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egalitarian theory and practice

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IMPRINTS

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IMPRINTS aims to promote a critical discussion of egalitarian and socialist ideas, freed from theoretical dogma but committed to the viability of an egalitarian and democratic politics, and open to the possibility of such politics at the international level. We take for granted that most societies in the world are characterised by class oppression, but that class division does not exhaust the unjust inequalities to which their peoples are subject.

Contributions are invited on topics such as the theory and practice of equality in domestic and global contexts, the theory of history, the normative foundations of social inquiry; and on social inequality, political practice, and institutional change. The criteria for the acceptance of papers include analytical power and empirical rigour; no school of thought or intellectual tradition is excluded, though we are committed to the view that the world remains a rationally intelligible place.

Editor

Catrina McKinnon

Associate Editors

Christopher Bertram

Harry Brighouse

Alan Carling

Saladin Meckled-Garcia

Jeremy Moss

Steve Smith

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Editorial comment on the renaming of *Imprints*

When the first issue of *Imprints: A Journal of Analytical Socialism* appeared in June 1996 a distinctive strand of thinking about equality – which the founding editors dubbed ‘analytical socialism’ – existed in the egalitarian literature. This way of thinking found its roots and inspiration in the values associated with the Marxist tradition. This current of egalitarian thought still exists, of course, and has much to contribute to wider debates about equality: it is certainly not a degenerating research programme. However, as *Imprints* has evolved our interests have broadened so as to incorporate these wider debates – indeed, in some issues of the journal, so as to move beyond them – as reflected in material we have published dealing with, for example, liberal equality, deliberative democracy, developments in egalitarian thought in America, and just war theory. We are still committed to publishing work on socialist thought, and to interviewing the major figures who have sculpted this tradition in recognisably egalitarian ways, but we signal the fact that our interests have evolved by renaming the journal *Imprints: Egalitarian Theory and Practice*.

Interview:

From Marx and the Capabilities Approach, to Rawls and Liberal Egalitarian Justice: An Interview with Martha Nussbaum

In your work on the capabilities approach you note the kinship between your own approach and Marx's early work. What is it exactly about Marx's work that you find important?

I find Marx's early work important for its recognition that a flourishing life for a human being is not simply a life of satisfaction, but rather a life in which truly human functioning, functioning appropriate to the worth of a human being, is available. Such a life requires material and institutional arrangements that foster not only a decent living standard in the usual economic sense, but a good human relationship to our living, by which Marx meant the availability of sociability and practical reasoning in all areas of life. In place of 'the wealth and poverty of the economists' Marx placed 'the rich human being and rich human need,' understanding the rich human being as a 'human being in need of a

totality of life-activities.' I consider this insight the ancestor of the capabilities approach. Another way in which Marx's early work is important for my approach is in its insistence that human functioning always has material and institutional preconditions: even freedom itself is not available just because the state keeps its hands off. The state that is going to produce real human freedom has an affirmative task, to create the material conditions in which a free life can be lived. (I connect this idea particularly with the need for state support for education and health care.)

The capabilities approach has been very influential in the areas of international development, poverty measurement, women's development and political philosophy generally. Where you discuss these issues in your own work, you have highlighted how the approach provides not just a good metric for understanding disadvantage, but a way of including the concerns of some of the most oppressed people. How would you situate your approach on the political spectrum?

Well, I would begin by *not* situating it on the US political spectrum, since this sort of comprehensive concern for the prerequisites of a flourishing human life is utterly off the political table in the US at present. Such was not always the case. Roosevelt's idea of the 'second bill of rights' and Eleanor Roosevelt's related work on the Universal Declaration of Human Rights have a close relation to the approach I favor, as did much of Lyndon Johnson's Great Society. Even the Supreme Court in those days seemed likely to recognize a range of social and economic rights as enjoying constitutional protection, with the great Justice Brennan taking the lead. Today, however, I would find this approach most nearly realized in the social democracies of Europe — before they began to cut back on their commitments. Having worked with a UN agency in Finland, I have formed a close attachment to that political culture, and I think Finnish social democracy is a very good example of what I favor, if we can leave to one side the issue of closed borders, and the xenophobia that is a rather pervasive feature of Finnish society. (On the issue of respect for pluralism, which is an aspect of my approach that I share with the political liberalism of John Rawls, I think that the US does relatively well, indeed somewhat better than many of the nations of Europe, and that our system of liberal education, which makes it easy to integrate the study of race and ethnicity, of women, and

of other minority issues, into the university curriculum deserves a lot of credit for this.)

While critical of many aspects of the Rawlsian approach to justice in your book Women and Human Development, you nonetheless seemed closer to his project than in your present research. What differences does your understanding of a capabilities approach make when developing a non-contractarian theory of justice?

I don't believe that I have moved further away from Rawls in my present work. I continue to think that his theory of justice is one of the strongest such theories we have, and I continue to have a lot of agreement with it, particularly in the area of pluralism and respect for diversity. (I'm currently working on a new introduction to *Political Liberalism*, for a new edition that will be published.) It is simply that in my current work I am turning to issues concerning which Rawls himself was unsure that his own theory could be extended to provide adequate guidance. These issues, which he mentions in *Political Liberalism* as problems for his theory, are: justice to people with disabilities, justice to non-human animals (Rawls does not actually grant that these are issues of justice), and justice across national boundaries. Concerning the last of these, Rawls believed that his approach could ultimately be extended to provide adequate guidance. In his last book, *The Law of Peoples*, he attempted this extension. I believe that this book is his weakest, and it dramatically shows that Rawls's approach cannot (without major change, which he does not attempt) address economic inequalities between nations. Concerning the first two issues, Rawls himself said that they were questions on which 'justice as fairness may fail;' he invited people to pursue them and see how serious a problem this might be for his theory. I view myself as following this invitation.

There are three aspects of Rawls's theory that I believe we must call into question, and in each area I would argue that the capabilities approach does better. First, we need to conceive of the 'primary goods' that society distributes as capabilities, not resources, in order to take account of people's different abilities to convert resources into capabilities, as Amartya Sen has long said. Rawls is unwilling to make this shift because of the importance he attaches to wealth and income as definite ways of indexing relative social positions, a strategy that is

crucial to his argument for the difference principle. However, that commitment is independent of his general contractarian approach, and one might reject it without altering the basic structure of his theory – though one would either have to come up with a different argument for the difference principle or to argue instead (as I do) for an ample social minimum.

Second, we need to take issue with his Kantian conception of the person, with its emphasis on a rather idealized notion of rationality as the core of our political humanity and our human dignity. Such a political conception of the person makes it impossible to respect the equal humanity of people with mental disabilities, and makes it impossible to envisage any type of reciprocity between human beings and non-human animals. I believe that it also distorts our relationship to the frailties and disabilities of the 'normal' human life cycle, an important issue as populations age. The capabilities approach as I have developed it uses a political conception of the person that is more Aristotelian than Kantian, seeing human rationality as one aspect of an animal existence, and not the only one that is relevant to our dignity. Human dignity is seen in our animality, not as opposed to it. This means that the approach can recognize and respect dignity in children and adults with mental disabilities, and envisage political reciprocity in ways that fully include them. It also means that it is easy to extend the approach to take account of the need to reform our relations with non-human animals, seeing dignity in their lives and trying to figure out how we might respect that dignity.

Third, and finally, we need to challenge the assumption that lies very deep in the social contract tradition, namely that people will get together and contract for principles to form a society only if they are rough equals in power and ability, because only then will cooperation yield mutual advantage. Despite the egalitarian and Kantian elements that are very important in Rawls's theory, he declares himself a contractarian at this point, and he says that the idea of a rough equality of power and ability (which he traces to Hume as well as to the contract tradition) is his analogue to the idea of the state of nature in classic contract doctrines. He makes it explicit that this rough equality means that the parties in the original position know that their physical and mental powers lie with the 'normal range.' He knows well, and emphasizes often, that his particular type of contractarianism entails that problems posed by people with

disabilities can be handled only after basic political principles are already chosen, at the legislative stage. I believe that this is inadequate. Certainly we can easily see that it makes it impossible to include the severely disabled on a basis of full equality. And of course it makes impossible any account of fundamental entitlements based in justice for non-human animals. Rawls does not believe that our relations to non-human animals raise questions of justice, but I do.

The capabilities approach operates with an account of the purposes of social cooperation that is richer and more inclusive than contractarian accounts: people get together to form a society in part for mutual advantage (understood in the usual economic terms), but also out of a love of justice and a love of humanity. Only if we have such an account of the purposes of social cooperation can we explain why people would (as by now we do) seek to create a society that respects the dignity of people with disabilities and supports their full inclusion as citizens.

What do you take to be the chief legacy of John Rawls's work?

I believe that the chief legacy has been to supplant utilitarian ideas with a much richer set of ideas, which, I think, correspond much more nearly to people's 'considered judgments', to use Rawls's phrase. The idea that each person should be treated as an end, and none as a mere means to the ends of others, was present in the tradition, of course, in Kant and, in a different way, in Smith and even (I believe) in Mill. But it took Rawls to show us in detail what this intuitive starting point would yield for political theory. So that idea of the person as end, and the related idea of impartiality, is the important idea, but the great thing about Rawls's work is that it is not just an intuitive idea, but a vast and extremely well-argued structure, in which all the parts are complexly related to one another and illuminate one another.

I myself also deeply value the core ideas of *Political Liberalism*, concerning reasonable disagreement and the need to respect comprehensive conceptions of value. Some people think that here Rawls moved away too much from the Enlightenment, but I think that he is right, and that the resulting theory is urgently important for modern societies, who are grappling with all the difficulties of pluralism.

You have been openly critical of some American feminism influenced by postmodernism, noting that some of it has only the 'flimsiest of connections with the real situation of real women'. In your own work you stress the importance for feminism of notions of dignity and equality. How do you understand the requirement to focus on 'real lives' with an appeal to universal notions? In particular, how does your model of a list of basic capabilities respond to hostile but democratic discussion?

I do think that the starting point should always be people's real problems and what they say about those problems. That is why I keep going out into the field and looking at what good NGOs in India working with women are doing. But it is not possible, in our theory-driven world, that the particular insights of such activists will prevail in the policy arena without some kind of theoretical structure. If one goes to the World Bank and tells stories of poor women's lives, one will not get much of a hearing, nor would anyone understand the extent to which these stories entail rejection of dominant economic-utilitarian models. So one needs a counter-theory, one that encapsulates the voices and, I hope, the insights of good activists and goes to bat for them in the halls of power. That's how I like to see my theory, and I think that there is some evidence that it is working in this way. It is no use pretending that one can do without theory, since the world is right now run by theories, some of them grossly defective. The only hope a richer humanistic vision of the goals of policy has is to be formulated in the form of a theory, and that is what I try to do. Theories must, of course, use universal notions, as do activists themselves, when they talk about human rights and human dignity. The notion of human dignity is a central one in constitution-making the world over, and I often follow the lead of the Supreme Courts of India, South Africa, etc., in my understanding of what this notion implies. The list of capabilities can be seen as a list of what the fundamental rights section of a constitution might include.

I do not think that people's current preferences are always automatically the best basis for social policy, because preferences are often distorted by unjust background conditions: by fear, subordination, lack of information, as well as by enjoyment of power, racism, and sexism. But the NGO's that I visit seem to me to exemplify conditions under which preferences are reasonably reliable: trust, lack of hierarchy, lack of intimidation, respect for each person, etc. (I discuss all this in ch.

2 of *Women and Human Development*; Paolo Freire has written well about these conditions.)

Now of course one of the points I try to emphasize throughout is the great importance of respect for pluralism and different visions of the good. There are five ways in which this respect for pluralism works itself into the very structure of the theory: (1) The list of capabilities is tentative and open-ended, subject to revision, supplementation, and deletion. (2) The list is formulated at a high level of generality, to leave room for the legislative and judicial processes in each nation to specify the relevant capabilities rather differently. For example, Germany has a free speech right that is somewhat less protective of dissident political speech than is the corresponding right in the US; antisemitic speech can be suppressed. Each country has responded in a reasonable way to their own different histories. (3) The conception is regarded as a list for political purposes, in the context of a form of 'political liberalism,' not as a theory of human nature or a comprehensive ethical conception. People can link it to their religious or secular comprehensive conceptions in many different ways, as the framers of the Universal Declaration of Human Rights explicitly did. (4) The major liberties that protect pluralism (liberties of speech, expression, religion, press, etc.) are major items on the list. (5) The political goal is capability, not actual functioning; many people who support a right to vote and freedom of religion would be offended were voting made mandatory, or religious functioning. (6) The whole project is a basis for persuasion and dialogue, not for implementation. I believe that questions of interference in the internal affairs of another nation are very difficult questions, and I favor humanitarian intervention only in a very narrow range of grave cases. So I imagine the capabilities list as something we will continue to debate, but it will only be implemented to the extent that nations decide to implement it (and to put it into international treaties and organizations). If a given nation decides that it does not want equal treatment of the religious groups, or equal treatment for women, I think we can show by a good philosophical argument that they are wrong. But that doesn't license us to use force against them; it does license us to use persuasion and argument.

Do you think US academics, particularly philosophers, responded adequately to effects of recent US interventions in Afghanistan and Iraq, especially the effects on women?

Well, we have no idea as yet what the effects of these interventions on women may be! In the case of Afghanistan, they initially seemed good, but there are ominous signs that the situation is degenerating, and I feel that it is important to keep insisting on a larger role for women in the decision-making process there. I am not sure that academics involved with these issues made enough of that point, although I was glad to see an increased general level of concern with women's opportunities, something that feminists had tried to get people to care about for a long time without success.

In the case of Iraq, overall I think that US academics, prominently including philosophers have played a good role, expressing their views, whatever they are, and spending a lot of money on ads to state those views in places where people would see them. But the problem is just there: we have to pay thousands of dollars to get our views into the *NY Times*. The American media are even more closed to academic voices than they were a few years ago, and it is difficult for any of us to get into media that have general circulation. The government has even less interest in soliciting the views of academics than US governments usually do, and none at all in soliciting the views of academic feminists. As for women and Iraq, I have been very worried all along that going in there without a well-worked-out plan for 'nation-building' and a cooperative multinational force to implement it would lead to a sharp downturn in the capabilities of women, as fundamentalism rushes into fill the empty space. I hope I will be proven wrong; in any case, I think academics are well aware of this danger, but nobody cares what we think.

In general, I think that the corporate ownership of the US media has led to a real decline in the freedom of the press. The press in Britain seems to me more inclusive and expressive; so too in India. And neither of those nations has ever had the degree of anti-intellectualism that the US has always had. In the US, being an academic virtually guarantees that nobody in Washington will listen to you.

In your recent work you argue that compassion is a basic social emotion with respect to the creation of civil society. Could you explain what you

mean by this, and whether compassion is any more basic than other human emotions that have been associated with anti-egalitarian theories such as fear or envy?

First of all, I am writing much more on this topic: indeed, I've promised a book on connections between compassion and the capabilities approach. One sign of the position I'll take is an article I wrote in *Daedalus* winter 2003, called 'Compassion and Terror.' But to try to answer your question as well as possible: in *Upheavals of Thought* I argue that compassion is a basic social emotion, in the sense that it forms a connection between oneself and the reality of another person's good or ill. One does not have compassion, I argue, unless one sees the other person's plight as seriously bad, and as an important part of one's own scheme of goals and projects. In the emotion itself, this connection between oneself and another is affirmed and strengthened. (I draw on psychological studies that link compassion to helping behavior.) Fear and envy are not social in this way: other people figure in them only as obstacles or instruments to one's own well-being. They do not involve the affirmation of another person's good as an important part of one's own scheme of goals and ends. Now of course compassion can go wrong, particularly by mis-estimating which predicaments are really serious, and by putting only a narrow group of people into one's circle of concern. That is why I argue that we need to combine compassion with an adequate ethical account of our relations to people at a distance, to educate the emotion accordingly, and to build institutions (such as a good tax system) that incorporate and fix the insights of an ethically appropriate compassion, so that we need not rely on having perfectly compassionate citizens all the time. But such institutions will not be stable unless we also produce compassionate citizens, or at least enough of them to make a difference. There is a lot more to be said about the relationship between compassion and the arts, which nourish the ability to imagine the predicament of another and estimate its seriousness.

You also argue that the emotion of pity is a similar emotional state to compassion. What do you say to those who want to make a sharp distinction between compassion and pity, and to those within social movements (such as the Disability Rights Movement) who vehemently

object to being defined by prominent egalitarians as 'tragic and pitiable victims' of brute bad luck?

Well, the point I make is a slightly different one from the one you describe. I try to say that there is great continuity in the Western philosophical tradition in discussing an emotion that writers call by various different names, in the different languages, but define in a common manner. Because a central ingredient of this emotion, in the classic accounts, is the thought that one's own possibilities and vulnerabilities are similar to those of the sufferer, it is (rightly) thought to be an egalitarian emotion, and not one that involves condescension. This emotion is called *pitié* by Rousseau, but he stresses its sense of common fellowship, and the way in which it undermines hierarchy. Similarly, the Greek terms *eleos* and *oiktos* always stress common vulnerability, although the most common English translation for these words is 'pity.' In German, the most common term is *mitleid*, which we usually translate 'compassion,' but Nietzsche feels perfectly free to use French *pitié* as an alternative, when he is scoring points against Rousseau. So my point is that although by now the English word 'pity' has nuances of condescension and superiority, that is not so of Rousseau's *pitié* and Greek terms that are rendered in English by 'pity.' We should therefore prefer 'compassion' as an English translation for these terms. I am sure that there is an emotion that corresponds to what the disability advocates are worried about: It says 'Poor you,' from a position of smug invulnerability. The English word 'pity' often designates such an emotion. That is very different from the emotion that I am talking about, which insists on the fact that we are all prone to disabilities of many sorts. I think sometimes people with disabilities reject both sorts of emotion, both what I am calling 'pity' and what I am calling 'compassion,' taking up an extremely Stoic position. The Stoics thought that misfortunes are never really bad, because the dignity of the will and of human agency is never taken away by them. So they thought that compassion was always inappropriate, because it involves the thought that the misfortune matters greatly. I think that some disabled people have the Stoic view: their disability doesn't really matter, hasn't made things worse for them. If that is their view, they will reject both 'pity' and 'compassion.' I believe that this rejection is comprehensible, because so often the agency and intelligence of people with disabilities have been denigrated. An understandable reaction is to say, 'I am not

damaged at all, thank you.' Still, my own view is that it is best for us to treat disabilities as large and serious misfortunes (that any human being might suffer), because only then do we have the proper social incentive to support the full inclusion and functioning of people with disabilities and to treat these conditions medically (and to insist on public funding for these treatments) insofar as we can.

Liberal egalitarianism underwent a revival in the 1980s and 1990s at the same time as many national governments in the West were retreating from egalitarian principles. Would you see this as a symptom of the detachment of philosophers from reality or a genuine attempt to articulate an alternative to dominant principles?

I find this remark puzzling. The impetus for the revival of liberal egalitarianism in philosophy was surely John Rawls's great work, *A Theory of Justice*, which developed in the 1960's, and was published in 1971, at the height of the Great Society. Rawls always thought of his work as something of an apologia for the status quo: he said he refused honorary degrees because he was so mainstream, and he feared that a Marxist or some other non-mainstream person might not be honored for work of similar distinction. The US then began its march away from these ideas, but, not surprisingly, philosophers kept on debating and refining them, since they found them good ideas, as indeed they are. At this point in history, of course, the feeling is that we are proposing an alternative to dominant principles, but that is not always how things were. I would add that Rawls's theories still do coincide with the status quo in the area of 'political liberalism' and respect for religious and ethnic diversity, where there is reasonable harmony between reality and philosophy.

In some other areas, philosophers seem to me to follow political changes, rather than leading them. In 1970 hardly any philosophers were writing about feminism and none was writing about sexual orientation; now philosophers in the mainstream debate all of these issues of justice, at the same time that American society also does so. In feminism, the work of leading theorists has very much influenced the political debate; but in the area of sexual orientation, politics has moved well ahead of the timid profession of philosophy, for the most part. So too with the issue of disability: there is fine work, but most of it is either done by

philosophers who are also activists, or is posterior to the work of disability activists.

In the area of animal rights, the philosophers who care about that are indeed 'ahead of' and offering a challenge to the mainstream culture, but that has been the case since Bentham's time, and Bentham's prophecy that cruelty to animals would one day look to everyone as odious as slavery has not yet been fulfilled.

So it's much as one would expect: sometimes philosophers move ahead of or against the current, sometimes they try to preserve good ideas that have been rejected, sometimes they simply recognize and incorporate into their work social changes that are taking place.

Some of the most interesting research being done in political philosophy at present is concerned with aspects of global justice. To what do you attribute the surge of interest in global justice in recent years among philosophers?

Well, what we might also ask is, why didn't philosophers address this issue before? Utilitarians did to some extent. But basically it is only very recently that people have begun to develop systematic theories on this topic. I believe that the failure to address global justice until recently has several causes. One is that philosophers are on the whole not very knowledgeable about the world outside their own nation, at least American philosophers. The blame for this rests to a great extent on the American educational system and the American media, but philosophers could have done more to inform themselves. When we were hiring a colleague, several years ago, who would hold a joint appointment in the philosophy department and the Human Rights program, we looked, not surprisingly, for knowledge of the world, and we found very little. Luckily, the only candidate who adequately displayed such knowledge was also the best philosophically, and he accepted our offer. Similarly, when Sen and I worked on quality of life at the World Institute for Development Economics Research, we had a very hard time getting philosophical papers that had an adequate empirical grounding. Some of the very good ones we published never were sufficiently tethered to the facts.

Another obstacle in the way of philosophers' addressing the issue of global justice is that our major theories of justice have taken the nation state as their basic unit. In the case of the dominant social contract

tradition, this is no trivial aspect of the theory, easily to be modified. It is built deeply into the logic of the theory. So addressing global problems in a really adequate way would mean major theoretical change. It would, *inter alia*, mean recognizing the role of entities such as corporations, non-governmental organizations, international treaties and organizations, in the allocation of duties to promote human rights and human well-being. So a wholly different sort of theory seems required, and theories will have to have a high degree of responsiveness to the world, as the nature of the entities involved shifts over time.

So why have philosophers finally come to take up the topic? Well, it is important, and people see that. One incentive is surely the phenomenon of globalization, which makes clear the inadequacy of any theory of justice that treats the nation-state as an isolated entity. Another incentive is surely the information that people increasingly have – even philosophers – about global inequalities. Philosophers, if not all that well-informed about world events, are, on the whole, a rather decent group of people, and any egregious injustice that exists they will probably address sooner or later.

Article:

Curbing the Deficit: Democracy After the European Constitution

Albena Azmanova

Summary

This study assesses the democratic potential of the draft Constitutional Treaty for Europe.¹ It reviews the various sources of the democratic deficit in the European Union and examines the effect of some of the provisions of the draft Constitutional Treaty on the quality of democracy at national and supranational level. The institutional strategies contained in the Treaty collide to create a policy dilemma: increasing democratic

¹ This article is based on a lecture I delivered at the symposium on European Enlargement and Institutional Reform at the Diplomatic Academy of Vienna, organised by the Institute for European Studies of The Free University Brussels (VUB), 18-19 September 2003. I have profited from the feedback Chris Bertram offered on the first draft, as well as from the detailed comments I received from the group of anonymous reviewers. With pleasure I acknowledge my gratitude to William Chew III and Jacqueline Cessou for help with the final revisions. The intellectual companionship of Steffen Elgersma, as always, gave energy to my writing. Of course, I retain full responsibility for the content and structuring of the ideas expressed in this work.

input or enhancing political accountability. It is argued that embracing the path of accountability, rather than that of democratic input, as a reform formula, would allow us to solve the EU democratic deficit without undermining the Union's institutional efficiency, and without jeopardising the formation of a European political community. This line of institutional development is in tune with the post-sovereign and post-national nature of power relations on the continent in the early twenty-first century.

1. The Place of Democracy in the Constitutional Rhetoric

The American and European constitutional conventions have a striking feature in common: The fifty-five-member Philadelphia convention which produced a ten-page text and, two centuries later, their hundred and five counterparts in Brussels who crafted two hundred and sixty five-pages, assign democracy a place only secondary to such concerns as liberty, in the American case, and efficiency of governance, in the European one.

The word 'democracy' is nowhere to be found in the American Constitution. The driving concern of the Founding Fathers was to prevent the abuse of power so as to safeguard liberty, as well as to avoid factionalism in order to secure the national interest. These concerns are reflected in the compelling rhetoric of the *Federalist Papers*, where majority rule is refuted as being a threat both to the rights of individuals and to those of minorities. It was the desire for liberty, not for democracy, that motivated the creation of what is now the oldest codified constitution of a modern democracy still in use.

In apparent contrast, the draft EU Constitutional Treaty opens with a pledge to democracy, understood as majority rule. Quoting Thucydides, the Preamble's motto declares: 'Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number'. Yet, the equation of democracy and majority rule here betrays a failure to acknowledge democracy's essence and purpose: The current European Founding Fathers appear oblivious to the essential distinctions the ancients drew between the form of governance (who

rules) and its purpose (who benefits from the rule). This distinction led the ancients to dismiss 'democracy' as a form of tyranny of the majority, giving preference to the 'polity'² as a form of rule in the service of all. This second understanding of democracy – as a form of governance directed to the public interest, is taken up by the modern tradition of Republicanism (at the root of the US Constitution), which considers constitutional government and parliamentary representation to be better suited to liberal democracies than majority rule is.³ Even putting these philosophical considerations aside, it is certain that the new EU member-states from Eastern and Central Europe, where sensitivity to minority rights are high (especially in countries which have large minorities abroad), are bound to find the majoritarian version of democracy advanced in the new Constitution's motto to be particularly unbecoming to the model of democracy they have been striving to adopt in the decade since the collapse of State Socialism.

Despite the frequent mention of the word 'democracy' at the European constitutional convention and in the text of the draft Constitutional Treaty itself, concerns with democracy have been only secondary to concerns with institutional efficiency. The constitution-making exercise was prompted by the awareness that the enlargement of the Union from fifteen to twenty-five member states, as of May 2004, was likely to produce considerable shortcomings in governance. Enlargement made institutional efficiency the primary objective of the

² For Aristotle, 'polity' is a form of government marked by the *rule of many* in the *service of all*, in which the majority decision-making is restrained by constitutional principles that uphold the common good. In this, majority rule is just one of the procedural tools for governing; it does not embody the political essence of governance, as implied (wrongly) in the motto of the draft EU Constitutional Treaty. With this, Aristotle contrasts 'polity', a form of rule, to 'democracy' – the *rule of the many* in their *own interest*. In contemporary political parlance 'polity' has a different meaning – it denotes (any) society organized through the exercise of political authority. This is not the usage I imply here.

³ It is from the perspective of utilitarianism that democracy is perceived and praised as majority rule. A recent defence of majority rule is offered by Jeremy Waldron in his *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), which presents a forceful vindication of the democratic virtues of majority-decision against what Waldron perceives as the fictional importance of consensus.

drafting effort. To return to the parallel between the European and the American constitution-making: In the case of the United States, the democratic organisation of power emerged as a (positive) side-effect of solving the problem of liberty by preventing the abuse of power, e.g., by adding checks-and-balances to the separation of powers.⁴ In the case of the European Union, enhancing democracy – solving the EU's notorious 'democratic deficit'⁵ turns out to be largely a side-product of improved governance. Thus, at the very outset, the European Convention upheld the EU democratic deficit: In setting the agenda of policy priorities, deepening democracy turns out to be secondary to, and predicated upon, the institutional streamlining of the EU once it grows to twenty-five members. Could this logic repeat the American experience and foster the emergence of a stronger democratic polity by force of enhancing the institutional vitality of the Union?

This study addresses various sources of the democracy deficit in the European Union and examines the effect of some of the new constitutional provisions on the quality of democracy. It reveals that the draft Constitution contains opposing, often irreconcilable institutional

⁴ On the insufficiency of the separation of powers to guarantee the abuse of power Madison writes: 'Mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all powers of government in the same hands'. (Madison, *Federalist Papers* No. 48, in Hamilton, Madison, Jay, *The Federalist Papers*, New York: Mentor, 1961, p.313). To this adds his observation of the natural tendency of democratically elected bodies to concentrate power due to the fact that they derive legitimacy from popular consent and, therefore, his warning against the 'elective despotism' of parliaments: 'One hundred and seventy-three despots would surely be as oppressive as one'. (Ibid, p.311).

⁵ The term 'democratic deficit' is erroneous as it suggests a democratic quality to a certain deficit. A grammatically more correct term would be 'democracy deficit', or 'deficit of democracy'. However, we will keep to 'democratic deficit' as it has already acquired an established significance in the EU institutional parlance, becoming a meta-term signifying the misfit between, on the one hand, the growing policy making powers of EU institutions and, on the other hand, the lack of democratic legitimacy of these bodies.

strategies, which eventually produce a policy dilemma, which needs to be solved urgently if the Union is to enhance its democratic legitimacy.

2. The EU and its Legitimacy Deficits

Although regrettable, the prioritisation of efficiency over democracy in the current constitution-making exercise is neither illogical nor surprising. What is commonly perceived as 'democratic deficit' is a normative and institutional feature of the European Union, embedded in a fundamental structural peculiarity of European integration: Since its very inception some five decades ago, two projects have converged in the making of the EU – a free market Europe and Europe as an interventionist super state.⁶ While the idea of economic liberalism has been, so far, EU integration's main content, dirigisme and elite policymaking have been its means. Both trends have combined to make democracy a secondary issue: the predominant significance of liberal markets valorised economic efficiency over democracy, while political dirigisme checked democratic input. Thus, elite-driven economic integration, rather than a pan-European democracy, was seen as the proper tool for achieving a stable peace in post-war Europe.

Although the idea of a supra-national democracy has been around for more than three centuries (ever since William Penn called for a European parliament and an end to the state mosaic in Europe in 1693), a directly elected European Parliament with genuine, yet limited legislative functions, was established only in 1979 – twenty-two years after the launch of the European Community by the Treaty of Rome. By the nature of the Union, the sources of its legitimacy so far have lain neither in the Union's cultural cohesion as a political community (European culture), nor fully in the democratic essence of its body politic. Instead, its legitimacy has been primarily derived from the success of its policies and the efficient functioning of its institutions, which have enabled it to exist as an economic zone, allowing the free movement of people, goods, capital, and services. The inadequate democratic quality in EU policy-making is again revealed by the nature

⁶ John Gillingham, *European Integration, 1950-2003: Superstate or New Market Economy?* (Cambridge University Press, 2003).

of the recent constitution-making effort: The text created by the 2002-2003 Constitutional Convention is not a constitution in the sense of a contract between a state and its citizens, but a constitutional treaty – an agreement between sovereign states.⁷

As Andrew Moravcsik has forcefully argued, in view of its idiosyncratic nature and assessed in the standards of contemporary industrial democracies, the EU does not suffer from a fundamental democratic deficit.⁸ However, as the new Constitutional Treaty now aspires to seal, and even accelerate, the evolution of the Union from an economic entity to a genuine political community, the question of the EU's legitimacy arises with new urgency.

The issue of the EU's *legitimacy* is distinct from that of the *justification* of its further integration. In recent years, Jürgen Habermas, among others, has contended that the EU is in need of a new type of justification of its further integration, as the two original motives – ending interstate war and controlling German power – have lost (most of) their original value.⁹ Accordingly, Habermas has proposed to charge the EU with safeguarding the achievements of the welfare state in the face of globalisation. To say that the EU needs new justification for further integration is not to say that the Union has lost *all existing legitimacy* that makes it an established political body with publicly accepted status and functions. This means that even if, along with Habermas, we agree that currently the justification for pursuing further integration in the EU is insufficient (ergo – the need to find new reasons

for it), we need to ground such an effort on a diagnosis of the state of the actual forms of legitimacy in the Union.

The legitimacy the EU has acquired throughout the five decades of its existence rests on three axes: 1) the efficient performance of its institutions and the success of its policies (functional legitimacy); 2) the formation of European identity, next to local or national identities (cultural legitimacy); and 3) the existence of the Union not only as an association of national democracies, but as a democratic body in its own right (democratic legitimacy). Accordingly, we can say that the EU is currently facing three types of legitimacy deficiency: functional, democratic, and cultural. While for a long time the performance legitimacy (now challenged with the accession of ten new members) has been the principal one, the success of EU policies no longer suffices to generate that trans-European solidarity which Robert Schuman saw as the ultimate goal, towards which the creation of the Coal and Steel Community he initiated in 1950, was the first step.¹⁰ The cultural axis of legitimacy – the creation of a common identity defined in the thick ethnogenic sense of having common history, language, religious beliefs, family customs or personal lifestyles, is untenable in a multi-lingual Europe of strong national and regional identities. A trans-European cultural identity, therefore, is perceivable only in the 'thin' terms of political and social culture: culture centred on interaction within societal institutions, marked by a shared understanding of the general rules of economic, social and political life. The minimal (necessary, though insufficient) grounds for a trans-European culture understood in these terms, is the nature of EU member-states as *liberal-democratic civic*

⁷ The ideas of the constitution have been traced to the dirigiste Latin European tradition as distinct from the more free market Anglo-Saxon one. A. Alesina and R. Perotti, *The European Union: A Politically Incorrect View*. National Bureau of Economic Research, Working Paper 10342 (2004).

⁸ Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, Vol. 40, No. 4, (2002), pp. 603-24.

⁹ Jürgen Habermas, *Why Does Europe Need a Constitution?*, transl. Michele Everson. Florence: European University Institute, 2001.

¹⁰ In his declaration of 9th May 1950, which laid the path for the EU's foundation with the setting up, on his initiative, of the European Coal and Steel Community, French foreign minister Robert Schuman asserts: 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity' (quoted from Pierre Gerbet, *La Construction de l'Europe*, Paris: Imprimerie Nationale, 1983), pp.124-5. Accessible also at *Europe: Gateway to the European Union*, Official site of the European Union, http://europa.eu.int/abc/symbols/9-may/decl_fr.htm).

nations, which have outgrown the nationalistic impulses in the formation of their political identity.¹¹

This means that, even if we agree with Moravcsik's assertion that, assessed realistically, the EU does not suffer from a major democratic deficit, improving the quality of democracy in the Union is a condition for creating trans-European cultural identity. With the lack of strongly shared cultural identifiers, coping with what is commonly perceived to be the EU democratic deficit (or simply, enhancing democracy in the functioning and output of EU institutions) becomes a key factor in managing the cultural deficit. Therefore, enhancing democratic legitimacy – building the EU as a trans-national democratic framework which safeguards and revitalises the national liberal-democratic traditions of its members – becomes as imperative a goal as maintaining the EU functional performance after enlargement is now. It is through the continued performance of EU institutions as a democratic and efficient political framework that citizens' allegiance to the EU has a chance to evolve. This endeavour is not without a precedent: Indeed, a similar logic of nation building – generating a sense of common belonging among diverse populations as a result of loyalty towards the successfully performing institutions of the modern state – has been common in the formation of the majority of the nation-states in Western Europe, as successful state-building has entailed nation-building.

The objective of enhancing democratic legitimacy is as complex as the sources of the legitimacy deficiency itself. Three issues converge to

¹¹The new and future EU member states from East and Central Europe do not completely qualify as liberal civic nations, although they do qualify as democracies. What marks them out from the majority of the old EU member states is that belated modernisation and decades of state socialism hindered the development of liberalism, while centuries of delayed, or stalled, state-building have left the nationalistic impulses still vibrant. This presents them as illiberal ethnic nations in contrast to the 'old' Europe of liberal civic nations. This subject is explored in W. Kymlicka and Opalski ed., *Can Liberal Pluralism be Exported* (Oxford University Press, 2001). The insufficient development of the new EU member states as liberal civic nations is likely to generate considerable problems for EU integration after enlargement.

form the current public perception of the EU's democratic deficit. The first is the growing complexity and bureaucratisation of the policy-making process, which dissociates EU citizens from the institutional machinery of the Union. The second cause of the democratic deficit is the erosion of state sovereignty, as EU policy competencies come to include not only economic, but many other areas. As European democracies have been vested in the institutions of the European nation-states, the erosion of the nation-state is often considered detrimental to democracy. From both perspectives – that of overt bureaucratisation, and that of erosion of the nation-state, the democratic deficit is embodied in the disproportional distribution of power between national parliaments and supranational bureaucracy (in favour of the latter). The third source of the democratic deficit is the disproportional distribution of power between the directly elected European Parliament and the non-elected supranational decision-making bodies such as Commission and Council (in favour of the latter). These three sources are at the root of what Fritz Scharpf has named 'input legitimacy': the share of democratic bodies in the EU policy-process.¹² To this adds a deficiency in the democratic quality of policy outputs: The majority of EU legislation aims to promote more efficient markets, leaving aside issues of broader public concern such as social welfare protection or culture.¹³

It appears, therefore, that enhancing democratic legitimacy requires (at least) a four-fold reform: 1) increasing transparency – i.e. by consolidating the previous treaties into a single text, streamlining the functions of the different EU institutions and simplifying decision-making rules, 2) attaining a fairer delimitation of policy competencies between national and supra-national levels, 3) deepening democracy – enhancing the role of national parliaments, of the European Parliament, and of European citizens in the decision-making process, and 4) democratizing the policy-outputs of the Union – entrusting the EU with

¹²Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?*, (Oxford University Press, 1999), in particular chapter 1.

¹³Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, Vol. 40, No. 4, (2002), p. 605.

competences which are more directly relevant to citizens. Yet, these four remedies are hard to attain simultaneously, for they follow a divergent normative logic and imply conflicting institutional solutions.

Attempts to solve the democracy deficit in the Union (or simply to enhance the quality of democracy) have been hampered by the fact that policy efforts tend to fuse the different sources of this problem – eroded national sovereignty, growing bureaucratisation and lack of input by the European citizenry – into a common malaise named ‘European integration’. The dented quality of democracy at the EU level concerns in fact two rather different ailments, which in turn would necessitate the application of two, often mutually conflicting, types of therapy.

The first vision of the democratic deficit is reflected in grievances that the EU is turning into a Napoleonic super-state, an over-centralised, dirigist federation that undermines state sovereignty and with it, the institutions which channel the democratic process in member-states (elected parliaments and governments). Here policy choices are framed by the dichotomy *super-state* versus *nation-state*, and solutions are to be sought within the paradigm of popular sovereignty.

The second vision of the democracy deficit is expressed in complaints that the EU is turning into yet another undemocratic, bureaucratic Leviathan, accumulating heavy layers of administration (both national and supranational), at the expense of individual citizens. This concern resonates with the Kantian forewarning that Perpetual Peace comes at a bitter price: governance at a global scale would need a heavy administrative machinery, which will alienate people and will incrementally and inadvertently erode liberty and democracy into bureaucratic despotism. The dilemma in this case is: *despotic bureaucracy* or *accountable government*, and solutions are to be sought within the paradigm of liberal constitutionalism.

Popular sovereignty and liberal constitutionalism are two sources which merge to provide the legitimacy of contemporary liberal democracies. Yet, the normative cultures of liberalism and democracy emerged at different times and in response to different historical concerns. The notions of liberal constitutionalism (rule of law, individual rights, limited and accountable government) were born in

reaction to the emergence of absolutism in Europe. First these notions were advanced in Britain (formulated by Locke in the late seventeenth century, but already imminent in British aristocracy’s effectual struggle against the crown since the thirteenth century), and much later elsewhere in Europe.¹⁴ The political philosophy of modern popular government was born later (most articulately formulated by Rousseau in the mid-eighteenth century) in answer to the question of the source of authority and the justification of political obligation in secular, already liberal in outlook, European societies.¹⁵

We see these two trends – of popular sovereignty and responsible government – reappear in the issue of the democratic quality of the European Union. Reform policies, therefore, run along two paths: The first is the road of restoring some degree of national sovereignty, as well as mobilising national democratic institutions, in order to counter the formation of a European super-state. The second is the road of strengthening the EU as a trans-national liberal democracy (against unaccountable bureaucracies).

Enhancing democracy along the first vision of the democratic deficit (within the dilemma *super-state* or *nation-state*) will require shifting the institutional balance in favour of established national democratic institutions. This is to be achieved with a triple strategy: Firstly, national parliaments are to have a bigger input in EU policy-making. Secondly, the principle of the equality of states is to guide the composition of EU institutions. Thirdly, some degree of state sovereignty is to be restored by means of a new allocation of competencies between supranational and national levels, in the logic of dual (rather than shared) sovereignty, and thereby separating the authority of nation-states and that of the EU into distinct policy domains.

From the perspective of the second dilemma: *despotic bureaucracy* versus *accountable government*, the Union’s democratic deficiency is

¹⁴ Montesquieu’s theory of parliamentary liberalism is based upon the writings of Locke.

¹⁵ Rousseau starts from the perspective of liberalism, to which democracy is an instrument: in his account democracy is a means through which people can achieve freedom and autonomy, understood as ‘obedience to a law one prescribes to oneself’.

not so much a matter of the 'wrong' delimitation of powers and allocation of policy competences between national and supranational levels of governance, as it is a matter of incompetent and unrestrained rule. Protecting the common public interest of European citizens as well as individual freedoms would require building an accountable European government which will not so much counter the evolution of the Union into a super-state, but prevent turning this state into the despotic bureaucracy of the Kantian Perpetual Peace. In terms of a reform strategy, the stress here is on democratic *accountability*, rather than democratic *input*; the reliance is on the norms and tools of *liberal constitutionalism* (responsible government, rule of law and citizens' equality before the law), rather than on those of the *democratic nation-state* (popular sovereignty). The choice between these two alternatives will affect the quality of democracy in the Union, together with the nature of its sovereignty.

What criteria should guide the choice of a reform path? The efficient policy performance of the Union in the past was often achieved at the expense of democracy – ergo, the late establishment of the European Parliament and its limited powers thereafter. Presently, however, the creation of a sense of political identification and loyalty on the European level (which may co-exist or compete with national loyalties) is conditioned on the strengthening of both the functional and democratic legitimacy of the Union. The question then arises: what reform strategy is most likely to boost simultaneously the Union's efficiency and its democratic nature. This question will guide us in the subsequent review and assessment of the innovations put forward by the draft Constitutional Treaty.

3. Democracy and/or Efficiency in the Draft European Constitution

Within the objectives of the European Constitution, the relationship between improving governance and deepening democracy is indirect and intricate. Improving governance – the overarching aim of the constitution-making effort – is a matter of accomplishing two tasks: *improving institutional efficiency* and *enhancing the Union's democratic legitimacy*.

Improving institutional efficiency is approached in the draft Constitutional Treaty as a matter of accomplishing (at least) four tasks: (1) building European leadership; (2) strengthening the four key EU institutions and achieving a more clear division of competences among them; (3) facilitating rule-making by simpler voting rules and a reduced number of legal instruments; (4) establishing a clearer division of competences between national and supranational levels of government.

The main predicament of the current constitution-making effort in Europe appears to be that within the broader objective of improving governance in the EU, democracy and efficiency confront each other as two, often irreconcilable, elements. Thus, improving efficiency through furthering supranational sovereignty (empowering EU institutions, building European leadership, eliminating national vetoes) is commonly seen as a move towards a European super-state. This is achieved at the expense of national and local democracy and violates the principle of equality of states in intergovernmental decision-making. In this way enhancing supranationality is perceived as indirectly eroding democracy through the corrosion of state sovereignty. Conversely, measures to enhance democracy – such as allowing greater involvement of national parliaments, enlarging the legislative powers of the European Parliament, maintaining respect for the principle of equal representation of member-states (i.e. having 25 members of the European Commission), and upholding the sovereignty of democratic states through preserving national vetoes, would complicate an already cumbersome policy-making process, and thus hamper the efficiency objective. However, within this general tension between democracy and efficiency, the particular correlation between these two objectives varies according to the specific strategies for improving governance contained in the draft Constitutional Treaty. Thus, sacrificing democracy to efficiency is not without an alternative.

According to the relations they establish between the goals of democracy and efficiency, the various institutional and policy innovations proposed by the draft Treaty can be categorised into four types. The first category comprises measures for building European-scale, *supra-national democracy* based on the emergence of a European political community. The second includes articles strengthening the *supra-national institutions* in the EU. The third covers initiatives giving a larger role to *national democratic bodies* (i.e. parliaments). The fourth

refers to instruments focusing on *state sovereignty*: enhancing inter-governmental co-operation and preserving the voice of national governments. Let us now examine each of these four groups of constitutional provisions in light of the balance they establish between democracy and efficiency.

A. *Towards a trans-European, supra-national democracy*

This first category of initiatives is the most unequivocal and uncontroversial response to the Convention's objective to 'bring citizens closer to the European design and European Institutions' (draft Treaty, Preface). They target the establishment of supranational European democracy. Worth mentioning are:

i. *Establishing European citizenship*

One of the most noted innovations of the draft Constitutional Treaty is the establishment of 'European citizenship', including the right to vote and to be elected, as well as the right to live and circulate freely in the EU. An essential step in the same direction is the incorporation of the *Charter of Fundamental Rights* as Part II of the Constitution, thus making the charter legally binding for the EU bodies and agencies (but with a limited application in national courts).¹⁶

ii. *Affirming participatory democracy*

Title VI of the draft Constitutional Treaty, entitled 'The Democratic life of the Union', stipulates the principle of civic equality irrespective of nationality (Article I-44), pledges that 'decisions shall be taken as openly as possible and as closely as possible to the citizens' (Article I-45), and commits the EU decision-making bodies to a 'regular dialogue with representative associations and civil society' (Article I-46). The introduction of a referendum is a significant novelty. A minimum of one million EU citizens will have the right to request the Commission to submit a proposal on matters on which they believe the Union should act

¹⁶A general provision on fundamental rights, which recognises the Charter as an integral part of the Constitution and which also recommends accession to the European Convention of Human Rights, is inserted in Article I-7.

(idem). Since previously such proposals were initiated by national governments, and the provision makes no reference to nationality, this represents a clear move towards a post-national vision of democracy.

iii. *Improving access to justice:*

A brave step in the direction of securing democracy via equality of rights is the improved access for individuals to the European Court of Justice (ECJ). Under the old EU Treaty individuals could only challenge a Union measure at the European Court of Justice (known as 'direct actions'), in limited circumstances. The ECJ tended to apply this principle in a very restricted manner. This created a serious gap in the enforcement of rights in the EU. The draft Constitution includes a provision that widens access to the court, ensuring that individuals can challenge Union measures if they are of direct concern to them (Article III-270 (4)). A European Ombudsman is established as an independent institution; he/she will be appointed by the European Parliament and will consider citizens' complaints about maladministration within the EU institutions (Article I-48).

iv. *Strengthening the European Parliament (EP)*

The European Parliament, with the principle of 'degressive proportionality' in representation,¹⁷ transforms national democracies into supranational ones. Although national publics elect the parties represented in the European Parliament, these parties consequently function as units of supra-national, European civil society. Nationally elected parties are grouped in the European Parliament according to their ideological platforms (and not by nationality), thus representing trans-European ideological alignments and political loyalties, rather than national or local interests.¹⁸ Therefore, fully empowering the EP in its

¹⁷According to this principle, the larger a country's population, the greater the number of citizens represented by a single MEP. This gives relative advantage to small member-states. This principle is made explicit in Article I-19.

¹⁸Currently the European Parliament has the following 7 party groupings: Left-wing formations: *Party of European Socialists* (PES), *United European Left-Nordic Green Left* (UEL-NGL), *European Greens-European Free Alliance* (GRE-EFA). Right-wing formations: *European People's Party-European Democrats* (EVP-

legislative functions is one of the most direct steps in remedying the EU's democratic deficit. Despite the gradual increase of the legislative powers of the EP in recent years, its relative weight in the rule-making process stayed limited, as compared to that of the European Council and Council of Ministers. The draft Constitutional Treaty establishes a relative parity between the Council of Ministers and the Parliament, turning them into two legislative chambers: European laws will be voted together by the Parliament and the Council of Ministers, which becomes the normal legislative process of the Union. Similarly, Parliament and Council of Ministers will exercise the budgetary function together. (Article 19-1)

A further improvement of Parliament's status comes from the provision giving it the right to submit revision proposals to the Council of Ministers, which was previously the exclusive prerogative of the Commission and individual Member States. The EP will also have the exclusive right to demote, or to recall, in a motion of censure, the members of the Commission (Article 25-5). Contrary to the initial proposal, the European Council will not be empowered to do so.

v. *Transparency and simplicity of the policy-process*

A cluster of provisions attains both democracy and efficiency indirectly by means of increased transparency. These measures target the simplification of the Union's structure and functioning, making it more transparent, and thus more intelligible to its citizens. Simultaneously, enhanced simplicity achieves efficiency in policy making and implementation. Notable measures include:

The European Parliament and the Council of Ministers, when examining and adopting a legislative proposal, are to meet in public. The individual right to access to documents of the Union institutions is also guaranteed, and the Union's institutions, bodies and agencies are to 'conduct their work as openly as possible'. (Article I-49).

The EU Treaties are consolidated into a single text: The allegedly simplified framework (the draft Constitution is still some two-hundred pages) should make the Union somewhat more comprehensible to its

ED), *European Liberal Democrat and Reform Party* (ELDR), *Union for a Europe of Nations* (UEN), *Europe of Democracies and Diversities* (EDD).

citizens. Furthermore, improved transparency creates the conditions for improved accountability, thus serving the cause of democracy, as well as that of governance efficiency.

The distribution of powers between the Union and its member states is clarified by way of articulating three categories of competences: exclusive competences of the EU, shared competences between EU and member states, and 'supporting, co-ordinating or complementary actions' of the EU (Article I-11). The task here has been two-fold: to simplify the policy framework of the Union, and to return some policy domains to the authority of national governments, in an attempt to remedy the democratic deficit.

The range of legal acts used in the Union was scaled back from fifteen to six, and a 'hierarchy of acts' has been introduced (Article I-32).

The first cluster of measures, discussed above, improves the quality of European democracy either directly – by fostering EU citizenship and strengthening the institution which represents EU citizens (the European Parliament), or indirectly, by improving the transparency of policy-making. In both cases, the objectives of democracy and institutional efficiency are obtained without a need to compromise either one.

B. *Building up supra-nationality*

Let us now turn to the second category of measures aiming to improve governance- those constitutional provisions that further transform the inter-governmental nature of the Union into a supra-national one. Here priority is clearly given to improving the efficiency of governance, over democracy. Such initiatives include:

i. *Creation of a single legal personality of the Union*

The so-called pillar structure of the Union is abolished and the EU as a whole acquires legal personality in international law – something that so far belonged only to the European Economic Community. This is a significant step towards federalisation and for those who see it as a sign of the creation of a European super-state, implies a further loss of democracy, together with the loss of national sovereignty. (Article I-6)

ii. *Enhanced separation of powers among the EU's main institutions*

There are four functions which any system of governance performs (and not three, as Montesquieu is commonly misperceived to have

established): 1) general policy-making, giving impetus and direction to the polity (steering function), 2) rule-making (legislative function), 3) rule application (executive function, administration), 4) rule interpretation and conflict adjudication (judiciary function).¹⁹ The draft Constitutional Treaty codifies more clearly this enhanced separation of powers: it attributes the steering function to the European Council and its president, while the executive is to be exercised by the European Commission, the legislative jointly by the Council of Ministers and the Parliament, and the judiciary by the European Court of Justice. Prior to the draft Constitutional Treaty, the European Council was involved in three of the four governing functions: the steering, the executive, and the legislative ones. The European Council is now explicitly attributed the steering function: it is to 'provide the Union with necessary impetus for its development, and shall define its general political direction and priorities'. (Article I-20 (1)). Notably, the Council of Ministers becomes a more clearly structured legislative chamber, with most of the decisions being taken by majority voting, imbuing it with a higher degree of supranationality. The separation between the executive and the legislative functions of the Council will bring a necessary streamlining of the EU policy-making mechanism and is surely to promote policy efficiency.

iii. *Creation of a visible European leadership*

To this end, the draft Constitutional Treaty proposes to replace the six-month rotating Presidency of the European Council, which previously gave all member-states the equal chance to Chair the Council, with a permanent President, elected by the Council with qualified majority for

¹⁹In his *The Spirit of the Laws*, Montesquieu proposes the principle of 'separation of powers' to be institutionally expressed in the division between three administrative branches of government, specialized in performing the legislative, executive and judiciary functions of governance. The steering function is of a higher order and he, correctly, does not treat it on the same level as the other three. This means that the principle of separation of powers can find a variety of administrative types of implementation according to the particular allocation of governing functions to specific institutions. I am grateful to William Chew III for inviting me to clarify this point.

two-and-a-half years, once renewable. The President (Chairman) would not have a national mandate. (Article I-21).

In principle, setting up a unified political leadership of the EU would ensure continuity in policy-making, co-ordination among the different bodies, and therefore make their work more efficient. At the same time, it would provide an external representation of the political identity of the EU. A similar logic of enhancing policy-performance and building a supra-national political identity of the EU stands behind the merging of the current positions of External Relations Commissioner and High Representative for the CFSP into the new position of EU Foreign Minister.

Most importantly, a coherent EU leadership will provide agency for the most important function of governance, i.e. giving a direction to the polity, which in nation-states is carried out by the head of state/government, and which hitherto in the EU has been carried out by means of protracted inter-governmental co-ordination.

iv. *Reducing the European Commission's college composition*

In order to prevent the college of Commissioners at the EU's executive body from weakening with enlargement, the draft Constitutional Treaty foresaw abandoning the principle of one Commissioner per member-state, which was introduced at the 2000 European Summit in Nice. Instead, The Convention recommended that the Commission be composed of only fifteen members with voting rights. This reduction of the number of Commissioners, while introduced for the sake of institutional efficiency, is perceived by the current Commission and the small member-states as a violation of the principle of equality of states and consequently as undermining democracy (a point discussed below). Therefore, an alternative proposal was launched to allow each member-state a Commissioner. Eventually, the June European Summit adopted the compromise decision to reduce the size of the European Commission from 2014, with members sent from only two-thirds of member states on a rotation basis.

v. *Generalisation of the qualified majority vote in the Council of Ministers*

Making majority voting the basic principle of decision-making at the Council of Ministers will eliminate some twenty national vetoes. This is

an unambiguous step towards federalisation. The rationale behind this step, like that behind reducing the number of Commissioners, is to avoid gridlock after enlargement. For the sake of simplification, the formula for majority voting in the Council of Ministers has been set as the majority of states (at least fifteen) comprising at least sixty-five per cent of the population in the EU. This is to replace the complex calculation of voting points required by the provisions of the Nice Treaty. This proposal, which gives more voting power to member states with larger populations, is justified on the assumption that assessing voting power by population is more democratic than the principle of equal status of each member (equality of states). This proposal for reform has raised two types of concern: On the one hand, eliminating national vetoes at the Council of Ministers would mean giving more decision-making power to an institution which lacks direct democratic legitimacy while at the same time depriving national governments, who enjoy such legitimacy, a say in EU policy-making. On the other, some countries (mostly Spain and Poland) question the fairness of the specific calculus of the qualified majority, arguing that it gives undue advantage to the most populous countries.²⁰

A common denominator of the five innovations, described above, is achieving policy efficiency through deepening the supranational, federal nature of the Union. However, this approach has been criticised, on two grounds, as undermining democracy: First, the move towards supranationality is seen as a step towards the formation of a bureaucratic super-state that erodes the sovereignty of national democracies and enhances the power of international bureaucracies, which themselves lack direct democratic mandate. Secondly, it violates the democratic principle of equality of states.

²⁰Ana Palacio and Włodzimierz Cimoszewicz (Foreign Ministers of Spain and Poland), 'How to keep the balance in Europe's new treaty', *Financial Times*, September 25th, 2003. The Nice formula of vote weighing, while trying to take into account both size and equal status of each member, gives particular advantage to Spain and Poland.

C. Increasing the impact of national democratic institutions

A third set of measures attempts to mitigate the democratic deficit by giving national institutions (Parliaments, local governments) greater say in EU policy-making. These measures consist primarily of the following provisions:

i. Allowing national parliaments an input in the pre-legislative phase of rule-making:

The *Protocol on the Role of National Parliaments in the European Union* makes a commitment to 'encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on legislative proposals as well as on other matters which may be of particular importance to them'. The protocol binds EU institutions to submit documentation to national Parliaments, such as Commission consultation documents, the annual legislative programme, instruments of legislative planning or policy strategies, legislative proposals, the agendas for and the minutes of meetings of the Council of Ministers, the annual report of the Court of Auditors, etc.²¹

ii. Consulting national parliaments in changing the legislative procedure

National Parliaments are given significant weight in EU decision-making by the requirement for their consent in replacing the special legislative procedure (Council of Ministers voting unanimously) by an ordinary legislative procedure (qualified majority voting in Council of Ministers, co-decision with European Parliament). In such cases four months are to elapse before any decision is taken. (*Protocol on the role of national parliaments in the European Union*, Article 6).

iii. Monitoring proportionality and subsidiarity

The draft Constitutional Treaty introduces a new monitoring mechanism that empowers national Parliaments to uphold the principle of

²¹Proposals for turning national parliaments into a third legislative chamber (next to the European Parliament and the Council of Ministers) and thus involving them in the legislative phase of rule-making were advanced, and subsequently rejected, at the Constitutional Convention.

proportionality and subsidiarity (deciding who has the authority for decision-making on a particular issue). The Commission must justify all its legislative proposals with regard to the principles of subsidiarity and proportionality and the reasons for taking community action are to be substantiated. National Parliaments will have the power to call the Commission, Parliament, and Council to account over the application of these principles, and eventually to take cases before the European Court of Justice for a final ruling on a complaint that proposed or enacted Union legislation encroaches on the national domain. The European institutions are compelled to take account of the reasoned opinions of national parliaments. (*Protocol on the application of the principles of Subsidiarity and Proportionality.*)

The above provisions enable national parliaments to police new proposals for EU legislation and ensure that EU law does not encroach on member states' rights, which introduces an essential new element of accountability. Yet, this is not without certain disadvantages. Firstly, The proposed monitoring device stimulates a process where the issue of subsidiarity and proportionality is permanently re-examined. This complicated mechanism of decision-making, while adding a new level of democratic scrutiny, is likely to complicate and slow down decision-making, create conflicts, and thus contradict the efficiency imperative. Secondly, by complicating the mechanisms of policy making, it will undermine the transparency on which the increased legitimacy of the EU is conditioned. This apparent step towards more democracy undermines the democracy objective in a third, more critical, way, i.e. by bringing domestic political conflicts onto the European scene EU policy-making risks becoming unduly politicised. For in so far as many of the Commission's legislative proposals originate in member-state governments, it is likely that the proposed monitoring mechanism will be used by national Parliaments (particularly where the majority in one of the chambers is in opposition to the government) to challenge a policy position of its government. This politicisation would be neither of service to efficiency, nor to Europe-wide democracy. While, surely, some degree of partisanship often has beneficial consequences for democratic debate (and an antidote to the mix of technocracy and the rather comfortable relationship among political groupings at the European Parliament), such direct permeation of national political

conflicts into the European policy process would hardly have an added value for the content of the European public debate. A more reasonable alternative is to make sure national parliaments scrutinise the policy initiatives which their governments introduce to the European Commission, as this is usually the way for governments to circumvent parliamentary control and eventually, use the EU to justify policy choices that are unpopular with the national parliaments.

iv. *Democratic control over the European Court of Justice (ECJ)*

In answer to a concern that the judges of the ECJ are unaccountable, the creation of an appointment panel for Judges and Advocates-General has been envisaged (Article III- 262). According to the mechanism for appointing the panel, the Parliament can propose one out of the seven panel members (including possibly one of its own members or a member of its Legal Service). Although this does add an element of democratic accountability, it threatens the ECJ members' autonomy and independence. The appointments procedure might become politicised as the Parliament and the Council often appear before the Court. Furthermore, the Constitution increases the possibility of politically charged cases being brought before the ECJ, which increases further the need for political independence of the Court. Therefore, a more logical direction of reform would be to improve the autonomy of the Court, rather than placing it under the influence of the bodies whose work it is supposed to oversee. Here again, as in the cases of provisions increasing national parliaments' say in EU policy process, the move to democratise may entail unhealthy and counter-productive politicisation.

The issue of the European Court's powers is the crossing point where the two main strategies we outlined for mending the democratic deficit-democratic input versus liberal accountability-conflict. The incorporation of 'values' into the Constitution leaves open the possibility that the ECJ will seek to use those in a general way to rule on disputed questions. This, democratic critics of judicial tyranny assert, will lead to further judicialisation of politics in a US-like scenario where judges of the Supreme Court increasingly take on a law-making function at the expense of democratic assemblies. From this perspective, the new right of citizens to standing with the European Court of justice does not enhance democracy.

However, the increased powers of the ECJ are more likely than not to enhance the quality of trans-European democracy in two ways. Firstly, by enhancing the chain of accountability. The Parliament's role in controlling the European Commission and the Council of Ministers has been growing: it can force the resignation of the former and block or amend decisions of the latter. National parliaments can examine legislative proposals before they are adopted by the European parliament and the Council of Ministers. Yet, the growing policy-making powers of the European Parliament make it necessary that it also became more accountable. The role of the European Court of justice in ensuring such scrutiny is essential. The Constitutional Treaty's provisions do not effectively allow this.

Secondly, the history of the US Supreme Court testifies to the beneficial impact a powerful judicial body can play in a multi-cultural political community. The Supreme Court's ruling against racial segregation in the 1954 case *Brown versus Board of Education*, and the legalisation of a woman's right to abortion in the 1963 case *Roe versus Wade*, are just the most famous of many examples on how judicial power can thwart majority tyranny and unjust governmental practices. Before the incorporation of the US Bill of Rights into state legislation by the binding decisions of the Supreme Court (a process which started only in the 1950s), state legislatures and governments tended to fashion local politics after dominant cultural prejudice and powerful local economic interests. This explains why it took more than one hundred and fifty years (since the ratification of the Bill of Rights in 1791) for an effective struggle against racial discrimination in the US even to start. Europe represents a conglomerate of socially and culturally diverse groups similar to the US, where cultural conflicts could be even more intense in view of the stronger national cultures of EU member-states. To this is added the questionable capacity of the European Parliament and the Council of Ministers, where decision-making is strongly marked by the interplay of political ideology and national interests, to uphold both the European common good, and to apply a 'culture-blind' approach to public policy. It seems that the only institution that can offset these particular flaws in the European policy process is a strong

European Court of Justice. In a detailed account of the functioning of the European Court of Justice, Alec Stone Sweet has observed that law-making and policy-making in Europe are becoming increasingly judicialised. Yet, as the author observes, the ECJ has played an essential role in protecting human rights.²² The draft Constitutional Treaty indeed continues the process of judicialisation of politics in Europe. Yet, between juridicized politics and politicized judiciary, the latter is the greater evil. Regrettably, the draft Constitutional Treaty also incurs a politicisation of the judiciary by making a compromise with the principle of the separation of powers.

D. *Strengthening inter-governmentalism and regaining national sovereignty*

An alternative to the negative trade-off between efficiency and democracy are initiatives that protect the sovereignty of nation states (as guardians of democracy). This approach makes the principle of equality-of-states the cornerstone of its vision of trans-European democracy. Such measures include:

i. *Delimitation of competences between EU institutions and member-states:*

One of the most important mandates given to the Convention has been to establish a more clear distribution of powers between levels of government. The rationale behind this effort was to limit EU powers through a more precise allocation of competences and was initiated by pressure to have some policies transferred back to national authorities in order to bring the process closer to the citizens. With that purpose in mind, and in the name of upholding the authority of local democracies, the category of 'supporting, co-ordinating, or complementary' was added next to the categories of exclusive and shared competences in the EU – one of the main innovations in the Constitution (Article I-16). Introduced under the pressure of the German Länder and some small member states (i.e. Ireland and Malta), this innovation resulted in excluding important domains that touching on regional and national

²²Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, (New York: Oxford University Press, 2000).

sensitivities, from the EU sphere of authority.²³ Rather than applying here the principle of subsidiarity, the draft Constitutional Treaty's provisions stipulate that the 'legally binding acts' adopted by the Union cannot entail 'harmonisation' of Member States' laws and regulations. The downside to this form of safeguarding local democracy is that it prevents necessary co-operation between levels of governance in important policy fields.

In fact, the whole effort of establishing a clear delimitation of competences between national authorities and the EU, rather than leaving this to the subsidiarity principle, has been founded on a fallacious (in this case) idea of local democracy. It is fallacious, because in the EU levels of governance are entwined, all competences are shared, and the implementation of policy decisions requires the co-operation of various levels of governance.²⁴ Thus, compromising the uniform application of the subsidiarity principle in the name of local democracy, is counter-productive in terms of achieving simplicity and accountability.

ii. *Preserving the equality of state representation in the Commission's college*

Upholding the principle of equality of states as a democratic standard is the justification given to the proposal of the current Commission President, Romano Prodi, backed by the small and new member-states, for allowing one Commissioner per member-state. This stood against the initial position, adopted at the Convention, of reducing the number of voting members of the Commission from twenty-five to fifteen. The conflict between democracy and efficiency is apparent here: reducing the number of Commissioners violates the principle of equality of states, while appointing twenty-five members of the college in defence of the equality of states principle would lead to decision-paralysis.

²³Such policy areas are: culture, education, vocational training, youth and sport, industry, protection and improvement of human health. On the motivation for re-assessing the allocation of competences see 'The Draft Constitutional Treaty – An Assessment', European Policy Centre, *EPC Issue Paper No. 5* (3.7.2003).

²⁴The Draft Constitutional Treaty – An Assessment', European Policy Centre, *EPC Issue Paper No. 5* (3.7.2003), p. 20.

Furthermore, 'restoring' democracy as equality of member-states at the Commission (appointing one Commissioner per member-state), introduces an inter-governmental element in this body, which, in contrast to the European Council and the Council of Ministers, is meant to embody the supra-national nature of the European Union. It is only at the 2000 Nice European Council that the principle of one Commissioner per member state was formally endorsed. This move to solving the democracy deficit (in the name of equality of states) eventually undermines the integrationist perspective of the Union's development. It is also potentially perilous to the quality of policy making, as, according to the position adopted at the June 2004 Summit, the college of commissioners will be filled on rotation basis and upon nominations by member-states, rather than leaving the Commission's president the freedom to selecting his team on the basis of professional qualifications, regardless of nationality.

iii. *The creation of the European Council as a fully-fledged EU institution*

The separation between legislative and executive functions of the Council through the institutional separation between an executive (European Council) and legislative (Council of Ministers) has led to the appearance of the European Council as a fully-fledged EU institution with high governing functions. As the European Council represents states (its members are heads of state and government) this move sets off a shift in the inter-institutional balance within the EU towards inter-governmental bodies. While preserving the principle of equality of states (and thus allegedly enhancing democracy)²⁵, this situation undermines efficiency because it will place the Commission in competition with a powerful rival executive, thus damaging its ability to carry out its functions of policy-proposal and co-ordination.

²⁵The European Council members are directly elected by national constituencies, or appointed by national parliaments. The Commission members, who represent the supra-national identity of the Union, are not.

iv. *Appointing the Commission's President by the European Council*

This means that an inter-governmental body will appoint the executive's president, rather than having him/her elected by the European Parliament as representing the European citizenry.

v. *Limiting the functions of the European Council's President:*

The idea of creating a high-profile European leadership at the Council has been opposed by small member-states, seeing in this move a shift of balance in favour of big states. Smaller member states expressed a preference at the Convention for keeping the six-month rotating presidency. In answer to this, a compromise solution was adopted, consisting in limiting the functions of the President to no more than providing chairmanship for the Council sessions, without having any policy initiative. Consequently, the nature of the presidency stays in fact unchanged. This compromise, cast in the name of democracy understood as equality of states, goes against the initial rationality of setting up a European Council President – the creation of united leadership with high executive functions.

vi. *Countering majority voting in the Council of Ministers with emergency national vetoes*

Instituting qualified majority voting at the Council of Ministers as part of the normal legislative procedure was a critical step in the direction of federalism. Overcoming national vetoes enhances the Union's policy-making efficiency and strengthens its supra-national nature. However, opposition to further eroding state sovereignty in favour of European integration has prompted some member-states (i.e. Poland and Britain) to urge that an 'emergency break' mechanism be allowed, under which the new voting system could be set aside for issues of vital national importance.

The above described efforts to redeem the democratic deficit by restoring state sovereignty (either in the name of equality of states, or in the name of opposing the authority of Brussels' bureaucracy), is at odds with the overall objective of building a democratic and efficient European polity. As exemplified by the tumult over the calculation of the voting rights of member-states that sabotaged the adoption of the

Constitutional Treaty at the Rome European Council in December 2003, national interests become corporate interests set against the larger European public interest.

4. Reform alternatives

As our analysis thus far establishes, the series of constitutional measures intended to redeem the EU democracy deficit do not converge into a coherent effort because they contain divergent normative logic, which in turn takes the policy process in conflicting directions. While all four types of measures we examined are intended to deepen the Union's legitimacy, from the point of view of their impact on the balance between democracy and efficiency they build up the following conflict:

The first two groups of measures – those aimed at creating a supra-national European polity, as well as those designed to strengthen the EU supranational institutions – offer solutions to the democratic deficit within the liberal paradigm of accountable government and citizen equality before the law (and within the 'despotic bureaucracy versus accountable government' dilemma we outlined at the start). The balance between efficiency and democracy here is achieved at the expense of the alternative modus of democracy – democracy understood as popular government based on citizen input into the policy-process.

The second two groups of measures: those giving a bigger say to national parliaments and those safeguarding state sovereignty, provide solutions to the democratic deficit within the paradigm of popular sovereignty (within the 'super-state versus nation-state' dilemma). The adoption of these provisions has been motivated by a vision of the value of local democracies shared by political elites in Europe across the main ideological divisions, and often in the name of the democratic principle of equality of states. Appeals for granting national parliaments an even bigger role in EU law-making than the one foreseen in the draft Constitutional Treaty proliferated after the closing of the Convention in the run up to the adoption of the Constitution.²⁶ However, this approach to remedy the democratic deficit entails the following risks. First, a

²⁶See, for instance, 'Pat Cox Calls for a Bigger Role of National Parliaments', *EU Reporter*, Sept. 22, 2003, p.3.

larger involvement of national parliaments would complicate the already cumbersome decision-making process, and therefore hamper institutional efficiency. Second, the input of these institutions would tend to be sporadic and undermine the cohesion of EU policy. Third, interference by national parliaments might inject partisanship into EU politics. This would bring in an unnecessary politicisation, by allowing national political issues to permeate the supra-national policy process. This will not only hamper the efficiency objective, but will also contribute to substituting the European public interest with the corporate interests of political groups. Lastly, the 'democratic' principle of equality of nations undermines the liberal in its origin, but equally democratic, principle of citizen equality, as it gives more relative weight in representation to citizens from smaller member-states.

Similar problems issue from attempts, in the name of democracy, to revisit the balance between states and EU institutions in favour of the former. Ultimately, it is the nature of sovereignty in the European Union that makes this project outdated. Currently sovereignty in the EU exists under a double modus: as shared sovereignty (national and supra-national institutions share competences in some policy domains), and dual sovereignty²⁷ (policy domains are exclusively attributed either to the EU, or to member-states). The term 'shared sovereignty' in fact disguises the end of sovereignty: sovereignty, understood as ultimate authority, by definition cannot be shared. In this sense, a more appropriate term for the particular organisation of political authority in the EU is Neil MacCormick's notion of 'post-sovereignty'.²⁸ The principle of subsidiarity creates an additional situation of 'negotiated' sovereignty: every policy initiative is evaluated in order to be attributed to the respective level of governance, with priority given to the state, over the supra-state level. As we noted, the draft Constitutional treaty further

²⁷After the fashion of the US federal model in which the authority of states and Federal government derives directly from the Constitution, and not from each other.

²⁸Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Clarendon Press, 1999).

strengthens the subsidiarity principle by giving national parliaments powers of control over the application of this principle. However, while intended to enhance democracy, the situation of negotiated sovereignty which subsidiarity creates, generates permanent tension between state and supra-state authorities. The negative effect is double: with invigorating national, corporate, identities, policy efficiency is jeopardised together with the European public interest.

Besides being institutionally unsound insofar as it undermines the efficiency imperative of the reforms (and ergo-the functional legitimacy of the Union), the attempted shift towards national sovereignty in the name of democracy is normatively questionable from the perspective of the very values it strives to defend, liberalism and democracy. Hannah Arendt has observed that the nation-state was a reliable guarantor of individual rights against the rule of arbitrary administration only as long as the establishment of nation-states coincided with that of constitutional government.²⁹ In her analysis, entrusting national institutions with the protection of *individual* rights unduly reduced these rights to the rights of *national* citizens, and thus made their survival conditioned on the survival, or the proper functioning, of the nation-state. Thus, 'when the precarious balance between nation and state, between national interest and legal institutions broke down'³⁰ with the First World War, the crisis of the nation-state entailed with itself the crisis of liberal constitutionalism. The European welfare states after the Second World War managed to restore the institutional framework of liberalism within the structures of the nation-state. Yet, the solution was only temporary, as EU integration entailed the gradual loss of state sovereignty, as well as the loosening of national identities into what Habermas has termed 'a postnational constellation'.³¹ If, along with Arendt, we admit that the collapse of the liberal framework of Europe at the beginning of the twentieth century was not due to the unfortunate collapse of the nation-

²⁹Hannah Arendt, 'The decline of the nation-State and the End of the Right of Man' in Hannah Arendt, *The Origins of Totalitarianism* (San Diego, New York, and London: Harcourt Brace, 1979) p.275.

³⁰idem.

³¹Jürgen Habermas, *The Postnational Constellation* (Cambridge, Mass.: MIT Press, 2001).

state, but rather due to entrusting the defence of the liberal principles to the institutions of the nation-state in the first place, we should not be counting on the nation state to solve the democratic deficit in the European Union at the beginning of the twenty-first century. As the days of national sovereignty are fast fading, state institutions are becoming equally inadequate channels for the democratic process, as they are an inappropriate framework of governance in a globalising world.

The above considerations lead to the conclusion that curing the EU democracy deficit by resorting to the democratic institutions of the nation-state is counter-productive on several grounds: it hampers the efficiency imperative of the current reforms; it contradicts the post-sovereign nature of the organisation of power in the Union; it undermines the European public interest; and, in the final analysis, is unlikely to strengthen democracy. Therefore, a more reliable solution to the democracy deficit in the EU should be sought within the terms of the second dilemma: despotic bureaucracy versus liberal democracy. Protecting the collective public interest of European citizens as well as their individual freedoms would require building efficient and accountable governance at both national and supranational level. Powerful supra-national institutions are not a menace to democracy as long as they are checked by strong mechanisms of control and accountability to prevent abuse and mismanagement.

Following this logic, the most appropriate tools of reform are the ones examined previously in the first two clusters of constitutional provisions – measures fostering pan-European citizenship, combined with measures enhancing the accountability of EU institutions. This would mean, in the first place, further improving the efficiency, political status, and accountability of the European Parliament as the institution that represents Europe-wide democracy beyond national identities. From the point of view of enhancing European citizenship, it will be necessary to re-balance the distribution of powers in favour of supranational institutions dedicated to furthering the common interest, (European Parliament, Court of Justice, European Commission) against inter-governmental ones (European Council and its specialised formations) and in a spirit of independence from member-states which through national governments are trying to optimise the advantage of their

respective populations. To avoid the trap of politicisation which comes with inviting the input of national parliaments into EU policy-making, solutions should be sought in the direction of more classical forms of accountability (rather than direct policy input), such as enabling national parliaments to scrutinise systematically their government's requests to the Commission for legislative proposals, as well as the positions of their governments in the Council of Ministers and the European Council – a form of classical parliamentary control which exists in member-states, but not in the EU, and has not been foreseen by the draft Constitutional Treaty. Another option would be for MPs from national parliaments to come to Brussels for an annual review of the Commission's work, as Pat Cox has recently proposed.³²

Embracing the path of accountability, rather than that of democratic input, as a reform formula, would permit the resolution of the EU democratic deficit without undermining the Union's institutional efficiency, and without jeopardising the formation of a European political community. This line of institutional development is in tune with the post-sovereign and post-national nature of power relations on the continent in the early twenty-first century.

This will provoke the evolution of the EU into a transnational *liberal* framework of constitutional government as a sanctuary of national democracies, without relying on them for the enforcement of the rule of law. In time, the efficient and accountable governance through the supra-national EU institutions is likely to shift citizens' political identification and loyalty from the national to the European level, redeeming the third (cultural) legitimacy deficit – the one on which the creation of a European political community ultimately depends.

³²Pat Cox Calls for a Bigger Role of National Parliaments', *EU Reporter*, September 22nd 2003, p.3.

Article:

It Was The Best of Times, It Was The Worst of Times¹

Richard W. Bruner

EARLY IN MAY, 1953, I arrived at the office of District 3 of the United Packinghouse Workers of America (UPWA)-CIO in Des Moines, Iowa. I had driven down from Mankato, Minnesota, about one hundred and eighty miles, to take up a new occupation, after quitting my job as a radio journalist. I was joining what I thought of as a great social movement. Yet, my appearance that first day in the union office probably marked me more as a dance-hall dandy than a revolutionary. I was wearing a double-breasted suit whose jacket I usually left unbuttoned to hang open awkwardly and a purple shirt with gold-plated cuff links. I was naïve, but bristling with confidence. And the job turned out to be a watershed experience, something that probably defined me for the rest of my life.

In that period, two issues were paramount among America's left: racism and the Cold War.

Even though the Civil War had ended eighty eight years earlier and had supposedly given equal status to freed slaves, whites' treatment of blacks continued to range from outright barbarism to unfeeling disregard

or pitiless segregation and discrimination. The worst was lynching – mob violence named after Colonel Charles Lynch and his associates' treatment of Tories during the American Revolution. It had taken the lives of more than three thousand black men and women between 1882 (when statistics became reliable) and the mid-twentieth century and was continuing with depressing regularity. All attempts to adopt federal laws against lynching had failed. At the same time, Jim Crow laws and customs confined most blacks to menial jobs; they were not served in many restaurants, not accommodated in many hotels, and not waited on in many stores. They were seated only in the balconies of some movie theatres. They were prevented from buying or renting homes in most white neighbourhoods. In the South, they could sit only in the backs of buses. They were even prohibited from drinking from the water fountains used by whites. Laws and intimidation kept them from voting. Although the most egregious of these offences took place in the south, many northern cities and states had de facto, if not de jure, ways of keeping blacks 'in their place'. Sadly, much of the American labor movement was no exception to the rest of society. Some American Federation of Labor (AFL) unions had provisions in their charters excluding blacks from membership. Although most Congress of Industrial Organizations (CIO) unions had no such provisions, only a few made efforts to integrate blacks into the mainstreams of their memberships. The UPWA was extraordinary in its determination to be fully integrated at all levels – in the workplace and among its own officers and staff.

Yet, at the time I joined the UPWA, there were stirrings. Five years earlier, at the Democratic Party's 1948 national convention in Philadelphia, Hubert H. Humphrey, the liberal mayor of Minneapolis and candidate for the US Senate, made a speech that shattered the party's fragile unity. The issue was the 'plank' in the party's platform advocating civil rights. 'I do not believe that there can be any compromise on the guarantee of civil rights,' Humphrey said:

To those who say ... "that we are rushing this issue of civil rights", I say to them we are 172 years late! To those who ... say "this civil-rights program is an infringement on states' rights", I say this: the time has arrived in America for the Democratic party to get out of the shadow of states' rights and walk forthrightly into the bright sunshine of human rights!

¹ Charles Dickens, *A Tale of Two Cities*.

It was a defiant first-time challenge to delegates from the South, a traditional stronghold of the Democratic Party. They were so angered when the plank was adopted that they walked out of the convention and, three days later, held a convention in Birmingham, Alabama, where they set up their own party. Its official name was the States' Rights party, but it was usually called the Dixiecrats.

Some participants in the Democratic convention said that President Harry S. Truman, nominated for re-election, was furious at Humphrey for provoking the split. Truman was faced with what seemed an impossible phalanx of opponents: on the right, Republican candidate New York governor Thomas Dewey and Dixiecrat candidate South Carolina governor Strom Thurmond; and, on the left, the Progressive Party candidate Henry A. Wallace. Commentators of all stripes predicted an easy victory for the Republicans, since Wallace was expected to steal votes from Truman's left, while Thurmond would steal them from his right.

The country's left was split. The Progressive Party had the support of the CIO's eleven unions alleged to be controlled by Communists. Wallace, twice secretary of agriculture and once vice president under Franklin D. Roosevelt, had been secretary of commerce under Truman, but was forced to resign after attacking Truman's policy toward the Soviet Union. He accepted the newly-formed Progressive Party's nomination for president. But most anti-Communist liberals believed Wallace and his party were controlled by Communists. They gritted their teeth and stuck with Truman (who was not the first choice of many Liberal Democrats). A few on the non-Communist left, including me, voted for Norman Thomas, the Presbyterian clergyman and anti-Soviet pacifist who had studied political science under Woodrow Wilson at Princeton and was the perennial Socialist Party candidate for president.

Against these seemingly overwhelming odds, Truman prevailed and won the election. Ultimately, he also won the hearts of many liberals. However, the left suffered a setback in the next presidential election (1952) when the Democratic nominee, Adlai Stevenson, governor of Illinois, an urbane, articulate intellectual, lost to Republican Dwight D. (Ike) Eisenhower, the former supreme commander of Allied forces during World War Two, a genial, bland man given to occasional malapropisms and mispronunciations (like President George W. Bush,

Eisenhower persisted in pronouncing nuclear as nu-cu-lar). He had been inaugurated a few months before I joined the UPWA staff. Not long afterwards, he took the United States out of the Korean War through a negotiated armistice.

Also not too long before I joined the union staff, Josef Stalin had died. But his death and the end of the Korean War did nothing to diminish the Cold War or the witch hunts for Communists or those suspected of being Communists, including many of the most talented screen-writers in Hollywood.

Later that year, 1953, Ethel and Julius Rosenberg were executed as atomic spies. Interestingly, it was also the year in which Arthur Miller's drama, *The Crucible*, was first performed; many considered it an attack on the witch-hunts of the period.

Happily, though, the United States was on the cusp of some momentous changes. I had wanted to become part of the American labor movement since, as a student at the University of Minnesota, I had read such books as Henry Kraus's *The Many and the Few* about the sit-down strikes in the GM plant in Flint, Michigan. I became a volunteer – researcher, writer, and general go-fer – for the Minnesota state CIO council, hoping it would lead to a job, either on the council's newspaper or in its research department. But it was a time of massive turmoil shaking the very foundation of the CIO. Eleven national unions were purged out of the federation for being dominated by Communists. Once out of the CIO, the Minnesota local unions of the purged national unions stopped paying dues to the state CIO council, a significant financial loss, which meant there was not enough money to hire an eager young college radical.

By the time I joined the UPWA staff, nearly all these purges had taken place. Even so, the CIO was investigating the UPWA for possible Communist domination. In fact, during my first week on the staff I was sent to the national union's Chicago headquarters where top officers briefed us on their latest appearance before the CIO committee appointed to hear our case.

The UPWA was unique in the American labor movement, which perhaps made it a target. At that time, total membership was somewhat more than 100,000, a very small entry in CIO account books, since the United Automobile Workers (UAW), for example, had more than a million members. Small as it was, the UPWA had an integrity that

seemed to mock other unions. For example, instead of a Taj Mahal-style headquarters like those many unions had constructed, the UPWA's central headquarters was in a modest office building in downtown Chicago. Instead of the lavish salaries collected by officers of many other unions, UPWA's national officers and staff had incomes capped at the highest amount a skilled UPWA member could earn in a packinghouse. But, most important, the leadership, staff, and even headquarters office workers reflected the ethnicity of the union's membership, about one-third black. One of our two vice presidents was black, four out of ten district directors were black, and probably a third of our staff was black. Not even the purged Communist-dominated unions, supposedly anti-racist, could claim such a diverse leadership.

The reason for our substantial black membership was a result of the industry's employment patterns. Meatpacking plants were noisy, bloody, and dirty. They attracted workers whose ethnic background put them at the bottom rung of American society. The industry's first employees, according to Les Orear of the Illinois Labor History Society, in the mid-19th century were immigrant Germans; then Bohemians, Czechs, Slovaks and the Irish laborers who had been building the canal – the Illinois and Michigan Canal that connected Chicago to the Illinois River. In the 1910s, Polish, black, and Lithuanians worked in the Chicago packinghouse plants. Gradually Hispanics moved in.

In any case, ours was one of the last industrial unions to be organized. The union began as the Packinghouse Workers Organizing Committee in 1937 and lasted until the CIO chartered it as an international (including Canadian affiliates) union in 1943.

The American labor movement evolved in the early 20th century from craft unions belonging to the American Federation of Labor (AFL). Craft unions represented, as the term implies, workers in particular crafts or trades – e.g., carpenters, bricklayers, plumbers, etc. Factory – or industrial – workers were excluded. The only significant exception was the United Mine Workers (UMW), a union embracing all mining crafts. John L. Lewis, president of the UMW, broke ranks in 1935 by persuading the presidents of seven other AFL unions to join him in forming the Committee on Industrial Organizations to organize factory workers as part of the AFL. When the AFL expelled it, the Committee renamed itself the Congress of Industrial Organizations (CIO).

From its beginnings, the CIO was generally more liberal; in fact, some of its leaders, notably socialists like Walter and Victor Reuther of the United Automobile Workers (UAW), perceived unions as political-social movements. In its earliest days, the CIO accepted support from Communists. They served on 'organizing committees,' professional organizers who pioneered the non-union industries: establishing unions for auto-workers, steelworkers, rubber workers, electrical workers, and other unions in the mammoth factories that dominated the American industrial landscape. At the same time, the organizing drives were helped considerably by Congress's adoption of the National Labor Relations Act of 1935 (often called the Wagner Act) which recognized workers' right to join unions and created the National Labor Relations Board to supervise and certify elections in which workers voted for or against being represented by a union (or, to complicate things, voted for one of the several unions that were contending to represent them).

The 1930s became a period of colossal efforts to 'organize the unorganized.' However, by the time the CIO got around to the packinghouse industry, there was already an AFL union in that jurisdiction. The Amalgamated Meat Cutters and Butcher Workmen of North America had been in existence since the beginning of the last century. Its membership was largely retail butchers, although it represented workers at a few packinghouses. The CIO Packinghouse Workers Organizing Committee (PWOC) paid no attention to butcher shop employees, but concentrated on the big plants in the stockyard centres: cities like Chicago, Omaha, and Kansas City where Armour, Wilson, Cudahy, Morrell, Rath, Hygrade, and Swift employed East European immigrants, Italians, Hispanics, and blacks who welcomed the union. The abominable working conditions in packinghouses had been documented in *The Jungle*, a novel commissioned in 1904 by the editor of the socialist journal, *Appeal to Reason*. The socialist Upton Sinclair spent seven weeks gathering research in Chicago packinghouses. The journal serialised his novel in 1905. When Sinclair tried to publish it as a book, six publishers rejected it. Then Doubleday changed its mind after hearing that Sinclair, in a self-publishing venture, had obtained a big number of advance orders for it. It was an immediate success and, since, has been printed in seventeen languages. President Theodore Roosevelt read it and ordered an investigation of the meat industry. He told Sinclair he disapproved of socialism but agreed that 'radical action must be taken

to do away with the efforts of arrogant and selfish greed on the part of the capitalist.'

The CIO efforts to organize packinghouse workers were largely successful and, in 1943, the CIO chartered the union, raising its status from PWOC to UPWA, allowing it to manage its own affairs under the federation umbrella. At this juncture, there was a conflict. The CIO had decided it would impose one of its own loyal staff members on the UPWA as president, a form of political patronage. Delegates to the charter convention, however, objected to having an outsider foisted on them. That year, they chose their president from among their own ranks. However, later, after a strike in 1946, convention delegates made a change and installed their union's general counsel as president, despite the CIO's opposition. Legend says they were modest about the capabilities of anyone among their ranks. Therefore, they chose the smartest person they knew, Ralph Helstein, who had never worked in a packinghouse, but had been the general counsel for the PWOC and then for the UPWA. They valued him for his skills as a negotiator.

Helstein's election as UPWA president was a landmark. It was probably the first time a non-worker became president of an American union. Helstein sometimes joked that his first knowledge of unions came when workers at his father's furniture factory went out on strike. Born in 1908 in Duluth, Minnesota, to an affluent family, he attended the University of Minnesota and got a law degree in 1934. The 1930s were a decade of active radicalism in Minnesota, especially in Minneapolis where Helstein attended the university. The state was the first to elect a third-party governor, Floyd B. Olson, whose Farmer-Labor party was, in Olson's own words, not liberal, but radical. Minneapolis was the scene of violent strikes by truck drivers who had joined the Teamsters union led by Trotskyists Vincent Dunne and his brothers. In the midst of this, Helstein worked for the federal government as a labor compliance officer, enforcing labor codes in the National Recovery Act, a New Deal effort to overcome the Great Depression (later ruled unconstitutional). He then practised law in Minneapolis, in a firm with other liberal lawyers who specialised in labor law. In 1939 he became general counsel to the Minnesota state CIO and, in 1942, he became general counsel to PWOC.

After his election as president, Helstein, a stubby little chain-smoker, shaped the union in his own image. He put enormous stress on rank-and-file participation, especially in bargaining sessions with the meat-packing chains. A towering intellectual who never talked down to his members, he was fiercely dedicated to civil liberties and civil rights. As a result, he steadfastly refused to join the CIO's campaign against the Communist-dominated unions.

The CIO purge began in 1949, when the first of eleven unions was expelled, the United Electrical, Radio, and Machine Workers of America (UE) led by Albert J. Fitzgerald, president, and Julius Emspak, secretary treasurer. The expulsion took place at the 1949 CIO convention, to which the UE sent no delegates, so great was its disdain and exasperation with what it described as 'red-baiting.'

No doubt there was red-baiting. Many of the CIO leaders, like James Carey and Philip Murray, were Roman Catholics and took advice from priests. Yet, there were other reasons for their wanting to rid themselves of the left-led unions, which had become political albatrosses. The CIO was vulnerable. Or at least it believed it was. Only fourteen years old, it lacked confidence in its ability to withstand any significant onslaught by politicians. Two years earlier, the Republican-controlled Congress had adopted the Taft-Hartley Act over President Truman's veto. The new law banned closed shops (requiring prior union membership as a condition of employment), secondary boycotts, and union contributions to political campaigns, although court rulings later nullified that provision. And it provided that union leaders must sign a statement avowing they were not Communists in order for their unions to be allowed the protection of the NLRB.

Despite labor's vulnerability, it had a number of things going for it. It was a period of high employment, especially among factory workers. It was an industrial economy, unlike today's service economy. Although automation and robotics were just around the corner, they weren't there yet. Many workers turned cranks, swung hammers, and operated drills. The first McDonald's restaurant was only a year old and there were as yet no franchised replicas. Fast food meant the Automat or sandwiches in a lunch bucket.

There were also signs of some liberalising of America. In 1947, the same year as the passage of the Taft-Hartley Act, Jackie Robinson became the first black man to play on a major league baseball team. The

following year, President Truman ordered an end to armed forces segregation and established a Fair Employment Practices board to prohibit discrimination against blacks and other minorities in federal jobs. Ralph Bunche, a black State Department functionary became part of the United Nations bureaucracy and was appointed UN mediator in Palestine. He has the reputation of bringing Israel into being.

At the same time, the Cold War between the Soviet Union and the United States – exacerbated by the 1948 Communist takeover of Czechoslovakia – was provoking increasing hostility toward American Communists. In 1948, the black scholar, W. E. B. DuBois, was dismissed from the National Association for the Advancement of Colored People (NAACP), the most prominent American black organization, for pro-Soviet and pro-Communist sympathies. Eleven leaders of the Communist Party were convicted of wilfully and knowingly conspiring to teach and advocate the overthrow of the government of the United States by force and violence.

In 1948, the eleven left-led CIO unions supported the Wallace campaign, while the rest of the CIO fell in with Truman's scrappy campaign. The decision of the left-wing unions to support the Progressive Party became, for CIO President Philip Murray, the litmus test. It was proof of their betrayal.

Besides the UE, other unions pushed out of the CIO were International Union of Fishermen and Allied Workers; United Farm Equipment and Metal Workers; International Longshoremen' and Warehousemen' Union; American Communications Association; International Union of Mine, Mill, and Smelter Workers; National Union of Marine Cooks and Stewards; International Union of Fur and Leather Workers; Food, Tobacco, Agricultural, and Allied Workers Union; United Office and Professional Workers of America; and United Public Workers of America.

Helstein, in general, was opposed to the purge. And he was determined not to become a part of it. My introduction to him and to the rest of the union's leadership was at the conference of staff members held in the Chicago headquarters in the same week I joined the staff. Helstein and other officers brought several of us up to date on the CIO's efforts to persuade the UPWA to purge its ranks and staff of suspected Communists. Helstein and Tony Stevens, the union's vice president in

charge of organizing, had attended a meeting with a CIO committee, which included Walter Reuther, the president of both the United Automobile Workers (UAW) and the CIO federation (Murray had died in 1952). I gathered that Helstein conducted a delicate balancing act. He didn't want to appear too rebellious (since we needed the CIO more than it needed us), but he didn't want to cave in to a demand he considered a violation of civil liberties. His enduring conviction was that if members objected to a leader because they suspected him or her of being a Communist, they should vote him or her out of office. He also believed that, if a staff member were a Communist, but was not allowing his party membership to interfere with his work, there was no legitimate reason for dismissing him. Not all the UPWA members or leaders agreed with him. In fact, a UPWA faction wanted to clean out the union. As I recall, it consisted of at least two district directors and several staff members. Beyond doubt, we did have some Communists on our staff. One was Jesse Prosten, a very capable international representative originally from a Boston local union. He worked as the chief union representative in grievance arbitration with two big packinghouse chains, where master agreements were in force. He had the reputation of being very skilled at his job and certainly had the support of the members who worked with him. Although I cannot remember the other Communists, there were undoubtedly a few. Les Orear, the editor of the union's newspaper, who became a close friend of mine, had quit the Communist party and was treated as a pariah by Communists on our staff. I am sure that some of Orear's former colleagues tried to pressure Helstein into firing him, but Helstein refused. His principles on the issue of civil liberties extended to non-Communists, as well as Communists. Because of this ideological split, the union's conventions were often spirited.

Despite internal and external pressures, the UPWA continued its fraternal relations with some of the ousted unions. In our district, we cooperated with the United Electrical Workers (UE) and I had a social relationship with a UE field representative, Don Harris. Our union made a point of showing to our members a film, *Salt of the Earth*, about a strike by the International Union of Mine, Mill, and Smelter Workers, an ousted union. It had been written and directed by two of the 'Hollywood Ten,' who were blacklisted by film studios. Unfortunately, it was almost embarrassingly melodramatic.

That was the basic situation when UPWA offered me, in the words of a contemporary, 'a dream job.' (That contemporary was Phil Allen, a TV journalist who had been fired from his broadcasting job in Omaha because of his liberal views. Our district of the UPWA stepped in and sponsored his commentaries on TV in Omaha and Sioux City, Iowa.) My job, as Program Coordinator for District 3 – Iowa, Nebraska, and Colorado – was basically that of a social activist. There were Program Coordinators for three other districts, besides District 3. Our responsibilities were to prod local unions into turning convention-adopted programs into action. We had four major program areas – anti-discrimination (our term for civil rights), women's activities, political action, and farm-labor relations. I did my best to get local unions in our district to establish committees for each of these programs. After that, I worked as a consultant with the committees in their efforts to fight discrimination, integrate women into the union's mainstream, get involved in politics, and reach out to liberal farm organizations to work in tandem, especially on political programs. My immediate boss was Russell Bull, the director of District 3; but I also reported to Dick Durham, a black man and the Program Coordinator for the international union. At various times, he would send me instructions or have me join him and other district program coordinators for special projects. He was a skilled writer and I much admired him. The program coordinator for the Chicago-area district was Oscar Brown, Jr., who later went on to be a song-writer, singer, and author of a musical, *Kicks & Co.*, a clever plot about a Mephistophelean villain and a civil rights hero. By the time the musical reached the preview stage, I was a writer at NBC News. I invested a modest amount in *Kicks & Co.*, but it closed during Chicago previews.

There was a built-in conflict over priorities among programs, as they affected District 3. Since our district was headquartered in Des Moines, with the bulk of its membership in Omaha, we were relatively rural, especially when compared with District 1 – Chicago – heavily urban, with a high proportion of black members and staff. Our district had two black staff members of a total of five. But the conflict over priorities was not directly related to race; it was based on the fact that our relatively rural location meant we were sensitive to the farm economy and farmers. Whenever we had a strike, we wanted farmers to stop bringing hogs and

cattle to those plants affected by a strike and, of course, not to accept jobs at a packinghouse and become strikebreakers. This meant that we paid close attention to farmers. The union's farm-labor relations program was crucial in our district and I was expected to work hard at it. I made an effort to get local unions to establish their own farm-labor relations committees and reach out to farmers in their localities. For my part, I tried to set up certain kinds of relationships.

My efforts on the farm-front led to some interesting events. In 1955, the American farm economy was in a recession. The Republican Secretary of Agriculture, Ezra Taft Benson, part of the Eisenhower administration, was, predictably, conservative. In fact, the administration was determined to reduce or eliminate price supports for farmers, the government subsidies initiated during F. D. Roosevelt's New Deal as a way to keep farmers from going bankrupt. Benson and Eisenhower wanted farmers to stop depending on the government and, instead, tailor their production (which was undoubtedly enormous) to the market demands. We thought it was a destructive idea, since it was impossible for the average farmer to anticipate market needs as he considered what he would plant each spring. As the situation got worse, farmers got more outraged. Eventually, a group organized the National Farmers Organization (NFO) and began holding meetings in rural centres. One such meeting was held in Shenandoah, Iowa, in the southwest corner of the state. We were extremely interested in the group – especially because its founders spoke of using the union model as a way to bargain for higher prices – and I decided to attend the Shenandoah meeting. When I got to the meeting, I introduced myself to the NFO leaders and offered to speak to the audience. They liked the idea and I did speak them, excoriating the Benson-Eisenhower policy and offering them whatever support our union could lend them. The Shenandoah weekly newspaper carried an article written by its editor about the NFO meeting and depicting me as a Communist. Somehow, I saw the newspaper and decided not to ignore that slander. I found a very aggressive Des Moines lawyer to help me. I explained the situation and he gleefully went to work. While I was sitting in his office, he picked up his phone and called the Shenandoah editor. In a marvellous diatribe, eloquent and articulate beyond my own abilities, he chewed up that editor and spit him out. He demanded an immediate retraction and said he would send him the language to be used in it. He did so and the editor faithfully used the

text. The editor confessed that he had no knowledge or evidence of my being a Communist and regretted calling me one. We gave wide publicity to the retraction and were praised by UPWA staffers and officers. It was a heady experience for me; it taught me a valuable lesson, that is, do not accede to slander.

The NFO was, initially, very robust. Its goal was to force food processors to pay higher prices for farm produce. It argued that, while farmers made up nine percent of the nation's population, they earned only four percent of its income. The early history of the NFO was marked by radicalism; farmers organized withholding actions to increase prices, then staged boycotts and protests which included slaughter of livestock and some property damage. The violent aspects of the organization's activities receded by 1979, when its focus turned to collective bargaining for better prices. In general, though, most farmers were too conservative and the NFO ultimately disappeared.

On another occasion, I rounded up a group of union members to demonstrate against Benson's policies. They wore barrels suspended by shoulder straps with only undershorts underneath. Carrying picket signs alleging that his policies had driven them (masquerading as farmers) to poverty, they gathered in front of the airport terminal when Benson arrived for a visit to Des Moines. Photos and stories explaining our protest appeared in Iowa newspapers. Of course, its ultimate effect was only cosmetic.

Meanwhile, in 1954, momentous social changes were happening. A court case began in 1951 when black third-grader, Linda Brown and her father, Oliver Brown, appealed to the National Association for the Advancement of Colored People (NAACP) for help to enable Linda to go to a white school in Topeka closer to her home than the black school she was obliged to attend. The case ultimately went to the Supreme Court which heard it in December, 1952, and December, 1953. On May 17, 1954, Chief Justice Earl Warren (an Eisenhower appointee) read the decision of the unanimous Court striking down the Plessy doctrine of 'separate but equal' and ruled that segregated schools were inherently unequal. That decision reverberated through the South like a bomb explosion. It effectively set the stage for more assertive behaviour by American blacks who wanted genuine civil rights.

Another 1954 event, which overlapped the Brown decision in May and thereby probably distracted some Americans' attention from the Supreme Court decision was the televised drama, the Army-McCarthy hearings, April 22nd to June 17th, thirty six days – one hundred and eighty eight hours – broadcast 'gavel to gavel' on the ABC and DuMont networks.

The event had its beginnings in October, 1953, when Senator Joseph McCarthy of Wisconsin began investigating what he said was communist infiltration into the military. He tried to discredit Secretary of the Army Robert Stevens, finally infuriating President Eisenhower who had, until then, been seemingly indifferent to McCarthy. Meanwhile, David Schine, a McCarthy committee consultant was drafted into the Army and McCarthy's chief counsel, Roy M. Cohn, tried to pressure military officials into giving him special privileges. The Army responded with a detailed chronology of Cohn's improper intrusions. Newspaper columnist Drew Pearson published the story in December, 1953. McCarthy accused the Army of holding Schine 'hostage' to keep his investigating committee from exposing Communists within military ranks. His committee then conducted hearings into the issue, with another senator acting as chairman. After the hearings, the Senate censured McCarthy for his reckless behaviour. He never recovered his previous notoriety.

Meanwhile, civil liberties suffered a setback when the witch-hunt reached into the ranks of government scientists. The victim was J. Robert Oppenheimer who, from April, 1943, to October, 1945, had supervised fifteen thousand people – including a collection of energetic and talented scientists – at the Los Alamos, New Mexico, site where the atomic bomb was developed. Oppenheimer had been a radical in his youth and had married a woman who had once been a Communist. On December 21st, 1953, Lewis Strauss, director of the Atomic Energy Commission accused Oppenheimer, by then an AEC consultant, of disloyalty and presented a list of charges against him. Oppenheimer refused to resign and demanded a hearing. On May 27th, the security board affirmed Oppenheimer's loyalty but denied him security clearance. The AEC cancelled his contract.

In 1955, a watershed event galvanised black leaders who, until then, had been largely dependent on white liberals for advancing the African-American cause. A black seamstress, Rosa Parks, the secretary of the

Montgomery, Alabama, chapter of the National Association for the Advancement of Colored People (NAACP) deliberately refused to move to the back of a city bus to make way for a white male passenger as the local law required. She was arrested and E. D. Nixon, an NAACP activist, capitalised on the outrage felt within the black community and put into practice a planned boycott of the city's buses. Blacks carpooled and walked. Most important of all, they found a leader, the Reverend Martin Luther King. His prominence extended beyond Montgomery, where he was pastor of a black church, and he became the leader of the Southern Christian Leadership Conference in 1957. The formation of the SCLC was the outcome of discussions among a group that included King, some other black clergymen, Brotherhood of Sleeping Car Porters President A. Philip Randolph, and a brilliant black strategist, Bayard Rustin, who introduced King and others to the philosophy of non-violent resistance advocated by Mohandas Gandhi. The SCLC spearheaded a nationwide movement to break down segregation. King was assassinated in 1968.

The impact of the Montgomery bus boycott is almost immeasurable. The movement it spawned sensitised the entire nation to the plight of black citizens. We in the UPWA became ardent supporters of King and his followers. He was invited to be a major speaker at one of our annual conventions. The union also donated a substantial sum of money to the SCLC. Closer to home, it inspired me and other staff members to work hard on one of the union's main programs - antidiscrimination. For example, our union was responsible for the passage of a Fair Employment Practices ordinance by the Des Moines city council. This was a period when it was a common practice of American employers to refuse employment to minorities, especially blacks, except to offer only the most menial jobs to them. It was rare to see black clerks in stores, black public servants, black doctors and lawyers, or blacks in just about any kind of professional occupation. And it seemed impossible to get even the best-intentioned employers to act as pioneers. They needed the kind of excuse that an FEP law provided.

Although never expressed in such terms, the UPWA was assimilationist in philosophy. Black and white staff members were expected to be color-blind. When we were at conferences and conventions, we drank together, played poker together, and generally

hung out together. I took such behaviour seriously. I believed in assimilation. I wanted mixed neighbourhoods, mixed friendships, and mixed work groups. I endorsed the idea of interracial couples. Of course, that attitude became somewhat passé when Stokely Carmichael came along with his ranting about 'black power.' A lot of friendships were destroyed by Carmichael's rage.

Like the rest of the CIO, the UPWA strongly supported the Democratic Party almost as an unwritten part of our Political Action program. Thus we played a major role in a very successful effort to put Democrats into office in the Des Moines area. It came about because of the leadership of the young lawyer who was Democratic Party chairman for Polk County (Des Moines). He approached some of the county's labor leaders with a plan to win the 1956 election. Along with others, I attended a meeting where he explained how we could turn out a big vote on election-day.

Basically, this was one of the first election-day efforts to get out a big vote for one of the parties. Using the man-and-woman-power of the local unions, we first located the name and address of every single voter predisposed to vote Democratic. Since Iowa had no voter registration by party, there were no lists of registered Democrats. So we organized a vast telephone campaign. Dozens, perhaps hundreds of us, including union wives as well as members, spent hours telephoning people in assigned sections of the phone books. Names and addresses of probable Democratic voters were put onto 3x5 cards.

On election-day before the polls opened, hundreds of union volunteers turned up at assigned gathering places, usually homes. Each was given one of the stacks of cards carrying the names of probable Democratic voters. He or she was to walk through the streets, knocking on the doors of persons listed on the cards, greet residents by name and urge them to vote. Once the volunteer had completed rounds of voters, he or she was to go back to each house and remind the resident again of the importance of voting. If that resident had already voted, the volunteer noted it on the card. Also, if in either visit, the volunteer learned that the voter needed transportation to the polls, he or she arranged for a car to transport the voter.

The results were breathtaking. Democratic candidates won every single county-level office, loosening a Republican stranglehold. It might have been the most effective get-out-the-vote effort since the heydays of

Tammany and the Chicago Daley machine. All of us were enormously proud.

Another activity of a political nature included my serving on a governor's commission. Probably as a result of our Des Moines FEP success, I was appointed as labor's representative to a governor's commission on human relations. I used the commission as a way to promote state fair employment legislation and I worked with UPWA local unions in those locations where our commission held hearings to help them prepare testimony. I showed local union members how to use census tract information about employment of various ethnic groups to document the fact that blacks and other minorities were woefully underrepresented in jobs above common laborer status. Thus, each time the commission held a hearing in an Iowa town, someone from that community's UPWA local, if there were one, would testify with documentation that was the result of my instruction. We made a good case for an FEP law on the state level, although it was not adopted during my tenure there.

In 1957, I caught chickenpox from my five-year old son; it led to pneumonia and I spent several days in a hospital. It gave me time for reflection. The AFL and CIO had merged in 1955 and George Meany, AFL president, had taken over the presidency of the joint federation. I knew it meant the labor movement would become more conservative, emphasizing 'business unionism' over social concerns. I decided it was time for me to go back to journalism. Since then, I have worked as a journalist in Chicago, New York, Mexico City, Arizona, and Europe. Yet, as I look back, the excitement of working in such locations has never matched the exhilaration of working for the UPWA. Even though it lasted a mere four and a half years, it was a defining experience for me. Everything I have done since then has been, in some way, measured against that experience. It was the most rewarding time of my life.

And I have never worn a purple shirt again.

POSTSCRIPT

Long after I left the UPWA, it merged in 1968 with its AFL counterpart, the Amalgamated Meat Cutters and Butcher Workmen.

That union merged in 1979 with the Retail Clerks International Association to become the United Food and Commercial Workers (UFCW), nearly 1.5 million members. The multi-mergers worked against rank-and-file packinghouse workers; business unionism replaced the militancy of the UPWA. In 1979, an employer assault against the union's standards resulted in a decline in members' wages and benefits.

Article:

Locating the Injustice of Exploitation: Some Thoughts on G.A. Cohen's 'Exploitation in Marx'

Paul Warren

WHAT MAKES EXPLOITATION UNJUST? So asks G.A. Cohen in his book *Self-Ownership, Freedom, and Equality*.¹ The question is particularly salient for those interested in the Marxist theory of capitalist exploitation because, as Cohen explains, '... three logically distinct things occur in the Marxist account of exploitation, each of which carries a redolence of injustice.'² Because '... workers are on the short end of an unequal distribution of the means of production' they are

¹ G.A. Cohen, *Self-Ownership, Equality, and Freedom*, (Cambridge: Cambridge University Press, 1995) (hereinafter *SFE*). My main concern is with *SFE*, chapter 8: 'Exploitation in Marx: what makes it unjust?', pp. 195-208. More generally, *SFE* critically examines the idea of self-ownership, explains its relationship to the notions of freedom and equality, and explores its connection to the Marxist concept of exploitation.

² *SFE*, p. 195.

thereby both '... forced to work as others direct them' and '... forced to yield surplus product to others.'³ In which of these three logically independent sites should the injustice of exploitation be located? Is injustice to be found in the initial unequal distribution of the means of production, in the control that capitalists exercise over workers' labor, or in the forced appropriation of the products of workers' labor? Should it be found in all three locations? Or should it be found, perhaps, in the relations that exist between the three things that happen in exploitation?

Cohen answers that the injustice of exploitation should be principally located in two places: in the unequal distribution of the means of production and in the forced yielding surplus product by workers.⁴ But there are different and complementary injustices involved in these two occurrences and a proper understanding of the normative structure of Marxian exploitation requires grasping the complex relation that exists between them. The fact that workers are forced to yield surplus product is what Cohen calls the normatively generative injustice of exploitation. It is unjust because of what it is, viz. the forced taking of surplus product. It is not unjust because it arises from, or is otherwise related to, some separate, logically independent injustice. Yet the normatively generative forced taking of surplus product is causally dependent on the prior fact that workers are on the short end of an unequal distribution. That unequal distribution is unjust, but its injustice, while causally primary, is normatively secondary. It is not unjust because of what it is, but because it gives rise to the forced taking of surplus product—which is unjust because of what it is. In developing his answer to the location question Cohen correctly focuses on the complex normative and causal relations that exist between the different things that happen in exploitation. However, in my view his account does not yet adequately clarify the structure of the injustice of Marxian exploitation. The difficulty, I believe, is that Cohen's distinction between the normatively

³ *SFE*, pp. 195-6.

⁴ Notice that the second of the three things that happen in exploitation on Cohen's account drops out of his analysis. His rationale is that working at the direction of another is not 'germane to exploitation as such' because one can be forced to work at the direction of another without necessarily being deprived of what one produces in the process. See footnote 4 in *SFE*, p. 197. More needs to be said about this point, but it would be out of place to pursue it here.

generative and normatively secondary, while unobjectionable in general terms, is not applicable in the specific way that he wants to use it to explain the injustice of Marxian exploitation. The injustice of exploitation should not be thought to have a normatively primary location either in the forced yielding of surplus product or in the unequal distribution of the means of production. Rather, the normatively primary injustice of exploitation should be understood in the relation between the two sites. In the very explanation of what makes the yielding of surplus product unjust it is necessary to include the fact that such yielding results from workers being on the short end of the distribution of the means of production. The forced transfer of surplus product is not unjust because it inherits injustice from a prior injustice in the distribution of the means of production. But neither is it unjust because of what it is—at least not if we suppose that to be distinct from what causes it. The crucial point to recognize, I argue, is that the unequal distribution of the means of production contributes both causally and *normatively* to the injustice of the forced taking of surplus product.

A couple of preliminary points of clarification are in order. It should be noticed that Cohen's location question contrasts with other questions that might be asked about the normative significance of Marx's concept of exploitation. It is different from the question of the nature of Marx's normative critique of capitalism generally. It is also distinct from the question of whether Marx's critique of capitalist exploitation rests on a concept of justice at all—rather than on non-justice-related normative deficiencies such as lack of freedom or community.⁵ Distinct from these interpretive questions, the location question raises the separate issue of the injustice of exploitation, given that Marx is roughly correct about what exploitation is and given that it is indeed unjust.⁶

⁵ Both of these questions have spawned an extensive literature. For an overview and critical discussion of this literature see the following two articles by Norman Geras: 'The Controversy About Marx and Justice', *New Left Review*, Number 150, March/April 1985, 47-85 and 'Bringing Marx to Justice: A Rejoinder' and 'Bring Marx to Justice: An Addendum and Rejoinder', *New Left Review*, Number 195, September/October 1992, 37-69.

⁶ See *SFE*, p. 195 and p. 203.

Secondly, the subtitle-question of the relevant Cohen book chapter—what makes exploitation unjust?—is ambiguous. It can be interpreted as a question about the location of exploitation's injustice, as, following Cohen, we have taken it. But it can also be interpreted as a question about the content of exploitation's injustice, i.e. about the principle or principles of justice that should be used to support claims of unjust exploitation, wherever that injustice is ultimately located. Indeed, Cohen's motivation for addressing the location question stems partly from his own exploration of the possible role that one such principle—the principle of self-ownership—might play in the explanation of the injustice of exploitation. In considering the relationship between self-ownership and exploitation, which takes up other portions of *Self-Ownership, Freedom, and Equality*, Cohen arrives at two conclusions: (1) that Marxian exploitation *qua* unequal distribution of means of production does not require that Marxists reject the principle of self-ownership and (2) Marxian exploitation *qua* appropriation of surplus product requires that they affirm it.⁷ Cohen recognizes that such conclusions locate the injustice of exploitation in two different places and therefore seem inconsistent with one another. It is to resolve this apparent tension in his account of the Marxian concept of exploitation that Cohen takes up the location question in 'Exploitation in Marx'.

An additional reason for Cohen's concern with the location question stems from John Roemer's skepticism about whether Marxists should be

⁷ See *SFE*, Chapters 5 and 6, pp. 116-164 and especially, 197 where summarizing his position Cohen writes: 'In Chapter 5 I said that, in the Marxist critique of capitalist injustice, the exploitation of workers by capitalists derives entirely from the fact that workers lack access to physical productive resources. Here the Marxist charge is that the badly off suffer injustice in the left libertarian sense that they do not get their fair share of the external world (a charge, I noted, that requires no rejection of the thesis of self-ownership). But in Chapter 6 the prime site of injustice appears to shift from the pre-production asset distribution to the forced extraction of product itself ... I do not say in Chapter 6 that Marxists think that the extraction is unjust because of what enables or induces it (the pre-production distribution), but because it involves what Marx called 'the theft of another person's labor time' (and this charge I argued, requires the thesis of self-ownership'.

interested in exploitation.⁸ Roemer distinguishes between property relations and unequal exchange conceptions of Marxian exploitation, corresponding respectively to the unequal distribution of the means of production and the forced taking of surplus product, the first and third of the things that happen in Cohen's description of Marxian exploitation. He argues that exploitation understood as unequal exchange is normatively interesting only when it corresponds to exploitation as property relations. But because it can fail to so correspond, it loses any essential normative significance and hence Marxists should no longer be concerned with it. Thus, in addressing the location question, Cohen also responds to such Roemerian worries about the normative importance of Marxian exploitation.⁹

Let me turn now to examine the particulars of Cohen's account of the injustice of exploitation, starting with Cohen's most succinct statement of his position:

... the normatively generative injustice is the final distribution, its propensity to produce which derivatively makes the causally generative injustice unjust.¹⁰

There are three important contrasts here. First there is a contrast between the causal and the normative; second there is a contrast between normatively generative injustice and normatively derivative injustice; and, third, there is a contrast between causally generative injustice and causally secondary injustice. Cohen argues that the normatively generative injustice of exploitation lies in the fact that workers must yield part of what they produce without compensation, which in the terms of the quoted passage is the 'final distribution.' The causally generative, but normatively derivative injustice of exploitation is the

⁸ See J. Roemer, 'Should Marxists Be Interested in Exploitation?', *Philosophy and Public Affairs*, 14, 1985, pp. 30-65.

⁹ After developing his account of what makes exploitation unjust, Cohen contrasts it with Roemer's and uses it to diagnose the problems with the latter's. See *SFE*, pp. 204-208. For an alternative, though I believe complementary, critique of Roemer see my 'Should Marxists Be Liberal Egalitarians?', *The Journal of Political Philosophy*, Volume 5, Number 1, March 1997, pp. 47-68.

¹⁰ *SFE*, p. 203

unequal distribution of the means of production that has the 'propensity to produce' such forced and uncompensated transfers. That unequal distribution of productive assets is unjust, but in a derivative or secondary way because its injustice depends on the normatively fundamental injustice of the forced uncompensated labor that it causes. Its injustice arises because of a kind of backward inheritance.

Before turning to Cohen's argument that these distinctions apply in the case of Marxian exploitation, it will be helpful to say a bit more about their content. Consider first the distinction between the normatively generative and the normatively derivative. Cohen understands this as a distinction between an injustice that is wrong because of *what it is* and an injustice that *inherits* its wrongfulness. He gives robbery as an example of a normatively fundamental injustice. Robbery is unjust because of what it is: '... a forced unreciprocated transfer of money to the robber.'¹¹ It would remain unjust in the normatively fundamental sense even if it were caused by some prior injustice or if it had further consequences that were unjust. Suppose in the first case that there was an earlier injustice that rendered a person vulnerable to robbery: e.g. suppose that the person was deprived of police protection because of his or her race. In the second case suppose that robbery led to further injustice: e.g. suppose that because of a robbery a person can't afford urgent medical treatment. In such eventualities these injustices associated with robbery—either by causing it or being caused by it—are in addition to its normatively fundamental injustice which lies simply in its being a forced and unreciprocated transfer of money. In a parallel fashion Cohen wants to say that '... forced extraction of a surplus is wrong because of what it is and not because it inherits the wrong of something else.'¹²

Consider next the distinction between the causally fundamental and the causally secondary. Cohen's takes these notions as central to the explanation of the occurrence of social action, and unjust transfers in particular.¹³ They are to be understood relationally: X is causally fundamental for Y, which is causally secondary in relation to X. According to the relevant notion of causal fundamentality, the crucial

¹¹ *SFE*, p. 198.

¹² *SFE*, p. 199.

¹³ *SFE*, p. 199.

idea is that Y is not possible without X, not the idea that X necessitates Y. Cohen says, 'I say that the asset distribution is unjust because it enables or makes possible an unjust flow. I do not say that it necessitates such a flow....'¹⁴ The point is that those on the short end of the initial distribution could choose starvation rather than exploitation and those on the long end could choose to use their greater share of productive assets in non-exploitative ways. (That they could make such choices is of course consistent with their being forced to make them.) But given a normal range of preferences for the relevant agents, an unequal distribution of means of production will have a 'propensity to produce' the forced yielding of surplus product and therefore exploitation. In Cohen's view that fact is sufficient for saying that such an unequal distribution is causally fundamental for the forced transfer of surplus product and that the forced transfer is causally secondary.

Taking these distinctions between the normatively generative/derivative and causally generative/derivative together Cohen argues that the extraction of surplus product from workers is unjust because of what it is; therefore, it is the normatively generative injustice of exploitation. The unequal distribution of the means of production causally enables this forced transfer because those on the short end of that distribution have no alternative—or at least no acceptable alternative—but to cooperate on terms resulting in the transfer of the products of their labor. Because the initial distribution is causally generative in this way, it is also unjust, but derivatively so because it inherits—backwardly—the injustice of what it causes.¹⁵

But do these distinctions really apply to the case of Marxian exploitation? Cohen uses an analogy with an unequal distribution of guns to argue that they do. He writes:

¹⁴*SFE*, p. 207.

¹⁵Cohen has an illuminating and discussion of the way in which the injustice of the unequal distribution of the means of production is an intrinsic injustice even though it is a normatively derivative injustice. Crucial to this argument is a distinction between different senses of intrinsic that we need not go into here. See *SFE*, p. 201.

Suppose that whoever is in a position to do so distributes guns unequally, that is, to some people but not to everybody, and that guns enable those who have them to engage in highway robbery. Suppose that the equal distribution of guns would have meant no highway robbery, because of mutual deterrence, and suppose also that the only relevant use of guns is to commit or deter highway robbery ... Distribution of guns is meant to parallel distribution of means of production, robbing parallels forcible extraction of a surplus, and the important requirement that people care about guns only as a means of effecting or preventing highway robbery matches a stipulation we should make about the means of production, to wit, that no one cares about them except as means of production.¹⁶

Consider first how Cohen intends his distinctions apply in the robbery case and then, in a parallel fashion, to the exploitation case. As already noted earlier, robbery is a normatively fundamental or generative injustice because it is wrong because of what it is: the forced and unreciprocated transfer of property. It is not the transfer of property *per se* that is wrong—for there are, of course, many transfers of property that are unobjectionable—but the fact the transfer of property is a forced and unreciprocated one. The unequal distribution of guns causally enables this transfer because it upsets the balance of force maintaining the mutual deterrence that prevents robbery from occurring. Therefore, the unequal distribution of guns is causally fundamental for robbery because it makes robbery possible: no unequal distribution of guns, no robbery. On the other hand, the unequal distribution of guns is unjust, though in a secondary way, because it causes that which is fundamentally unjust, i.e. robbery. Cohen concludes that we care about the unequal distribution of guns because of what it causes and not because of what it is (i.e. not because of its own normative features). However, we care about robbery because of what it is and not because of the normative features of what causes it.

Cohen believes that when we shift from the unequal distribution of guns to the unequal distribution of the means of production the same relations of normative/causal fundamentality and primary/secondary injustice obtain. He says the following:

¹⁶*SFE*, p. 198.

First, forced extraction of a surplus is wrong because of what it is, and not because it inherits the wrong of something else. Second, ... a distribution of means of production is unjust only if and because it enables an unjust transfer of product. Finally, and in proper analogy with the gun example, the fact that the transfer of product is unjust when and because it is enabled by maldistribution of (this time) means of production does not make that maldistribution normatively fundamental. To think so is to confuse causal and normative fundamentality.¹⁷

The unequal distribution of the means of production is analogous to the unequal distribution of guns and robbery is analogous to the extraction of uncompensated labor. Forced extraction of uncompensated labor is normatively fundamental: it is wrong because of what it is, i.e., a forced transfer of workers' products without compensation. The unequal distribution of the means of production has the propensity to produce this forced transfer possible and hence is causally fundamental. But that simply means that it is also unjust, though in a secondary way, because it causes that which is normatively fundamental and therefore inherits its injustice (backwardly) from that which it causes.

Is Cohen's analogy a good one? There are three aspects of Cohen's comparison that are in need of scrutiny: (1) initial unequal gun distribution and initial unequal distribution of the means of production, (2) robbery and the performance of forced uncompensated labor, and (3) the respective causal relations between the corresponding pairs mentioned in (1) and (2). It is true that the pair in (1) is analogous: both are unjust only in virtue of their being causally fundamental for their correspondent in (2). However, I believe that the parallel that Cohen draws breaks down because there is dissimilarity in comparison (2) and therefore in comparison (3). In the robbery case, as Cohen argues, we would not say that robbery is wrong because of what causes it—that is, it is not wrong because it results from an unequal distribution of guns. The point is that although it is true that in the circumstances imagined robbery wouldn't occur without an unequal distribution of guns, that

¹⁷SFE, p. 199.

unequal distribution doesn't figure in the explanation of what robbery is. In other words, robbery isn't wrong because it *reflects* an unequal distribution of guns. However, the matter is different in the case of forced uncompensated labor. It is crucial to its injustice that it *reflects* the unequal distribution of the means of production. The notion of 'reflect' does work here in the explanation of injustice because the initial distribution of the means of production does more than simply causally enable the performance of forced uncompensated labor as an effect: it helps furnish the explanation why that forced uncompensated labor is unjust. In addition to its causal role, it has a role in the normative constitution of what it causes and accordingly has normatively relevant features in addition to its causal features. The initial unequal distribution of the means of production implies that relevant agents have unequal power. This results in a performance of forced uncompensated labor that is unjust not simply because it is uncompensated and forced, though indeed these features are normatively essential to its injustice, but also because of how it came about.

To help see the point here we need to consider the fact that not all forced uncompensated labor is unjust. Of course uncompensated labor that reflects the autonomous preferences of agents would not normally be supposed to be unjust: people do things for each other all the time without expecting compensation in return. The presence of force seems to make a normative difference. But here too arguably there are circumstances where forced uncompensated labor is performed in order to meet some moral or political obligation and therefore the performance of such labor is not only not unjust, but required by justice. Suppose, for example, that the forced surplus labor in question goes to support those who are unable to work because of disability and who would otherwise starve. But in the Marxian case in question neither autonomous preferences nor relevant moral or political obligations explain the performance of forced uncompensated labor. Rather it is the unequal distribution of the means of production and the differential power that such a distribution entails that explains why uncompensated labor is performed.

It should be stated that Cohen says things that would support the points in the last paragraph. For example he says: 'The flow is unjust because it reflects an unjust division of resources which is unjust

because it tends to produce precisely such a flow.¹⁸ He goes on to elaborate this statement as follows:

- (i) Worker W is exploited by capitalist C since C gets some of what W produces by virtue of differential ownership of the means of production, and where that causes C to get some of what W produces, C's getting is unjust.
- (ii) Unequal distribution of means of production is unjust because it causes the unjustly un-reciprocal transfers described in (i).¹⁹

I agree with what I take Cohen to be saying in (i) and (ii). But notice that what Cohen says here is in tension with his aforementioned notion of normative fundamentality and his proposed analogy between unequal gun distribution and the unequal distribution of the means of production. To see why, notice that Cohen's explanation of the injustice of the uncompensated transfer in conjunct (i) is in terms of the differential ownership of assets. Indeed this is a case where a 'cause' provides a kind of reason. The fact that differential ownership causes C to get part of what W produces is a reason why C's getting part of what W produces is unjust. But then recognition of this point requires a refashioning of Cohen's notion of what it is for something to be normatively fundamental. In the case under discussion causal conditions are not external to the injustice that they cause (as they are in the unequal gun distribution case), but figure essentially in the very characterization of what it is that occurs, namely, workers being forced to yield part of the product of their labor *because* of their lack of access to the means of production. So here the unequal distribution of productive assets contributes both causally and *normatively* to the injustice of the uncompensated labor that arises from it. However, we should not suppose that this means that uncompensated labor is unjust only because it is caused by a distribution of assets that is already characterized as unjust. Neither the initial unequal distribution, nor the

¹⁸SFE, p. 199.

¹⁹SFE, p. 200.

resulting forced flow of labor is unjust independently of the other condition. But if not, then it might be wondered why we don't we face circularity? In answer, no circularity arises because the injustice in question is itself constituted by a relation that involves both the unequal distribution of the means of production and the performance of forced surplus labor. Instead of trying to avoid circularity by locating the injustice of exploitation primarily in one feature of exploitation—which is what Cohen does with his notion of the normatively generative—we should view exploitation as a complex process in which the initial unequal distribution of productive assets has causal and normative features. Moreover, both of these features are relevant to understanding the injustice of the forced uncompensated labor that results from that distribution. The mistake is to suppose that normative fundamentality must be located either at the beginning of the exploitative process (the unequal distribution of assets) or at its end (uncompensated labor). It must be understood in both locations and, importantly, in their causal and normative relations to each other.

Perhaps a more appropriate analogy than Cohen's gun analogy is provided by the argument that one of the reasons that economic inequality is unjust is because of its consequences for political decision-making and political power. One version of the argument is that because of the causal influence exerted by economic inequality on political decisions, those decisions are made for the wrong reasons, reflecting economic power rather than the results of a fair deliberation among equals. But then what's unjust (i.e., the decision) cannot be characterized as unjust apart from its causal history: the political decision is unjust because it is produced in the wrong way and for the wrong reasons. Moreover, the economic inequality producing this decision is unjust precisely because it produces such a skewed decision. (Assume, in parallelism with the gun example, that there are no other grounds for objecting to the economic inequality in question.) This particular account of the connection between economic inequality and political decision-making finds in it a normative structure that is similar the one that exists in Marxist exploitation between the unequal distribution of

productive assets and uncompensated labor, but dissimilar to the one that Cohen proposes in his unequal distribution of guns example.²⁰

The crucial point is that causes, in addition to producing effects, also can provide *normative reasons* of a certain kind. More specifically, causes in the form of unequal distributions of the means of production provide normative reasons that *partly* constitute the injustice of exploitation. This account of causes as normative reasons should be contrasted with other ways in which causes can be normatively significant such as when a cause inherits injustice from that which it causes or when an effect inherits injustice from that which causes it. The robbery case and Cohen's corresponding unequal gun distribution analogy provide an example of the first of these last two possibilities. An example of the second would be a 'historical-entitlement' theory that traces the injustice of a distribution back to its unjust origins. But I have presented a third possibility and one that I believe better captures the structure of injustice involved in Marxian exploitation: the initial unequal distribution of productive assets is both causally and *partly* normatively responsible for the injustice of the forced surplus labor transfers that result from it. Those transfers are exploitatively unjust because they are (A) uncompensated and (B) reflect the unequal power that causally—and therefore normatively—produces them. *Contra* Cohen, it is a mistake to say that the performance of forced surplus labor is normatively fundamental and the initial distribution of productive

²⁰There may be good reasons for granting some people greater say in political decision-making, just as there may be good reasons why some people might perform uncompensated labor or even be forced to perform uncompensated labor. However, if economic inequality rather than different levels of expertise explains unequal political influence, this arguably would undermine the arguments seeking to justify unequal political decision-making. Notice the parallel with the case of exploitation: there may be situations in which uncompensated labor is not only permitted by justice (autonomous preferences), but required by justice (moral obligations). But in causally tracing the performance of uncompensated labor to the unequal distribution of assets, these potentially justifying arguments are undermined. The causal story is normatively relevant in a parallel fashion in both cases.

assets is normatively secondary. Features of both of these conditions are normatively important and must be viewed together, if we are to get a complete picture of the structure of the injustice of Marxian exploitation.

Review:

School Choice and Social Justice

John Christman

LIBERALISM is now the dominant framework within which (or against which) western political philosophy now proceeds. This orientation assumes an institutional framework of constitutional democracy and relies on the normative fundamentals of the rule of law, protection of the individual – in particular, the individual's rights, liberties and opportunities – and recognition of the permanent pluralism of moral voices by way of tolerance and reciprocity. Liberal egalitarianism is the dominant framework of the non-marxist left in contemporary (modernist) social thought, and this approach to political institutions takes the basic principles of liberalism and connects them with a fundamental commitment to equality of condition (variously defined). This marriage of egalitarian social and economic policy with liberal values often betrays signs of internal struggle, where the commitment to neutrality and acceptance of difference from the liberal partner spars with the uniformity demanded by commitments to equal treatment and condition. Nowhere do the challenges of this domestic

¹ Harry Brighouse, *School Choice and Social Justice* (Oxford: Oxford University Press, 2000).

disturbance show themselves more trenchantly than in discussions of educational policy.

Education has always been an under thematized topic in liberal political thought. Except (famously) for Rousseau and (tangentially) for Kant, the social contract theorists neglected to explain the ways in which a just regime must take steps to ensure that its population is reproduced, cared for, and socialized in accordance with the dominant norms of the society. In more recent liberal thought (again with some notable exceptions), principles of justice have neglected to include central reference to the programs by which a legitimate state will deliver to its young population the information and skills they will need to fully participate in the benefits of social cooperation, without, that is, engaging in the kind of social engineering or programmatic indoctrination that liberal principles forbid.

Yet the guarantee of equality of opportunity to which all liberal (and especially left liberal) schemes are committed require state provision of those basic resources necessary for an individual to grow into a fully functioning and capable adult citizen. The basic requirements of distributive justice demand that such provisions be guaranteed to all independent of income, basic abilities, and the talents and wisdom of parents. But how can a liberal state make good on such guarantees while protecting the integrity of other social institutions and ways of life, including, most centrally, the family? Can the state remain neutral – that is, respectful and tolerant of the ongoing social patterns and cultural forms found in late modern societies – while insisting on a public education system in which all young people must participate and which must be structured in particular ways? If those social forms and value systems – indeed, if the structure of family life itself – conflicts in some way with the curricular directives of such an education program, which side of the liberal egalitarian marriage gives in?

This set of issues comes to the fore most poignantly in the question of school *choice* – the complex issue of whether public education should be supplied only with state-run and managed schools to which young people are assigned by virtue of geography alone, or whether parental choice from among a variety of such schools should be allowed to determine the educational opportunities of the young. Harry Brighouse – in a clear-headed, well argued, and intellectually honest work – faces these issues head on. Making a contribution both to debates about this

specific policy question as well as the larger question of the ultimate shape of liberal egalitarian political philosophy, Brighouse takes us carefully through the serpentine argumentation surrounding educational policy in liberal states.

Brighouse's explicit aims are to develop a theory of education – specifically concerning the issue of school choice – under a liberal egalitarian rubric, while at the same time refining and advancing the philosophical basis of the rubric itself. This comes as a welcome corrective to the relative silence on the topic of education just mentioned (and noted by Brighouse). The book displays expert familiarity with the details of educational policy (including empirical evaluations of some elements of such policies) as well as a keen ear for the subtleties of philosophical debate. Brighouse has contributed significantly to the latter in other places, so his insights here concerning this more particular (though as I indicated quite central) issue are especially valuable. This is an excellent nuts and bolts approach to these questions – clearly laid out and expertly organized – where Brighouse never flinches from admitting that certain questions must be left open to further research, or that certain objections to otherwise attractive positions cannot be easily answered.

The book's overall conclusion concerning its central issue is that a highly qualified and guarded case for school choice can be made, one that is faithful to the basic tenets of liberal egalitarianism (which itself receives elaboration and partial defence). At the same time, Brighouse admits that radical reform of the current system of state directed school programs might be acceptable, and indeed he discusses what the most needed of those reforms should be – again displaying a refreshing fair-mindedness.

Liberalism, for Brighouse, rests on, among other things, the principle of 'ethical individualism' (5-6) – that the individual is the ultimate object of moral concern, as opposed to groups or communities *per se*. This, as we will see, will be more of a sticking point than Brighouse makes out, as the argument for school choice will necessarily resist educational policies based on unadulterated commitment to solidarity for its own sake. Moreover, liberalism here is committed to neutrality, at least regarding the justification of social principles (rather than their effects). This is not to reduce liberalism to relativism – indeed, at a basic level it

is incompatible with it – for nothing in the liberal picture denies that there are ultimate (objective) moral values by which citizens guide their lives. However, on the liberal view, the enforcement mechanisms of state power should not be used to promote any particular one of those values. All this is combined with the traditional liberal reliance on individual rights, the protection (with complex qualifications) of a private sphere, and a fundamental commitment to toleration and mutual respect.

There are certainly many versions of liberalism in the theoretical literature of the last several few decades (not to mention the last three centuries). But one line flowing from the work of Locke, Rousseau, and Kant features the fundamental value of individual autonomy as the linchpin of its larger normative framework. Brighouse (while avoiding discussion of any historical debts) embraces this strain and explains the role that autonomy plays in the value structure that shapes justice in general and social policy (including educational policy) in particular. Facilitating the autonomy of its citizens is the fundamental obligation of just states, not because autonomy is a free standing (intrinsic) value necessarily, but because it is instrumentally necessary for the pursuit of those things (whatever they turn out to be) which are and hence which give value to a life. The capacities for critical (rational) reflection – on the values that guide one's life, on the claims of fact that undergird those values, and on the development of one's tastes and preferences – are central to the self-government that autonomy manifests (65-68). Brighouse eschews those arguments that connect autonomy's value to democratic citizenship (since those unrealistically emphasize political participation as a social duty), and he situates autonomy as a means to living a life that goes well and at the same time that one judges to go well. Autonomy is, moreover, a component of equality of opportunity in that it 'enhances dramatically the ability of individuals to identify and live lives that are worth living' (88) and so forms part of what is valuable about what such opportunities are for.

But the emphasis on individual autonomy as the basic commitment of liberal justice, for Brighouse, forces him to face (repeatedly) the problems of recognizing the fundamentally non-individualist, ultimately paternalist institution of the family, where parents are traditionally afforded tremendous control and decision-making prerogatives over the development and value orientation of their children. That alone might

not pose a threat to autonomy-promoting social directives, but when the education of children comes into play (as well as various other important aspects of child welfare), the precise limits of parental authority, and the complex role of parental choice in children's educations, must be specified.

For these reasons, Brighouse carefully considers both the grounds and the scope of parental rights concerning their children (13–18, 83–89). He considers, for example, the strong libertarian claim that parents have primary responsibility over the education and welfare of their children, as an extension of their own liberty and self-government. This claim (which on my view is a non-starter) is met with the reasonable argument that children's autonomy is a primary concern of justice, and while clearly parents are in the best position to secure such autonomy for their offspring, state regulations, including strict educational policies, are necessary to ensure this.

This connects to Brighouse's fundamental theory of education based on liberal principles, what he calls 'autonomy facilitating education' (Chapter 4). The case for such an approach to education rests on the claim mentioned earlier that we all have a basic interest in becoming autonomous, as an element of leading a valuable and valued life. The curricular implications of seeing autonomy-facilitating education as the focus of education are fairly clear. Minimal degrees of basic information and skills must be afforded to students in order to enable the critical self-reflection constitutive of autonomy (against a background of contrasting choices). Information on a wide range of value systems, religious orientations, historical traditions, and the like, is also required for this reflection to be effective.

This last point deserves special comment, and Brighouse makes an interesting case in defence of it. That is, autonomy demands not only the skill to reflect on how one *is* but also exposure to alternatives that one might embrace if one's perspective changed (73–4). The wide variety of personalities, perspectives, value orientations, and personal ideals that abound in a pluralistic society is evidence of the various ways that children might turn out as they grow into adults. Some religious opponents of autonomy-facilitating education (about which more below) are loath to face the very real possibility that children might develop into people with very different commitments from their parents or their

communities. Forcing such young adults to adhere to value systems or lifestyles which they can in no way embrace from their own authentic perspective is to rob them of a chance at a valuable life lived 'from the inside'.

However, centering the account on the concept of autonomy brings, for Brighouse, a host of complications that he judiciously avoids, complications emanating from the tangles of the idea of autonomy itself. First, while seeing autonomy as involving a range of reflection-related skills is plausible, the threshold at which those skills are fully developed enough to merit the label is much more difficult to discern. This matters to education policy of course because it helps define a stage at which mandatory schooling is no longer necessary. Controversies involving exemptions (for religious groups and the like) from state-mandated educations turns in part on questions surrounding *when* not just *how* autonomy is established.

More pointedly, there is ongoing and complex debate over whether autonomy should be seen as fundamentally value-neutral itself – as embodying skills and competences specified without reference to particular value commitments – or substantively – as requiring self-reflection-related capacities as well as a commitment to certain values, such as independence and non-conformity. The latter view can be said to be held by John Stuart Mill, while the former is closer to the idea held by many contemporary liberal theorists. This is more than a semantic issue, however, since seeing educational policy as autonomy facilitating runs up against a challenge that emanates from such disparate quarters as religious conservatives, post-modern sceptics of Enlightenment values, strong communitarians, and others. This is the view that liberalism is not merely a neutral framework within which plural voices can live justly together but rather is merely one sectarian value conception among others, a conception which valorizes certain ways of life (independence from authority, self-reliance etc.) over others (strict obedience, unquestioning devotion to tradition, etc.).

Brighouse faces this issue in places where he discusses objections to autonomy-facilitating education (Chapter 5) based, for example, on a supposed right to one's own culture. That argument claims that insofar as individual entities are constituted in part by cultural forms, direct state support of those cultural forms is called for (beyond the 'benign neglect' of liberal institutions). Brighouse rightly replies that this stance neglects

the ways in which cultures naturally evolve, and such evolution cannot simply be forcibly restrained by state action (99–100). The autonomy of the members of such groups must be protected (and established by educational institutions) to avoid state support of institutions that, by their refusal to move with the tide of their members' changing attitudes, quash rather than constitute the identities of those members.

In replying to other objections to autonomy-facilitating education, Brighouse fleshes out the picture of liberalism at work here, contrasting it for example with other views resting on the need to promote civic virtues (William Galston) and civic respect (Amy Gutmann). Of particular interest is his reply to Shelly Burt's liberal case against secular educational policies, an argument that trades on the need to neutrally respect various modes of individual and family life, including traditional religious value systems. The need to supply children with the levels of religious instruction necessary for them to continue in the faith (and hence avoid personality destabilizing conflicts with parents) provides grounds for deferring to parents in educational matters to a degree far beyond what would be sanctioned by Brighouse's view. He replies, interestingly, that the skills involved in autonomy will better equip young people to confront the various non-religious lifestyles that they inevitably will encounter in a pluralistic world: if ...

... children encounter displays of alternative ways of life, they are better able to deal with those displays, *and* to have a sympathetic understanding of the creed from which they may defect, if they have the skills associated with autonomy. (109)

This shows once again, and rightly on my view but hardly uncontroversially, that the primary emphasis is on the protection of the individual's chances for a flourishing life, looking at the protection of traditions, communities, and groups as at best of instrumental value. A paradox here may be that even if traditions and groups have no non-derivative moral standing, a group member's flourishing – her faith as a Catholic or a Mennonite say – depends on her thinking the very opposite. A person's being Catholic grounds her values and gives meaning to her life only because she sees Catholicism as having universal, non-instrumental, value. She is then expected to support state institutions that are justified by denying, or at least suspending belief in,

that very claim. An important difficulty to Brighouse's approach, which he acknowledges but does not truly answer (199–200) concerns the degree to which general political support for egalitarian schemes such as this (which, after all, makes serious claims on the beneficiaries of existing patterns of inequality) can be reasonably expected.

Brighouse develops and defends the egalitarian component of his liberalism and applies this directly to educational policy (Chapter 6 and 7). His principle is based, most fundamentally, on the equal moral value of all persons which in turn supports the claim that unequal rewards are deserved only of the candidates for them are in some way responsible for their level of success. In a world where labour market success depends heavily on personal resources one develops while growing up and which are, in turn, affected by family structure and resources (which clearly are not deserved by the children whose lives they affect), educational resources must be structured to counteract the natural inequalities in family background circumstances. So as much as possible, he argues, schooling must be afforded at levels that are insensitive to differences in family income, parents' wisdom (in choosing schools for example) and other unchosen aspects of the child's condition. The equal distribution of what Brighouse calls 'effective resources' – resources that can be used effectively by students no matter what abilities they bring to the classroom – is therefore required by justice.

Brighouse considers several lines of objection to the egalitarian picture he paints. One such, echoing a recurring theme in the book, says that the structure of the family itself, and the prerogatives and obligations of parents towards their children, conflict with the goals of providing equal educational resources independent of background. For parents inevitably will, and have a fundamental right to, directly shape the capabilities and opportunities of their children such that children of differently positioned families will enter adulthood with differential advantages. Educational structures designed to counter these advantages will be not only overburdened and unfair, but also need to inject themselves intrusively into the sacrosanct arena of family intimacy.

But the rights of parents to guide and shape their children's lives, while a fundamental right, is nevertheless complex, and subject to different interpretations. Brighouse argues that we should see this arrangement as 'institutional' rather than unconditionally fundamental, which means seeing the family as the best arrangement for the

promotion of children's welfare. As such, some restrictions on parental decisions concerning their children are clearly called for and, moreover, a level of insulation from family privilege – measures that would not intrude on family intimacy to a marked degree in any case – are required by justice. Such measures include school funding arrangements that do not allow rich parents to pass on (undeservedly) greater labour market opportunities to their children through elite (publicly financed) schooling in their areas, for example (155f).

With this theoretical stage fully set, Brighthouse outlines and defends a system of school choice through vouchers that is modelled on two rather different existing systems, one in Wisconsin in the US and the other in the UK (systems which are analyzed in helpful detail). The basic case for injecting *choice* into the system at all is laid out earlier in the book, and it is based on considerations of greater efficiency (which benefits all), the promotion of diversity and innovation, and the desire to extend to all the privilege the wealthy already enjoy (in being able to choose private specialized schools for their children). The programs are studied carefully and the limitations are squarely faced, but Brighthouse makes a credible case for including choice schemes – albeit highly restricted ones – into the current public education system in order to further the equalization of educational opportunities (for autonomy facilitation).

The mechanism by which educational opportunities are improved in such systems is parental choice (the varying quality of which poses a problem that Brighthouse faces and discusses). Such choice acts as a signal to state authorities that some schools, either through administrative incompetence or unpopular educational approaches, are not succeeding. 'Failing' schools, then, would be closed (at reasonably predictable times) in favour of more successful ones, taking account of the costs of building and rebuilding physical infrastructure due possibly to popular trends (one year schools that require uniforms are *outré*, the next year they're all the rage). Brighthouse discusses these difficulties, as well as the alternative of direct state intervention into substandard schools (189). This raises a complicated question: why do parental decision (raised via reports from their children as well as evidence from grades, and the like) provide a better measure of school success than direct observation and testing by experts? And given that school buildings and facilities serve not only an educational purpose but also

direct community services (in the US, schools often provide space for community groups, neighbourhood recreational activities, and the like, not to mention voting stations for state and federal elections), will the great costs of tearing down unsuccessful schools be worth it? Brighthouse discusses these questions with sensitivity and insight, but more might have been said about why exactly schools 'fail' and whether such conditions could be manipulated directly (through teacher monitoring, incentives to administrators, and so on) rather than relying on the indirect and messy system of competitive shifting of resources through a market.

Brighthouse ends with an honest appraisal of the major alternative to the system he favours – reform of the current system of uniform state provision. As with the rest of the book, this overview is unblinking in its condemnation of the present inequities (such as the abominable system of property based tax support for public schools in the US which solidifies the competitive advantage of richer families by basing school quality on surrounding income levels) and thus provides an honest appraisal of needed reforms.

In all this is an invaluable contribution to this complex and pressing issue. And while I find little to object to here, there are some missed opportunities perhaps. For example, Brighthouse only mentions in passing the rather significant and growing home schooling movement in the US. Spurred by court exemptions from mandatory public schools for religious movements, an increasing number of parents (mostly mothers) are taking on the task of educating their young children at home. This is often motivated by religious conviction, and it raises the stakes in the conflict between parental prerogative and social obligation toward children. Brighthouse's position can be discerned fairly easily here – that such practices must be looked upon with much scepticism insofar as they evade obligations to secure basic autonomy for children (given the difficulty of regulating home schooling practices). But a focused discussion of this challenging phenomenon would have been welcomed.

The issues surrounding educational policy bring into sharp focus not only the complexities but also the challenges of connecting liberal respect for individual choice with egalitarian insistence on uniform opportunities. The question of whether to allow parental choice to figure centrally in the mechanism of supplying equal educational resources doubly emphasizes the uneasy relationship between liberalism and

egalitarianism. Harry Brighthouse has done a tremendous service in helping to dissect this pressing theoretical and practical issue.

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catrionamckinnon@fastermail.com.

Contributors to this issue

Martha Nussbaum is the Ernst Freund Distinguished Service Professor of Law and Ethics, appointed in the Philosophy Department, Law School and Divinity School at the University of Chicago. Her publications include *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (1986, updated edition 2000), *Love's Knowledge* (1990), *The Therapy of Desire* (1994), *Poetic Justice* (1996), *For Love of Country* (1996), *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (1997), *Sex and Social Justice* (1998), *Women and Human Development* (2000), *Upheavals of Thought: The Intelligence of Emotions* (2001). She has also edited ten books. Her current work in progress addresses questions of global justice, compassion, and democracy in India.

Albena Azmanova is Assistant Professor at Vesalius College, Brussels. Her most recent work deals with the emergence of new political cultures in Europe on the basis of opportunity-risk vectors of political alignment, and appears in *Contemporary Politics* (June 2004) and *European Journal of Sociology* (December 2004). She has also been teaching at Institut d'Etudes Politiques de Paris (Sciences Po.) and has been working as political analyst to the European Commission and the European Parliament.

Richard W. Bruner is a free-lance journalist living in Budapest, Hungary. He has written: for NBC's Huntley-Brinkley News Show in New York; investigative articles about social issues (poverty, predatory lending, adolescent obesity, trade unions, prison labor, Navajo Indians) in Arizona; and *Black Politicians* (New York, David

McKay Company, 1971); *Whitney M. Young, Jr., The Story of a Pragmatic Humanist* (New York, David McKay Company, 1972). He can be reached at de@bruner.net

Paul Warren is Associate Professor of Philosophy at Florida International University (Miami). His main areas of research interest are Social and Political Philosophy, Marx and recent Marxism, and Ancient Greek Philosophy.

John Christman is Associate Professor of Humanities and Political Philosophy in the Department of Philosophy at Penn State University. His published works include *Social and Political Philosophy: A Contemporary Introduction* (2002); *Autonomy and the Challenges to Liberalism* (co-edited with Joel Anderson, forthcoming); and *The Myth of Property: Toward an Egalitarian Theory of Ownership* (1994). He is currently working on 'Narrative Unity as a Condition of Personhood' (journal article) and *Embedded Selves: The Value of Autonomy for Socially Constituted Persons* (tentative title, book ms.).