

OXFORD

# Democratic Justice & the Social Contract



ALBERT WEALE

DEMOCRATIC JUSTICE AND THE  
SOCIAL CONTRACT

*This page intentionally left blank*

DEMOCRATIC  
JUSTICE AND THE  
SOCIAL CONTRACT

ALBERT WEALE

OXFORD  
UNIVERSITY PRESS

**OXFORD**

UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide. Oxford is a registered trade mark of  
Oxford University Press in the UK and in certain other countries

© Albert Weale 2013

The moral rights of the author have been asserted

First Edition published in 2013

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in  
a retrieval system, or transmitted, in any form or by any means, without the  
prior permission in writing of Oxford University Press, or as expressly permitted  
by law, by licence or under terms agreed with the appropriate reprographics  
rights organization. Enquiries concerning reproduction outside the scope of the  
above should be sent to the Rights Department, Oxford University Press, at the  
address above

You must not circulate this work in any other form  
and you must impose this same condition on any acquirer

Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data  
Data available

ISBN 978-0-19-968464-9

Printed in Great Britain by  
CPI Group (UK) Ltd, Croydon, CR0 4YY

For Jan—once again

*This page intentionally left blank*

What people say is that to do wrong is, in itself, a desirable thing; on the other hand, it is not at all desirable to suffer wrong, and the harm to the sufferer outweighs the advantage to the doer. Consequently, when men have a taste of both, those who have not the power to seize the advantage and escape the harm decide that they would be better off if they made a compact neither to do wrong nor to suffer it.

Glaucon in Plato, *The Republic*, Book II, 358–9.

The ancient republics, being mostly grounded from the first upon some kind of mutual compact, or at any rate formed by an union of persons not very unequal in strength, afforded, in consequence, the first instance of a portion of human relations fenced round, and placed under the dominion of another law than that of force.

John Stuart Mill, *The Subjection of Women*, chapter 1.

For really I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, sir, I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government . . .

. . . the main cause why Almighty God gave man reason, it was that they should make use of that reason. . . . I do not find anything in the Law of God that a lord shall choose twenty burgesses, and a gentleman but two, or a poor man shall choose none: I find no such thing in the Law of Nature, not in the Law of Nations. But I do find that all Englishmen must be subject to English laws, and I do verily believe that there is no man but will say that the foundation of all law lies in the people. . . .

Colonel Rainborough, speaking in the Putney Debate on  
'The Agreement of the People', 29 October 1647.

If I am not for myself, who is for me? And if only for myself, what am I?

Rabbi Hillel, *Chapters of the Fathers*, 14, *The Mishnah*.

*This page intentionally left blank*

# CONTENTS

<i>Preface and acknowledgements</i>	xi
1. Justice, social contracts, and democracy	1
2. The democratic social contract	31
3. Economic justice and the democratic contract	65
4. The theory of democratic social contracts	95
5. The great transformation	129
6. Political democracy in the great society	159
7. Just returns in the great society	191
8. The sense of democratic justice	221
<i>Notes</i>	245
<i>Bibliography</i>	279
<i>Index</i>	299

*This page intentionally left blank*

## PREFACE AND ACKNOWLEDGEMENTS

This work offers a theory of democratic justice, that is to say a theory in which the principles of social justice for a political association are defined by the democratic procedures of that association. Provided collective decision making respects basic conditions of procedural democracy and takes place under circumstances in which the strength of the parties is approximately equal, it will generate principles of just obligation. One inspiration for the theory is John Stuart Mill's observation in *The Subjection of Women* that unjustifiable social inequalities arise from inequalities of power. Injustice then is an effect of unequal power at work in the basic institutions of society. According to Mill, the ancient republics of the classical Greek world were formed through social compacts among persons of roughly equal strength. As a result, relations among their members were governed by principles other than those of mere force. From this it is a short step to the claim that justice can be defined by the principles that would be agreed among persons entering a social contract in which their power of negotiation over the terms of that contract was approximately equal. When it functions well, political democracy is a system of government in which power is as equally distributed as it can be. In the same way that the ancient republics, with equal strength among their members, established a principle of social organization other than force, democratic procedures, in circumstances in which all parties to the contract enjoy a balance of power, provide one model for a just social contract. So some types of democratic procedure empirically model, that is to say stand as a representation of, a social contract. The theory of democratic justice is thus a social contract theory.

As Chapter 1 notes, social contract theories of justice go back to the Sophists and Epicureans of classical Athens and the Hellenistic world. Plato has Glaucon, his brother, state the idea in the second book of *The Republic*. Glaucon is made to expound the theory so

that the Platonic Socrates can refute it (an expression of sibling rivalry perhaps?). Despite Platonic and Aristotelian objections, the idea of justice as the product of a social contract survived in the Hellenistic thought world, particularly among the Sophists and the followers of Epicurus. According to their view, justice is to be understood as a convention. As a principle of social organization, it derives its force from its coordinating the expectations of separate persons to their mutual advantage. In being conventional, principles of justice do not derive from an eternal natural law or from reasoning in terms of universalizable maxims. Instead, such principles are to be understood as constructions of human practical rationality under conditions in which persons of roughly equal power have to cooperate to mutual advantage in circumstances of limited altruism and moderate scarcity. Each party to the contract pursues his or her own good. The need for a social contract arises because the collective outcome of this pursuit is mutually self-defeating. The principles of justice are those principles that agents trapped in this dilemma could agree to their mutual advantage. To use the contemporary distinction, the theory is contractarian rather than contractualist. Since the mutual advantage of the associates is negotiated through democratic procedures, the theory may be called democratic contractarianism.

Social contract theory captures a key element in the logic of any viable society, namely the need to reconcile the existence of separate and competing interests with the need to secure common interests. Any viable society requires an implicit social contract in order to bring about this reconciliation, but not all such contracts are just. How could we know which social contracts were just and which unjust? To answer this question, in Chapter 2 we identify societies or social organizations in which the logic of contractual association among persons of roughly equal strength is exhibited. Empirical examples of such societies are to be found in common property resource regimes. The features that enable successful common property resource regimes avoid collective action failure in the context of pressing environmental constraints can also be interpreted as the conditions for a just social order.

What principles of economic justice are found in common property resource regimes? As Chapter 3 explains, a central principle is that producers are entitled to the full fruits of their labour, provided

that all have access to the essential means of production on equal terms. The principle that all should receive the full fruits of their labour can be seen as a focal point agreement to mutual advantage in a situation in which the uncoordinated exercise of Hohfeldian liberties by each agent leads to mutually disadvantageous spillover effects for all. To be effective, principles of social justice must strike a balance between economic individualism and economic collectivism. The full fruits principle, resting on the equal access principle, may be contrasted with Locke's individualism, Rawls's collectivism and Gauthier's attempt to combine both an individual right to the appropriation of natural resources with collective control of the economic rent resulting from the social contract. The full fruits principle, when combined with equal access to the means of production, mean that economic advantages that accrue from luck are permissible. The problem of need is to be solved at a later point in the argument.

Contractarian accounts of justice often rely upon formal bargaining theory, using a deductive choice-theoretic account of rationality. However, as explained in Chapter 4, democratic contractarianism does not adopt this approach, but relies instead upon a concept of rationality in which choice is voluntary action arising from deliberation. Such deliberative rationality involves reflective distance, deliberative competence in the practical syllogism, the ability to understand particular specifications as elements of planned ends, including specifications that are novel, and the capacity of rational agents to give themselves normative self-direction. Practical public reasoning is also defeasible, meaning that it is liable to being altered by the discovery of unanticipated facts that render previous decision premisses unreliable. Consequently, political decision making should be sensitive to the limits under which general principles are to be applied, political design should take into account local information and political theory needs to model reflective and creative thinking in the design of solutions to collective action problems.

Common property resource regimes are small-scale societies in which participants can bargain and negotiate face to face with one another. How, then, can we use their experience to model principles applicable to industrial and post-industrial societies, regarded as 'great societies'? Some, like Hayek, have argued that we cannot. To transpose the principles of one type of society to the other type is

to commit a category mistake. Another view is that it should prove no more difficult to model a just social contract in terms of common property resource regimes than it is to model a social contract by a hypothetical thought-experiment in which the potential members of society bargain or deliberate over the terms of their association. Chapter 5 suggests that both answers miss a trick. By understanding the 'great transformation' from small-scale to large-scale societies, we gain an understanding of what the distinctive features of justice are in large-scale societies. These features include the centrality of broad political representation where there is an inevitable plurality of interests; the relative contribution of markets and hierarchies in allocating returns to labour; and the transformation of interdependence in the household as it ceases to be the predominant unit of production.

The central problem in designing the political institutions of a great society is to make political decision making responsive to a plurality of interests and opinions, whilst simultaneously meeting standards of deliberative rationality. The solution to this problem of design is not to suppose that deliberation can generate consensus across the whole of society. Rather, as argued in Chapter 6, a system in which political parties are elected by proportional representation and policy is decided with the support of a majority of representatives in the legislature exemplifies one possible institutional design that satisfies the requirements of a just social contract. Even when shifting parliamentary-coalitions determine legislation or policy, political accountability is still possible, though it cannot be represented in the form of a consistent rank-ordering of a disinterested social planner. Instead, public deliberative rationality requires institutions to test and refine the decision premisses of authoritative political action.

Returns in the hierarchies of the modern corporation do not give workers the full product of their own labour, a principle that was a feature of common property resource regimes. As argued in Chapter 7, under some circumstances, denying workers their marginal product is to deny them justice. The marginal product principle is not challenged by the observation that there are increasing returns to scale in a modern economy that provide grounds for redistribution. Scale economies entail that workers should contribute to the common overheads required for production, not share

their product with other producers. The marginal product principle is not even challenged by the principle of need, taken as an independent consideration of social justice, since redistribution on grounds of need in the modern welfare state is best understood as redistribution across the life-cycle among those who produce, rather than as redistribution from those who produce to those who do not. Moreover, the transformation of the household in a great society, with a life-cycle approach to redistribution, reveals the extent to which the labour of reproduction is a social responsibility. Finally, securing equal access to the means of production requires the widespread distribution of material and human capital.

Participants in a social contract need a sense of justice. Chapter 8 argues that a sense of democratic justice cannot come from identification with the principles that define the historic identity of a community, since traditional principles may need to be challenged in the name of justice. A just social contract must allow for self-assertion among equals. However, it cannot rely only on self-assertion. It also requires an understanding of the contribution that each has to make to the common enterprise. Yet there is no reason for thinking that rational contractors will always find a prudential reason for abiding by the terms of a social contract. In consequence, there is a need for governance, to monitor and enforce performance, if the mutual assurance of cooperation on which the social contract rests is to be secured. Since social justice requires democracy, pride in a just social order is only possible among those who contribute to that social order. In a democracy, only citizens who contribute to the maintenance of the social order can say with Rabbi Hillel: if I am not for myself, who will be for me and if only for myself, what am I?

So the leading propositions offered of the democratic theory of justice can be stated as follows. Justice can be represented as a convention among persons of equal strength for their mutual advantage. The political procedures of some societies, one example of which is common property resource regimes, model a social contract for justice. Such societies show that a justifiable principle of economic appropriation is that producers are entitled to the full fruits of their labour, provided that all political associates have equal access to and control over the essential means of production. The rationality of the social contract is a deliberative non-deductive form of rationality that requires associates to understand how their

common ends can be specified in practice whilst allowing that agreed decision premisses can be overturned by new evidence. Neither considerations of method nor of substance prevent the principles of common property resource regimes being applied, with due modification, to great societies, and indeed the development of great societies enables us to understand what a democratic social contract entails. The political equality of each associate is consistent with majority rule when representative political parties enter into shifting coalitions with each other. Economic justice links work and reward, sometimes requiring the modification of market transactions arising from organizational and other imperfections. Needs are met by institutions that spread income across the life-cycle. To have a sense of democratic justice in such a political economy requires one to understand oneself as a cooperating partner in a scheme of mutual advantage so long as effective governance provides the requisite assurance of cooperation from others.

A number of the claims offered in this book are ones that I endorsed before I started working on the project. To me it has long seemed a useful heuristic device to think of societies as though they involved an implicit social contract, not least because any viable society has to balance the claims of the individual and the collective. I had also thought for some time that practical rationality was defeasible, although I did not have an inkling of how the idea might be developed and how extensive its implications might be. Earlier work on environmental policy in Europe had convinced me that policy making involved essential reference to intellectual paradigms that constituted decision premisses. I had been attracted to an empirical approach to social contract theory by the work of Brian Barry, and his approach tied in with my more general conviction that the type of analysis characteristic of comparative political science, involving typologies of institutional forms, had received insufficient attention in the theory of justice. I also thought that, though institutions mattered and their evaluation ought to be a prime task of normative political theory, one could not understand how democracies might flourish without seeing the role played in that flourishing of a civic culture based on a sense of justice.

However, an equal number, if not more, of claims advanced in the present work are ones that, before writing, I would have rejected completely or held only half-heartedly. Although convinced that the

empirical method was a viable approach to justice, I did not think this meant that democratic decision making modelled a social contract. Instead, I thought that one would derive justifiable principles of democracy from a social contract, without fully realizing that I was thereby committed to presupposing a veil of ignorance in a necessarily hypothetical social contract. My initial prejudices also led me to think that justice could not adequately be modelled on principles of mutual advantage, so my preferred mode of theory was contractualist rather than contractarian. This preference seemed to dovetail with that strand of deliberative democracy that stressed public reasoning as discussion on the merits of the case rather than bargaining and mutual accommodation. Lingering pre-Enlightenment and rationalistic sentiments led me to reject the idea that justice could be a mere convention. I certainly rejected the claim that economic justice required that workers be entitled to the full fruits of their labour, and I did not realize that the theory of justice could deal with the centrality of the household to human life only by understanding its historical transformation.

Because working on this project has required me to give up a number of important prior prejudices, I have wondered at times whether I could expound a theory that seemed so out of balance with my long-held considered judgements. But theoretical reflection means nothing unless you are prepared to treat some of your intuitions as misguided prejudices to be rejected. So I have adopted the strategy of pursuing my *idée fixe*—that justice can be understood by reference to empirical social contracts in which the power of the parties is equalized—to the best of my ability, in order to see to what principles and conclusions it might lead. I am comforted by the thought that as great a political theorist as John Stuart Mill thought the idea worth stating. Indeed, rereading his work with this idea in mind makes one realize just how central to his thinking is the need to rectify inequalities of power. Whether, in pursuing my *idée fixe*, I shall be led, like the character in Berlioz's *Symphonie Fantastique*, to the fatal gallows with the critics taking their role in the witches' Sabbath only time will tell. Political theorists are a hard-headed bunch, so where I have made mistakes, it will soon be apparent.

In an earlier draft, I offered a series of interpretations of key texts in modern social contract theory as a way of locating my own

approach. However, I found it impossible to keep to this plan. I had a great mass of material and, in trying to compress that material between the same covers as the present work, I ended up saying either too much or too little. So I have taken out that interpretative material and I hope to publish it as a separate monograph. It currently has the working title *Modern Social Contract Theory*. Its central thesis is that, although hypothetical social contract theory is offered as a method of political ethics, it can be formulated in such varied ways that first-order disagreements about justice and democracy are simply displaced onto second-order disagreements about how to model the hypothetical contract. A sketch of this argument, which I draw upon in the present work, can be found in my ‘Contractarian Theory, Deliberative Democracy and General Agreement’, in Keith Dowding, Robert E. Goodin and Carole Pateman (eds.), *Justice and Democracy: Essays for Brian Barry* (Cambridge: Cambridge University Press, 2004), pp. 79–96.

If you write about the social contract, you should acknowledge the extent to which your individual effort depends upon the public goods that are the preconditions for any productive activity. In my case, I thank the United Kingdom’s Economic and Social Research Council (ESRC) for awarding me a Professorial Fellowship between January 2009 and March 2012 (RES-051-27-0264-A) for a programme of work on ‘Social Contract, Deliberative Democracy and Public Policy’. Naturally a successful award is likely to make anyone well disposed to the body that provides the money. Despite that, I hope my view will not be discounted if I say that the Professorial Fellowship scheme, by encouraging a programme of work and not a single project, is both ambitious and displays a commendable willingness on the part of the ESRC to take risks. I should also like to put on record that I have always found the staff at the Council to be courteous and effective, and I am particularly grateful to my case officer, Chris Wyatt, for dealing with the inevitable complications of a large award in such a helpful, timely, and efficient manner.

If the ESCR is the agent, the UK taxpayer is the principal. No one should write on social justice without realizing that goods have to be produced by work. During my own working life I have been fortunate in having a succession of posts at five excellent universities, posts that have been both personally satisfying and economically

well rewarded. I will defend to any taxpayer who asks the importance to a society of financing academic research in the social and political sciences that is speculative and theoretical. But I also always try to bear in mind that publicly funded research is paid for by some portion of the difference between the figures at the top left and at the bottom right portions of each taxpayer's pay-slip. I hereby record my gratitude.

As well as supporting a significant proportion of my own salary, the ESRC award also provided monies for replacement teaching, a PhD studentship, and research assistance. Deborah Savage covered some of my teaching with real commitment at the same time as conducting her own research, never an easy feat. Nick Martin took up the challenge of writing a PhD on liberal neutrality and the public benefit test for charities in a way that has exceeded my expectations. Aude Bicquelet provided the initial research assistance on the programme drawing on our earlier joint work on the computer-aided text analysis of political reasoning, a small sample of which is referred to in the present work. I am grateful for her enthusiasm and I hope that she and I can return, in the not too distant future, to the challenges and opportunities that the new methods of text analysis present. Sarah Clark has worked on the public policy implications of the research programme. She has been indefatigable, combining a remarkable lucidity of mind with an exemplary commitment to working out the significance of social values for public policy. Quite apart from her intellectual contribution, she has always made me feel, whenever I have talked to her about this work, that the project was worthwhile, for which I am particularly grateful.

With complete disregard for the proper courtesies of life, I inflicted earlier drafts, sometimes very rough earlier drafts, of this book on those willing to read it. I am grateful to those who gave me written comments, including Peter Bloom, Cécile Laborde, Sue Mendus, Ian O'Flynn, and Laura Valentini. John Horton was kind enough not only to provide written comments on one very early draft but also to spend a morning, followed by a pub lunch, discussing where it could be improved. Robert Sugden read a version and helped me greatly in correspondence to understand the logic of economies of scale. In one conversation, Joseph Raz alerted me to the significance of non-monotonic reasoning and in another