flourish; these associations exist to empower and not to dominate.⁴¹ It is this reasoning that leads John Finnis

³⁷ Ibid, para 79; J. Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) VI.5.

³⁸ Pope John Paul II, *Centesimus Annus* (1991), para 48.

³⁹ Pius XI (n 35) para 30; John Paul II (n 38) para 15.

⁴⁰ Leo XIII (n 34) paras 19–20; John Paul II (n 38) para 17.

⁴¹ Leo XIII (n 34) para 37; John Paul II (n 38) paras 11, 44.

to present subsidiarity as a principle of justice; it is a principle that limits the proper bounds of collective activity.⁴²

The Catholic principle of subsidiarity is similar to the principle of civil society, discussed earlier in this book. Sometimes, indeed, the two may overlap, and what one theorist would discuss under the label of civil society, another would discuss under the label of subsidiarity. Whilst it would be a mistake to argue over terminology—what matters is our understanding of the content of the principle, not how we title it—there is sufficient space between the Catholic principle of subsidiarity and civil society to justify drawing a distinction.

The principle of civil society presupposes and requires the existence of the state; it is formed at the point of interaction between the public and the private. It is, in the terms of this book, a principle of constitutionalism. Whilst the Catholic principle of subsidiarity often engages with the questions about the boundaries of the state, it does not presuppose or require the existence of that institution. The Catholic principle of subsidiarity, if valid, would apply even if the state did not exist. It engages with the broader question of the relationship between larger organizations and smaller groups; indeed, it speaks as much to the division of power within the Church—or between the Church and other social groups—as it does to the divide between the public and the private.

This distinction in focus has implications for the way in which writers on the Catholic principle present the relationship between smaller and larger groups. Many use the language of ‘priority’ to describe this relationship.⁴³ The claims of smaller groups are ‘prior’ to those of larger entities; the demands of the family, for example, are ‘prior’ to the state. The idea of priority plays out in a number of ways in the literature.

Sometimes smaller groups are presented as empirically prior to larger groups. As Maria Cahill puts it, subsidiarity ‘starts with recognition of the existence of groups that emerge naturally in response to this irreducibly social dimension of human flourishing’.⁴⁴ This claim might be a version of the historical story that was discussed in Chapter 2—the gradual growth of social institutions from families, through villages and cities, into states. The smaller

⁴² Finnis (n 37) VI.5; Carozza (n 33) 43–47.

⁴³ N. Aroney, ‘The Federal Condition: Towards a Normative Theory’ (2016) 61 *American Journal of Jurisprudence* 13, 17; V. Muñiz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (OUP 2014) 57–64.

⁴⁴ M. Cahill, ‘Sovereignty, Liberalism, and the Intelligibility of Attraction to Subsidiarity’ (2016) 21 *American Journal of Jurisprudence* 109, 120.

groups might then be thought to be ‘prior’ to the larger in that the larger units emerged from them. More ambitiously, the claim might seek to divide social groups into two categories: the natural and the artificial. The former, natural groups, are the product of biological forces—they are, in some sense, the inevitable consequence of our innate disposition towards sociability—whilst the latter are, in some sense, the creatures of reason, built by thought and deliberation, and perhaps stand in tension with our natures. A third possible reading of this claim of priority might take subsidiarity as claiming that the authority of the state—and of larger units in general—is built out of the authority of these smaller groups. One interpretation of Aristotle’s account of the progression from family, to village, to city state, presents Aristotle as making this claim: the larger units are formed out of, and remain reliant upon, the smaller.⁴⁵ These three assertions, three glosses on the meaning of priority, are compatible: it could be that the Catholic principle of subsidiarity embraces all three.

A normative claim is then combined with these descriptive assertions: smaller, ‘natural’ groups, are ‘prior’ in that they should be accorded, or recognized as possessing, priority over larger groups. According to Cahill, the state should only intervene when these smaller units request intervention, or where the smaller units are manifestly incapable of functioning.⁴⁶ The larger units are, in this sense, subsidiary to the smaller bodies they exist to support. John Finnis makes the point even more strongly, contending that the state should ‘never’ take over the formation, direction, or management of these bodies.⁴⁷

The account of social groups which underpins this book—and which animates the principle of civil society—differs from that which animates many versions of the Catholic principle of subsidiarity.⁴⁸

First, no distinction is drawn between natural, or organic, social groups and other forms of social group. Social groups are constructed through rules,

⁴⁵ N. Aroney, ‘Subsidiarity, Federalism, and the Best Constitution: Thomas Aquinas on City, Province, and Empire’ (2007) 26 *Law and Philosophy* 161, 170–76; Aroney (n 43) 23–24; B. Koch, ‘Johannes Althusius: Between Secular Federalism and the Religious State’ in A. Ward and L. Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate Publishing 2009) 76–80.

⁴⁶ M. Cahill, ‘Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach’ (2017) 15 *International Journal of Constitutional Law* 201.

⁴⁷ J. Finnis, ‘Limited Government’ in J. Finnis, *Human Rights and Common Good: Collected Essays: Volume III* (OUP 2011) 83, 89–90. Finnis’ position is powerfully critiqued by Alan Bogg: see A. Bogg, ‘Subsidiarity or Freedom of Association: A Perspective From Labour Law’ (2016) 61 *American Journal of Jurisprudence* 143.

⁴⁸ On social groups, see N. W. Barber, *The Constitutional State* (OUP 2010) chapter 3.

some of which are set by the communities in which those groups exist, some of which are chosen by the participants in the group.⁴⁹ In societies governed by law, all social groups are partly conditioned by legal rules—in the sense that the law provides a background set of rules within which those groups operate—and many types of social group are partly constituted by legal rules—in that there are laws which relate directly to the operation of the group. To return to an example used many times in this book, the family, a social group often discussed in writings on the Catholic principle, is both conditioned by legal rules—criminal law sets limits to the ways participants can engage with each other—and partly constituted by legal rules—the obligations of parents towards their children are partly determined by law. The institution of the family is, in this respect, no different from the state. In each case, the group is constituted by a mix of legal and social rules, more or less consciously chosen by the communities in which they exist and those who participate within them.

Supporters of a distinction between natural and artificial groups might reply that the division is not intended to bring forward their manner of composition, but, rather, their mode of origin: perhaps natural groups are the products of human nature, whilst artificial groups are the product of human ingenuity. But, if this is the claim, this would rely on a divide between biology and reasoned action that is hard to defend. Reasoned action—that is, action based on decisions that have been considered before being adopted—is grounded in our physiology just as much as instinctive action. And, indeed, in actual decision-making the two are mixed: reasoned action is animated and shaped by instinct. All social groups are formed from a mixture of instinct and reason, and all are, ultimately, grounded in human nature: the state may be more complicated and less ubiquitous than the family, but—as Aristotle recognized—it is just as much a product of our nature as is that institution.

These doubts carry over to the supposed moral priority of smaller groups. It is undeniable that different groups can and do make contradictory moral claims on individuals. Sometimes it may be possible to rank these claims, or expose one set as mistaken—there will be a morally correct answer to be found. But even if this is the case, it seems unlikely the moral claims of the smaller group should always be accorded priority over the larger, irrespective of the content of that claim. It is easy to conjure fictional examples of clashes between, say, family and state obligations in which the impact on the family would be trivial, and the impact on the state would be significant. Here, our obligations towards the state would be more pressing, and it would be a (moral) mistake to give priority to our family.

⁴⁹ Barber (n 48).

Furthermore, as Alan Bogg has argued, the constraints that some forms of the Catholic principle place on the state are hard to justify.⁵⁰ Bogg examines with some care Finnis' claim that the state should 'never' take over the formation, direction, or management, of what he, Finnis, terms 'non-instrumental' associations, like the family, and should 'only exceptionally' play this task with instrumental associations, like trade unions and businesses.⁵¹ As Bogg shows, Finnis' account is only attractive if we understand the qualification of 'formation, direction, or management' narrowly, as amounting to little more than an insistence on the value of people being able to form and operate associations freely. Beyond this, there are a host of ways that states create structures that directly and indirectly shape how these organizations operate, and, when these organizations are failing, might step in to provide support. Bogg focuses on trade unions, but even with an association that is, on Finnis' account, intrinsically valuable, like the family, the state may have many roles to play. As we have seen, the state fashions a portion of the rules which structure how family members interact. In fashioning these rules it cannot avoid taking a position on how this institution should function and be formed; in this regard, it is compelled to take a view on both the formation and operation of the family as an institution. But the state, recognizing the value of the family, might go beyond shaping this institution, and seek to encourage people to enter into this collection of relationships. Normally, this recognition would stop short of the state creating a specific family unit—it would be a serious injustice to compel a marriage against the wishes of its participants—but the state might encourage the formation of families through the tax system or other means. Sometimes, there might be situations in which the state might seek to compel other sorts of family connections; it might, for example, require parents to care for their children, or adult children to care for their parents. There are limits to how far the state could hope to achieve these goals—as the encyclicals remind us, support required by law will be a poor substitute for care provided through love—but these compelled relationships might be better than nothing, and might, sometimes, provide a starting point for a deeper relationship. Furthermore, the claim that the state should never take over the management of families is hard to defend. When a family is failing, the state may step in to provide support and help. Sometimes, the state may take over aspects of the management of the family as a long-term project; rather than removing children from a family with parents who are struggling, it may be preferable to provide support, perhaps with social workers taking over some

⁵⁰ Bogg (n 47).

⁵¹ *ibid* 147–53; Finnis (n 47).

of their tasks. Sometimes, this intervention may be short-term, seeking to educate parents by example.

Simply showing the range of instances when states intervene in the operation of these organizations does not show that the state should intervene: it could be that these interventions are moral mistakes. But reflection on the types of interventions many states undertake, and the potential good that the state can do in these situations, should lead us to question the attractions of embracing a principle that would prevent this activity. At the very least, the desirability of Finnis' version of subsidiarity is something that should be debated within democratic institutions—part of the political tussle between those who would like more state action and those who would like to see less—rather than built into the constitutional structure of the state.

Whilst it is undeniably the case that some social groups in some forms pre-exist the state, beyond this historical truth, the principle of civil society does not assert that families, trade unions, partnerships, are 'prior' to the state in any of the senses embraced by supporters of the Catholic principle of subsidiarity. It does not contend that smaller groups are 'natural' in contrast to larger groups, it does not contend that our obligations to them take precedence to our obligation to larger entities, and it does not require that the state should never, or only exceptionally, intervene in the operation of smaller bodies. Of course, the contrast between the Catholic principle and civil society should not be overplayed. There is a range of different interpretations of the Catholic principle, some of which come far closer to the civil society model presented in Chapter 5. And at the heart of each principle is a vital recognition of the value of the private realm, and an acknowledgement that the flourishing of the private realm requires that the state ordinarily leave private actors to form and operate associations without interference.

This account of the Catholic principle of subsidiarity also differs from the constitutional principle of subsidiarity discussed earlier. Whilst the Catholic model focuses on the value of private bodies—such as individuals, families, and voluntary associations—the constitutional principle is exclusively concerned with public bodies that possess a deliberative element. Even the very broadest reading of the constitutional principle presupposes that the decision will be taken within the public, rather than the private, realm. Whereas the Catholic model attempts, in part, to determine the bounds of the private sphere, the constitutional principle is concerned with the allocation of power within the public realm. This difference is important: though the Catholic and constitutional principles share a name, they may embody different rationales.

The argument for the democratic principle of subsidiarity flowing from the structuring of the constitutional process took a different path to its Catholic

counterpart, but there are many possible connections between the two. The arguments that supported the Catholic principle could also provide support for the constitutional principle. The Catholic principle related to the powers that ought to be allocated to collective associations, and democratic bodies, exercising the power of the state, are a form of collective association. Once institutional qualifications are factored in, the constitutional principle of subsidiarity could, indeed, be presented as a subset of the Catholic principle. However, a supporter of the constitutional principle is not compelled to support the Catholic model. She might disagree with the Catholic account of the proper limits of the public realm; potentially arguing for a wider or narrower vision of the role of the state. The Catholic and constitutional principles of subsidiarity can be brought together, but they need not be combined: support for one does not necessarily entail support for the other.

The Application of Subsidiarity

Subsidiarity addresses three levels of democratic decision-making: the regionalization of democratic power within the state, the boundaries of the state itself, and the creation of democratic units above the state level. There are two types of subsidiarity decision that need to be allocated amongst these levels: primary and secondary subsidiarity questions. Primary subsidiarity questions relate to a particular decision faced by a democratic body: an institution should ask itself whether it should make a decision or pass this up or down the constitutional chain. So, for example, a regional legislature might decide that, because of its effects, a decision should be made by local councils or should be passed up to a national legislature. Secondary subsidiarity questions relate to the question of who gets to decide a primary subsidiarity question. Some institutions may have to reach decisions about which institutions should decide the primary question. So, a national legislature may empower a regional legislature to decide whether a decision on an issue should be decided by that body, or should be passed up or down to another institution. It is worth noting that just as an institution can decide that subsidiarity requires that a particular area of power be passed from it to a differently sized unit, it can also decide to pass on the secondary question, empowering that institution to decide who gets to decide the subsidiarity question. So, rather than merely empowering a regional legislature to take subsidiarity decisions in a particular policy area, the national legislature could also empower that body to delegate decisions about which body is appropriate to exercise that power further down the constitutional chain if it wishes.

All of this may start to sound worryingly like a brainteaser, but it is important: subsidiarity—like the rule of law and the separation of powers—is a principle that addresses its own application. Who should decide the question of subsidiarity is, also, a question to be assessed through the subsidiarity framework.

(i) Subsidiarity Within the State

The division of democratic power within the state can take a number of forms. These can be divided into two, very loose, groups: there are unitary states, in which the regionalization of power is undertaken through devolution, and federal states, in which the national constitution allocates powers between the centre and the regions.⁵² In a federal state, power is divided in such a way that each level of government has the final decision about some matters.⁵³ In a unitary state, power may be—indeed, often is—regionalized, but the regionalization of power depends on the restraint of the national legislature which can take back power from the devolved institutions at any time. On top of this, Arend Lijphart has identified a number of secondary characteristics often possessed by a federal state.⁵⁴ Federal states commonly have written constitutions that are difficult to amend, constitutional courts that police the federal divisions, and a bicameral national legislature, one chamber of which represents the regions.

The division between federal and unitary states is sharp in theory, but becomes blurred when applied to reality. The USA and Germany are clearly federal on this account, but the classification of other states may prove more debatable. States can move from a unitary structure towards a form of federal settlement without any formal constitutional change; there need not be any grand ‘constitutional moment’.⁵⁵ Regions within a federation possess the final decision about the exercise of public power in certain, constitutionally defined, areas, but this capacity may not be conferred by law, but, instead, by convention and by political pressure: the entity may then remain a unitary state in law, but closer to a federation in terms of the balance of constitutional power. The United Kingdom, for example, is, in form, a unitary

⁵² Elazar (n 7) 39–41. See also R. L. Watts, ‘Comparing Forms of Federal Partnerships’ in D. Karmis and W. Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005).

⁵³ K. Wheare, *Federal Government* (4th edn, OUP 1963) 33; see generally, A. Lijphart, *Patterns of Democracy* (Yale University Press 1999) chapter 10; D. McKay, *Federalism and the European Union: A Political Economy Perspective* (OUP 1999) chapter 2.

⁵⁴ Lijphart (n 53) 186–91.

⁵⁵ See Wheare’s discussion of various constitutions that have shifted in nature over time: Wheare (n 53) chapter 2.

state with certain powers devolved to Scotland, Wales, and Northern Ireland. As a matter of law, the United Kingdom Parliament retains the capacity to alter the powers of these institutions, to override their decisions, and even to abolish the devolution settlement in its entirety. In reality, though, it is presently inconceivable that the devolved institutions could be extinguished without their consent, and the conventions that prevent the United Kingdom Parliament from legislating in devolved matters have proved effective. In these respects, the United Kingdom resembles a federal state.⁵⁶ The converse is also true: states that are federal in form may prove, on closer inspection, to be unitary in truth. The old Soviet Union was, in form, a federation, but the reality was very different: power was centralized in the national institutions, and the supposedly autonomous regions only had the latitude permitted them by the centre.⁵⁷

With the possible exception of some micro-states, subsidiarity invariably requires the regionalization of power within the state. There are normally enough issues that need to be decided below the level of the state to justify democratic units being established in villages, towns, and counties, tying decisions to those communities who are affected by them.

Subsidiarity clearly addresses the broad question of the regionalization of power, but, it might be asked, does subsidiarity also speak to the choice between a unitary state, with regionalization accomplished through devolution, and federalism? The distinction between unitary and federal states has implications for subsidiarity—in particular, for secondary subsidiarity questions, the questions of which institution gets to decide a primary subsidiarity question. Many legislatures, in federal and devolved structures, are empowered to take decisions about primary subsidiarity questions. The legislature may decide to hand decision-making down to a smaller unit when it believes that subsidiarity requires this, or pass it up to a larger one, if it concludes that the effects of the decision have significant impact outside of its borders. Federations and devolved systems commonly divide up primary subsidiarity questions, vesting decisions about the exercise of certain powers at different levels; the two structures are alike in this respect. But the two differ when it comes to secondary questions of subsidiarity. In a unitary state, the national legislature has the power to allocate primary—and secondary—subsidiarity questions, but retains the power to second-guess the decisions made by other bodies within the constitution. In a federal system, some secondary

⁵⁶ S. Sedley, *Ashes and Sparks* (CUP 2011) 178; A. Gamble, 'The Constitutional Revolution in the United Kingdom' (2006) 36 *Publius* 19.

⁵⁷ R. Service, *The Penguin History of Modern Russia* (4th edn, Penguin 2015) 128–34.

subsidiarity questions are protected from the national legislature; the national legislature cannot, through ordinary legislative action, alter the competence of regional legislatures over some primary subsidiarity questions.⁵⁸

As we saw in the chapter on sovereignty, subsidiarity and sovereignty are connected. Sovereignty is connected to finality: the state claims, and, to an extent and in certain ways, is successful in its claim, to have the final say about the rights and obligations of those within its territory. There is, then, a necessary connection between the state and questions over subsidiarity; the state invariably presents itself as the body that has the final say about the allocation of subsidiarity questions. But whilst the state can, and ordinarily does, empower constitutional institutions to answer these questions, there is a particular type of secondary subsidiarity question it cannot transfer: those secondary questions that relate to the ultimate decision about the empowerment of state institutions. To put it another way, the state must present itself as the stopping point for questions of subsidiarity. In federal and unitary states, it is the state, as a whole, which ultimately decides on subsidiarity. It is worth noting that this capacity also amounts to a constraint—if the state wishes to stay a state, it cannot transfer this ultimate subsidiarity question either up or down the constitutional chain; to do so would be an abdication of its sovereignty, and, by implication, a form of self-destruction.

This might help explain why some scholars—most notably Carl Schmitt—have believed that there is a tension between federalism and sovereignty.⁵⁹ In a unitary state it is possible, even probable, that the national legislature will be empowered to make decisions for the state as an institution; that it will enjoy unlimited law-making power. Under the old British constitutional order—before the complications of the European Union and devolution—the much-discussed rule of parliamentary sovereignty made this equation explicit. Parliamentary sovereignty stated that whatever the Queen-in-Parliament enacted as a statute was law.⁶⁰ Though state sovereignty and parliamentary sovereignty were never synonymous—parliamentary sovereignty did not pretend

⁵⁸ It is conceivable that regional legislatures might be prohibited from addressing primary subsidiarity questions—that they may neither pass up or down issues they are empowered to answer. Then, in a federal system, at least part of this allocation cannot be altered by the national legislature through ordinary legislation.

⁵⁹ C. Schmitt, *Constitutional Theory* (J. Seitzer tr, Duke University Press 2008) 390, discussed in Aroney (n 43) 21–22 and N. Patrici, 'Looking in to Medusa's Eyes: Carl Schmitt on Federalism' in A. Ward and L. Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate Publishing 2009). See also G. Barrera, 'Confederalism, Federal State, and Federation: Around Louis Le Fur' in A. Ward and L. Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate Publishing 2009).

⁶⁰ For discussion of this rule, see N. W. Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 *International Journal of Constitutional Law* 144.

to legitimate all sources of law within the United Kingdom constitution—there was clearly a close relationship. The state's purportedly unlimited law-making power, including those powers in respect of subsidiarity, were vested in Parliament. These bodies have a jurisdictional reach that is similar to that identified by Schmitt as the hallmark of the sovereign. In a federation, in contrast, there cannot be this tight connection between state sovereignty and the national legislature. In particular, a federation cannot contain a standing legislature that can, by ordinary legislation, address the complete range of subsidiarity questions. In a genuine federation, no standing institution has an unfettered constitutional power to make decisions about subsidiarity.⁶¹

Sometimes federalism is presented as a principle of constitutionalism, a claim that would seem to require that all states should move towards a federal structure.⁶² In contrast, subsidiarity may require more and, sometimes, less than federalism.⁶³ In some, perhaps in all, federal systems subsidiarity is not satisfied by the construction of the federal structure; the principle continues to press for the further devolution of power beyond this allocation. Smaller democratic units, town councils, local authorities, and so forth, should also be created within this structure, though not accorded the sorts of constitutional protections given to federal entities. On the other hand, in some very small states the creation of federal structures may be unnecessary and, sometimes, even counter-productive, retarding democratic control of the state. In these systems subsidiarity requires the creation of regional bodies with devolved powers. Each of these possibilities—where subsidiarity pushes for devolution, and where it pushes for federalism—needs to be considered in detail.

Subsidiarity pushes for devolution, rather than federalism, where the democratic body that will be created or empowered requires the on-going supervision of another set of democratic institutions further up the constitutional chain. These higher legislative bodies retain the power to overturn decisions of the lower bodies or to remove their power to decide certain issues. This on-going supervision will be required when the creation of the sort of vibrant legislative institutions necessary for a successful federal body are unlikely. First, this vibrancy is manifest in the connection that federal legislatures enjoy with their constituents. Federal legislatures need the active

⁶¹ Dieter Grimm provides a fascinating intellectual history of the engagement between sovereignty and federalism: D. Grimm, *Sovereignty* (Columbia University Press 2015) 51–67.

⁶² K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 205. Though it is worth noting that some use the word 'federal' to mean something akin to subsidiarity: P. McNamara, 'Thomas Jefferson's Enlightenment Idea of Federalism' in A. Ward and L. Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate Publishing 2009).

⁶³ For the many and various forms of regionalized power, see: Elazor (n 7) 38–64.

engagement of their voters. It is not enough that voters turn up and register a vote every few years, but, more broadly, an on-going interest in the work of the legislature is required. When a federal legislature is functioning well, its activities are widely reported in the media and its representatives talk to and debate with their constituents. Secondly, as with national legislatures, federal legislatures rely on the existence of party structures within the chamber to permit coherent, effective, production of policy, and to enable the effective control of the federal level executive branch.

Where democratic institutions enjoy very limited powers, it is less likely that voters will engage with them, and less likely that stable party structures will develop within those units. To take an extreme example, it would be unrealistic to expect a parish council—whose tasks mainly consist of the planting of trees and the running of the village hall—to satisfy either of these criteria to any great extent. The decisions made by smaller bodies may often be subject to less scrutiny, and fewer internal controls, than decisions made by larger bodies. This does not mean that we should not create small democratic units; the benefits of bringing a decision closer to the community may outweigh the costs of a body with low visibility. Though the overall democratic vibrancy of the institution may be low, in the context of that particular decision its vibrancy may compare favourably with the larger institution. Sometimes, indeed, these small institutions can play a valuable mediating role with larger institutions, fighting for the interests of their constituents in the larger entity.⁶⁴ However, empowering these smaller, less visible democratic bodies, brings with it the risk that they are less accountable to, and responsive to, the public. Given this, the supervision of these smaller units by larger bodies may be one way in which these risks can be reduced. In a devolved structure, the decisions made by, and powers given to, these smaller bodies can be reviewed by a higher body. Devolution of power brings with it the possibility of supervision, and can permit the creation of small democratic units whose autonomy could not be justified as parts of a federal structure.

A further reason for preferring devolution to federalism, mentioned earlier, is where there is some problem with the functioning of democracy in a region that can be mitigated by the supervision of a body higher up the constitutional order. If, for example, there are ethnic tensions within a region that are not duplicated at the state level, the national government might have a role to play in supervising the operation of democracy at the regional level, ensuring that minority groups are not excluded from power, or oppressed by the majority.

⁶⁴ J. Jacobs, *The Death and Life of Great American Cities* (Jonathan Cape 1962) 131–39.

Sometimes devolution supplements federalism, with powers being regionalized within the federal structure, but sometimes devolution should replace federalism entirely, with all the smaller legislative bodies operating under the on-going supervision of the national legislature. In small countries—like Israel or Iceland—so many issues affect the whole population, and so few relate only to a region of those states, that it might not be possible to create regional legislatures with the type and quantity of powers that are likely to lead to effective federal institutions.

Subsidiarity pushes for federalism rather than devolution, in contrast, where on-going supervision by bodies higher in the constitutional chain is undesirable rather than desirable.⁶⁵ This might be because these lower bodies are likely to be more democratically vibrant than the higher bodies: in some federal systems more decisions are made at the federal level than at the national level. Where this is the case, the day-to-day political life of the community may be focused on these institutions. National level institutions may act infrequently, and have less impact on people's lives. If the United Kingdom were to create an English Parliament, with powers equivalent to those enjoyed by the devolved institutions, the national Parliament, Westminster, would be left with comparatively little work to do. It is likely that most political activity would occur in these regional institutions. The arguments made in the previous paragraphs now point the other way: it would be an error to allow the national body—by ordinary legislation—to overturn the decisions of these lower bodies, or to restrict their power to decide questions. Federalism may also be preferable to devolution when there is likely to be destructive tension between the national and regional level; where the capacity of the higher body to review presents a danger, rather than a useful protection.

That subsidiarity may sometimes require a federal as opposed to a unitary state provides a further argument against the model of sovereignty, developed by Schmitt and others, in which sovereign power is understood as vested in an institution within the state, rather than in the state itself. This account of sovereignty and the account of subsidiarity developed here are set in tension. If Schmitt's account of sovereignty were correct, any attempt to create a federal state would be predestined to fail; either sovereignty would vest in a national institution, and the federal structure would be a sham, or sovereignty would disperse to the federal units, and the state would fragment.⁶⁶ If either of these outcomes were inevitable, subsidiarity could never

⁶⁵ E. Young, 'Federalism as a Constitutional Principle' (2014) 83 *University of Cincinnati Law Review* 1057, 1060–83.

⁶⁶ Patrici (n 59) 306–08.

require the creation of a federation—it would be demanding the impossible. That federal structures *are* possible, and can be successful and long lasting—the USA and Germany are two examples amongst many—shows Schmitt’s concern over federalism was overblown and his account of sovereignty overly demanding. Sovereignty is not located within the state but, as argued earlier, vests in the state as a whole; the possibility of stable federal systems provides evidence of this.

(ii) Subsidiarity and the Creation of the State

States are created when a new sovereign institution is created. This may be a wholly new entity: a former imperial power may draw a few lines on a map, establish a framework for some decision-making structures, hold some elections, and then step back, hoping for the best. Far more commonly, states emerge from other institutions. An administratively distinct region may secede from a larger unit; a revolutionary party may seize control of a territory. As with the discussion of the regionalization of power in the previous section, the attribution of sovereignty is a decision that falls within the principle of subsidiarity; the principle engages with the question of when a new state should be created.

The relationship between subsidiarity and sovereignty was discussed earlier in this book. Sovereignty, in part, consists of a claim to make decisions about the allocation of power within the state. The state decides which of its institutions will get to decide primary and secondary questions of subsidiarity, and—where a federal structure is adopted—will remove some of these questions from the jurisdiction of all of its standing institutions, either not permitting the answers given in the constitution to be changed, or changed only by constitutional amendment. The question of the level at which this decision, the fundamental decision about the allocation of public power, should be made is, also, governed by subsidiarity. Subsidiarity requires that decisions be allocated to democratic institutions that represent the people who will be affected by the outcome of the decision. But it also requires that these democratic institutions be vibrant; that their constituents engage with these institutions, and that the institutions are sensitive to their constituents’ needs and wishes. As was discussed in Chapter 2, applying the principle of subsidiarity, states can be too big or too small. They are too small where the state is unable to take autonomous decisions, and is dependent on the decisions of its larger neighbours. Whilst, on the other hand, states are too large when few decisions need to be made at the level of the state—where, if the principle of subsidiarity were applied, virtually all decisions would have been sent down the constitutional chain.

It might be objected that the state is not a democratic institution—at least, it is not an elected body in the sense that a legislature is elected—but the state should be considered a democratic body in two respects. First, constitutional institutions within the state are parts of the state; the state partly exists through and because of these institutions. All of the state's democratic bodies—the national legislature, regional assemblies, and parish councils—are aspects of the state. Where there are constitutional bodies within the state that are democratic, the state, by derivation, can also be considered a democratic body. Secondly, where there are not democratic institutions within the state, the clear demand of subsidiarity is that they should be created; that the state should move to become a democratic institution. Constitutionalism requires the creation of a democratic state and undemocratic states can only be defended as steps towards this end.

(iii) Subsidiarity Above the State

Much international activity, activity above the level of the state, is conducted between states. This does not mean that democratic control over these decisions and actions is impossible; instead it is mediated through state institutions, rather than undertaken directly. On rare occasions, democratic institutions are created above the state, and these supra-national bodies may make decisions that bind the state in the international sphere and, sometimes, directly alter the domestic legal position of people within those states. The European Parliament, for example, acting in conjunction with other European institutions, is able to take decisions that both bind Member States and are sometimes directly effective within those states.⁶⁷

Supra-national democratic bodies are in the same position as regional assemblies. Depending on their effectiveness, they may either require continued democratic supervision, or, if more successful, may be delegated the power to take decisions, with the states retaining the capacity to retrieve these delegated powers if they are poorly exercised. The position of the European Parliament varies depending on the constitutional order of the Member States, but, in many systems, it occupies a position similar to a legislature in a federal system; its powers can be altered or ended, but only by amendment of the state Constitution. The state retains the capacity to remove its law-making powers—though this might require a difficult process of constitutional change.

⁶⁷ S. Weatherill, *Law and Values in the European Union* (OUP 2016) 6–10.

Subsidiarity and National Self-determination

The principle of subsidiarity outlined in this chapter is incompatible with some political positions: most obviously, those who are opposed to democracy, or who are against the existence of the state, will have no use for it. Subscribers to such beliefs are rarely found in modern politics. But the principle may also be set against a far more popular collection of political beliefs, a group that has had a considerable impact on writings about the European constitutional order: those of liberal nationalism.⁶⁸

Recent years have seen a resurgence of interest in nationalism, championed by academics such as David Miller⁶⁹ and Yael Tamir.⁷⁰ Their work has been modified and developed within the European context by a number of theorists, in particular Joseph Weiler.⁷¹ A national group is a collection of individuals bound together by mutual recognition; a belief, whether justified or not, in common kinship.⁷² Flowing from this is an assumption that, in some sense, membership of this group is of normative significance: the moral obligations that exist between nationals are different, and, all else being equal, stronger than, those owed to non-nationals.⁷³ Liberal nationalists either endorse these beliefs about the demands of morality, or, more pragmatically, regard it as close as imperfect folk can come to properly appreciating their obligations to each other: we ought to feel these obligations towards all humans, but weakness of will makes a fully developed moral sense impossible.⁷⁴ This heightened moral sense is sometimes presented as a necessary prerequisite for activities that will require sacrifices from some of the participants. Consequently, it

⁶⁸ For a fuller discussion of the influence of nationalist thought, N. W. Barber, 'Citizenship, Nationalism, and the European Union' (2002) 27 *European Law Review* 241. See also T. MacDonald, 'Boundaries Beyond Borders: Delineating Democratic "Peoples" in a Globalizing World' (2003) 10 *Democratization* 173 for a careful discussion of the differences between liberal nationalism and other, perhaps less controversial, forms of communitarianism.

⁶⁹ D. Miller, *On Nationality* (OUP 1997) and D. Miller, *Citizenship and National Identity* (Polity Press 2000).

⁷⁰ Y. Tamir, *Liberal Nationalism* (Princeton University Press 1993).

⁷¹ J. Weiler, *The Constitution of Europe* (CUP 1999), esp 'To Be a European Citizen: Eros and Civilisation'. See also N. MacCormick, 'Democracy and Subsidiarity in the European Commonwealth' in N. MacCormick, *Questioning Sovereignty* (OUP 1999) 144–45.

⁷² C. Geertz, 'The Integrative Revolution: Primordial Sentiment and Civil Politics in the New States' in C. Geertz (ed), *Old Societies and New States* (University of Chicago Press 1963); B. Anderson, *Imagined Communities* (Verso 1983); S. Grosby, 'The Verdict of History: The Unexpungable Tie of Primordiality' (1994) 17 *Ethnic and Racial Studies* 164.

⁷³ Miller, *On Nationality* (n 69) 3.

⁷⁴ *ibid*, chapter 2.

has been argued that both democracy⁷⁵ and social welfare provision⁷⁶ require the support of a national group if they are to be stable and effective. More ambitiously it has been argued that these special ethical ties are crucial to an individual's sense of identity. The nation is one social institution, perhaps the primary social institution, which provides a normative framework within which we can define ourselves.⁷⁷

When liberal nationalists address the question of the proper bounds of the democratic unit, they turn, unsurprisingly, to the principle of national self-determination for guidance.⁷⁸ Political recognition of the national group is required to protect or facilitate the benefits of nationalist sentiment.⁷⁹ The classical model of national self-determination presented itself as an argument for autonomy: nations should have complete political control over their territories. Modern theorists are more cautious. David Miller, noting that many national groups overlap and inter-relate, avoids speaking of a 'right' to self-determination, but rather speaks of nations having a 'good claim' to self-determination, that will often have to be satisfied by political recognition that falls short of autonomy.⁸⁰ Some groups can only demand limited political power. National self-determination is no longer confined to questions of secession; it also addresses the division of power within the state: regional democratic boundaries should track national group boundaries. The core claim that a liberal nationalist makes is that national groups have an *inherent* claim to political power; that they are, by their nature, morally entitled to some form of self-government.

This chapter is not the place to explore the many and varied arguments for national self-determination.⁸¹ The purpose of this section is to contrast the claim to national self-determination with the demands of subsidiarity. These are rival constitutional principles. Crucially, subsidiarity attempts to tie decisions to those affected by them, whereas national self-determination ties political power to a national group—which may or may not map on to those affected by the power. This difference in approach has produced criticism

⁷⁵ M. Canovan, *Nationhood and Political Theory* (Edward Elgar 1996) chapter 3; N. MacCormick, 'A Kind of Nationalism' in N. MacCormick, *Questioning Sovereignty* (OUP 1999) 167.

⁷⁶ Miller (n 69) 97–99.

⁷⁷ Tamir (n 70) chapter 1; C. Gans, *The Limits of Nationalism* (CUP 2003) 39–49; MacCormick (n 75) 181–83.

⁷⁸ But see R. Brubaker, 'Myths and Misconceptions in the Study of Nationalism' in M. Moore (ed), *National Self-Determination and Secession* (OUP 1998) 235–41.

⁷⁹ MacCormick (n 75).

⁸⁰ D. Miller, 'National Self-Determination' in D. Miller, *Citizenship and National Identity* (Polity Press 2000) 81; D. Miller, 'Secession and the Principle of Nationality' in M. Moore, (ed), *National Self-Determination and Secession* (OUP 1998). See also Gans (n 77) chapter 3.

⁸¹ For a good discussion see Gans (n 77) chapters 1 and 2.

from those wedded to the nation-state: subsidiarity has been criticized in strident tones, with Paul Marquardt arguing that it is a corrosive notion that 'reduces the claim of rightful governance to a technocratic question of functional efficiency that will eventually undercut the nation-state's claims to loyalty'.⁸² Self-determination and subsidiarity present rival answers to the same question: where should the boundaries of the democratic unit be drawn?

There are a number of objections that might be made to this sharp juxtaposition of subsidiarity and self-determination. Most obviously, subsidiarity cannot ignore national ties: even if the belief in the heightened moral duties between nationals is mistaken, it may remain a powerful force within the state. As we saw earlier, one consideration that factored in to subsidiarity was the health of the democratic institution. If the liberal nationalists are right, and only an assembly whose catchment area matches a national grouping will be able to form the basis of a vibrant democracy, subsidiarity and self-determination will often reach the same conclusions about the bounds of the democratic unit. However, the way in which the two principles reach this common conclusion will be significantly different, and will have broader implications for the identity of the democratic unit. Subsidiarity does not endorse the nationalist beliefs that it accommodates. In this context the approach of subsidiarity is similar to that adopted by consociational theorists. Consociational democratic structures provide forums and mechanisms whereby different national groups can share power, avoiding the peculiar peril majoritarian democracy presents to deeply divided communities.⁸³ Advocates of the consociational approach need not endorse the divisions it accommodates, nor do they need to seek to maintain the group cohesion that the structure reflects. Subsidiarity might mimic national self-determination, but it does not come with the baggage of that principle: it does not endorse the national sentiment it recognizes. Further, application of the principle of national self-determination implies a commitment to the value of nationalist attachment. Along with national self-determination comes a commitment to a host of other measures designed to shore up this sentiment: the state rests on the nation, and depends on this connection for its stability. Adherence to the doctrine of national self-determination will have implications for education, citizenship, and cultural policies. The advocate of subsidiarity need not subscribe to any of these further measures: the democratic unit and the national

⁸² P. Marquardt, 'Subsidiarity and Sovereignty in the European Union' (1994) 18 *Fordham International Law Journal* 616, 617.

⁸³ A. Lijphart, *Democracy in Plural Societies* (Yale University Press 1977) chapter 2.

group may be congruent, but there is no commitment to the continued desirability of the connection.

This distinction between the two approaches is also evident when one of the most telling objections to the regionalization of power is addressed: the objection of parochialism. The British Labour Party long opposed devolution because it feared this would encourage richer regions to shirk their responsibility for poorer areas. Deprivation in Wales, for example, should be seen as a British problem: devolution risked it being perceived as a distinctively regional problem, the responsibility of the Welsh political community.⁸⁴ The principle of national self-determination might endorse such a conclusion: the duties that English nationals owe to each other would be different from, and superior to, the obligations that exist between the English and the Welsh. Subsidiarity, in contrast, does not commit itself to the view that the boundaries of democratic units reflect, or should reflect, our pre-existing obligations to each other. Whilst some moral obligations, in particular those relating to participation, will be created or altered by the introduction of a new democratic forum, it does not follow that the regionalization of power pre-supposes an existing moral division. Those advocating Welsh devolution on the basis of subsidiarity, therefore, need not believe that this institutional shift reflects any redistributive obligations between the Welsh and the English, nor has any necessary implications for these obligations.

A second attempted reconciliation might argue that national self-determination is a principle that goes to state autonomy, whereas subsidiarity should be confined to the division of power within the state. Such a combination might appeal to those who see subsidiarity as a principle solely of power allocation and not of institution creation. But it is hard to see a principled reason why different approaches should apply at a state and sub-state level. Why should smaller national groups not call for limited regional power, why should they be confined to demanding secession? As Miller recognizes, if national self-determination is endorsed at the state level it will be hard to deny regional national groups some degree of political autonomy.

Conclusion

The principle of subsidiarity is shaped by the principle of democracy, given earlier in this book. The account of democracy found there—an account that required the creation of representative institutions—conditions the answers

⁸⁴ V. Bogdanor, *Devolution in the United Kingdom* (OUP 1999) 150–52, 168–70.

that can be given to the boundary question. Subsidiarity draws from the old maxim, what touches all should be approved by all, but is conditioned by the institutional demands of democracy. As the discussion of direct democracy in the last chapter contends, attempts to perfectly match decisions with those who are affected by them would be self-defeating: even if this could be done, the type of control this would give citizens over their states would be weak. There is, then, a limit to the number of democratic units that can be created, and this limitation requires the grouping of decisions. Subsidiarity requires the creation of democratic units that are, in the context of any particular decision, both over- and under-inclusive.

Conclusion

The Application of the Principles of Constitutionalism

The last six chapters have examined the content of the principles of constitutionalism, those principles that—alongside other considerations—guide the structuring and operation of the state. The principles of constitutionalism are applicable to all decisions that affect the shape or operation of the constitution, and the starting assumption should be that all constitutional institutions should apply the principles whenever they are relevant. Rather than examining why the institutions should apply these principles—an examination which underlies the discussion of the principles in previous chapters—the bulk of this chapter approaches the question of application from the opposite direction: asking when institutions *should not* apply the principles.

The chapter addresses these questions in three stages. First, it outlines the ways in which the principles interconnect, bringing together a number of points made elsewhere in this book. The interconnectedness of the principles entails that no single principle can be fully realized without the demands of the others also having been satisfied: the principles come as a package. A failure by the state to apply one principle will impact on the application of the other principles. The second part of the chapter seeks to mitigate the apparent absolutism of constitutionalism by reflecting on the ways in which constitutionalism may be realized in different ways by different states, and has different relationships with institutions within those states. Constitutionalism does not map out a single, perfect, constitutional form, and its demands vary across institutions within the constitution. As the principles of constitutionalism engage with the question of constitutional competence, of which institution should make a decision in a particular area, the principles are self-reflective: they speak to the question of their own application. Sometimes, the best understanding of the demands of a principle requires that an institution not seek to apply it to the decision it faces: the principles of constitutionalism themselves may require that an institution leave decisions about constitutionalism to another body. The

third part of the chapter considers situations in which there are justifiable exceptions to the principles, situations in which state institutions should permit constitutionalism to remain unfilled. It will be argued that whilst the principles of constitutionalism are achievable ideals—and whilst it is possible for a state to satisfy all of the principles—exceptions to a given principle may be justified by a need to compensate for failings elsewhere in the constitution or society more generally. More broadly still, the impact of constitutional change—its likely costs and possible risks—may mean it is sometimes better to leave the constitution unreformed. A constitution that falls short of the demands of constitutionalism but which is, nevertheless, functioning reasonably well might be best left alone. Having started the book by presenting constitutionalism as an ideal, this final chapter contends that there are reasons why, on occasion, deviations from this ideal should be accepted, and we should embrace, or at least tolerate, ‘good enough’ constitutionalism.

The Interconnectedness of the Principles of Constitutionalism

Some of the principles of constitutionalism must be realized to a minimal extent for the state to exist. As we have seen, sovereignty is intimately connected to the nature of the state. The authority claims at the core of sovereignty, and the capacity to make good, to some extent, on those claims, are features of the state; an entity that does not make these claims, or which is completely unable to exercise control over its territory and people would not possess statehood. Some of the other principles of constitutionalism must be present for the claims of sovereignty to be made and to be effective. The primary, but not the only, mode through which the state exercises authority is the law. For a state to articulate its authority claims, it needs a working legal order; the rule of law must be present, to an extent, in order for the state to function. Furthermore, both the rule of law and sovereignty require aspects of the separation of powers—both the state and legal order require the existence of courts, some sort of enforcement agency, and a recognition that there is a functional difference between creating law and applying it. Furthermore, the existence of the state requires the parallel existence of the private realm, and the minimal realization of these three principles—sovereignty, the separation of powers, and the rule of law—requires that the state regulate, to an extent, the exercise of power within the private sphere. Once again, the establishment of civil society, in some form, is required.

The question of the minimum necessary realization of these four principles is a seductive one, and turns, in the end, on what institutions we would identify as states. Trading real and imagined examples of polities that lack one or other of the features of these principles and then debating whether or not they should be categorized as an instance of a 'state' may be fun, but is unlikely to be ultimately illuminating; people may reasonably disagree about where they draw these conceptual boundaries. More pressing, perhaps, is what is needed for the state to be successful, to flourish. For the state to achieve its defining purpose, the well-being of its people, the demands of the principles of constitutionalism become more exacting and broader. It is not enough that the state is able to exercise power over its people and territory; that power should be directed towards the benefit of its people. As we have seen, this requires the state to intervene in society in a number of different ways. For example, the principle of the rule of law requires that the state protect people from oppression by private actors—from powerful companies to abusive spouses—and the principle of civil society requires the state to support and foster private interaction.

Once the question shifts from the features necessary for the bare existence of the state to the constitutional features necessary for its flourishing, the principles of democracy and subsidiarity are also brought into consideration. Whilst it is undeniably the case that states can exist without democracy, lacking democratic structures, such a state cannot hope to turn its members into citizens. And though completely centralized states are possible—subsidiarity can be ignored—any polity that is large enough to warrant statehood will also be large enough to require some form of regionalization of democratic control.

At the start of this book it was argued that it is the relationship between the institution of the state and the principles of constitutionalism that allows us to draw the principles together, to treat them as a set of principles that are united by a distinctive focus. As well as a shared focus, each of the principles of constitutionalism is also shaped, and informed, by its fellow principles; the principles cohere, and become more appealing when understood as a whole. Sometimes one principle requires or presupposes the existence of structures and institutions demanded by another principle. There are *institutional* relationships between the principles. The separation of powers and the rule of law, for example, are particularly closely linked. The separation of powers can only be realized in a society governed by law; without a functioning legal order, it is virtually impossible to imagine an executive operating within a political community, and the establishment of courts and legislatures would be completely impossible. On the other side, the rule of law requires certain aspects of the separation of powers. At a minimum, the rule of law requires the separation of the practice of law-making and

law-applying, the existence of a range of types of institution—in particular, the courts and executive bodies—and the presence of a range of legal tools, including the capacity to make general laws and the capacity to issue binding rulings in particular cases.

There are also *justificatory* relationships between the principles: the justification of the demands of one principle may depend on the operation of another. So, for example, the demands of sovereignty are justified, in part, because of the need for the regulation of civil society and the functioning of democracy. The limited concern that is characteristic of private institutions is defensible only because of the broader concern exhibited by the state, and it is through the realization of the principle of sovereignty that the state asserts authority over these private groups. And part of the reason why it should be the state that regulates these private groups is the presence of democracy; it is the members of these groups who, in a different capacity, determine the rules that will apply to the private realm.

Throughout the book the connections between the principles has been stressed, and only a few examples have been picked out in the last couple of paragraphs to demonstrate the ways in which the principles interrelate. Not all states pursue all the principles of constitutionalism all of the time, nor, indeed, with the vigour that they deserve, but a failure to pursue one of the principles will often have an impact on the extent to which the state can achieve the others, and may distort the functioning of aspects of the constitutional order. For a state to succeed as a state, it cannot pursue only a subset of the principles. Failure to correctly apply one principle will inevitably lead to failures in other aspects of constitutionalism.

Who Should Apply the Principles of Constitutionalism?

This book has made some ambitious claims for the principles of constitutionalism. Constitutionalism has been presented as a set of principles that are grounded in the nature of the state. Wherever and whenever it is right to use the state as an instrument of social ordering, the principles of constitutionalism are applicable. The principles of constitutionalism are applicable to all constitutional institutions that make decisions that affect the structure and functioning of the constitution—in effect, this means that the principles are always relevant, though sometimes their implications are so plain and undisputed that there will be no need to make explicit reference to them. The most prominent consideration of the principles is found in the reasoning of two of the most significant law-making institutions of the constitution: the courts and the legislatures.

It sometimes seems as if scholarship on the application of constitutionalism divides into two camps, with supporters of courts contesting with supporters of the legislature. In British constitutionalism scholarship, this divide has come to be glossed as a divide between legal, or Common Law, constitutionalism on the one hand, and political constitutionalism on the other. Common Law constitutionalists argue that it is primarily for the courts to determine the content of the principles of constitutionalism (though their understanding of constitutionalism is often narrower than that set out in this book) whereas political constitutionalists regard the construction and maintenance of the constitution as primarily the task of elected assemblies.

Common Law constitutionalism encompasses a wide collection of accounts of how a constitution should function.¹ At its core, though, is the claim that it is the judges who should structure the constitutional order, that law—as articulated by the courts—should provide the foundations of the state. Possibly the most developed account of Common Law constitutionalism is to be found in the work of Trevor Allan.² For Allan, the rule of law is the structuring principle of the United Kingdom's constitutional order, but it is the decisions of the judges, in the Common Law system, that have defined and established this principle.³ More broadly, within the context of the rule of law, it is for the judges to identify and apply those constitutional principles that are animated by the values of the constitutional order.⁴

There is a range of possible bases for Common Law constitutionalism, a range that tracks the moral beliefs of its advocates. It could be that a full appreciation of the Kantian categorical imperative requires that the law protect a certain range of rights and values,⁵ or, perhaps—properly understood—utilitarianism, tempered with Kant, makes this demand,⁶ or it may be a working through of the ideal of democracy itself. The thread that runs through Common Law constitutionalism, though, is the claim that the judges are particularly well-placed to determine what morality requires of law.⁷ This might

¹ For a good discussion of Common Law constitutionalism, see T. Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 *Oxford Journal of Legal Studies* 435 and A. Vermeule, *Law and the Limits of Reason* (OUP 2009) chapter 2.

² For discussion of Allan's model of constitutionalism, see A. L. Young, *Democratic Dialogue and the Constitution* (OUP 2017) 74–80.

³ T. R. S. Allan, *Law, Liberty, and Justice: The Foundations of British Constitutionalism* (OUP 1993) 4–5.

⁴ *ibid* 17–18.

⁵ J. Laws, 'The Constitution: Morals and Rights' [1996] *Public Law* 622; T. R. S. Allan, *The Sovereignty of Law* (OUP 2013) chapter 3.

⁶ J. Laws, 'The Good Constitution' (2012) 71 *Cambridge Law Journal* 567.

⁷ See John Griffith's pugnacious attack on this claim: J. Griffith, 'The Brave New World of John Laws' (2000) 63 *Modern Law Review* 159, 172–76.

be because of the ingrained wisdom of the Common Law—a set of rules that have been debated and tested over generations—or because of the reasoning process demanded of the Common Law judge, who must explain her decisions in a public and principled fashion.⁸

Political constitutionalists are often presented as counterpoints to the Common Law constitutionalists, emphasizing the role of the legislature in establishing and maintaining constitutional structures.⁹ For Richard Bellamy, one of the leading writers in the political tradition, it is through elected bodies that the crafting of the constitution should be undertaken. These are bodies that permit open, reasoned, deliberation with which all members of the public can engage.¹⁰ Bellamy's arguments for the significance of elected assemblies combine a mix of normative and empirical claims. As a normative matter, decisions made by elected bodies are made fairly, or, at least, have the potential to be made fairly, a potential that the courts cannot hope to embody. These decisions are fair, in that they have been made in ways that enable all views to be heard, and which treat citizens with equal concern and respect, recognizing them as autonomous reasoners.¹¹ It is only elected bodies that can realize these procedural aspects of fairness. Moreover, as an empirical matter, Bellamy asserts that the end product of the political process accommodates reasonable disagreement better than the legal, and is more likely to successfully settle these disagreements.¹² Legislatures are better at producing social consensus—or at least, acquiescence—than courts. An appreciation of the realities of disagreement in society is a core feature of all strands of political constitutionalism, and can be traced back to one of the earliest articulations of the idea, found in the work of John Griffith.¹³ Whilst the legal constitutionalists often assume that judges can surmount disagreement within society through rational argument, political constitutionalists are doubtful of the capacity of the courts to end such disputes. The task of the judges, on Bellamy's account, is, then, a comparatively narrow one. Ordinarily, judges should apply pre-existing law, and where that is not possible they should confine themselves to analogical reasoning: looking back at past decisions

⁸ For careful and critical discussion of arguments of this type see Vermeule (n 1). As Paul Yowell notes, it is worth remembering that in the higher courts a significant portion of judicial deliberation—discussion between the judges and between judges and their clerks—is kept confidential: P. Yowell, *Constitutional Rights and Constitutional Design* (Hart Publishing 2018) 111–14.

⁹ G. Gee and G. Webber, 'What is a Political Constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273.

¹⁰ R. Bellamy, *Political Constitutionalism* (CUP 2007) chapter 5.

¹¹ *ibid* 191. ¹² *ibid* 4, 191.

¹³ J. Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 18–20; Gee and Webber (n 9) 276–81.

to decide the case before them.¹⁴ For Bellamy, this approach embraces one part of the Dworkinian interpretative method whilst rejecting another; it embraces 'fit', but not—as Bellamy puts it—the 'morally best reading' of the legal system.¹⁵ In short, judges should stick to the law.

Approaches to the judicial role such as Bellamy's can be described as conservative, with a small 'c'; judicial creativity is constrained in order to protect, to conserve, the legal efficacy of statutes, constitutional texts, and past judicial pronouncements. For Bellamy, the principal virtue of this conservatism is that it empowers the democratic parts of the constitution; those legal texts produced by democratic bodies are applied by the courts in the way that their authors—those elected institutions, and the representatives within those bodies—would have intended. Where elected bodies have yet to act, Bellamy argues for judicial restraint. Though Bellamy does not make this point, it could be that judicial restraint has a further virtue in these situations: it may encourage the legislature to face up to its responsibilities. If judges decline to modify the law in light of changing social needs or attitudes, their restraint may lead to voters putting pressure on legislatures to act. It is an understandable oddity of democratic systems that some hotly contested political issues are sometimes avoided by representatives within the legislature.¹⁶ On the questions of abortion, euthanasia, pornography, the legalization of drugs, and so forth, the policy of some political parties is not to have a policy: the issue is too divisive to make adopting a position electorally attractive. If the courts take it upon themselves to reform the law in these areas, the attention of citizens might shift. Rather than pushing for change through the legislature, they start to push for change through the courts. Now, rather than persuading their fellow citizens of the rightness of their position, they need only persuade the judges.

It is tempting to interpret Allan and Bellamy as providing radically different answers to the question of which institution should apply the principles of constitutionalism—with the Common Law constitutionalists pitching for the courts, and the political constitutionalists batting for the legislature. But this would be too quick. Instead, each side has a different understanding of what the principles of constitutionalism require—or what they require in the context of a given system. So, both Bellamy and Allan agree that the principle of the rule of law binds the judges, and that the decisions of the courts should be made in conformity with this principle, but whilst for Allan this

¹⁴ Bellamy (n 10) 83–88.

¹⁵ *ibid* 85.

¹⁶ G. Helmke and F. Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 *Annual Review of Political Science* 345, 348.

often entails creative reasoning by the courts, for Bellamy this requires judges to stick tightly to pre-articulated legal rules.¹⁷ Similarly, for Bellamy constitutionalism requires the legislature to make decisions about the proper structuring of the constitution, whilst for Allan it requires the legislature to respect and support the decisions of the court.

Political and Common Law constitutionalists sometimes give the impression that their theories exist in separate, sealed, categories, but a more plausible reading of their work would place them on a spectrum. Sensible legal constitutionalists recognize the importance of legislatures, whilst political constitutionalists, in their less rhetorical moments, acknowledge that judges have a part to play in the shaping of the constitutional order. To an extent, as we have seen, their disagreement turns on competing interpretations of the principles of constitutionalism, interpretations that are examined elsewhere in this book, but sometimes the insights that animate these two schools are complementary rather than contradictory. The legal constitutionalists are right in recognizing the important role played by judges in shaping the constitution. The political constitutionalists are right in recognizing the dangers that can be caused if this role is overplayed. The ways in which these two insights should play out in any given constitution—the relationship between the courts and the legislatures—will depend greatly on the local circumstances of that state.

It is tempting, at this point in the chapter, to provide thumb-nail sketches of the roles of the courts and the legislature in applying the principles—but it is a temptation that will be resisted. Much of this work has already been done elsewhere in the book. The principles of constitutionalism apply to all state actors whenever they are making decisions that affect the structure and operation of the constitution. As a starting assumption—one shared by both Common Law and political constitutionalists—both the courts and the legislatures should make decisions that conform to the requirements of constitutionalism. Given the interpretations of the principles of constitutionalism argued for in this book, what constitutionalism then entails in any particular instance will then depend on the pre-existing condition of the constitution and the local circumstances of the state. So, for example, we have seen that in modern states the rule of law requires the creation of administrative law (and, moreover, has some things to say about the forms administrative law should take). But whether this requires the legislature to pass a statute establishing some form of judicial review, the courts to develop their own set of rules, or—perhaps most likely—some combination of the two, will depend greatly on the local circumstances in which the principles of constitutionalism are

¹⁷ Young (n 2) 100–10.

being applied, and which institution is in a position to answer the question. The discussion then moves beyond the province of this book, which has considered the principles in the abstract, and turns to the broader, and often harder, question of how, in any given system, constitutionalism should play out.

Before moving on from the discussion of the application of the principles, it is worth emphasizing that it is not only the courts and the legislature that have a role to play in applying constitutionalism. Though the courts and legislatures will be the focus of much of what follows, other constitutional bodies should also adhere to the principles. The executive is, perhaps, the most obvious of these, both when exercising its law-making and law-applying functions; its conduct can be crucial to the success of constitutionalism. But, less obviously, constitutionalism also applies to the citizenry, to the ordinary members of the state. Many of the principles of constitutionalism require the support of the people to be established. The operation of law, the establishment of sovereignty, the successful working of democratic structures, requires that the people act in ways that help the constitution to function. Even the most oppressive regime cannot last long in the face of general opposition from its people, and the best of regimes cannot succeed without their positive and active support.

Justified Variation in the Application of the Principles

Given the starting assumption is that constitutionalism is virtually always relevant to the decisions of constitutional actors, it might be asked whether there are situations in which, nevertheless, those actors ought *not* to act on these principles. This part of the chapter will consider those situations in which a full understanding of the principles of constitutionalism requires a variation in the application of the principles. Here, constitutionalism is fully honoured, but honoured in different ways by different states and different institutions within those states. What might appear to be a departure from the principles is, in fact, a justified variation in their application.

(i) Superficial Variation in the Application of the Principles

The first form of variation is superficial: whilst successful states comply with the principles of constitutionalism, they need not do so knowingly. States—communities—may lack the concept of a constitutional principle, yet still meet its demands. Indeed, some of the principles of constitutionalism—like

subsidiarity and civil society—have not been extensively discussed within some communities. In British constitutional scholarship, for example, there has been comparatively little discussion of the role of the state in structuring the private realm. Rather than conceptualizing the public–private divide as embodying a symbiotic relationship, with the public and the private as mutually supportive, British scholarship has tended to present the distinction as a categorical divide, emphasizing the differences between the two and focusing on the extent to which the public should be restricted from intruding on the private. Nevertheless, the United Kingdom still created, and created with a high degree of success, the structures necessary for the functioning of the private realm. Sometimes, indeed, a state might publicly oppose a principle and yet, in practice, its constitution might track some of the principle’s demands. Some states, for instance, are strongly committed to the idea of the centralization of power in theory, but in reality, allow considerable autonomy to their regions.

(ii) Actual Variation in the Local Application of the Principles

Even when states explicitly endorse the principles of constitutionalism, their understanding of the implications of those principles may differ. Sometimes, this will be because those shaping the state have made a mistake; they have misunderstood the requirements of constitutionalism. On other occasions, though, there will be justifiable local variations in the ways in which the principles of constitutionalism are applied. This may be because of local circumstances that shape the application of the principles; the conditions and needs of the community in which the principles apply partly determine the requirements of the principles. To take an example from the discussion of democracy, for a range of reasons states need political parties for democracy to flourish. But what states should do to foster and support these parties will depend on a wide range of factors. In one state, the private part of society may produce and regulate political parties with very little need for public intervention. In another, though, the state may need to encourage the creation of parties—perhaps by providing funding for them—or may need to regulate aspects of their internal operation. In these situations, the question of state support for political parties will turn on the local circumstances in which the principle of democracy is being applied. There will sometimes be a right answer, even a uniquely right answer, about what is needed, but what that answer entails will be conditioned by empirical determinations; to put it bluntly, the facts on the ground will dictate the application of the principle. Frequently, it will be the empirical side of these assessments that is the most difficult to

answer: working out what those local needs are, and how well various policies will meet those needs, is a hard task. When local variations take this form, they are not deviations from the principles but, rather, a working through of what the principles require within the context of a given state.

Local variation in the application of the principles may also arise where the principles are under-determinative. The separation of powers, for example, requires the creation of certain types of institutions, but these institutions may operate within presidential or parliamentary structures, or some combination of the two forms. The separation of powers excludes some possible constitutional forms, but does not identify a single correct model. Sometimes, as in the previous paragraph, the choice between these forms may be determined by local factors—and there may be a right answer to be found—but sometimes there simply is not a unique right answer. There are wrong answers to avoid, but also a range of correct answers from which those crafting the constitution can pick.

(iii) Actual Variation in the Application of the Principles Justified by Institutional Ability

Our starting assumption was that the principles of constitutionalism are applicable to all constitutional actors and should be applied whenever those actors are in a position to do so. However, sometimes—perhaps even quite frequently—that starting assumption is displaced. Different constitutional bodies have different relationships with the principles, and some of these differences are required by the principles themselves. A full and correct understanding of constitutionalism will lead an institution to conclude that it should not apply one of the principles in some instances, or at least apply it in a qualified way.

Recalling our earlier discussion of Common Law constitutionalism, if it was the exclusive, or unqualified, task of the judges to realize the requirements of constitutionalism, the legal versions of the principles of constitutionalism should mirror their moral counterparts; whenever one of the principles requires action, it would fall to the judges to act. Many legal systems include legal principles that share a name with those described in this book, but these legal principles often differ significantly from their moral counterparts. For instance, the US legal system includes a version of the principle of the separation of powers, the European legal system possesses a supposedly justiciable form of subsidiarity, and it is at least arguable that a form of the rule of law is included within the English legal order. All three of these legal principles differ from the accounts developed in previous chapters. Should the judges

modify these legal principles so as to more closely track their counterparts in constitutionalism?

The gap between a principle of constitutionalism and its legal instantiation may turn on the recognition that the courts are only one part of the constitutional order, and not the whole. These gaps may be required by a correct understanding of the requirements of constitutionalism. The institutional limitations of the court played a central part in our earlier discussion of the separation of powers. Not only are there some issues that courts are ill-placed to assess, there may be situations in which the judges are ill-placed to assess what they are ill-placed to assess; courts may think they are more institutionally competent than is, in fact, the case. This ignorance may extend to the structures of the constitution and the application of the principles of constitutionalism. Perhaps surprisingly, the separation of powers requires that the courts *not* be given free rein to apply the principle of the separation of powers: in some respects, the constitution should seek to limit the judges' capacity to shape the constitutional order. If the legal principle of the separation of powers was a direct copy of the moral principle this would, in itself, be a breach of the separation of powers.

The principle of the separation of powers is not the only principle that may require limits on the judges' role in applying and developing the principles of constitutionalism. Indeed, most of the principles militate against judicial application in some situations. There are, then, good reasons why the legal version of a principle of constitutionalism may differ from its moral counterpart and the legal order may, rightly, only accord judges the power to apply parts of this broader principle. So, the legal order might, for example, allow judges to use the principle of subsidiarity to help interpret statutes, but not allow them to rely on the principle to reallocate legislative powers within the constitutional order. Or, perhaps, it might empower them to invoke the rule of law as a general principle allowing for the restrictive interpretation of retrospective statutes, but not accord the judges the power to strike down these laws.

As the political constitutionalists demonstrate, legislatures and, even more significantly, constitutional conventions (ie, elected bodies that craft constitutions) have an important role to play in structuring constitutions. When elected, these institutions have a democratic legitimacy that the courts lack, but, equally importantly, their institutional form enables them to gather a wider range of information and consult with a broader collection of groups than is possible within the structures of the court. Having undertaken this exercise, the legislature or convention is able to legislate; it can produce a coherent, prospective, set of rules to structure the relationships between institutions. Although courts can, from time to time, behave more like

legislatures—judges can make changes to the law that are prospective, they can hand down decisions that set out lists of rules—such decisions cut against their institutional nature; they are in tension with several of the principles described in this book. The principles of constitutionalism are sensitive to these institutional distinctions. Constitutionalism requires that some of the decisions about the working through of the principles should, for these institutional reasons, be left to the legislature. The legislature, rather than the courts, may, for example, be best placed to decide on the types of support the state should provide to political parties in order for democracy to flourish, or might rightly reserve to itself decisions about the extent to which the courts can discipline its representatives for wrong-doing. Once again, in these instances it is not that deviation from constitutionalism is justified, nor even that there is tension between its elements that demands a hard choice be made, but that the principles themselves regulate their own application.

But, just as the Common Law constitutionalists tend to overlook the role of the legislatures, political constitutionalists risk overlooking the role played by the courts. Reflection on institutional constraints not only reveals the limitations of the courts, but also the limitations of the legislature. Just as the structure and constitutional role of the courts entails that they should not, always, seek to apply the principles of constitutionalism, so too the institutional position of the legislature may also require self-restraint. For example, the constitution might include rules that limit the capacity of the legislature to pass laws that are directed against individuals—such as acts of attainder—or prevent the national legislature from encroaching on the powers possessed by state legislatures. Whilst it is conceivable that these limits might be non-justiciable—and perhaps a really committed political constitutionalist might try to argue that, even here the political process will regulate itself—where such limits are found in constitutional texts it is the courts, not the legislature, that should normally apply these rules, and given the point of the rules is to regulate the jurisdiction of the legislature, the legislature is prevented from altering them, irrespective of what that institution believes constitutionalism requires.

Justifiable Departures From the Principles of Constitutionalism

The principles of constitutionalism are obtainable ideals: they are ideals that have been shaped by the limitations of human nature and society. It is at least possible that a state could successfully realize all of the principles, and that an ideal constitution could be created. The discussion in the last section

explained why, even if this exceptionally unlikely position were reached, we would still find variations between the constitutions of states and between the decisions of state institutions about the implications of the principles. Whilst the account of constitutionalism developed in this book is an achievable ideal, it is clearly not an ideal that has been achieved in many, if any, states. The variations we see often rest on errors, or on wilful disregard of constitutionalism. In these situations, situations that are commonplace, institutions are faced with hard choices: failings within the constitution may require institutions to choose between the principles, or between competing demands of the same principle, or, more broadly still, between constitutionalism and other desirable things.

In the previous section we discussed situations in which a full understanding of constitutionalism would lead an institution not to act on one aspect of a principle: constitutionalism itself required that the decision about what constitutionalism requires be left to another body. When the constitution is functioning reasonably well, this sort of institutional self-denial will occur frequently. But this self-denial, to be justifiable, presupposes that the other institution that should apply the principle is operating passably well, and will make the changes constitutionalism requires. In many situations, this assumption will not be defensible: some parts of the constitution may not be functioning successfully, and those actors within the institution considering self-restraint will be aware of these failures. This may be because of a failing by another institution—the court may be aware of problems in the legislature—or failings in the past decisions of the same institution—judges might become aware of an error in their own decisions. Two options present themselves: either the institution can correct the mistake at the cost of venturing beyond the role set for it by constitutionalism, or it can leave the error uncorrected, allowing the mistake to remain part of the constitutional order.

Sometimes, failures within the constitution require that an institution step beyond the boundaries that would normally be set within a well-functioning system. On occasion, the failure of one constitutional institution may, justifiably, lead to the inflation of the activities of another body.¹⁸ The most common example of constitutional inflation occurs when the legislature is malfunctioning in some way—perhaps it lacks democratic legitimacy for some reason or it has become deadlocked and unable to legislate—this sometimes leads to the courts modifying their law-making role in response,

¹⁸ D. E. Pozen, 'Self-Help and the Separation of Powers' (2014) 124 *Yale Law Journal* 2, 11–14.

becoming more willing to radically interpret existing legislation or make decisions that depart from existing law.

For the political constitutionalists, the claims of democracy weigh against judicial expansion, but the strength of the argument from democracy, in these suboptimal situations, will depend on the democratic credentials of the legislating institution—both in general, and in the context of the particular issue being considered by the court. In a paper that has already become a classic—‘The Core of the Case Against Judicial Review’—Jeremy Waldron makes a powerful argument against strong form judicial review, an argument that is in sympathy with, if more cautious than, that found in Bellamy’s work.¹⁹ Waldron’s attack on judicial review begins with him making a set of assumptions on which the remainder of the paper rests. Crucially, he assumes that there exists a democratic institution that is functioning reasonably well, with universal suffrage, and that there is a broad commitment within society to the idea of individual and minority rights.²⁰ Having made these assumptions, Waldron then advances a compelling argument for leaving decisions about rights to the legislature. To a significant extent, if we accept Waldron’s assumptions it is very hard to argue against his conclusions. Where the legislature is genuinely democratic, is functioning reasonably well, and there is a community standing behind the legislature that values all of the members of the state, the legislature is, indeed, likely to do a better job than the courts at resolving disputes over rights. All of the arguments canvassed by Bellamy and Waldron then point to the advantages of representatives over judges in gathering information, producing consensus, and establishing stable decisions about the implications of rights within the state. But it is often the case that Waldron’s assumptions are not satisfied in the real world: states often fail to live up to the aspirations of the principle of democracy, citizens often fail to properly value the well-being of their fellows. If the democratic credentials of the legislature are weak, the attractions of requiring the courts to defer to that body look correspondingly less tempting.

One answer to this worry—and an answer robustly given by Bellamy—is that legislatures, and the democratic process more generally, remains the correct forum for the resolution of disputes over rights. Democracy, Bellamy argues, should police itself.²¹ Even when it comes to disenfranchised groups fighting for the vote, or disadvantaged groups fighting for recognition as citizens who merit the support of the state, it should be legislatures, not courts,

¹⁹ J. Waldron, ‘The Core of the Case Against Judicial Review’ in J. Waldron, *Political Political Theory* (Harvard University Press 2016).

²⁰ *ibid* 203–12.

²¹ Bellamy (n 10) 220.

through which these campaigns are undertaken.²² Following this line of argument, the courts should maintain a conservative view of their role, and wait for the democratic process to correct itself.

On occasion, this might be the best strategy, but on other occasions the court might be in a position to support these disadvantaged groups.²³ At the most extreme, the court might be in a position to insist that marginalized groups are included within the democratic process. Whilst—as both Bellamy and Waldron note—socially radical decisions made by legislatures can often prove more durable and effective than decisions made by courts, courts may still be able to accomplish, or participate, in such decisions.²⁴ For instance, a decision by a judge requiring that a disenfranchised group be given a vote might succeed in giving members of that group at least some of the formal trappings of citizenship. It could be that, over time, having witnessed the inclusion of the group within the political process, other citizens will come to accept their inclusion as normal, as signalling that the interests of those people count, too. Perhaps the social consensus that, to some degree, must be present before a representative institution will make a change of this type, will, instead, emerge after the decision has taken effect.

More modestly still, the courts may respond to flaws in the democratic process by modifying the way in which they approach their law-making role. Where judges are aware that some citizens have been excluded from the legislative process, they may seek to develop and modify the law in ways which help protect these groups or, perhaps, which seek to push the law towards the form it might have taken if these groups had been included. So, oppressive statutes might be narrowly construed or have exceptions read into their texts, or Common Law rights might be developed to supplement a lack of protection found in statutes.

Even in relatively well-functioning democracies the arguments for judicial conservatism flowing from the principle of democracy will be weaker in some areas of law than in others. Where a statute (or constitution) has just been produced by an elected body, hammered out through discussion and debate, the text of that document merits a great deal of judicial respect. Waldron points to the parliamentary debates over abortion in the United Kingdom as an example of a legislature functioning well: the debate over the bill was

²² *ibid* 224–25.

²³ See the careful and balanced discussion of this issue in J. King, *Judging Social Rights* (CUP 2012) 63–85.

²⁴ The reasons why decisions of legislatures might prove more effective and durable were discussed in the chapter on democracy.

extensive and well-informed.²⁵ For a British judge to have then overturned Parliament's decision on abortion—whether by striking down the statute or by interpreting it in a way that departed from its text—would have been a scandal; a blow to democracy. Whilst the parliamentary process that generated the abortion laws was particularly impressive, in other areas of law there may be less to commend statutes. Where statutes are very elderly, for instance, the courts might properly decide to take a more creative role: in England, much of the law on violent criminal offences is found in a statute that is more than 150 years old—it is hardly surprising that the judges have taken it upon themselves to update the law in this area.

Sometimes, the decisions of judges may be even more radical than the examples discussed in the previous paragraphs. Judges, like all other actors in the constitution, are morally bound by the principles of constitutionalism. That is, irrespective of their legal obligations, and of the legal instantiations of these principles, the principles of constitutionalism also apply to the judges directly. Judges are not just legal actors, they are also constitutional actors, and their place in the constitutional order may sometimes require them to act contrary to the law. On rare occasions, where a judge is put in a position in which the principles of constitutionalism require her to make one decision and the law requires another, it may—notwithstanding the reasons for restraint set out in the earlier part of this section—be right for the judge to follow the principles of constitutionalism rather than the law. In previous work, Adrian Vermeule and I have discussed the exceptional role of the judge in constitutional orders, those unusual situations where the judges' decisions are contrary to law but in broad accord with the principles of constitutionalism.²⁶ These situations sometimes arise at the very start of the legal order—when the judge is asked to determine the basis of her own authority—or in times of crisis, where the strict adherence to law would be disastrous for the state. In these, rare, circumstances the judge may rely on the principles of constitutionalism directly to justify her decision. The decision that a new state has emerged from an imperial structure,²⁷ or the decision not to apply a legal rule that would spectacularly undermine legal certainty by rendering a large chunk of the legal order invalid,²⁸ may be justifiable in terms of sovereignty or aspects of the rule of law, even if it cannot be defended by reference to pre-existing legal rules.

²⁵ Waldron (n 19) 224–25.

²⁶ N. W. Barber and A. Vermeule 'The Exceptional Role of Courts in the Constitutional Order' (2017) 92 *Notre Dame Law Review* 817.

²⁷ *ibid* 829–41. ²⁸ *ibid* 847–50.

The last few paragraphs have discussed situations in which an institution expands its role to accommodate failings elsewhere in the constitution. On other occasions, the principles of constitutionalism or other considerations may require that a failing in the constitution be left uncorrected.²⁹ The principles of constitutionalism may, themselves, require the judge or the legislators to leave an error uncorrected, even if it is unlikely that another body will step in and reform the law. For example, the rule of law is set in opposition to surprising changes to the law; those within the legal order may have built up expectations on the basis of the suboptimal legal rule. A change to the law in this instance might reduce people's confidence in the legal order as a whole. Furthermore, the principle of democracy might weigh against the judges changing the law. If the suboptimal principle is found within a statute, it may have been endorsed by a representative forum and might, perhaps, embody a compromise hammered out in the political processes within and around the legislature. For the courts to rewrite such a principle risks undermining the democratic process, reducing the capacity of the legislature to set the content of the law, and reducing the capacity of those within the legislature to strike effective compromises and agreements. It may not only be the principles of constitutionalism that weigh against correcting the error. Sometimes other factors will be relevant. It could be that these past mistakes have had beneficial consequences—perhaps enhancing social justice or boosting the economy. Correcting the error might unsettle or remove these benefits.

Adrian Vermeule has written of the theory of second best, and its application to constitutions.³⁰ The theory of second best turns on the interconnect- edness of elements within a system. The connection between the elements means that a suboptimal realization of one element may also lead to a sub- optimal realization of another element. This may simply make matters worse, but, sometimes, these failings may partially balance out. As we saw in the pre- vious section, a badly performing legislature may be partnered with a court that has inflated its role within the constitution. In each case, these institu- tions are falling short of the requirements of constitutionalism, but the com- bined effect may be to produce a reasonably well-functioning constitution. The theory of second best warns us that it can be a mistake to seek to move one element of a system towards the ideal, given that this will have implica- tions for other parts of the system. Perhaps surprisingly, pushing one element towards the ideal might have the effect of drawing the system as a whole fur- ther away from its optimal form. So, if the courts were to pull back, it might

²⁹ Pozen (n 18) 49–52.

³⁰ Vermeule (n 1) 29–36.

be that the legislature would not step forward to fill the space that the judges have vacated. In short, improving one part of a second-best system may make the whole worse, rather than better.

At the birth of the Soviet Union, Lenin boldly declared his intention to try method after method, experiment after experiment, to overcome capitalism.³¹ This sort of utopian zeal can prove problematic for those subject to the consequent social experiments, and Lenin's economic innovations were, of course, calamitous for the Soviet Union, resulting in widespread misery and starvation.³² Even if there is a viable alternative to capitalism to be found, it may still be a mistake to undertake radical and risky changes to your economic system in a bid to achieve this goal. There is the risk that the harms you cause along the way will outweigh the merits of the improvements gained, or, even, as Lenin found, that the hoped-for improvements are not realized in the end, and the suffering was for nothing. The same considerations apply to constitutionalism. All real-world states fall short of the demands of constitutionalism. Often, states should reform their structures to bring them more closely into line with constitutionalism, but sometimes the potential benefits of reform may not be enough to out-weigh the hazards of constitutional change; the constitutional order may be 'good enough' to justify avoiding the risks inherent in attempting to make it better. Institutions within the state should tolerate failures in constitutionalism because of the costs and risks involved in attempting to make things better.

Sometimes good-enough constitutionalism will be defensible simply on the grounds of the effort that would be involved in improving the constitution. If the state is devoting resources to improving the constitution, it may, as a result, have less money and energy to expend elsewhere. A legislature might conclude that its representatives' constituency boundaries are less than perfect, with some constituencies too large, and others too small. The principle of democracy requires that these be re-drawn—the weight of electors' votes should not vary from place to place—but the cost of undertaking this reform might be considerable. In this situation, the legislature might conclude that it would rather spend its time, and the public's money, on some other area of state activity.

In addition, radical reforms may have a significant, and potentially destabilizing, impact on the constitution. To give an example, the existence of a

³¹ R. Stites, *Revolutionary Dreams: Utopian Vision and Experimental Life in the Russian Revolution* (OUP 1989) 42–43.

³² R. Service, *The Penguin History of Modern Russia* (4th edn, Penguin 2015) chapter 7; J. C. Scott, *Seeing Like a State* (Yale University Press 1998) chapter 6.

monarchy is clearly incompatible with the principles of constitutionalism. It amounts to a rejection of the basic idea of constitutional equality that is at the heart of citizenship, and which plays out in the principles of democracy and the rule of law. Both presidents—the modern reinvention of the position of monarch—and monarchs possess constitutional powers other state members lack, and are often given immunities from certain aspects of criminal and civil law, but whilst the office of president is elected, open to all citizens, and normally held for a limited time, the office of monarch rests on inheritance and is held for an indefinite period.³³ The institution of monarchy, in contrast to that of the president, unjustifiably raises one person above others within the state. However, in some states, the monarchy brings great benefits. The monarch can stand above politics and act as a unifying figure for the state: as an unelected state official, she is not reliant on the support of any particular political grouping. She can also provide a sense of continuity. Monarchs can serve for a long time, and the hereditary nature of the post can also give the impression (often a very misleading impression) of continuity and stability over generations.

A state that possesses a broadly successful constitutional monarchy—like the United Kingdom—should think carefully before abolishing that post. Some of the costs of abolition would be predictable. Those who see the monarch as a core element of the state would feel distanced from the state, and that broader, nebulous, public sense of constitutional continuity would be impaired. The costs of sorting out the practicalities of shifting to a republic would be considerable—constitutional lawyers would spend happy hours puzzling out what legal powers the monarch possesses, and distinguishing between the property the monarch owns in her personal capacity and the property she holds on behalf of the state. Some of the other costs would be predictably unpredictable: it is hard to estimate how difficult it would be to agree on some sort of replacement for the monarch—whether the state should have a president and, if so, how that president should be chosen. Finally, there is the risk of some surprising implications that cannot be foreseen. Making a radical constitutional change in a state is like giving a kaleidoscope a twist: you can never be entirely sure what the outcome will be.

These last few paragraphs have explored what is, at heart, a simple point. Even if constitutionalism requires a change, the possible costs of making that change should be assessed. Where the change is relatively minor and in line

³³ On the monarchic origins of the presidency, see S. Huntington, *Political Order in Changing Societies* (Yale University Press 1968) 114.

with the rest of the constitutional order the costs are likely to be limited. But when the change is radical, the costs are likely to be significant, and hard to accurately estimate. This does not mean that the change should not be made, but it should encourage caution: in some respects our suboptimal constitutions may be good enough for our needs, and should be left alone. Maintaining and improving its constitution is one of the tasks of a reasonably successful state—but it is not the only task the state faces, and is often not the most pressing. Good enough constitutionalism will often suffice.

APPENDIX

Invisible Hand Systems

Invisible hand systems are a set of social systems. They share an important feature: there is a gap between the reasons that motivate actors within the system and the reasons we have for valuing its product. This distinction can be useful. Invisible hand systems are mechanisms that can advance the common good even when individuals are unwilling or, equally importantly, are unable to act towards that common good directly. By processing the partial reasons of individuals, invisible hand systems may mitigate or even justify this partiality. Invisible hand systems are touched on at a number of points in this book. In the chapter on sovereignty it was argued that the moral partiality of the state—the special concern that the state pays its own citizens over that given to other peoples—might be justified through such an argument. In the chapter on the separation of powers it was contended that one of the tasks of a constitution is to combine the differing types of scrutiny provided by different types of state institution into a coherent whole. And, perhaps most prominently, in the chapter on civil society, invisible hand systems were invoked to show how the partial concerns characteristic of private groups and individuals can be aggregated into the common good—and, as a result of this, how the state's primary purpose of advancing the well-being of its members can be better achieved through support of the private sector than through the state seeking this goal directly.

Invisible hand systems will be examined in two stages. First, an idealized account of the market will be introduced as a paradigmatic instance of an invisible hand system. The example reveals the three elements invisible hand systems possess: there are actors, with the reasons that motivate them; there is a system, operating through dispositions and rules; and, finally, there is the product of the system, identified and potentially justified by the function it plays in the community. Secondly, invisible hand systems will be contrasted with direct co-ordination through authority. The exercise of authority is a social phenomenon that has been thoroughly—perhaps even exhaustively—analysed by legal scholars. There are a number of important points of comparison to be drawn between the exercise of authority and the operation of the invisible hand system. Crucially, the operation of both authority and invisible hand systems depend on exclusionary reasons, but whereas in an authority relationship the actor's reasons for action are replaced by the authority's command, in invisible hand systems the reason that motivates the actor is left untouched: her reason for action is not normally supplied by another party.

The Market as an Instance of the Invisible Hand

Both Adam Smith and F. A. Hayek developed models of the marketplace that relied upon the invisible hand. In each case, their accounts were both explanations and justifications:¹ they purported to expose the actual operation of the market and, also, explain why this operation worked to the benefit of the community. It is not the aim of this chapter to argue for or against Smith's or Hayek's account of the market; instead, an idealized account of the market is introduced as a paradigmatic instance of the invisible hand as found in scholarly writings, and reflection on this model will reveal the elements of invisible hand systems, exposing the features that must be demonstrated to exist if an invisible hand system is to be morally defensible. Smith's and Hayek's accounts may fail to explain the workings of capitalism, but they are clear instances of the invisible hand model—and, for our present purposes, this is all that we need.

It was Adam Smith who, in *The Theory of Moral Sentiments* and *The Wealth of Nations*, introduced the invisible hand to the world.² In each book, the structures of the market are shown to lead self-interested private actors to produce outcomes that work towards the public good. Though the second of these books may be the more famous, it is in Smith's *The Theory of Moral Sentiments* that we find an account of an invisible hand system that comes closest to our modern understanding of the term.³ In his discussion of the invisible hand, Smith sought to show how the greed of the rich benefits the poor: in order to get the luxury products they covet, the rich are compelled to buy the labour of the poor. This serves to redistribute wealth. The rich must pay the poor to get the goods, the poor then get richer, and so society as a whole benefits from the avarice of the wealthy. The rich, guided by an invisible hand, have unintentionally advanced the common good.⁴

Adam Smith's invisible hand generated an attractive distribution of resources through the operation of the market, even though none of those involved sought to bring about this end directly. Smith's account of the market provides the starting point and inspiration for much of modern economics. Accounts of the market and the invisible hand that followed Smith can be placed into two rough groups.⁵ First, there

¹ The justificatory aspect of their models might be contested, and is discussed further later in this Appendix.

² A. Smith, *The Wealth of Nations* (Penguin 1999) book 4, chapter 2; see also book 1, chapter 7. Though the ideas behind the label are older than Smith's work: see J. M. Parrish, *Paradoxes of Political Ethics* (CUP 2007) esp chapter 6.

³ A. Smith, *The Theory of Moral Sentiments* (Penguin 2009) part 4, chapter 1. See also J. Getzler, 'Law, Self-Interest, and the Smithian Conscience' in M. Del Mar and M. Lobban (eds), *Law in Theory and History* (Hart Publishing 2016).

⁴ There is dispute over what Smith intended by the 'invisible hand': see W. Grampp, 'What Did Smith Mean by the Invisible Hand?' (2000) 108 *Journal of Political Economy* 441; E. Rothschild, 'Adam Smith and the Invisible Hand' (1994) 84 *AEA Papers and Proceedings* 319 and Parrish (n 2) chapter 6.

⁵ A. Vermeule, *The System of the Constitution* (OUP 2011) 67.

are those who argue that—under certain rather exacting conditions—the market will by itself generate Pareto-optimal outcomes; that is, a distribution of goods in which no redistribution can be undertaken without at least one person being left worse off.⁶ People keep exchanging goods until an equilibrium is reached, at which point no one has any further incentive to make an exchange. The second invisible hand model of the market presents the market as a device that reveals information. It is this account of the market, and this invisible hand model, that will be examined most closely in the remainder of this section.

F. A. Hayek, who was inspired by Smith,⁷ claimed that the market operated to reveal information about the relative value of goods and labour.⁸ The price that an item sold for in the market was the tip of an information pyramid. Its market price was the product of the costs involved in its production, coupled with the profit the seller could hope to secure.⁹ Its costs of production, in turn, were a product of the costs of the materials, labour, and profit, required to produce its constituent elements. And the price of these constituent elements were, again, determined by the price of goods that went into their production. This pattern spread outwards, with ever more information being factored into the price set on a single object. An alteration in the cost of a material would echo back up through the chain. If, say, the price of steel increased—perhaps because iron became scarcer, because the cost of transporting coal to furnaces rose, or because it became harder to find skilled workers to operate the plant—the cost of producing nails would rise, as would the cost of any object that used nails in its production. The costs of goods that used a great many nails would then rise relative to goods that used few nails, or no nails at all. By allowing the price of these items to be fixed by the market—rather than set by central planners—their true relative worth is revealed.

The information provided by the market generates a number of interconnected social benefits. First, it provides a relative price for satisfaction of an individual's desires.¹⁰ In the market, a person is presented with a range of goods and services at a range of prices. The individual will normally pick the product that has, for her, the greatest premium over its market cost: the product that she values most over the price set by the market. If the market price is accurate, a true reflection of the item's cost, this means that goods will tend to go to those who value them most highly. The total

⁶ On these accounts the invisible hand produces a Pareto optimal distribution of goods: see K. Arrow and G. Debreu, 'Existence of an Equilibrium for a Competitive Economy' (1954) 22 *Econometrica* 265, discussed in J. Schlefer, *The Assumptions Economists Make* (Harvard University Press 2012) 10–15.

⁷ F. A. Hayek, 'Between Instinct and Reason' in F. A. Hayek, *The Fatal Conceit* (University of Chicago Press 1988) 14; A. Gamble, 'Hayek on Knowledge, Economics, and Society' in E. Fesser (ed), *The Cambridge Companion to Hayek* (CUP 2006) 113, 125.

⁸ F. A. Hayek, *Law, Legislation and Liberty* (Routledge 1982) volume I, 15–16, 41–42.

⁹ F. A. Hayek, 'The Mysterious World of Trade and Money' in F. A. Hayek, *The Fatal Conceit* (University of Chicago Press 1988) 104–05.

¹⁰ Hayek (n 8) volume II, 113; F. A. Hayek, 'The Uses of Knowledge in Society' (1945) 35 *The American Economic Review* 519, 526.

wealth of the community is thereby increased. Secondly, those who place the highest value on the goods will often be those who will make the most of them, processing them in a way that maximizes their subsequent profit, and their subsequent capacity to meet the desires of consumers.¹¹ Finally, knowing the true cost of goods can encourage innovation: producers are encouraged to search for the cheapest and most efficient way to produce marketable goods.¹²

Hayek's account of the operation of the market has been subjected to powerful critique. It has been shown that Hayek's invisible hand could never produce a fully efficient distribution of goods—a condition in which the market reaches stable equilibrium. As Grossman and Stiglitz have shown, the information problems that Hayek's account engages with are even more profound than he appreciated.¹³ There is a cost involved in acquiring information about goods within the market. As the market becomes more efficient, the incentive to discover this information decreases as the price of the goods approaches their relative worth. At some point traders will stop spending to acquire new information, and the market will decrease in effectiveness—until, again, there is reason for people to spend to discover the information. Grossman and Stiglitz's central point is that the market will never provide perfect information about the relative worth of goods and will probably move between situations of greater and lesser accuracy of information over time.¹⁴

However, it is not the aim of this book to defend or critique Hayek's—or anyone else's—model of the market. Hopefully, even those who doubt the accuracy of Hayek's account would concede that it is a clear instance of an invisible hand model and, if it were correct, it would provide reasons for us to value and engage with the market system. Hayek's model brings forward the three elements that are constitutive of all invisible hand systems. First, there are actors, whose actions are motivated by a particular reason or set of reasons. Secondly, there is a system that structures and integrates these actions. Thirdly, there is a product of the system, a product we have reason to value.

(i) **The First Element of Invisible Hand Systems: Actors and Their Reasons**

Accounts of invisible hand systems identify a set of actors and the reason or reasons for which they act. In Hayek's market, the actors are the buyers and sellers. Following a foundational assumption of much of economics, these actors are taken

¹¹ Hayek, 'The Uses of Knowledge in Society' (n 10) 523.

¹² *ibid* 527.

¹³ S. J. Grossman and J. Stiglitz, 'On the Impossibility of Informationally Efficient Markets' (1980) 70 *The American Economic Review* 393. See also A. Vermeule, 'Local and Global Knowledge in the Administrative State' (2013) 13–01 Harvard Working Paper, 8–10.

¹⁴ Recent work in behavioural economics would also question the assumption that people always make decisions based on a rational assessment of their wants: D. Ariely, *Predictably Irrational* (Harper Collins 2008).

to be motivated by a desire to satisfy their wants. They are either the final consumers of the product, deriving satisfaction from its use, or are extracting a profit from the processing of goods, selling for more than the original items cost. In each case, the actors are seeking to enrich themselves, either through consuming the goods and extracting the value directly, or by building up a store of wealth they could ultimately expend on goods to consume.

The identification of the actors and the reasons that motivate them constitute empirical, rather than normative, claims. Where the invisible hand is used as an explanation, to illuminate an existing social practice, this amounts to a factual claim about an existing state of affairs. So, if Hayek's explanation of the market were correct, it must actually be the case that people within markets are, in general, trying to increase their wealth. Not all incidents of the invisible hand depend on a desire for material personal enrichment. People can, and often do, pursue ends that do not add to their bank balances. As Michael Sandel demonstrates, there are some activities that are undermined by the introduction of a financial incentive.¹⁵ It is arguable that the operation of families within society is an instance of the invisible hand—a society in which children are raised within the family produces a more attractive and successful community than one in which the state seeks this goal directly—but parents who required a financial incentive to care for their children would, already, have failed in this role. Successful parents are motivated by love for their children, not cash—but this motivation can still form the basis for an invisible hand system.

This aspect of the invisible hand, the motivations that power it, is susceptible to testing: it is the type of assertion that could, potentially, be shown to be false. Where some version of the invisible hand is mooted as a possible solution to a social problem its success will be dependent on the actors' willingness to embrace the motivations that animate it. The invisible hand system will fail if it is structured on supposed incentives that people have no interest in obtaining. The carbon trading market, for example, was established to reduce the amount of pollution produced by industries by giving each polluter a permit to produce carbon dioxide. The polluter could then sell the right to pollute to others—the hope being that this would encourage companies to produce less carbon dioxide in order to make money by selling their permits. It seems that, for a number of reasons, the incentives behind the scheme initially failed: permits were granted too generously, especially to larger industries.¹⁶ The companies then had little incentive to reduce pollution—the potential benefits seemed not to justify the costs—but still benefited from selling their excess allowances.

¹⁵ M. Sandel, *What Money Can't Buy: The Moral Limits of the Market* (Allen Lane 2012) chapter 2. See further D. Burbidge, 'Space for Virtue in the Economics of Kenneth J. Arrow, Amartya Sen, and Elinor Ostrom' (2016) 23 *Journal of Economic Methodology* 396.

¹⁶ C. L. Spash, 'The Brave New World of Carbon Trading' (2010) 15 *New Political Economy* 169; Sandel (n 15) 70–79.

(ii) **The Second Element of Invisible Hand Systems:
Rules and Dispositions**

Any account of an invisible hand system must also identify the content of the system studied: the processes that structure the interactions of the actors and cause the product to be generated by the system.¹⁷ These systems are structured by rules and their operation shaped by the dispositions of their actors.¹⁸

Rules are directives that instruct people to behave in a certain way.¹⁹ They purport to exclude some or all of the reasons that actors would ordinarily consider, and instead provide people with a reason to act in a specified manner.²⁰ Rules are normative: they purport to tell people how they *ought* to behave. There is, as H. L. A. Hart famously explained, an internal aspect to rules. This internal aspect has two dimensions.²¹ On the one hand, the community within which the rule exists accepts the rule as setting a valid standard for the person to whom the rule applies. That person *ought* to comply with the rule, and will be exposed to social criticism if she departs from it. On the other hand, for the rule to be operative it must be the case that the rule makes a difference to how people behave: their conduct must have been shaped by the rule.²² Often these two aspects of the internal attitude are combined: the person whose conduct complies with the rule is also part of the group that regards the standard as obligatory. But they can come apart. Sometimes the people who comply with the rule and those who regard it as obligatory will be different groups, with the latter group maintaining the efficacy of the rules through coercion.

Rules come in many forms.²³ Many social rules stand alone, but some are part of a mesh of rules, with rules that identify and purportedly validate other rules. Law is an institution of this type. Here, it is enough that a significant part of the community accepts the rules that identify these other rules; that is, they accept the rules of recognition.²⁴ Some discrete legal rules might not be regarded as obligatory by the community, but they remain law because they are part of a system accepted by the group.

The market system, as described by Hayek and many others, is constituted by a large number of rules, normally including, in modern times, both legal and non-legal rules. These play a number of roles. First, and most basically, there are some

¹⁷ E. Posner and A. Vermeule, *The Executive Unbound* (OUP 2010) 22–23.

¹⁸ G. Brennan and P. Pettit, 'Hands Invisible and Intangible' (1993) 94 *Synthesis* 191, 205–06; G. Brennan and P. Pettit, 'The Hidden Economy of Esteem' (2000) 16 *Economics and Philosophy* 77.

¹⁹ N. W. Barber, *The Constitutional State* (OUP 2010) chapter 4.

²⁰ On social rules, see esp: J. Raz, *Practical Reason and Norms* (2nd edn, Princeton University Press 1990) and D. Galligan, *Law in Modern Society* (Clarendon Press 2007) chapter 3.

²¹ On the ambiguities of Hart's discussion of the 'internal attitude', see B. Bix, 'H. L. A. Hart and the Hermeneutic Turn in Legal Theory' (1999) 52 *Southern Methodist University Law Review* 167, at 183–86.

²² Raz (n 20) chapter 3. ²³ Barber (n 19) chapter 4.

²⁴ H. L. A. Hart, *The Concept of Law* (2nd edn, OUP 1994) 109–10.

social institutions that must exist before the system can function. For example, it is hard to imagine how a market could start to operate without the existence of the institution of property, as the possibility of trade presupposes the possibility of ownership. Secondly, there are rules that enhance the operation of a pre-existing system. The creation of money, credit, and more complicated forms of property all add to the functioning of the market. These rules create new institutions and render existing institutions more flexible. The formality of law enables these rules to become more complicated and nuanced, moving beyond the shared assumptions of social rules.²⁵ Whilst simple forms of property and credit can clearly exist without law, the more complicated structures of exchange become, the more pressing the need for law. Finally, there are rules that protect the functioning of the system, guarding against acts that may undermine its operation. In the market, rules against fraud and duress play this role.

As Brennan and Pettit have demonstrated, rules are not the only operative element that animates the invisible hand.²⁶ The perceived dispositions of people within the community may also shape its operation. Where actors in the system believe that their conduct will cause others within their community to praise or criticize them, this may lead them to modify their conduct to gain praise and avoid blame. Often, perhaps even normally, these dispositions will be elements of a social rule, with the criticism resting on a breach of the rule. But this need not be the case: sometimes communities may regard some actions as foolish or commendable without regarding them as governed by rules.

The market might be partly structured through dispositions. A trader who destroys her stock for a laugh, or who declines to engage in even the most limited form of advertising, might be criticized by her peers. This criticism would rest on the folly of these actions, rather than on the breach of some rule that governs her conduct. Fear of this criticism may, in itself, shape her behaviour. On the other hand, a desire to gain the esteem of the community may lead people to behave in ways they think will bring them praise—by, for instance, contributing to charities or helping run civic groups.

These perceived community dispositions affect the operation of invisible hand systems where they are widely believed and widely acted upon. The line between rule-governed conduct and pure disposition-governed conduct will be very hard to draw in practice. Many of the dispositions discussed in the previous paragraph could shift into social rules over time. The community may develop a sense of what it means to be a successful trader in the market: perhaps as someone who deals effectively with her stock, whilst also supporting charitable causes. The 'trader' then becomes a social institution in itself, a role that people can assume, defined by rules. Now a person who falls short in some way has not just acted unwisely, she has failed to comply with the rules that determine success in a social office.

²⁵ Barber (n 19) chapter 4.

²⁶ Brennan and Pettit, 'Hands Invisible and Intangible' (n 18) 206.

(iii) The Third Element of Invisible Hand Systems: The Product and Its Function

Invisible hand systems produce a product that has the appearance of design, but which is not, in fact, designed. In the case of the market, the product has the appearance of design because it is socially useful: the efficient allocation of resources within the community. Because of its utility, we see a pattern and, sometimes, we are seduced into believing that there must have been a designer.²⁷ There is a strain of relativism in Hayek's work that obscures the moral value he ascribed to the market.²⁸ Hayek wrote that one of the strengths of the market is that there is no need for an agreed ranking of ends.²⁹ This is correct, in that there is no agreement over the relative worth of different activities or goods—indeed, if there were agreement the operation of the market would be undermined—but Hayek's defence of the market depends on its capacity to distribute goods efficiently, to those who value them most highly and, often, will make most effective use of them. This is a moral benefit conferred on the community by the system. It is an end that we should all wish to see achieved. In the perfect market, the product of the system is that which an omniscient and well-motivated actor would have chosen to bring about: it is an outcome that we all have reason to wish for, though none of us has the capacity to identify. Furthermore, it is this beneficial outcome that identifies the pattern that forms the product of the system and creates the illusion of design.³⁰ Without this element of moral assessment—a moral assessment that serves to identify the pattern that constitutes the product—the invisible hand system could not be identified.³¹

There is an ambiguity, or uncertainty, in writing on invisible hand mechanisms. Some writers treat any system that produces an outcome that has the appearance of design as an instance of the mechanism. For Edna Ullmann-Margalit, the invisible hand is an *explanation* of how a social pattern has emerged.³² The pattern is identified, and then the theorist looks back to identify the social interaction that did, or that could have, brought the pattern about. The attractions of the pattern and, consequently, the attractions of the mechanism that generates the pattern, are a secondary question. Some invisible hand mechanisms, on this account, can be wholly negative. Thomas Schelling provides a powerful account of a negative invisible hand

²⁷ On this phenomenon, see: P. Boyer, *Religion Explained* (Vintage 2002) 163–69, chapter 9; M. Pagel, *Wired for Culture* (Allen Lane 2012) 138–45.

²⁸ Hayek (n 8) volume II, 25–27. ²⁹ *ibid.* 109.

³⁰ Against this, see R. Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 19. Nozick fails to recognize that the patterns he identifies as produced by the invisible hand are identifiable only because we have reason to desire them.

³¹ As Adrian Vermeule has explained, invisible hand systems can suffer from the 'dilemma of verification': how can we know that the product of the market is efficient, when it is the process of the market that identifies efficiency? See Vermeule (n 5) 94–99. The best that can be said is that the product of the market appears efficient when compared to other mechanisms of allocation. If a better system could be identified the pattern produced by the market would appear less morally significant, and perhaps start to look arbitrary.

³² E. Ullmann-Margalit, 'Invisible Hand Explanations' (1978) 39 *Synthese* 263.

mechanism. Schelling imagines a community in which two racial groups are intermingled. At the start of Schelling's story, houses are allocated at random between the groups. Homeowners are happy to live next door to a person of another race, but will move if surrounded by people of that race. Following the initial allocation, some people discover that both of their neighbours are of another race, and so move. As one group moves out and another moves in, the areas become steadily less diverse—and, as they become less diverse, the process accelerates. The end result is a town divided along clear racial lines, even though none of its members would have desired this at the start.³³ The outcome has the appearance of a design of racist intent, even though none of the actors sought to bring this outcome about. Once again, the pattern is of moral significance, but this time it is its negative moral appearance that leads us to identify the pattern. Other writers, in contrast, talk of invisible hand *justifications*. For Adrian Vermeule, invisible hand systems have a normatively attractive quality; we have reason to be glad that the system operates.³⁴ On Vermeule's account, the market may be an instance of the invisible hand, but Schelling's segregation example would not be included.

Brennan and Pettit provide a useful escape from this choice. They distinguish between invisible hands and invisible backhands.³⁵ Invisible hand systems produce outcomes that are social goods. Invisible backhands work in the same fashion, but produce negative outcomes. Though these two processes work in similar ways, the challenges they present to lawyers and political scientists are radically different. The invisible hand presents an opportunity, a possible technique for resolving social problems. The invisible backhand, in contrast, presents a problem, a difficulty that needs to be resolved through some other means of coordination. The distinction proposed by Brennan and Pettit is a helpful one, as the sets of systems their divide distinguishes raise very different issues.

(iv) Conclusion

This section began with accounts of the market that turned on an invisible hand explanation, in particular that provided by Hayek. This was not because these accounts are necessarily correct, but rather because they provide a clear and widely accepted model of an invisible hand system. This allowed us to identify the three elements of an invisible hand system, and the different types of factual and normative claims that invisible hand explanations imply. Invisible hand systems comprise actors, who are motivated by an identified reason. These actions are structured and integrated by a system that is constituted by a set of rules and shaped by the dispositions of those who act within it. Finally, the system generates a product, a product that we identify because it is of value to us. A successful invisible hand explanation makes a number of

³³ *ibid* 272–74; T. C. Schelling, 'Models of Segregation' (1969) 59 *American Economic Review* 488.

³⁴ Vermeule (n 5) chapter 3.

³⁵ Brennan and Pettit, 'Hands Invisible and Intangible' (n 18) 204.

connected factual and moral claims. The reasons that actors act for, and the rules and dispositions that shape those actions, are matters of fact, whilst the product of the system is a combination of fact and value. We identify the product because it matches a pattern that we have reason to want—an identification that implies a moral claim—but the explanation also asserts that this distribution is a feature of the world, and a feature causally connected to the actors and system specified by the invisible hand explanation—assertions that constitute factual claims. Hayek's account of the market would be false if the pattern of distribution produced by the system was morally irrelevant or unattractive—the explanation would then rest on a moral mistake. But it would also be mistaken if the distribution he identified was not, in reality, generated by the system—either because the market produces a different outcome or because the outcome he identified was produced by something other than the market.

Invisible Hand Systems Contrasted With Direct Coordination Through Authority

The characteristic mode of action by the state is the exercise of authority; the issuance of commands that the state presents as obligatory. As we have seen, authority claims are central to an understanding of sovereignty and, if the state is to be more than merely an idea, these claims must, to some extent, be successful. The most widely used—and discussed—model of authority is found in the work of Joseph Raz. At the core of Raz's account of authority is the pre-emption thesis.³⁶ An authoritative directive replaces, rather than supplements, the reasons that apply to an individual. The directive consists of an exclusionary reason—a reason not to consider some reasons that would otherwise apply to the decision—and a primary reason that requires some sort of action. So, for example, when the captain of a platoon orders her soldiers to adopt a certain plan of attack, the soldiers cease to consider the merits of other courses of action and instead act on the captain's plan.

Combined with the pre-emption thesis is Raz's dependence thesis.³⁷ Given that a purportedly authoritative command replaces some of the reasons that would otherwise apply to its subjects, the command ought to rest on reasons that already apply to those it addresses. The authoritative directive excludes these reasons because they have already been weighed when determining the primary reason embodied in the command. To weigh them again would amount to double-counting. To return to our example, the soldiers should not count their captain's command as an extra reason to be weighed in the scales alongside the various considerations for and against an action, as the captain ought to have considered those reasons when formulating her command.

³⁶ J. Raz, *The Morality of Freedom* (Clarendon Press 1986) 57–62.

³⁷ *ibid* 42–53.

This leads to Raz's third authority thesis: the normal justification thesis.³⁸ The normal way that authority is justified—that is, the normal reason why we should accept a person or body as possessing authority over us—is, according to Raz, that we will be more likely to comply with the reasons that apply to us by following the directive than by trying to follow those reasons directly. The soldier has reason to want to win the battle—but is more likely to achieve this by following the captain's orders than by relying on her own initiative. The captain has more information about the course of the battle, the environment it is being conducted in, and, crucially, can also ensure that other soldiers in the battalion will act in a co-ordinated fashion.

Invisible hand systems resemble systems based on authority in that they, too, operate to exclude some of the reasons that apply to those who act within their structures. When invisible hand systems work well, they achieve a social benefit. This benefit is one that people within the community have reason to want. If it were not for the invisible hand system, they would have reason to try to bring about this state of affairs directly. If the market did not exist, for example, people would still have reason to want to see goods traded at a fair price and resources allocated efficiently. Without the market, when people exchanged goods they should try to assess whether this was a fair bargain for the person with whom they are trading, or, indeed, whether there was someone else who could make more with the goods. Given the limited information available to a person in this position—coupled with her limited capacity to process this information—it is unlikely that she would even come close to answering these questions successfully. An individual is well-placed to determine her own abilities, needs, and wants, but poorly placed to determine the abilities, needs, and wants of others. When the market works well, it provides a more accurate answer to these questions than any individual could. This is at the core of Hayek's argument in favour of capitalism over socialism. According to Hayek, attempts by central planners to determine the 'true' or 'fair' value of goods and services undermine the functioning of the market, and end by depriving society of the social benefit the system brings. The same argument applies to actors within the market. If they tried to achieve the product of the system directly, if they tried to allocate their goods and services in the most effective way, they would harm the operation of the system and risk ending up with a less effective allocation than they would have secured if they had simply tried to make a profit.³⁹ We have reason to want the product the system brings, but—if the system is present—reason not to pursue this product directly.

These thoughts illustrate the first potential strength of invisible hand systems: they can mitigate or even resolve problems relating to information or reasoning capacity that actors face. A virtuous person might decide to engage in an invisible hand system, knowing the restricted reasoning that the system requires will, overall, better serve the common good than pursuing that good directly. If Hayek's account of the market was correct, a virtuous person should participate in that system, seeking narrowly to

³⁸ *ibid* 53–57.

³⁹ F. A. Hayek, 'The Fatal Conceit' in F. A. Hayek, *The Fatal Conceit* (University of Chicago Press 1988) 81.

maximize her wealth, but only because she appreciates that her apparent partiality actually advances the common good. The market mitigates her lack of knowledge of the needs and abilities of others within her community, and, also, mitigates her limited capacity to process the information that she possesses. She is more likely to achieve the social goods she recognizes she has reason to want by engaging in the limited moral reasoning required by the market rather than pursuing those social goods directly.

Invisible hand systems differ from those that rely on authority, though, in that they do not purport to supply actors with a new reason on which to act. Both invisible hand systems and simple authority relationships depend for their legitimacy on their output being something that the actors have reason to want. The soldiers have—or should have—reason to want victory in the war. The traders have—or should have—reason to want to see the efficient distribution of resources in their community. In each case—provided that the authority is justified and the invisible hand system successful—the actors should cease to pursue that end directly. The soldiers should obey the commands of the captain; the traders should not attempt to distribute their goods in an optimal fashion. But whereas the captain supplies a new reason on which the soldiers should act—instructing them, for instance, to secure part of the line—the invisible hand system excludes from consideration a reason that would otherwise have applied to the actor, but does not add a new reason to direct her conduct. The presence of the market—if working well—means that the trader need not consider some of the considerations that would otherwise have applied to her. It does not supply her with a new reason for action.

Given that invisible hand systems rely on pre-existing motivations, these systems have less need to directly coerce individuals or, indeed, to make appeals to their better natures, than systems based on authority. Invisible hand systems may use coercion to shut off options from people—the market is enhanced by laws, backed by coercion, that proscribe theft and fraud—but they do not normally require coercion to compel people to engage in their structures. Capitalism, as has often been said, sells itself. Similarly, whilst an altruistic person may engage in the invisible hand system to secure the social benefit that is the product of the system, such altruism is not necessary to make the system work. Ordinarily, even those who are not altruistic will wish to participate in the system. The difficult question of legitimacy, of what right those issuing commands have to expect the obedience of those they address, is not directly raised in invisible hand systems.

These thoughts lead us to the second potential benefit of invisible hand systems: they can serve to accommodate the moral weaknesses of those who act within their structures. In these instances invisible hand systems might be said to have a ‘curative’ function.⁴⁰ Invisible hand systems do not purport to supply their actors

⁴⁰ An argument similar to this can be found in a forerunner of an invisible hand argument: that found in Bernard Mandeville’s *Fable of the Bees*. Here, Mandeville argues that one of the tasks of the state is to channel people’s natural pride into beneficial courses. So, by directing a vicious desire for praise and honour the state can ensure the common good is achieved. B. Mandeville, *Fable of the Bees* (Penguin 1989) 67–69, 85–91. See Parrish (n 2) 203–31.

with new reasons for action; the reasons that motivate the actors would have existed even if the system was not present. Serge-Christophe Kolm has shown that a society of perfect altruists could distribute goods as efficiently as a society of egotists.⁴¹ Indeed, he argues that the altruists would do a better job, avoiding the market failures that the egotistical community would frequently face: the altruists can solve the informational difficulties identified by Hayek by exchanging and gathering information.⁴² An altruistic community works, according to Kolm, better than an egotistic community. But an egotistic community operates better than a community that is a mix of egotistic and altruistic actors. The moral weakness—if total altruism is to be regarded as a moral strength—of others within the system generates the informational constraints that the market can remedy. This is one example of a wider set of instances, discussed at greater length by Adrian Vermeule, of the theory of second best.⁴³ This warns us that sometimes we are better off with a second-best solution (the market of egotists) than trying to modify conditions to approach the optimal (the society of altruists) if we end up with a position that is worse than either of these two options (a mix of egotists and altruists). Hayek might have been mistaken in thinking that the market is the best of all *conceivable* economic systems, but he might have been right in thinking it the best of all *possible* economic systems.⁴⁴ On the scale between absolute self-interest and absolute altruism, more people may be motivated more of the time by self-interest than altruism—but if the market is functioning well, this moral weakness may be harnessed to the broader public good.

Conclusion

The purpose of this Appendix is to supplement, in a more formal manner, the discussion of invisible hand systems elsewhere in this book. It has identified three elements that are necessary for an invisible hand system to operate: a set of actors, with motivating reasons; a system of rules and dispositions that combines those actors' decisions in some way; and a product, a morally attractive outcome that we have reason to want to achieve, but which is distinct from the reason for which actors in the system act. Two possible benefits of invisible hand systems were identified, two reasons why we might be better off making use of invisible hand systems rather than pursuing the outcome of these systems directly. First, invisible hand systems can operate to overcome informational constraints. Where an institution is well-placed to assess the needs of one set of people but badly placed to assess the needs of others, invisible

⁴¹ S. Kolm, 'Altruism and Efficiency' (1983) 94 *Ethics* 18. See also R. H. Coase, 'The Wealth of Nations' (1977) 15 *Economic Inquiry* 309, 313–16.

⁴² Kolm (n 41) 27. ⁴³ Vermeule (n 5) 29–36, 87–94.

⁴⁴ A point that touches on a variant of the theory of second best: the distinction between the conceivable ideal and the possible ideal, a distinction well-known to classical scholars: see C. H. McIlwain, *Constitutionalism: Ancient and Modern* (rev edn, Cornell University Press 1947) 27–35; C. N. Johnson, *Aristotle's Theory of the State* (Macmillan 1990) 162–66.

hand systems may permit such institutions to narrow their range of concern: states can focus on the good of their citizens, not on the well-being of the citizens of other states, whilst families can prioritize the care of their children, and need not treat all children with equal care. Similarly, institutions may be well-placed to focus on some reasons relevant to a decision but poorly placed to comprehend others: our discussion of the separation of powers turned, in part, on the constitution combining the relative institutional strengths of institutions, manifested in a range of decisions, into a single state policy. Secondly, invisible hand systems may mitigate or permit the limited altruism that most of us show towards others. Citizens tend to care more about the interests of their co-nationals than foreigners, families show greater concern for family members than strangers, and, most broadly, most of us place greater weight on our own well-being than the well-being of others. In the discussion of civil society, invisible hand systems were shown to have the potential to accommodate these constraints and, where civil society is functioning well, these limitations on altruism become a benefit to the community rather than a hazard. Where such systems exist, people are morally justified in acting on those motivations that weigh most strongly with them—and, connecting back to the informational benefits of such systems—which often focus their attention on factors they are well placed to assess, whilst knowing that the structures of civil society combine these actions into the broader public good.

What this Appendix has not argued for is the claim that invisible hand systems are, themselves, un-designed or, in Hayek's term, are 'spontaneous social orders'. On the contrary, as the discussion in the book shows, invisible hand systems are routinely the subject of design; indeed, one of the core purposes of the state, one of the core arguments for sovereignty, is the need for such design. It is one of the most important tasks of the state to ensure that invisible hand systems within the constitution and within society are functioning successfully.

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