

Justice Without Agreement

Introduction

Most theories of justice pre-suppose that there is a neutral position from which we can debate our political interests. It is from this neutral point of view that we can arrive at a common set of aims that ultimately informs our choice of a social contract. In other work, I have argued against the plausibility of a neutral position¹. Instead, we have to consider the possibility that individuals have very diverse perspectives, and as such have difficulty finding any common ground from which to debate. The aim of this paper is to develop a procedure for determining the set of rights afforded to individuals when those same individuals agree on very little. In fact, I will consider the case where people not only disagree about what their preferred outcomes are, but they also disagree about what the set of outcomes even looks like.

Sen's Insight

In the first chapter of *Inequality Reexamined*, Sen noticed something quite important. When one considers the major conceptions of justice, every one of them has some notion of equality. It is just that each account of equality is different – each theory is measuring something different. Libertarians are concerned with equal negative liberties. Egalitarians are concerned with equal outcomes. Utilitarians are concerned with equal consideration in utility maximization. If an Egalitarian were to look at either a

¹ Ryan Muldoon, “The View From Everywhere” (Working paper, 2009)

utilitarian or libertarian regime, she would likely find significant inequalities in individual outcomes, but when, say, libertarians look at a libertarian society, they might see them as models of equality. It is not that the egalitarian is mistaken in her view, but simply that she is using a different standard of equality than the utilitarian, who is in turn using a different standard than the libertarian.

With this insight, Sen shifts the debate. Rather than arguing about whether equality matters, we find that everyone is in fact arguing about which political values matter. Libertarians assert that freedom is the most important value. Egalitarians think that socio-economic outcomes matter the most. Utilitarians claim that happiness is the most important value. Each theory, then, develops a way of looking at the world which accords with the values that matter the most to that theory, including standards of comparison. Unfortunately, once Sen makes this remarkable insight, he goes on to simply propose a new measurement of equality - capabilities. While his capabilities approach is interesting in its own right, much more can be mined from the original insight.

A way at looking at what Sen noticed is that each political theory is a representation of a particular *perspective*. This perspective categorizes the world in terms of the values that the theory holds dear. It also provides a judgment apparatus built around this categorization. As such, these political theories carry with them perspectives that shape our reasoning. Not only do these perspectives shape our preferences over potential political outcomes, but they also determine what we see as the outcomes. For example, while a Libertarian might see a political debate in terms of two outcomes “loss of liberty because of increased government intervention” and “increased liberty because

of less government intervention” and thus prefer the latter option, an Egalitarian might see “free government-provided health care for all” and “elimination of social safety net,” and then prefer the former option. Both preferences are informed by political values, but more importantly, those preferences appear to be over *different outcomes*. The libertarian and the egalitarian not only disagree about what’s a better choice, but how they see those choices in the first place.

The previous case is not even a particularly problematic example: both parties here agree on where the contours of the two outcomes are, but see them under different descriptions. This will not always be true. For instance, consider a vegan, a vegetarian, an omnivore, and an omnivore that keeps kosher. These individuals wouldn’t share the same preferences about what to eat for dinner, but more importantly, they would have different categorizations of the possibilities. A vegan would largely see the world in terms of “things that are vegan” and “things that are not vegan”. Vegetarians would draw the line differently. Omnivores have no particular need for such distinctions, while someone keeping kosher would be fine with some meats, so long as they are prepared and served appropriately. A vegan doesn’t even have to think about whether something is kosher or not – everything that isn’t kosher is already not vegan. These categorizations will naturally affect preferences over choices, but they also cause the different parties to see different choices altogether. Whereas the omnivore can have developed views about whether pork belly is better than bacon and pork chops, the other eaters would simply lump all of those options under a “can’t eat” category. Likewise, if someone wanted to require that all butcher shops in the country must be halal, no one but the omnivore would have reason to care, as it would only affect foods that they already wouldn’t eat.

An implication of this view of perspectives is that once we have chosen a particular political theory as the basis for our political discussion, we have cut off the ability of people who have a different perspective to even properly represent their own views. It is not merely a matter of what their preferences might be, but how they see the problem. Choosing to privilege a single perspective above the others means that the values embedded in those other perspectives cannot be fully articulated.² This means that once a perspective is chosen, much of the substance of political disagreement has already been shut down. Once this has been done, the way we consider what the outcomes are and what our options look like have already been determined. Following Sen, this means that the debate over which values matter the most has already largely been completed. It is no doubt a fact of psychology that individuals are going to be more prone to view the world in terms of one perspective or another. If anything, this should bolster our interest in preventing a single perspective from being the only appropriate frame for political

² Donald Davidson argues against this position in “On The Very Idea of a Conceptual Scheme” *Proceedings and Addresses of the American Philosophical Association*, Vol. 47, (1973 - 1974), pp. 5-20. He claims that if we think of conceptual frameworks as languages, then the claim is either trivial or incoherent. If we merely mean that we can only assign truth claims within a linguistic framework, then this is a trivial claim. However, going more in the Kuhnian direction is incoherent, since he claims that we can only make sense of different points of view by reference to a common “coordinate system” which allows us to map the differences. But then, given such a coordinate system, we can establish a translation from one conceptual scheme to another. I would respond, however, by suggesting that Davidson is himself stuck within his own perspective, that of linguistic-turn philosophy. Instead of considering conceptual schemes as synonymous with languages, we could imagine them as mathematical objects known as projections. A projection takes a higher-dimensional object down to a lower dimension, and in the process, some information is necessarily lost. Even if we start with the same high-dimensional object, and then take two different projections of it, we cannot translate between them because even though they started from the same source, they each differ in what information they retained. So no direct mapping between them is possible. And thus, had Davidson had an alternative conceptual scheme to work from, he could have seen that they are very much possible.

discussion in the public sphere. While many may share the same perspective, it would prevent others who have a different perspective from being able to fully participate in political discourse.

What this suggests is that instead of choosing another measure of equality, or another set of values to prioritize for social organization, we need to turn to a model that allows for political agreement amongst individuals who hold any arbitrary set of perspectives. It is important to note that this is not to say that developing new perspectives is not valuable: the view I present commits me to the idea that we can benefit from the development and presentation of novel perspectives. However, anointing a single perspective as somehow neutral or primary is problematic for the reasons I have described in other work³. As such, we must then move towards a model of political agreement that attempts to combine these disparate perspectives in a way that allows all participants to be enfranchised.

What is a Social Contract?

Before we proceed, it is important to articulate what exactly it is that we are aiming for in a model of political agreement. In particular, we are interested in developing a social contract. So we must first ask ourselves what the goals of a social contract are, and then we can see how to go about satisfying them. In doing so, we can identify the necessary components of a social contract theory, and then best determine how to satisfy them, given our commitment to enfranchising all perspectives.

³ Ryan Muldoon, “The View From Everywhere” (working paper, 2009).

If we consider what is most fundamental about a social contract, we can see it as at minimum an attempt to design a set of rules and assurances to further the goal of allowing individuals to successfully live together in society. In particular, we can imagine ourselves as seeing the potential value of living together, but needing to establish the basis for our social cooperation. It is this need to establish the basis for social cooperation that led the classical social contract theorists such as Hobbes, Locke and Rousseau to postulate a “state of nature” where humans are pre-contract and in turn, pre-social in the sense that there is no cooperation.⁴ These philosophers were different in how they pictured the state of nature, but they all argued that individuals would all be motivated to enter into a social contract with their fellows. From this, we can draw our first conclusion about the nature of the social contract: that we can view the social contract as a mutually-advantageous agreement designed to facilitate social cooperation.

Mutual advantage might initially seem like a loaded term aimed at skewing the discussion, but I want to argue it is merely a minimal, necessary condition of a social contract. If this basic condition were not being met, it would imply that remaining in society is harming some subset of the population. This suggests that either those people would not have entered into the contract in the first place, or would leave if given a chance. A rational agent would not join a society if it harmed them unless, like a slave, she was forced to join society. For Hobbes, the absence of mutual advantage makes social contracts impossible, as it would undermine his own argument. The key legitimating feature of the Leviathan is that she enables cooperation amongst the ruled,

⁴ Note that in Locke’s conception, the state of nature is not entirely pre-social. In fact, individuals have basic property rights and other things that we would normally associate with a social contract.

and an escape from the “nasty, brutish and short” life in the state of nature. Even Rawls needs mutual advantage, as individuals in the Original Position are still rational agents, and would not choose under the veil of ignorance a social contract that leaves the worst off in a worse position than some alternative. Even the rich would want to be in some social contract, as it assures them protection of their property and their persons against attacks of those less well-off, as well as insurance against dramatic reversals of fortune.

The social contract must enable rational agents to cooperate with each other and in doing so make them better off than they would have been otherwise. This is a purely individualistic requirement. It follows from agents being rational that they will not accept a deal that makes them worse off than before. Mutual advantage is thus really a collection of individual advantages, since no agent needs to be concerned with whether the other agents view themselves as better off than before – each agent watches out for her own interests.⁵

Mutual advantage, thus minimally defined, also implies that individuals will only abide by the contract so long as it is to their advantage to do so. If subsets of the society would be made to be better off if the society split up into multiple societies, then society will split. The classical social contract theorists do not discuss this, but it is a consequence of the idea of mutual advantage, and one that I will return to at greater length later.

⁵ It should be noted that this individual focus is independent of whether agents view advantage in a *relative* or *absolute* sense. That is, whether individuals compare themselves to their neighbors to assess how well they are doing. Even if an agent has a relative sense of advantage, she does not have to care about whether her neighbor considers himself to be better off – just that she sees herself as better off. So even if she is concerned with relative losses or gains, she does not have to care about her neighbor’s perceptions of loss and gain.

Mutual advantage is a nice principle, but in a sense it is without content for the purposes of developing social contracts. After all, we need to specify *how* we can enable cooperation. Social contracts enable cooperation by means of providing a set of rights to citizens. Even in the minimal Hobbesian model, the Leviathan ensures property rights and rights to bodily integrity. Rawls has a much more expansive account of rights, but what is common is that in each social contract account, we see that rights are the guarantors and enablers of social cooperation. Social contracts, then, always embed sets of rights. They specify the limits and scopes of rights, including both what the government cannot interfere with and what the government owes its citizens. It is by means of these rights that individuals can assess whether they are worse off or better off with them compared to some other bundle of rights. For example, individuals can assess whether a scheme of individual property rights would be better or worse for them than a scheme of communal property. Individual property rights have a number of incentives-oriented advantages over communal property, though that could be balanced against reductions in inequality and a more communitarian spirit engendered by communal property. Individuals can assess which system of property better suits them.

Now that we can conceive of social contracts as embedding bundles of rights, we have two questions to answer. First, we must think of a procedure for allocation. This determines what rights we allocate as well as who gets them. It is here where we can find the most significant source of differences in theories of the social contract. I will consider two alternative approaches to this question: deliberation models and bargaining models. But we are not done there: even though we may be able to say something about the process for allocating rights, we still need to clearly specify what we mean by rights,

and how to interpret them.⁶ I will proceed by first comparing deliberation models of the social contract to bargaining approaches, and show that bargaining approaches are superior. From there, I develop a conception of rights to be bargained over. Finally, I will turn to the particular bargaining model that I wish to advocate.

Bargaining versus Deliberation approaches to the Social Contract

The social contract theories of Rousseau and Rawls emphasize a conception of public reason. In this model, moral agents have substantial moral agreement. In particular, the General Will articulates the will of citizens qua citizens. It is meant to be a neutral statement of what the good of society is. Rawls develops a similar conception in the original position, wherein people identify those goods that everyone needs. While Rawls tries to avoid the requirement that agents share in the same comprehensive moral doctrine, he does believe that there are only certain forms of public justification that are appropriate. Public reason is then those justificatory arguments that can be made such that they can be made from a common political point of view. Public reason, like the General Will, is a common political conception of the good, and a system of political justification.

Rawls saw public reason as being the political solution to pluralism. Comprehensive moral doctrines could not be used for public justification, because in a pluralist society there is no assurance that others will share one's own comprehensive moral doctrine. As such, they would be very unlikely to accept the form of justification,

⁶ Consider the example of free speech. We can say that we have a right to free speech, but this right must be fleshed out by specifying the particular instances of speech that are deemed protected. I will elaborate this in detail in a later section.

and then there would be no political agreement. By turning to a common political rather than moral conception of justification, Rawls was aiming to suppress the private sphere differences in a society and focus solely on common political commitments. This is not unlike Rousseau's goal of forming the General Will by having citizens reason *as citizens* rather than as self-interested individuals. This is a proposal that has many merits, but ultimately, it has to confront the problems that we have considered above: namely, that this reasoning "as citizen" is not neutral, but instead is privileging a certain conception of values that may not be universally held, particularly as societies become more diverse. This problem will arise with any conception of public reason, precisely because there is no assurance that there will be a sufficient set of overlapping consensus about what may be described as a common political point of view. Our comprehensive moral doctrines and our other private-sphere interests play a significant role in shaping our perspectives, and in turn our perspectives shape our political interests.

This problem of diverse perspectives poses a significant challenge to the goal of political agreement. Even though we may be able to uncover some areas of consensus, there will be much that will have no consensus. There are simply too many different areas of political life that require independent consideration to expect that a justificatory framework that can be established in one area can be then extended to another area. Even if we all agree that murder is wrong, that does nothing to help us agree on questions of distributive justice. Likewise, even if we agreed on the principles of distributive justice, that does nothing for establishing freedoms of speech or assembly. This is why a common political point of view would be so valuable if we could have it: it resolves all of these issues, and grants us a systematic framework for political justification.

Thus we are stuck with a problem. We need some method for reconciling competing political goals without having recourse to a neutral political perspective that everyone endorses as a system of public justification. I propose that this problem can be resolved, but to do so we must move away from a conception of public reason, and instead move towards a model of bargaining. Bargaining has the advantage of requiring very little agreement between the parties involved. When I negotiate the price of a shirt in a Chinese market, I do not have to share many political values with my counterpart: we just have to find a price such that she finds it to be at least equal to her valuation of the shirt, and I find it no more than equal to my valuation of the shirt.⁷ In fact, my counterpart and I barely need to have a common language beyond numeracy and some display of agreement or disagreement. We certainly don't need to agree on the finer points of the Cultural Revolution, the Great Leap Forward, or for that matter, the Great Society. Nor do we have to even discuss our views on fairness: the exchange either happens or it doesn't. This is a significant deviation from the public reason model in several respects. Most importantly, we do not have a common system of justification, even though we are typically able to find agreement. Neither of us has to make a claim about some neutral position from which we can evaluate the bargain. I can seek to better understand the needs of my counterpart so I might be able to better determine her reserve

⁷ It may be argued that there are some other implicit agreements that we both have: that money is a reasonable unit of exchange, that you don't just kill the other person and take what they have, etc. These assumptions can be eliminated without much difficulty – we could barter and trade goods instead of using money, and we can both be armed with guns or other weapons that make unilateral attack not terribly likely to succeed. Even in US prisons, where individuals are more likely to be violent and prone to disagreement than the general public, market systems emerge with agreed-upon units of exchange. Originally the monetary unit was a cigarette until they were banned, and now it is canned mackerel. See Justin Sheck's "Mackerel Economics in Prison Leads to Appreciation for Oily Fillets", <http://online.wsj.com/article/SB122290720439096481.html>

price, and she likewise can do the same with me, but in these cases we aren't finding an outside standard, but instead we are attempting to better understand each other's own standards. Each party must be convinced on his or her own terms.

This bargaining view has several consequences. First among them is that bargaining outcomes are going to be sensitive to the particulars of the perspectives of the agents involved. This is a natural consequence of the elimination of a neutral standard that both parties share, as each bargain is going to be affected by the pairings of particular perspectives rather than a single "neutral" shared perspective. Since different perspectives will view outcomes differently, there would be no reason to suspect that they would all identify the same outcome as the appropriate solution. This is easy to see in normal flea market cases: the same good is often sold at different prices even by the same vendor. In the case that I look to employ a bargaining model, this will mean that the particulars of the social contract will depend heavily on the makeup of the particular society in which it is being enacted. More specifically, the social contract will depend on the perspectives of the agents creating the contract. To return to the food example, a society of people who all keep kosher could very sensibly ban pork and shellfish so as to prevent accidental pollution of their food. But this may change if people with no eating restrictions are also in the population, as their categorization of those foods would now be included in the bargaining process. Another example might be the case of a feminist perspective in articulating what workplace equality might entail: rather than just making jobs available to both men and women, as might be suggested by a male perspective, government policies requiring maternity and paternity leave, and some subsidy on child

care might be required to ensure equal access to employment. In later sections, this perspective-sensitivity will be developed at greater length.

Supporters of public reason and deliberational models of political agreement might want to challenge a bargaining position on the ground that bargaining does not promote a system of reciprocity and mutual understanding and respect, but is instead emblematic of a *modus vivendi*. On this way of thinking, a bargaining model, presuming an agreement could be reached, would merely allow individuals to coexist, but would not do anything to promote developing stronger social ties. In this way, a bargaining-based social contract would be the shallowest form of social union: it would merely allow individuals to promote their own self-interest in a society of other rational maximizers. This would be a far cry from the ideal of public reason, in which public debate relying on commonly held political justifications would serve to draw people closer to each other and foster a greater sense of shared identity that would promote a system of social reciprocation. I want to challenge this objection on two fronts. First, that bargaining just *promotes a modus vivendi*. The bargain itself is independent of the depth of social ties. While it is true that bargains can be reached between people who will only interact once and have no particular interest in each other, bargains do not have any features that require individuals to have no social ties. It is true that a bargaining model would permit a *modus vivendi* arrangement, but this seems to be an advantage: a bargaining model might find success where none would be possible in a public reason model. A public reason model requires greater commonalities among individuals. And as I question the premise as to whether these commonalities often obtain, a bargaining model seems more appropriate.

There is the further question of whether a bargaining model does anything to promote stronger social ties. Public reason models have a great deal of traction here: they do encourage fostering a shared political identity, and this would seem to encourage reciprocity. I would contend that a bargaining model does much to promote social ties, but in a manner that is quite different from the public reason model. In particular, a bargaining model encourages individuals to better understand the interests of their counterparts. Better negotiation outcomes can be had if all parties can better understand what the other side wants, so they can be in a better position to give it to them, and in turn be able to demand other concessions. In other words, bargaining encourages empathy.⁸ What's more, this empathy is based not on some shared political viewpoint, but instead an attempt at understanding the perspective and values of one's counterpart. For example, cities that have historically been more trade-oriented, such as port cities, tend to be more tolerant than cities with little active trade.⁹ Rather than suppress a "private sphere" version of oneself for a common "public sphere" identity, citizens can bring their full selves to bear on social concerns, and be engaged with on those grounds. This engagement legitimates each other's perspectives, as the bargaining process

⁸ It should be noted that bargaining encourages empathy *in the long run*. If two people are randomly paired to bargain only once (as we might imagine in a flea market case), there is only so much that one party can do to come to understand the other. However, in cases of repeated bargains, one can get a better sense of what the other party responds to, and has an incentive to investigate this further. Taking on a cost to learn more about the other party may not make sense in a single-shot case, but it will often pay dividends in a repeated interaction. This argument has a long tradition, most notably in Hume and Smith. A detailed discussion of this view can be found in Hirschman's *The Passions and the Interests*. (Princeton University Press, 1997).

⁹ A recent case study of this is found in Jha, Saumitra, "Trade, Institutions and Religious Tolerance: Evidence from India" (January 10, 2008). Stanford University Graduate School of Business Research Paper No. 2004 Available at SSRN: <http://ssrn.com/abstract=948734>.

acknowledges them as a relevant set of considerations to be reckoned with. This validation has no counterpart in a public reason model, as only the shared political perspective is considered. In a bargaining model, alternative viewpoints are embraced as relevant, even if they are not assured of carrying the day. This promotion of empathy and the procedural respect shown to alternative perspectives would do much to promote social cohesion, precisely because it serves to enfranchise those individuals who might otherwise have had their perspectives excluded from the political process. This is not unlike the *doux commerce* theory advocated by many of the early economic thinkers. Smith argued that market players do best when they are honest and empathetic. Self-interest drives agents to develop reputations for being fair and considerate, for if they are not, no one would want to do business with them.¹⁰

Though the source of justification of a bargaining outcome is ultimately individual rather than communal, this form of justification assures us that individuals from every perspective are willing to endorse the outcome. This is not to say that this will assure everyone the best possible outcome, but as we will see in later sections, it will ensure that everyone will get the best outcome that can be gotten given the constraints that everyone places on each other.

A Conception of Rights

Citizens of both the United States and France enjoy religious freedom, which includes the separation of Church and State. These rights, however, are interpreted in a

¹⁰ Hirschman traces the history of the *doux commerce* thesis in his *The Passions and the Interests* (Princeton University Press, 1977). Adam Smith develops his account in *The Theory of Moral Sentiments*.

quite different manner in the two societies. In the United States, the state does much to protect the right of individuals' religious expression. When we interpret the rights of church-state separation, we see it in terms of "anti-establishment." The state cannot do anything to promote one religion over any other. But we allow for a market of religions – citizens are free to choose their religion and level of religiosity, including their outward expressions of their faith.

France, however, has a different approach to interpreting these rights. In part, this is due to the way that the French interpret the concept of the citizen. Namely, individuals are "French first" and every other cultural identity comes second. Individuals are asked to subsume every other aspect of themselves to their Frenchness, and in return, the state then grants citizens the right of choosing whatever religion they want. This has had some success – in particular, Post-Napolean France was historically more welcoming of Jewish citizens than many other European countries so long as they saw themselves as primarily French. However, this interpretation of religious rights differs in an important way from the United States. Namely, it is not acceptable to have outward displays of religiosity, particularly in public institutions such as schools. This has in recent years become a significant issue with France's growing Muslim population. Though students can wear necklaces with religious symbols on them under their shirts, they are not allowed more outward expressions of faith, such as hijabs. Muslim girls have been expelled from school for wearing a hijab to class. Teachers have refused to teach so long as students wear them. The Muslim community claims that these restrictions are a violation of their rights, but the state responds that it is applying the same standard to everyone. If anything, France is trying to cling to its "French first" interpretation of rights more

aggressively now, as it faces increasing ethnic diversity. The state, and many in it, sees this interpretation of rights as a way of promoting national unity. Many Muslims see this interpretation of rights as discriminatory.

What makes the French case particularly useful is that we can see how one right can affect many others. Non-Muslim French citizens may see a right to religious expression for Muslim girls as a violation of gender equality. Having this violation of such an important right occur in school can have an undermining effect on other non-Muslim girls who might take in a conception of women as submissive or as objects of sexual desire that must be covered. This right of expression can be seen as *promotion* – that the state is now endorsing the practices of a particular religion. This can make others who are not Muslim uncomfortable or even feel pressure to conform to Muslim practices, which would violate their own religious autonomy. What is important to notice here is that our choices about interpretations of certain rights can impose external costs – those costs are limitations on how we might be able to interpret other rights. If we want to take a strong stance on rights of gender equality, we have to scale back our interpretation of a right to religious expression.

The goal of this section is to set the groundwork for understanding how we can apply a bargaining model to the social contract. Most basically, the bargain is about the rights and privileges that form the basic structure of society. These rights, as we can see, can come into conflict with each other, and we need to find a way to come to a common agreement about which rights we ought to endorse over others in particular cases. But we need to understand what exactly a right is. As we can see from the example, not only can we interpret what appears to be the same right in two very different ways, but that each

interpretive choice has many externalities that can affect how we interpret other rights. Thus, we are here concerned with the core freedoms and duties that citizens enjoy in society.¹¹

Let us consider what a right is. Rights are apportionments of freedoms and limitations on actions. They determine what and how individuals are allowed to do, and what constraints of action that they can demand of each other. Importantly, they also determine what actions cannot be constrained by others. It will here be useful to introduce a standard distinction between the kinds of rights: there are negative rights and positive rights. Negative rights are those rights that assure your freedom of action as understood as a freedom from *restraint*: the right to free speech says that I can say what I want without anyone being able to silence me, and the right to habeas corpus says that I can't be imprisoned without cause. Positive rights are those rights that incur obligations on others to assure your well-being: The last two of FDR's Four Freedoms are an example of this. The freedom from want and the freedom from fear are obligations that we all have to each other. Positive freedoms require some measure of government or social intervention – a freedom from want implies a social minimum, for example. So while negative rights tend to be prohibitions of government intervention, positive rights outline government obligations towards its citizens.

The distinction between positive and negative rights is an extremely useful one, but it is not the only distinction that we might make. Importantly, we can also try and consider whether rights are rivalrous or excludable. That is, we can consider whether

¹¹ Though I am only discussing rights allocation here, this discussion can easily be extended to an analysis of economic allocation. I do not develop this here, as this essay is primarily concerned with questions of political power.

rights can be understood as public goods¹², or if they come short in some respect. Rights that are rivalrous imply that when one person “consumes” the right, it takes away resources from another. Many positive rights have this character. For example, guarantees of a social minimum, or a right to health care would be rivalrous goods, simply because they involve the consumption of other material (rivalrous) goods.¹³ Other rights do not have this character, however. Free speech is nonrivalrous: my ability to speak my mind does not in any way inhibit your speech. In fact, if anything, my free speech can promote speech from you, whether you want to agree or disagree.

An interesting question is whether any rights are non-excludable. Having a right to clean air is non-excludable, in the sense that if you’ve supplied it to one group, others in the same area can’t be denied the same right. A right to protection from foreign invasion is similar: one can’t protect only some people in a country and not others from some foreign invasion. Either you have an army or you don’t. However, most other rights do not seem to have this same character. Police protection could be selectively granted, for instance. Even a right to speech could be selectively granted: one class of individuals could have that right, while others could be denied it. This is true of rights to

¹² Public goods are those goods that are neither rivalrous nor excludable. This means that there is zero marginal cost to providing another person with the good, and that if some people have access to the good, there is no way to restrict others from having the same access. A lighthouse is a classic example of a public good – it does not matter how many ships use its light, nor can the lighthouse prevent ships from seeing its light if some ships can see it. A normal manufactured good is the opposite of a public good – it is both rivalrous and excludable.

¹³ One could try to make the argument that the cost incurred in providing social minima or health care is offset by the savings in other areas of government spending, such as emergency services or prison expenditure. This may very well be the case, but it would have to be a perfect offset in every case for such an argument to work. Being that we are in the end dealing with material goods, which are always rivalrous, this argument is not going to be successful.

practice a given religion, right to assembly, or a right to health or a social minimum.

Non-excludable rights, then, are going to only be those rights that are also public goods, in the economic sense of the term. So we have seen that while most rights are excludable, many of those excludable rights are non-rivalrous. This means that though these rights can be extended to many or few people with no direct tradeoffs, there are ways of preventing these rights from being extended widely.

Why might someone want to not extend rights to a group, especially when there are no direct costs associated with such an extension? There are three plausible reasons that I will consider. First, one might get satisfaction from the denial of rights to others. Second, one might have the paternalist inclination that it is best for the group in question to have a restricted set of rights. Third, one finds some aspect of these rights in conflict with some other set of rights that one takes to be more valuable. The first reason requires a particular psychological disposition: not only does one care about others, but also one cares about them insofar as one can hurt them. This cannot be a preference of an egoist or an altruist. So while this preference only applies to a limited portion of the population, it is a possible preference. In particular, members of hate groups could be classified as having this kind of preference.¹⁴ They oppress people simply because they get satisfaction from the oppression itself. Otherwise, there are not relevant benefits.

The case of paternalism is simply one in which the paternalist must assume that they know better than others about how to best help them. A restriction in rights stems from the belief that a certain class of people, left to their own devices, will make poor

¹⁴ Though this classification is possible, it may be incorrect. Another plausible reason for being a member of a hate group is that one believes that once you grant rights to the group whom you are oppressing, these newly-granted rights will inhibit or diminish your own rights. Which would then move us to our third reason for not extending rights.

choices. This can have ugly consequences, as can be seen by some paternalist arguments in favor of racial subjugation.¹⁵ However, in other instances, there can be cases of paternalism that have more justification, such as mandatory seat belt laws and smoking bans, wherein minor rights restrictions come with a fairly sizable public benefit.

The more interesting case to consider is where rights are not extended fully because they come in conflict with other rights. This is the case that requires a more nuanced understanding of what rights themselves are. There are two cases to consider: one is to restrict the number of people who share in having access to a particular right, and the other is restricting the scope of the right itself. To illustrate the first case, consider voting rights. In the United States, we have a significant history of restricting voting rights to only certain classes of people. Originally, only white males could vote. While women and minorities are now granted voting rights, we still significantly restrict voting rights. This mainly happens in two populations: minors and felons. Individuals under 18 are not allowed to vote, no matter how politically active and informed they may be, simply because they are not yet old enough. This is true in all states. In some states, felons who are out of prison are not allowed to vote either. We restrict the votes of minors and felons in part because (rightly or wrongly) we believe that they cannot be trusted to put the public good first in their vote.¹⁶ In this instance, rights are restricted

¹⁵ A striking example of this is found in Thomas Carlyle's infamous essay "Occasional Discourse on the Negro Question" *Fraser's Magazine for Town and Country*, London, Vol. XL., (February 1849). Mill famously responded by challenging the paternalist approach to a denial of rights in his essay "The Negro Question" in 1850 in the same magazine.

¹⁶ In the case of felons, another likely source of justification is that their loss of suffrage is part of their punishment for committing serious crimes.

even though they are non-rivalrous because the rest of society deems that the disenfranchised population has not earned those rights.

In Belgium, however, rights are restricted to particular groups not because the rest do not deserve them, but rather different cultural groups have interests in different sets of rights. In particular, cultural-linguistic rights are managed by Community rather than by the federal government. So the differential distribution of rights is meant to reflect underlying differences in the populations, not a statement about power differences or equal treatment. However, the Belgian case can be explained in terms of rivalry. If a right is such that there are costs incurred for providing it to the marginal individual, then it is reasonable to only supply the right to those that want it at least as much as the marginal cost. Providing the right to everyone only serves to reduce the number of other rivalrous rights that one could otherwise provide that people would value more. So, when one is considering rights that are rivalrous in nature, it is entirely consistent to have both differential distribution of rights and equal treatment of all citizens. But when rights are nonrivalrous, differential distribution of rights needs further explanation.

Let us now consider the second case of limiting rights, where we limit the rights themselves, rather than the scope of people who have them. To illustrate, let's consider the right to free speech, and the right to personal bodily integrity. We have free speech rights, which should entail that we can make whatever claims we may want. But if we shout "fire!" in a crowded room, we will cause people to trample over each other. Similarly, if we shout "terrorist! He has a bomb!" on a plane, the person we point to will likely be tackled and beaten. In both of these circumstances, allowing for the fullest version of a right to free speech would adversely affect the rights of others – in particular,

their right to maintain bodily integrity. So we have a conflict between free speech and bodily integrity. This conflict raises an important issue about the nature of rights. We need not now decide that there is no right to free speech, or that of bodily integrity. Instead, we can choose to *reinterpret* one of those rights so as to eliminate the conflict.

Reinterpreting rights suggests that they can be broken up into component parts. So rather than having a single entity, “freedom of speech,” we can instead think of this right as being a bundle of many allowances. One such allowance might be the right to run a press, another might be to give a speech at a street corner, and another might be inducing panics in crowds. Though these activities are all related to each other, they are not mutual requirements for one another: it is perfectly consistent that one might be allowed to speak at a street corner, and not allowed to induce panics in crowds. Similarly, property rights can be absolute, or we can limit those rights in such a way that make taxation acceptable while still prohibiting stealing. So the concept of a right must shift away from being an absolute, and more towards a bundle of many affiliated allowances for action or guarantees that may be considered at least somewhat independently of each other.

This conception of rights as bundles of allowances and guarantees makes them firmly a social conception, as opposed to a metaphysical one. We agree to what of each bundle we take to be important, and what we can discard. This is evident in the differential allocation of rights across countries. Even Western liberal countries vary amongst each other in their rights allocations. If we viewed rights as something other than an agreement amongst citizens, we would expect to have active debates between friendly countries so as to determine the “correct” set of rights, just as we do with

scientific disputes. There is no French consensus on the atom that differs from the British or American one – there is just the scientific consensus.¹⁷

What we will turn to next is how we can develop an account for making these kinds of decisions. It is easily seen, however, that this requires that we view rights as subject to revision, and more importantly, subject to tradeoffs. Though we might care deeply for the freedom of speech if we think about it in general, not many among us would support the idea that the right to induce panics in crowds is more important than bodily integrity. So, we are willing to modify our conception of the freedom of speech to eliminate such a right so as to get rid of the conflict. Thus, the conception of rights I develop here requires that rights be bundles of associated allowances and guarantees, and these are all subject to tradeoffs amongst other bundles, since we cannot have two rights that conflict with each other.¹⁸

At this point, we have seen that a bargaining model has some advantages over a public reason model of a social contract. We have also outlined a conception of rights that allows for categorization along the economic conceptions of rivalry and excludability. Employing these distinctions, we can see how rights can be traded off amongst each other – and in fact that they must be traded off so as to assure a consistent

¹⁷ This is not to say that evidence of debate shows that there is no underlying truth. Rather, I suggest that a lack of debate in the face of differences suggests that these differences are not caused by different attempts to uncover hidden truths, but instead recognition that the differences represent different social agreements.

¹⁸ Having conflicting rights is incoherent: if rights are to be respected or even just always followed, then if two rights require conflicting sets of actions, at least one will not be followed. But then rights would not be notably different than just sets of guidelines that we can choose to follow if we so wish. For rights to have the inviolable character that we think they have, they must be mutually consistent.

set of rights. With these concepts in mind, we can now turn to a full elaboration of a bargaining model of justice.

The Bargaining Model

As we have seen, the starting assumption of a public reason model is that there is some suitable perspective that everyone can adopt to reason as citizens. This is problematic precisely because individuals do not all share this perspective, and since different perspectives can have different associated categorizations, individuals might not even be able to accurately represent their own political interests in a non-native perspective. My goal here is to correct this main deficiency of the public reason model by allowing individuals to engage each other with their own perspectives. In particular, in this section I will lay out a bargaining procedure that allows individuals to agree on a particular distribution of rights without having to agree on a common perspective from which to debate. To do this, I will rely on economic accounts of bargaining, though I will extend them to satisfy multiple perspectives.

The first step is to examine the consequences of perspectivism for an economic description of bargaining. In the previous section, we established that rights can be treated as bundles of associated guarantees. In normal economic theory, we would first define states of the world by partitioning state space: we divide up the state of the world into many pieces, and each partition identifies a particular scenario. Bundles of rights are the set of actions that we have that can apply to particular partitions of the world. The scope of a given right can be thought of as how many partitions of the state space it applies to – when we are allowed to perform the given action. An assumption here is that

everyone sees the same partitions of state space, and can see how a bundle of rights apply to the world.¹⁹ When two bundles of rights affect overlapping portions of state space, we can have conflicts between the two bundles. That is, rights can come into conflict with each other when they apply to the same state of the world, and describe different, incommensurate sets of allowable actions.²⁰ In the case of hijabs in France, an account of religious freedom interferes with gender equality. So a right has two components: first, a list of the allowable actions, and second, the list of partitions of the state space that these actions are allowed in. In those cases where there are conflicts between sets of allowable actions, the agent can then have preferences over these rights in the particular partition. Namely, one can rate free speech in crowded rooms as less important than bodily integrity. For partitions of the state space where there is some potential conflict, agents have to decide if they prefer right A to B, B to A, or are indifferent between A and B. Finally, one can have preferences over the partitions themselves: that is, one can determine which cases they deem to be most important, and what cases they care about the least. One may strongly care about free speech when it comes to the ability to have a printing press, but not care much when it comes to the ability to say whatever you want to your elementary school teacher in class.

¹⁹ This is slightly incorrect. In fact, the standard axioms require that if Alice and Bob are playing a game, Alice's partition set must be a subset of Bob's. This means that one agent may make finer distinctions than the other player, but he recognizes all the distinctions that she does. An example of this would be that Alice recognizes sunny days and cloudy days, but Bob recognizes sunny days, cloudy days and partially cloudy days. Bob can make finer distinctions since recognizes the difference between sunny days and partially cloudy days, and thus make more careful choices about his actions than Alice can, but he does not lack any categories that Alice has.

²⁰ In standard economic language, this would be one's strategy set. A strategy set defines the set of actions (also known as strategies) available to an agent.

Under normal economic theory, we have sufficient pieces to describe a bargain. Individuals have complete preference orderings over all the cases of rights conflict. Agents can then attempt to concede on some cases that they care less about to win concessions on those cases that they care the most about. Each agent's aim is to find the bargaining outcome that maximally increases her own utility with the constraint that her bargaining partner will agree to the arrangement. At the bare minimum, this means that neither party can come out of the agreement worse off than how they started. But this leaves open a huge range of potential bargaining outcomes. If we take seriously the requirement that both parties seek to maximize their returns subject to being able to get agreement from the other party, we are left with the Nash Bargaining Solution. The Nash solution is the bargaining outcome where the product of the utility gains is maximized. Maximizing the product rather than, say, the sum, helps to ensure fairness: each agent is gaining at as close to the same rate as the other agents as is possible. While this might seem like a convenient mathematical trick, it represents a deep thought: it captures the willingness of agents to accept a particular bargain. The Nash solution is the unique efficient²¹ solution that satisfies some basic axioms that support this condition of maximization subject to agreement.²² So each agent is maximizing their utility as much as they can, subject to the constraint that others have to agree to the bargain as well. If any agent proposes a bargain that increases his or her own utility, at least one other agent

²¹ In this context, "efficient" means that there are no pareto moves left to make. That is, any gain must be associated with a loss by someone else.

²² The first axiom is invariance to change in how one represents their utility (invariance to affine transformations), which means that it does not matter how you describe your utility function, just what it is. The second axiom is that it is pareto optimal. The third axiom is that it is independent of irrelevant alternatives. This means that if you prefer Apples to Oranges when those are all that's available, you won't all of the sudden prefer Oranges to Apples when you can also choose Bananas. The fourth axiom is symmetry.

would be losing relative to the Nash solution, and thus reject the bargain. The solution treats all agents equally, and so serves as a focal point for the bargain.²³

This bargaining approach has some nice features. In particular, the Nash Solution provides the best deal that any individual can get subject to being constrained by others. But it is done without having to do any interpersonal comparisons of utility. Each agent can have utility on whatever scale they want, and at no point do they have to try and interpret someone else's utility. They just have to worry about someone accepting the outcome. As we saw in the earlier discussion of mutual benefit models, this is taken care of in virtue of the interaction of rational agents itself. But we still run into problems. In particular, all the agents have to share the same partition sets. In effect, this is the same as saying that they must have the same categorization, which seriously constrains their abilities to have different perspectives. So we must find a way to modify this bargaining procedure to account for multiple perspectives.

There are two changes that become necessary. First, we must find a way to rectify the fact that different individuals can have different categorizations. Second, we must weaken our claims about the completeness of preference orderings.

If two agents have different categorizations, this means that they will not divide state space up in the same way. This is simply because they categorize the world differently, and so they have different conceptions of salience. As I have argued in other work²⁴, they are seeing the same thing, but just interpret it differently. As there is no neutral representation of the state space, we cannot take one partition as better than

²³ For a much more extensive justification of the Nash Bargaining Solution, see chapter 7 of H. Peyton Young's, *Equity: In Theory and Practice*, Princeton University Press, Princeton, NJ 1995

²⁴ Ryan Muldoon, "The View From Everywhere" (working paper, 2009)

another, and so we cannot just pick one and require everyone to use it. This much is clear. But we also cannot just take the union of everyone's partition sets and expect everyone to share this larger partition set. This is because there is no assurance that people can *see* the distinctions that are in other perspectives if they do not themselves hold them. So just as we do not have the same accounts of value (and hence utility functions), we do not have the same partition sets. But even though we cannot expect that individuals can adopt this union of all partition sets, we can describe the overall bargain by making reference to this union set, so long as we do not assume that the agents in the bargain themselves are aware of it.

Though we can use the union of partition sets in our model of the bargain, it may be useful to consider an alternative representation of the same idea. In particular, we can think of the categorizations of a perspective as dimensions of some high-dimensional object. Each dimension is a criterion on which one can make distinctions about states of the world. So, one dimension might be weather, another might be day of the week, a third might be how many people are present, and so on. We can aggregate all agents' perspectives by simply adding dimensions for every way of categorizing that these perspectives have. So, we have a single high-dimensional space that each individual can "see," but only by taking a lower-dimensional projection, as represented by his or her particular perspective. This high-dimensional space is not a metaphysically real entity – it is just the agglomeration of all the agents' perspectives. This space allows us to see how everyone is still in the end talking about something shared, even if they do not agree on how to describe it.

What is important to notice is that, as we each can only see a projection of this larger space, when Alice walks into the store and sees just food, Bob can walk in and see meats, grains, fruits, vegetables and dairy, and Carol can see canned food, frozen food and fresh food. They are all still looking at the same objects, and they are each making legitimate categorizations – they just don't recognize each other's categories. This captures something important about political discourse. Disagreement does not only stem from differences in preferences. It can also come from differences in how people interpret the world. So it is essential to capture this source of disagreement if we are to create an accurate model of political negotiation.

What we find ourselves with, then, is that the bargain itself is taking place over disagreements in preferences in rights allocation across this space, even though each agent can only see their particular categorization of the disagreement. Agents do not see themselves as engaging in the same bargain – they would describe the bargain rather differently from each other, based on their own perspective.²⁵ Further, because these categorizations are different, preferences are going to be over different things as well. Though each agent can have a complete preference ordering of rights across states of the world on their own perspective, they must have only a partial order²⁶ across the whole high-dimensional state of the world, since it includes many distinctions that the agent does not recognize. It is impossible to state preferences about objects that one does not recognize as existing. One consequence of this is that if Alice does not recognize some

²⁵ For instance, a libertarian might describe the bargain in terms of personal liberties at stake, whereas an egalitarian might describe it in terms of equality of material outcomes.

²⁶ A partial order is one where an agent cannot say whether they prefer A to B, or B to A, or are indifferent between the two of them, for some A and B in their choice set.

distinction that Bob makes, Alice is going to be more than happy to let Bob have what he prefers in that case, since Alice literally can't see what Bob wants.²⁷

With these two modifications, we now have a bargaining model that allows for multiple perspectives. Each agent has a partial order over rights in the union of all partition sets, which defines their utility function. They also each have a partition set that is a strict subset of the union set. Though agents do not even agree about what they are bargaining about, they can carry out a bargain.

What enables these agents to carry out a bargain is that there is always a price to allocating a given right. Even if different agents interpret rights differently, a price can be established, since everyone has a defined utility function. In particular, this analysis of a social contract in terms of a bargain allows for the society engaging in the bargain to discover exactly how much certain rights are worth to people who hold a given perspective. To discuss this important idea, I would like to examine two issues. First, how we find a price, and second what this price mechanism means for rights allocation.

That rights have a price is a perhaps uncomfortable claim to make. Rawls and other contract theorists deny citizens the right to sell their rights and freedoms for other benefits. One is not allowed to make any tradeoffs at all. I too would like to restrict the sale of rights. However, that does not mean that there cannot be tradeoffs *between* rights. As mentioned earlier in the description of the model, I assume that agents place value on particular interpretations of their rights. I further assume that the utility one gains from rights is fungible, so that tradeoffs between rights are possible. This is just to say that I

²⁷ This is true in those cases where Bob's preference does not affect any outcomes that Alice can recognize.

might be willing to accept a limitation on my right to bear arms if I can have increased rights to free speech.

With just these two assumptions, we can establish a price mechanism for rights. The price of a right is just its social cost. The social cost of a right is defined as the utility loss incurred by the conflicts with other rights bundles. The social cost of a strong right to gender equality in France is then the utility loss suffered from the perspective of those who want girls to wear hijabs to school. Some rights may have no social cost, and are thus free. A very basic version of free speech is likely to impose no social costs, as it does not impinge on any rights. It is even possible that it could have a negative cost if it helped enable other rights. But the right to hate speech can have high social costs, as it impinges on various rights to equality.

This account of a price for rights requires nothing more than a normal market discovery mechanism. The agents bargaining will accept or object to various rights bundles based on their personal utility assessment, and as such, they will reveal their valuations of these rights over the course of the bargain. The market price of a given right is just that price at which the social costs of the right are covered. It is only at this point that other agents in the bargain will accept the imposition of that right, since they are otherwise losing more utility than they are gaining. The price of a right is the point of indifference between having and not having the right. Bundles of rights can then be used to have rights that offset each other. A weaker right to property might be bundled with a stronger right to health care, for example. So rather than spend money or some physical

resource to “pay” for a given right, we can think about paying for a right with the allocation or removal of other rights in a particular bundle of rights.²⁸

This price mechanism, unlike the public reason model of social contracts, allows agents with different perspectives to engage with each other in a way that doesn’t privilege any given perspective. Since price is just the social cost of a right, this can be evaluated from the perspective of any given agent – if the agent is losing more than she gains, then she pulls out of the agreement. But she never has to agree on what it is that she is bargaining about. This is not possible under a public reason model. In addition, as opposed to just talking about “the balance of reasons” supporting a particular right, we can determine how much a particular interpretation of a right is valued by looking at what a society might be willing to give up to get it.

Additionally, the price mechanism embedded in a bargaining model allows us to treat different kinds of rights differently. In particular, we can identify those rights that are public goods and those that are excludable and rivalrous. Rights that have the character of public goods, or are even just non-rivalrous are those to be allocated to everyone in society at once. Public goods by definition can only be provided to everyone, and non-rivalrous goods cost the same to provide to everyone, so there is no reason to not allocate them fully. But rivalrous goods are also excludable goods, and those rights that have this character can be more selectively allocated. So, only those

²⁸ This particular form of payment is known as “logrolling” in the political science literature. Logrolling occurs when legislators agree on voting patterns across a series of bills. An example of this is when Alice agrees to support Bob’s budget bill if Bob will then support Alice’s climate change bill. Of course, logrolling can involve many more than two people and two bills. The idea is that legislators need to get enough votes on their bills, so they agree to exchange votes that they would not normally make so as to get what they want at a price they are willing to pay.

individuals who value rivalrous rights will choose to pay for them. This will result in different people having different rights, but as discussed before, this is not an indication of discrimination or inequality. Instead it is recognition of diversity. What assures this claim is the price mechanism itself. Those that want “additional” rights must pay for the social cost of these rights. While everyone must support rights that are public goods, rivalrous rights can be exclusive, and so we can allow for those agents who want them to have them, and those who do not to not have to pay for them.

Concluding Remarks

Building on the account of perspectives laid out in other work, we can see that a public reason account of the social contract is unable to accommodate diversity in a way that is neutral across perspectives. As a social contract is most importantly an embedding of a set of rights, we examine what mean by rights. Once we adopt a conception of rights that is considers rights to be bundles of associated interpretations of the right, and a classification of rights based on rivalry and excludability, we can define a bargaining procedure that can fully accommodate perspectival diversity. The resulting social contract is a Nash Bargaining Solution, which ensures that it is the outcome that ensures that everyone received as close as they could get to the set of rights that they most wanted, given that everyone else was out to do the same thing. This kind of justification is different in kind than the justification found in public reason models, as it is individual rather than social. This notion of individual justification allows each participant to feel invested in the outcome of the bargain, as it has been justified on grounds that they accept – not just a set of “public” reasons that they may not endorse.