

Pluralism and the Hobbesian Logic of Negative Constitutionalism

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According to an essentially Hobbesian account of political order, the claims of cultural and national minorities within a state to some form of constitutional or institutional recognition are morally suspect and politically undesirable. Underlying this Hobbesian logic is a particular understanding of the relation between law and politics. 'Negative constitutionalism' is focused primarily on limiting the damage government can do. However the pursuit of constitutional minimalism runs up against the challenges presented by deeply diverse political communities. By investigating the manner in which Hobbes has been invoked in arguments concerning the relation between the rule of law and the 'politics of recognition', I argue (i) that the distinction between the rule of law and politics is fundamentally unstable, and (ii) that in invoking Hobbes, modern theorists have missed an important element of Hobbes's own argument – namely, his appreciation of this instability. As an example, I examine the way Hobbes is used in some of John Gray's recent writings on pluralism and liberalism.

According to an essentially Hobbesian account of political order, the claims of cultural and national minorities within a state to some form of constitutional or institutional recognition are morally suspect and politically undesirable. The 'politics' of such claims – a term we shall have to unpack – is said to have undesirable consequences for the constitutional order of a political community. Underlying this Hobbesian logic is a particular understanding of the relation between law and politics; call it 'negative constitutionalism'. The focus here is primarily on the extent to which the constitution is meant to limit the damage a state can do. But this seems an incomplete formulation of what constitutionalism means. Constitutions are partly about preventing abuses of power, but are also about more positive things too. The pursuit of constitutional minimalism runs up against the challenges presented by deeply diverse political communities.

By investigating the manner in which Hobbes has been invoked in arguments concerning the relation between the rule of law and the politics of recognition, I hope to show (i) that the distinction between the rule of law and politics is fundamentally unstable and (ii) that in invoking Hobbes, modern theorists have missed an important element of Hobbes's own argument – namely, his appreciation of this instability.

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John Gray, for example, invokes Hobbes as a kind of post-modernist *avant la lettre*. In his Oakeshottian days, Gray appealed explicitly to such a reading. Even now, after apparently abandoning this 'postliberalism' for a purer form of pluralism, Hobbes hovers in the background as the source of a vital truth about the justification of government even as it becomes pluralized. Gray's dizzying variation of political allegiances is difficult to follow, but his invocation of Hobbes at different points is instructive to map. As I will try to show, I think he gets it wrong; both when he was a defender of the New Right and now as a scourge of Rawlsian liberalism.

Positive versus Negative Constitutionalism?

Emphasis has been placed recently on identifying and distinguishing between the negative and positive elements of liberal constitutionalism.¹ There are two ways in which this has been carried out. Firstly, by focusing on the apparently paradoxical insight that limited government can be more effective than unlimited government: that is, how constitutional constraints can be enabling. Secondly, the negative/positive distinction has been mapped onto different accounts of the legal and political form of the constitution. Legalistic, negative constitutionalism is opposed to more positive 'political' variants. Though the enabling (i.e. 'positive') consequences of institutional constraints complicates greatly any simple distinction between negative and positive constitutionalism, this negative conception deserves further examination.

What is a constitution and what does it do? A constitution both constitutes and regulates. A constitution constitutes The People who in turn constitute it. It establishes the form of government and the rules and norms which in turn regulate and govern it. The striking fact about any constitution that actually binds (and where sovereignty resides in The People) is that it is essentially self-enforcing. How it comes to be self-enforcing is part the need for coordination in political life, and part collective self-limitation (i.e. institutional design). A constitution coordinates society to a definition of the state and specifies its territorial and institutional domain.² It includes a set of institutions, practices, procedures and norms that structure society, empowering and constraining actors and agents in various ways. By 'structure' I mean provide mechanisms that facilitate the coordination of political action.³ It is at this stage that important differences emerge as to exactly how constitutions help coordinate or frame political action.

The more positive, 'political form' of a constitution is said to provide the mechanisms and space for The People (constituted as a collective body) to reflect upon (and improve) the conditions for a 'good' political order.⁴

¹ For a comprehensive survey of negative constitutionalism see Susan Bander, 'The negative constitution: a critique', *Michigan Law Review* 88 (1989), 2271–347; also Cass Sunstein, 'Democracy and Shifting Preferences', and John Ferejohn, 'Must Preferences be Respected in a Democracy?' in David Copp, Jean Hampton, John E. Roemer (eds), *The Idea of Democracy*, (New York, Cambridge University Press, 1993) pp. 196–241.

² P. C. Ordershook, 'Some rules of constitutional design', *Social Philosophy and Policy*, 10 (1993) p. 202.

³ R. Hardin, 'Why a Constitution?', in Bernard Grofman and Donald Whittman (eds), *The Federalist Papers and the New Institutionalism* (New York, Agathon, 1989); Ordershook, 'Some Rules of Constitutional Design', pp. 199–202.

⁴ U. Preuss, *Constitutional Revolution: The Link Between Constitutionalism and Progress* (New Jersey, Humanities, 1995) p. 18.

Depending upon one's normative preferences, this might involve: promoting the deliberative capacities of citizens; selecting for the most effective (i.e. virtuous) forms of representation; promoting various 'republican' public goods;⁵ ensuring that the political process treats all citizens with equal concern;⁶ or indeed some combination of all of the above. The constitution is presented as a 'system of politics', where the provision of such goods as the protection of rights and the rule of law fall within rather than outside politics.⁷ The point is not to limit political power simply for fear of the damage it can do, but in order to use it more efficiently and effectively.⁸ What is meant by 'political' in this conception of the constitution? Answers vary, but consider Weber's definition: public activity aimed at 'exerting influence on the government of a political organization; especially at the appropriation, redistribution or allocation of the powers of government'.⁹ Thus constitutionalism takes a political form when shaped by such activity. The constitution becomes 'rooted in political and social structures rather than pre-political legal norms'.¹⁰

Negative constitutionalism, in contrast, focuses on the limiting functions of the constitution. It coordinates to a definition of what the state cannot – or should not – do. So constitutionalism is a means of opposing state power, where constitutions are primarily inhibiting and preventing mechanisms meant to protect individuals and society against arbitrary exercises of power.¹¹ Such protection is argued to be anchored in certain pre-political legal norms, such as the fundamental principles of the rule of law. These are said to exist over and above the political community, and are not subject to the 'politics' of bargaining and compromise. A powerful version of this kind of constitutionalism is what might be called 'rights-based constitutionalism'. Here constitutionalism is essentially about protecting 'individual legal rights that the dominant legislature does not have the power to override or compromise'.¹² It is not clear, however, that negative constitutionalism follows from such a commitment. It depends on how the rights which are to be protected are picked out for special protection, and what the constitution protecting such rights is said to be doing in relation to the political system as a whole. Dworkin certainly thinks of his conception of constitutionalism as intimately related to democracy – defined as 'communal government by equals' – and indeed provides some of its necessary preconditions. The constitution ensures that the political process treats all citizens with

⁵ R. Bellamy, 'The political form of the constitution: the separation of powers, rights, and representative democracy', *Political Studies* 44 (1996) 436–56.

⁶ R. Dworkin, 'Constitutionalism and democracy', *European Journal of Philosophy*, 3 (1995) 2–11.

⁷ Bellamy, 'The political form of the constitution', p. 437.

⁸ For a general discussion see S. Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (Chicago, University of Chicago Press, 1995); Duncan Ivison, *The Self at Liberty: Political Argument and the Arts of Government* (Ithaca, Cornell University Press, 1997).

⁹ M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley, University of California Press, 1978) p. 55.

¹⁰ Bellamy, 'The political form of the constitution', p. 455.

¹¹ The argument for a presumption against intervention can be either foundational or practical, as Ferejohn argues. The former might be rooted in a conception of liberal neutrality towards individuals' preferences and conceptions of the good, whilst the latter might emphasize the risks of empowering fallible state officials and agencies to interfere in the private sphere. See 'Must Preferences be Respected in a Democracy?', p. 241.

¹² Dworkin, 'Constitutionalism and democracy', p. 2.

equal concern.¹³ The precise catalogue of rights it protects and the principles it appeals to are a matter for debate, and their incorporation a matter of popular referendum.¹⁴ This hardly places the constitution 'outside' of politics. However, it is true that Dworkin makes much of the fact that certain political rights are trumps in so far as they should not be overridden by matters of 'policy' or other 'background collective justifications'.¹⁵ Hence his belief in the importance of courts as a 'forum of principle' in which apparent infringements of rights should be judged, and where constitutional interpretation should occur. The interpretation of the constitution should be carried out in 'moral' rather than 'political' terms; that is, with regard to principles rather than power.¹⁶ The public is not excluded from such discussions, but constrained by the nature of the forum from participating in the 'ordinary [i.e. political] way'.¹⁷ So rights (and the constitution in which they are embedded), though not 'pre-political', have a special status in relation to 'ordinary' political processes.

Dworkin's constitutionalism is not as strictly negative, I would argue, as it is often portrayed, but the distinction between a forum of principle and ordinary politics is instructive. The concern with constitutional matters being tainted by 'politics' is, we shall see, a recurring concern of the negative constitutionalism I want to explore.

Hobbesian Political Order

The purpose of laying out the distinction between negative and positive constitutionalism is to establish a framework within which to consider a Hobbesian account of political order. I have argued that the distinction is not straightforward. 'Negative' limits and constraints can obviously have enabling – i.e. positive – consequences. What I will go on to argue is that the boundary between constitutional law and politics is unstable, and there is no easy way in which to draw a line securing one from the other.

The negative constitutionalism at issue is one that rejects the claims of ethnic and cultural groups for constitutional and legal recognition. The ethos here, as Russell Hardin puts it, is that '[w]e make a better world by ignoring what kind of world we make and living for ourselves than if we concentrate first on the ethnic political structure of our world'.¹⁸ For Hardin, we invite all kinds of trouble by aspiring to protect, even nurture, communal rights and privileges associated with ethnic and cultural groups in multicultural and multinational political communities. The 'politics of recognition'¹⁹ can go disastrously wrong,

¹³ Dworkin, 'Constitutionalism and democracy', pp. 5, 9; also *Law's Empire* (Cambridge MA, Harvard University Press, 1986), pp. 381–9.

¹⁴ Dworkin, 'Constitutionalism and democracy', pp. 5, 10.

¹⁵ Dworkin, *Taking Rights Seriously* (Cambridge MA, Harvard University Press, 1978) pp. 364–7.

¹⁶ Dworkin, 'Constitutionalism and democracy', pp. 10–11.

¹⁷ Dworkin identifies a particular 'interpretive, reflective attitude' (a 'protestant attitude') that judges, lawyers and citizens should take on in this forum, which is 'responsible for imagining what ... society's public commitments to principle are'. See *Law's Empire*, p. 413

¹⁸ R. Hardin, *One For All: The Logic of Group Conflict* (Princeton, Princeton University Press, 1995) p. 179. There is also a strong emphasis on Smithian and Humean themes as much as Hobbesian ones; cf. 'Hobbesian political order', *Political Theory*, 19 (1991), p. 172

¹⁹ See C. Taylor, in Amy Gutman (ed.), *Multiculturalism and The Politics of Recognition* (Princeton, Princeton University Press, 1992) pp. 25–73; J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, Cambridge University Press, 1995).

both for society as a whole and the parties involved (especially future generations). By the ‘politics of recognition’ I mean demands for the way ethnicity and culture should be recognized by the state. These demands can range from outright secession to claims for state recognition of languages, control over education, or support for ethnic community associations and projects.²⁰ As Kymlicka rightly points out, these questions form much of the substance of daily political life in multicultural countries, ‘both in the day to day administration of state policy and in the historical moments of constitutional commitments and crises’.²¹

There is some value in considering what I take to be a Hobbesian rejection of these claims, as well as a Hobbesian fear of the consequences of a politics of recognition. Why ‘Hobbesian’? Because theorists have made this connection explicit (see below). Hobbes argues that without counter institutional mechanisms, our passionate and presumptive tendencies lead to never-ending social turmoil. Being risk-averse is enough to induce a presumptive strike against a potential foe, who in turn assumes the same – and so on. Norms that would be to the benefit of all fail to emerge, and leave everyone worse off. Collective action has either to be coercively enforced or, as noted above, somehow become self-enforcing. Hence the influential game-theoretic approaches to understanding Hobbes’s argument about the establishment and maintenance of a commonwealth in *Leviathan*.

These approaches also see a particular function for law, best understood in economic terms. The moral purpose of law is said, generally, to serve some variant of efficiency, that is, to facilitate mutually beneficial interactions between individuals. Thus laws should guide people in their actions efficiently.²² ‘Guidance’ is achieved mainly through incentives and constraints, imposing ‘prices’ or penalties on particular actions in order to encourage people to act in certain ways, or to develop certain expectations. A legal system is justified according to this analysis, given the benefits of (coercively) coordinated individual behaviour compared to the norm anarchy of a state of nature. Though obedience to a government and its laws is in everyone’s ‘proper’ interest, individuals have strongly conflicting interests which are not easily reconciled by reason alone. The gap between this institutional justification of the rule of law and an individual’s reason to disobey it is filled by the incentives provided by institutional mechanisms. The constraints and incentives associated with the constitutional protection or recognition of minority rights, according to Hardin, send all the wrong signals.

Why they send all the wrong signals leads us to another aspect of this Hobbesian logic, and one very different from assuming it lies in the prisoner-dilemma structure of social and political interactions: collective action, far from being perpetually doomed to failure, is in fact a victim of its own success. In other words, collective action – when it works – can have deeply disturbing results. Hardin, for example, argues that individuals are more likely

²⁰ W. Kymlicka, ‘Liberalism and the politicization of ethnicity’, *Canadian Journal of Law and Jurisprudence*, IV (1991), p. 241; Hardin, *One For All*, p. 56.

²¹ Kymlicka, ‘Liberalism and the politicisation of identity’, p. 56–7.

²² R. Hardin ‘The morality of law and economics’, *Law and Philosophy*, 11 (1992), 331–84; J. Coleman, *Markets, Morals and the Law* (Cambridge, Cambridge University Press, 1988), pp. 67–94, 133–50; G. Brennan and A. Hamlin, ‘Economical constitutions’, *Political Studies*, XLIV (1996), 605–19.

to coordinate around commitments which are defined and understood as much *against* extant institutions, practices, and statuses than for commitment to more positive programmes or policies.²³ Collective interests are stronger when consistent with individual interests, and worse, norms that are focused on groups are more effective than those that are universalistic.²⁴ Thus 'norms of exclusion' – i.e. ones that establish difference – are much more powerful in motivating (individually rational) collective action than are universal norms of equality.²⁵ Where group and individual interests converge, incentives exist for intensifying these particularistic commitments, for example, by reducing opportunities for wider knowledge that might undercut such claims, or seizing and distributing scarce goods according to group commitment.²⁶ On this account, then, to positively encourage group manipulation of individual interests through granting 'rights of exclusion' (i.e. forms of political autonomy or state recognition of distinct cultural goods) is extremely dangerous.

Note that Hardin's argument is distinct from Gray's (which is discussed in more detail below). Hardin is suspicious of the politics of recognition because he thinks the consequences are basically anti-universalist, and not very beneficial for individuals – especially in terms of social and economic welfare. Furthermore, he is suspicious of any claim where value is said to inhere in a culture or society as such, independent of being valuable to individuals. To be fair, therefore, it does not follow necessarily that he is committed to negative constitutionalism. His suspicion of all forms of group or cultural political claims might still be compatible with a more robust 'positive' constitutionalism. Still, his analysis of how reducing the scope of government can contribute to civil peace, and his essentially economic analysis of law, suggests a belief in the efficacy of a kind of political and constitutional minimalism – especially when it comes to questions to do with the politics of recognition.

Negative constitutionalists place great emphasis on the containment of political power and on minimizing the damage government can do. This is justified according to either (i) certain fundamental 'pre-political' considerations, such as universal individual rights, the equal value of individual welfare, or the impartiality of the rule of law; or (ii) more strategic concerns to do with increasing the prospects for civil peace by decreasing the scope of governmental power. Gray has appealed to both in his various invocations of the 'paradox of the Hobbesian state'. The question is, to what extent do these justifications actually cut against the politics of recognition?

So much for the contemporary accents on Hobbesian themes. I want to test some of them below in relation to a closer reading of Hobbes's texts.

²³ Hardin, *One for All*, pp. 28–71, 223.

²⁴ Hardin, *One for All*, p. 140.

²⁵ Hardin, *One for All*, pp. 180, 216, 223; also 49–56; 74–82. People identify with groups not out of some primordial urge but because it is 'rational to do what produces a particular identification and, once one has that identification, it is commonly rational to further the interests determined by that identification'. (p. 60; see the examples discussed at pp. 53–6) We gain knowledge and experience of the world in particular settings, and the benefits of familiarity and easy communication are substantial.

²⁶ Hardin, *One for All*, p. 141; and especially pp. 77, 89–91 on the 'epistemological comforts of home'.

Hobbes on Law; Two Accounts

For Oakeshott – and Gray in his ‘post-liberal’ mode – Hobbes is above all a philosopher of the rule of law, an ideal tied closely to a particular account of the relation between the state and civil society.²⁷ Gray, however seems now to have rejected this view and adopted another stance. The best contemporary societies can hope for is, in fact, some kind of Hobbesian *modus vivendi* between distinct forms of common life. I shall take the arguments in turn.

In his postliberal mode, Gray argued that modern democratic states had ‘failed in [their] task of delivering us from a condition of universal predation or war of all against all into the peace of civil society’.²⁸ Instead, they themselves had become weapons in the war of all against all, ‘as rival interest groups compete with each other to capture government and use it to seize and redistribute resources amongst themselves’. This is nothing less than a ‘political war of redistribution’. Thus we were in a kind of ‘political state of nature’, a ‘legal and political war of all against all’. The modern state was both too weak and too large; too weak to protect the institutions of civil society and too large insofar as it has been ‘captured’ by economic and ideological interests which misdirected it from its proper interests.

Here Gray appealed to Hobbes as the great theorist of civil association. Despite the all-powerful portrait of Leviathan, Hobbes’s state was in fact limited to the task of securing the peace of civil society.²⁹ This was the ‘paradox of the Hobbesian state’. But, claimed Gray, for Hobbes civil peace meant more than merely the absence of war; ‘it encompasses that framework of civil institutions whereby men may coexist in peace with one another, notwithstanding the diversity of their beliefs and enterprises and the scarcity of means’. Civil society embraces the institutions of private property and contractual liberty, presupposes a rule of law, and is a ‘civil’ rather than ‘enterprise’ association.³⁰ The sole task of the Hobbesian state was to define and enforce property rights, and establish procedures and laws for the adjudication of conflicts over them. This limited government intervention generally, Gray claimed, since the Hobbesian state was supposed not to be interested in the redistribution of resources according to a substantial theory of justice (unlike the modern state). It should not be because disagreement and conflict over what kind of redistribution should occur disrupts civil peace. This is connected to a larger point about the rule of law. In the Hobbesian civil association, ‘all subjects possess the same liberties under the rule of law’ (which include the freedom of occupation, conscience, contract, and association).³¹ In fact, civil association simply is the ‘structure of law’ which allows common practitioners of different traditions, having no purpose in common, to coexist in peace.³² It is the impersonal and formal nature of this structure which enables the rule of law to accommodate political diversity. Hobbes thus becomes the defender of the

²⁷ M. Oakeshott, ‘The Rule of Law’, in *On History and Other Essays* (New York, Barnes and Noble, 1983), pp. 157–64; J. Gray, ‘Hobbes and the Modern State’ and ‘The Politics of Cultural Diversity’, in *Post-liberalism: Studies in Political Thought* (New York, Routledge, 1993).

²⁸ Gray, ‘Hobbes and the Modern State’, p. 4.

²⁹ Gray, ‘Hobbes and the Modern State’, p. 9.

³⁰ ‘Hobbes and the Modern State’, p. 10.

³¹ ‘Hobbes and the Modern State’, pp. 13–4.

³² Gray, ‘The Politics of Cultural Diversity’, p. 265. Cf. F. A. Hayek, *The Political Order of a Free People* (London, Routledge, 1979) p. 135.

'classical meaning' of the rule of law, whereas defenders of the modern state – captured by interest groups engaged in wars of political redistribution and 'projects for the protection of cultural identity' – 'degrade' and 'disfigure' the formality and impartiality of law.³³

In his more recent pluralist mode, Gray has rejected not only the Oakeshottian minimalism of much of the above, but also its blatant antipathy to 'projects for the protection of cultural identity'. Indeed, politics seems now to become nothing else but the means for 'distinct forms of common life' to coexist with others in 'Hobbesian peace'.³⁴ The appeal to Leviathan has nothing to do with an appeal to an ideal of the 'classical meaning of the rule of law' – structuring and accommodating political diversity within civil society – but simply a way of providing one among any number of grounds for a practical *modus vivendi*. The institutional forms best suited to a *modus vivendi*, argues Gray, 'may well not be the individualist institutions of liberal civil society but rather those of political and legal pluralism, in which the fundamental units are not individuals but communities'. Whether a pluralist political order is appropriate is a matter of 'time, place and circumstance'.³⁵ The only standard of assessment is 'whether it enables its subjects to coexist in a Hobbesian peace while renewing their distinctive forms of common life'.³⁶ This need not entail the presence of 'western-style' institutions of civil society, or even democracy.

Hobbes on Law; an Alternative Account

I want to provide an alternative account which challenges the above, and provides an important background for our consideration of the logic of negative constitutionalism.

If it is a fundamental distinction that the rule of law is above all a rule of *law* rather than of *men*, then Hobbes might appear to falter even here. For he infamously defines law in relation to a powerful will: 'Civil Law, is to every subject, those rules, which the commonwealth hath commanded him, by word, writing or other *sufficient sign of the will*, to make use of, for the Distinction of Right, and Wrong . . . of what is contrary, and what is not contrary to Rule'.³⁷ Law is the command – the will – of the sovereign. Moreover the tremendous power possessed by this sovereign will appear to be unchecked by countervailing conventions, constitutions, or institutions. The scope for the exercise of arbitrary power, and the general conflict between absolute sovereignty and law-likeness (i.e. the consistency and coherence of rules over time) appear fundamentally incompatible with any plausible theory of the rule of law. Indeed it is implausible as a substantive liberal theory of the rule of law, but then Hobbes was not a liberal. The point is not meant to be facetious. Rather, it is meant to direct attention to the theory that Hobbes in fact developed.

³³ Gray, 'The politics of cultural diversity', pp. 14, 265. This antagonism to group and collective rights, and legal pluralism generally, is present in other essays as well. See n.96 below.

³⁴ John Gray, *Enlightenment's Wake; Politics and Culture at the Close of the Modern Age* (London, Routledge, 1995), p. 140.

³⁵ Gray, *Enlightenment's Wake*, pp. 136, 139.

³⁶ Gray, *Enlightenment's Wake*, p. 140.

³⁷ R. Tuck (ed.), *Leviathan* (Cambridge, Cambridge University Press, 1991) ch. 26, p. 183. References to Leviathan henceforth shall be abbreviated to *L*, followed by chapter and page number.

In the state of nature, men are all independent judges of the means to preservation. Given Hobbes's general scepticism about the possibilities of intersubjective agreement on normative judgements and values, this independence of judgement only encourages disagreement and conflict, which undermines preservation itself. Thus the 'estate of man in this natural liberty is the estate of war'.³⁸

Hobbes's solution is well known, and I shall not spend any time developing it here. In the absence of natural agreement about the best means to our preservation there must be an artificial one.³⁹ That is, men must come to renounce their right to private judgement about the means to preservation and accept the judgement of a common authority. This is, as Hobbes puts it, the introduction of a 'restraint' upon their private wills, through submission to a single common will. The key point is that this rule by public will is *rule by law*. Once the commonwealth is settled 'then are [the laws of nature] actually laws . . . as being then the commands of the commonwealth; and therefore also civil laws; for it is the sovereign power that obliges men to obey them'.⁴⁰ So in the peculiar example Hobbes provides of who shall judge on the occasion of a 'strange and deformed birth' whether it 'be a man or no', he states emphatically that it shall not be decided by 'Aristotle, or the philosophers' but 'by the laws'.⁴¹ Nor should 'private men' (without the authority of the commonwealth) interpret the law 'by [their] own spirit'. The power of interpretation and explanation rests with the sovereign.⁴² Private judgement about the particulars of law only encourages disagreement and dissension.

The state of nature is effectively (if not strictly) a lawless condition, given that there is no common power able to enforce the dictates of the law of nature. A state of nature can exist when a government is faced by an effective countervailing claim on its sovereignty (e.g. as when challenged by rebels, or by the assertions of sovereignty by other institutions *within* the commonwealth), since subjects must then use their private judgement to decide whom to obey, and are subject to all sorts of seditious doctrines which lead them to question the existing public will.⁴³ Note that this appears to rule out the institutional checks and balances usually associated with liberal constitutionalism, particularly the separation of powers.⁴⁴ Divided sovereignty is out the question according to Hobbes, since it simply gives more scope for disagreement amongst those with real power, and thus breeds civil unrest. Also, given the nature of the sovereign's task – to secure peace – he needs all the power and ability available to do so.⁴⁵

³⁸ F. Toennies (ed.), *The Elements of Law Natural and Politic* (London, 1928), pt 1. ch. 14. para 11.

³⁹ *L* 17, 226.

⁴⁰ *L* 26, 314.

⁴¹ Hobbes, *Elements*, 2.10.8.

⁴² *L* 46, 700–1.

⁴³ Hobbes is extremely sensitive to the malleability of people's beliefs; see *Elements*, 2.10.8, and below.

⁴⁴ See *L* 26, 313; 29, 367.

⁴⁵ See *L* 18 passim. This includes the power to make laws, vet the teaching of doctrines, appoint officers, decide and apply punishments, raise taxes, and oversee economic policy; see *L* 24 passim; R. Tuck *Philosophy and Government: 1572–1651* (Cambridge, Cambridge University Press, 1993), pp. 308–9.

So the transfer of right which establishes the commonwealth appears to be very one-sided.⁴⁶ In instituting the commonwealth, i.e. by authorizing a sovereign representative (who is not himself subject to any covenant), subjects are in the fact the author 'of all the actions, and judgements' of it. Since he is authorized to act on their behalf for their protection, whatever the sovereign does for their protection he has a right to do.

Subjects need to see the connection between obedience and the protection offered by the 'Common Power', and accept the consequences. And the sovereign must recognize it too, insofar as it is the obedience of his subjects which literally enables him to 'do his office'.⁴⁷ So if a sovereign governs badly, if he makes life miserable for his subjects by starving them or over regulating their lives, he may provoke disobedience (however unjustified), and by encouraging 'intestine disorder' weaken the state and leave it vulnerable to attack.⁴⁸ The *sovereign* then, is dependent upon those who are dependent upon him. Hobbes makes this explicit: 'When . . . our refusall to obey, frustrates the End for which the Sovereignty was ordained; then there is no liberty to refuse: otherwise there is'.⁴⁹ Moreover, since no one can ever covenant to kill himself, a subject can resist a sovereign, or any of its agents, who tries to kill him, *even if* the sovereign is within his rights to do so. So the writ of the public will extends only as far as its end – maintaining authority in order to secure civil peace. This still requires a substantial amount of political power. The limits on this power hardly amount to a substantial set of rights for subjects, individually or collectively.

If the laws of a commonwealth are the commands of a sovereign – a public will – and the substantive end of a commonwealth is civic peace (which secures self-preservation), then what is it that laws do? Collecting together the different references to law in the *Leviathan*, they are said to bind, restrain, constrain, scare, punish, oblige and direct.⁵⁰ So the law binds or restrains people *from* acting as well as obliging or directing them *to* act. Moreover, the power to make laws is part of the authority granted to a sovereign to 'forme the wills' of subjects to 'peace at home and mutual ayd against their enemies'.⁵¹ So a simple declaration that Hobbes has a 'negative' or 'instrumental' account of law will not do. In fact, in addition to the many different discussions of law, Hobbes provides us with a definition of a *good* law. A good law is not a 'just' law, since no law can be unjust (i.e. no command of the sovereign can be unjust), but that which is '*Needfull, for the Good of the People, and withal Perspicuous*'. It is 'needfull' for the Good of the people since it is not meant to 'bind the people from all Voluntary actions; but to direct and keep them in such a motion, as not to hurt themselves by their own impetuous desires, rashness, or indiscretion'. This is the 'true end of a Law'.⁵² Thus punishments are not about the 'discharge of choler', but 'the correction, either of the offender, or others by his

⁴⁶ But not completely so. The laws of nature apply to the sovereign as well. The crucial difference is that this is between the sovereign and God, and not his subjects.

⁴⁷ T. Hobbes, Ferdinand Toennies (ed.), M. M. Goldsmith, 2nd ed., *Behemoth or the Long Parliament*, (London, Frank Cass, 1969) 144.

⁴⁸ L 21, 272; 27, 345–6; 11, 162; 29 passim.

⁴⁹ L 14, 199; 21, 268–9.

⁵⁰ L 14, 200; L 17, 223; L 18, 238; L 26, 315; L 26, 334; L 30, 388–9; L 42, 591.

⁵¹ L 17, 227.

⁵² L 30, 388.

example'.⁵³ Likewise, rewards must be applied so as to benefit the commonwealth, and be distributed efficiently to encourage public spiritedness rather than to pay off threatening individuals or groups.⁵⁴ A law is perspicuous when its justification and meaning is clear, reducing the 'multiplication' of meanings and thus contention and civil conflict. Though a sovereign might have every right to promulgate comprehensive laws covering every aspect of human conduct, Hobbes recommends a rather limited legislative agenda. Indeed good laws are contrasted with 'unnecessary laws', which are 'traps for Mony', superfluous, and usually inefficient.⁵⁵

Since protection is the 'very essence of Government'⁵⁶ then any activity not forbidden in the commonwealth is, in a sense, authorised by the Sovereign. 'If the state give me leave to preach, or teach', writes Hobbes, 'that is, if it forbid me not, no man can forbid me'.⁵⁷ This is not to say that the sovereign subjects each activity (or possible activity) to minute legislative review, however much this might be possible in theory. Since 'protection' means more than a 'bare preservation', it is in the interest of the commonwealth that its subjects should be secure enough to live reasonably well and pursue their own interests compatible with the preservation of civic peace.⁵⁸ The liberty left to subjects should be as much as possible 'without hurt to the public'.⁵⁹ This is, as Hobbes puts it, a '*lawfull* Liberty' (my emphasis).⁶⁰ And so it is 'absurd' for men to demand liberty 'if we take [it] for an exemption from Lawes', since this would be a demand for the liberty of others 'to master their lives'.⁶¹ The *liberty of subjects* lies in those things which, in regulating their actions, the sovereign 'hath praetermitted; such as the Liberty to buy, and sell, and otherwise contract with one another; to choose their own abroad, their own diet, their own trade of life, and institute their children as they themselves think fit, & the like'.⁶² There is at least one practical reason why Hobbes talks of a sovereign authorizing or allowing actions in this way. Concerned as he was with the 'government of Doctrines' and their effect on popular opinions about sovereignty and political power, the sovereign needs the ability to regulate 'the conduits' through which they are promulgated in any number of ways.⁶³

Still, as much as there is discussion of law 'directing' men to conduct themselves according to the public good, how exactly does it work? Is it simply a case of adjusting the payoffs attached to individual strategic behaviour, as game theorists have assumed? Generally Hobbes speaks of law directing men in three ways. Firstly, the force of a law is tied to a superior understanding of what is in an individual's best interest. A rational individual will *ex hypothesi* recognize

⁵³ L 30, 389.

⁵⁴ L 30, 390–1.

⁵⁵ L 30, 388.

⁵⁶ L 21, 270.

⁵⁷ L 46, 701.

⁵⁸ L 19, 241–2. The 'temporal good' of the people is defined along reason of state lines in *Elements*, 2.9.3.

⁵⁹ *Elements*, p. 141.

⁶⁰ L 46, 701.

⁶¹ L 21, 264; i.e. the liberty enjoyed in the state of nature – L 13, 184–5.

⁶² L 21, 264.

⁶³ L 18, 236; L 42–3 passim; 1 47, 709–10. See also *Behemoth*, pp. 56–9. See N. Malcolm, 'Hobbes and Spinoza', in Jimmy Burns (ed.), *The Cambridge History of Political Thought 1450–1700* (Cambridge, Cambridge University Press, 1991), pp. 543–4.

obedience to such a law as in their best interest.⁶⁴ A second way in which laws can direct individuals is the part they play within a structure of governmental actions brought to bear on the population of a state. Laws concerning the teaching of doctrines, for example, can affect the values and interests people have in the first place. This need not involve explicit legislation mandating certain opinions, but concern the conditions within which they are learnt.⁶⁵ Thirdly, given the short sightedness and desire-driven nature of human beings, laws provide incentives through sanctions for people to override immediate interests for their longer-term benefit.

Hobbes makes it clear, often enough, that ‘the passions of men, are commonly more potent than their Reason’.⁶⁶ And that the force of legal and political obligations, given man’s nature, are strengthened when the ‘Feare of the consequences of breaking [the covenant from which political obligations are derived]’ is prevalent and effective. Indeed, fear is ‘The Passion to be reckoned upon’ to ‘forme the wills’ of subjects.⁶⁷ As Hardin suggests, the legal and political order for Hobbes is justified holistically; if everyone prefers *some* kind of government to anarchy then any private judgement that some alternative system would be better is overridden by the costs of reform or revolution (i.e. going through a state of nature to get to a new set of arrangements).

Hobbes is aware, however, that fear alone can not ultimately provide for a stable and secure commonwealth, since the state can not always effectively deter those who are determined to cause ‘intestine disorders’ whatever the consequences.⁶⁸ Hence the importance of the ‘well-government of opinions’ (especially opinions about where sovereignty lies), in which ‘consisteth the well governing of mens Actions in order to their Peace, and concord’.⁶⁹ If men are ‘remissly governed’ in this regard, they will be prepared to take up arms to defend their subversive opinions; they ‘live, as it were, in the procincts of battaile continually’.⁷⁰

Good government, then, necessarily involves a degree of (re)socialization and encouraging the internalization of the norms of virtuous behaviour, defined by Hobbes as actions conducive to peace.⁷¹ The question is, to what extent? Are men completely converted to a new standard of behaviour? The connection between authorization and conversion has sometimes been construed in almost science-fiction terms.⁷² Subjects must give up their short-term judgement as to what is best for their preservation. The only way this can be ensured is if people reason properly about their long-term interests, that is, according to the sovereign’s standard of rationality. Put so starkly (in part because of an over-emphasis on Hobbesian reasoning *in every instance* being an expected-utility

⁶⁴ See Q. Skinner, ‘Thomas Hobbes and the proper signification of liberty’, *Transactions of the Royal Historical Society*, 40 (1990) 135; J. Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge, Cambridge University Press 1980) pp. 44–8.

⁶⁵ As even a ‘neoclassical’ subjective welfarist reading of Hobbes admits; see Ferejohn, ‘Must preferences be respected in a democracy?’, pp. 236–7.

⁶⁶ *L* 19, 131; also *L* 29, 221–2.

⁶⁷ *L* 14, 99; *L* 17, 120–1; *L* 21, 147–8; *L* 27, 206–7; *L* 28, 215–16.

⁶⁸ *L* 47, 478.

⁶⁹ *L* 18, 125. Also, *Behemoth* p. 144.

⁷⁰ *L* 18, 125.

⁷¹ *L* 16, 111.

⁷² As in J. Hampton, *Hobbes and the Social Contract Tradition* (Cambridge, Cambridge University Press, 1986), pp. 208–20.

calculation), the only way this can seemingly occur is if they are literally transformed into a new type of being, or have a microchip surgically implanted in their brain. Despite the plausibility of the latter possibility to many mid-Western Americans these days, this *reductio* is meant to discount the conversion hypothesis.

We do not, however, need to turn to the plotlines of the 'X-files' to see the plausibility of some aspects of the conversion hypothesis. It is plausible if good government produces some kind of internal restraint in subjects, namely, that they choose amongst actions in a particular way according to a certain form of reasoning. The kind of wayward behaviour Hobbes was concerned with was a conflict of rights to do with preservation. No one has a right to break the sovereign's laws unless it has directly to do with self-preservation, and not just any set of human wants or expected-utilities.⁷³ Remember that Hobbes speaks of a 'real unities' or union when presenting his authorization argument.⁷⁴ Authorization involves giving up '*my right of governing myself, to [the sovereign]*', which is to subordinate oneself to his (or its) right reason – i.e. law. Fear forms the wills of subjects and holds them to the 'artificial chains' of civil law, in the sense that subjects, if rational, will feel themselves literally bound by the laws to perform their duties. But we know that, often enough, the connection between protection and obedience is lost amongst doctrinal and ideological conflict. Passions can override the kind of reasoning Hobbes wants people to engage in when faced with the threat of punishment.⁷⁵ And Hobbes recognizes this explicitly. The 'terror of legal punishment' is not always effective at making clear the 'grounds of these rights of sovereignty'.⁷⁶ So even for threats to be effective, subjects must come to have the right opinions about the consequences of their actions.⁷⁷ If they are to avoid the 'procincts of bataille', subjects will have to engage in a form of reasoning which makes certain norms salient to them. Hobbes is pessimistic about the chances of this occurring – commonwealths might at best only ever be a 'craie building' as opposed to a 'firm and lasting edifice'⁷⁸ – but that is a separate issue. The artificial chains of civil law, and the arts of government generally, must socialize individuals in particular ways if the threat of political disorder is to be minimized.

Law, Politics and Negative Constitutionalism

I have defended the claim, then, that Hobbes does have something of a theory of the rule of law. However it is not, as Gray insists, concerned with the preservation of the liberty to 'opt to explore an inherited form of life, or migrate across traditions to a chosen lifestyle' *as you wish*.⁷⁹ In fact, for Hobbes, customary law and/or practices survive entirely at the discretion of the sovereign.⁸⁰ The ability of groups to reproduce themselves through adherence to distinctive doctrines and beliefs is entirely dependent upon the judgement of the sovereign according

⁷³ Cf. D. Gauthier, *Morals by Agreement* (Oxford, Clarendon, 1986).

⁷⁴ L 17, 120.

⁷⁵ L 19, 131; the 'understanding is by the flame of Passions, never enlightened, but dazzled'.

⁷⁶ L 30, 232.

⁷⁷ See also Hobbes, *Behemoth*, p. 181.

⁷⁸ L 29, 221.

⁷⁹ Gray, 'The Politics of Cultural Diversity', p. 265 (emphasis added).

⁸⁰ L 26, 184–5; L 24, 172. See n. 95 below.

to their consequences for maintaining civil peace.⁸¹ Even more to the point, Gray (in his Oakeshottian mode) was simply wrong to insist that the Hobbesian state is (i) 'not in the business of distributing resources to its subjects' and (ii) only concerned to establish practices and conventions which govern the acquisition and transmission of property rights.⁸² The state *is*, in fact, responsible for providing resources to its subjects beyond establishing a framework for property rights.⁸³ The sovereign did have to be careful not to pursue policies that antagonized sections of the commonwealth enough to provoke (unjustified) rebellion, or act inequitably, but this still allowed a tremendous latitude of action for interference in the lives of subjects.⁸⁴

My account of Hobbesian law also suggests a different emphasis than a recent interesting argument made by Philip Pettit, in the course of defending an account of republican negative liberty. For Pettit, Hobbes misses an important connection between liberty and law insofar as he thinks literal non-interference is a necessary and sufficient condition for liberty. If literal non-interference is to be realised no matter how, argues Pettit, then law will be inimical to it, even if a necessary evil of sorts. If law does increase liberty by inhibiting the interference of others, it does so only contingently. Pettit's law-liberty test tells us then that for Hobbes, the 'relation between law and liberty is a purely extrinsic one . . . the law is not particularly fitted to the promotion of liberty'.⁸⁵

However, instead of missing the 'intimate connection' between liberty and law, I have argued that Hobbes does in fact make a connection of some intimacy, though the emphasis is less to do with liberty than civic peace. The liberty of subjects in a commonwealth is explicitly a 'lawful liberty', and thus law helps constitute, or in more Hobbesian terms, 'forme' the wills of subjects, however much it depends, somewhat paradoxically, on the extent to which the sovereign 'has prescribed no rule'.⁸⁶ The point here is that in being free one is still free to do what one wants without external interference, but that what one wants, in certain crucial respects, is changed by being part of a commonwealth and living under its laws.⁸⁷

There remains, however, consideration of an important aspect of Hobbesian law which Gray does touch upon – in both his 'postliberal' and 'pluralist' guises – and that brings us back to the general concern with negative constitutionalism.

⁸¹ Cf. Gray, 'Hobbes and the Modern State', p. 9.

⁸² Gray, 'Hobbes and the Modern State' pp. 10–11.

⁸³ See *L* 30, 239. The sovereign also had the right to collect taxes without consent; see *L* 30, 238–9.

⁸⁴ See *L* 30, 237.

⁸⁵ Pettit, 'Negative Liberty', p. 28.

⁸⁶ *L* 21, 152.

⁸⁷ Paradoxically, this can be understood as a *defence* of the freedom of conscience rather than a contradiction of it. Hobbes argues that 'There ought to be no Power over the Consciences of men, but of the World it selfe, working Faith in every one, not always according to the purpose of them that Plant and Water, but of God himself, that giveth the Increase . . . it is unreasonable in them, who teach there is such danger in every little Errour, to require of a man endued with Reason of his own, to follow the Reason of any other man, or of the most voices of many other men . . .' (*L* 47, p. 480). This reinforces the point made earlier about the need for Leviathan to police the teaching of doctrines. But as Brett points out, if Hobbesian subjects subject themselves to restraints on their natural liberty and act justly, then they possess virtue, and the rationale for an omniscient sovereign is gone. See Annabel Brett, *Liberty, Right and Nature; Individual Rights in Later Scholastic Thought* (Cambridge, Cambridge University Press, 1997), p. 234.

Gray, at least in his postliberal moments, has argued strongly for the withdrawal of government, and the 'politics' that accompanies it, from large spheres of social life. Many others continue to do so.⁸⁸ The rule of law is invoked as a principled mediator between the domains of law and politics, and if meant not to dethrone politics, then at least to contain it, and to do so by restricting the extent to which the coercive powers of the state can be put to use for any purpose beyond those strictly required for the protection of civil society.⁸⁹ Hardin's concern with the perverse effects of coordinating power presents a similar but more complex case, since it is not explicitly 'anti-political' in this sense. However, he too argues that since governments can discriminate on jobs and other opportunities (they need not, but can), groups seek to control it or carve responsibilities from it. One reason for reducing the scope of government, then, is to reduce the value of controlling it; if group activity does not pay then people get diverted to other more benign pursuits, like the pursuit of individual economic well-being.⁹⁰ Dworkin's distinction between a forum of principle and the domain of politics is also relevant. Though it is not about the desirability of state intervention *tout court*, his concern is to minimize the extent to which proper consideration of constitutional principles are contaminated by 'politics'.

There is a sense, however, in which Hobbes saw the paradox of such anti-political sentiments in a way that many of these contemporary theorists do not. For Hobbes, to overcome 'contention, enmity, and war' and establish a commonwealth, men must renounce their right of nature and authorize a common authority and arbitrator. He has to convince people that what used to pass for politics, or what some say politics should be about, is dangerous and not worth having. And this is clearly a task of political persuasion:

in a Monarchy [as opposed to a 'Popular State'], [the] way to obtain praise, and honour, is shut up to the greatest part of Subjects; and what is a grievance, if this be none? Ile tell you: To see his opinion whom we scorn, preferr'd before ours; to have our wisdom undervalu'd before our own faces; by an uncertain tryall of a little vaine glory, to undergoe most certain enmities (for this cannot be avoided whether we have the better, or the worse); to hate, and to be hated, by reason of the disagreement of opinions; to lay open our secret Counsells, and advises to all, to no purpose, and without any benefit; to neglect the affairs of our own Family; These, I say, are grievance.⁹¹

⁸⁸ Public choice theorists remain, perhaps, the most sophisticated practitioners of the attempt to decouple government from the delivery of most public goods, in part to 'depoliticize' the process by substituting the distributive power of politicians with that of the market. See Geoffrey Brennan, 'The Contribution of Economics', in Robert E. Goodin and Philip Pettit (eds), *The Blackwell Companion to Political Philosophy* (Oxford, Blackwell, 1993), especially at pp. 147–54.

⁸⁹ Again, in his most recent writings, he has changed tack. Gray now castigates contemporary liberalism for 'hollowing out' the political realm, and supplanting politics with 'liberal legalism' (see Gray, *Enlightenment's Wake; Politics and Culture at the Close of the Modern Age* (London, Routledge, 1995) pp. 6, 76–8).

⁹⁰ Hardin, *One for All*, p. 227–8.

⁹¹ T. Hobbes, H. Warrender (ed.), *De Cive*, (Oxford, Clarendon, 1983), 136; L 25, 181–2. The anti-humanist context of this passage is crucial for understanding what Hobbes is doing here (and elsewhere). See Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge, Cambridge University Press, 1996), pp. 285–93.

Such is Hobbes's distaste for the humanist-inspired politics of 'democraticall gentlemen' and Presbyterians.⁹² The renouncing of private judgement over controversial matters in civil society is meant to reduce the opportunity for such 'enmities' to arise. The paradox is that Hobbes must convince people of the corruption and danger of their contemporary politics by counterpoising a vision of the Leviathan which cannot be but political itself. And Hobbes knows it, as is evident from his attempt in the *Leviathan* to harness the powers of humanist rhetoric – which he had previously vehemently rejected – to his scientific case for a properly constituted commonwealth.⁹³

My point has to do with recognizing the justificatory challenge posed by the deep social and political diversity of contemporary politics. The need to protect civil society, the economy or indeed government from 'politics' has to be justified against a background of agreement about the need for such protection, and what the proper function of government actually is (or should be).

Limiting the scope of government (and thus the damage it can do) is one way of diluting the incentives for particular groups to seek constitutional recognition or amendment as a means of protecting or enhancing their particular ends. However the challenge of pluralism means that there is a crucial question as to just who *The People* are and in whose name *the* government is supposed to act. This is precisely what claims for recognition by national and cultural minorities within and between states press against; how the will of a diverse political community is formed and thus the ends to which political power will thereby be directed. The manner in which we answer questions about the nature of The People affects our attitude toward the scope and limits of government. So long as questions concerning the nature of The People and the proper scope of government are controversial, the boundary between the legal and political form of the constitution remains porous. Thus the distinction between negative and positive constitutionalism becomes less and less perspicuous.

It is not that constitutional consensus or agreement over such matters is impossible. The strategy of pursuing a minimal negative form of constitutionalism is no more immune from the challenge of pluralism than any other, and thus is radically incomplete. We cannot invoke the rule of law and its end as a guarantor of civil peace in order to *rule out* claims associated with the politics of recognition, since the rule of law as a constitutional principle itself requires reference to the will of the people, which necessarily involves confronting questions raised by the politics of recognition. There is no escaping the need to attempt to justify to each other, from a variety of complex vantage points and different world views, the grounds for exercising political power in relation to some conception of the public good, given pluralism. Declaring *a priori* that certain claims – like 'projects for the protection of cultural identity' – degrade and disfigure the impartiality of constitutional rules betrays a serious lack of understanding about the consequences of pluralism for complex political communities today. For it is precisely these types of claims with which our politics must increasingly struggle, and most importantly, do justice to.

Perhaps it was realizing this that moved Gray to drop his Oakeshottian sympathies and embrace a purer form of *modus-vivendi* pluralism. Pluralism for Gray now needs to be decoupled from liberal principles and democracy entirely

⁹² See *Behemoth*, pp. 155, 144.

⁹³ Skinner, *Reason and Rhetoric*, ch. 9–10, and Conclusion.

if it is to escape the way in which modern liberals ‘trivialize’ late-modern value-pluralism.⁹⁴ But here too he misses an important aspect of the Hobbesian story. I noted above that for Hobbes the ability of groups to maintain and reproduce themselves, and live according to their own norms and practices, was entirely dependent on the judgement of the sovereign as to their consequences for maintaining civil peace.⁹⁵ So Hobbes is no defender of the open-ended pluralism favoured by Gray, who defines a pluralist regime simply as one that ‘enables its subjects to coexist in a Hobbesian peace’ while renewing their ‘distinctive forms of common life’ in any number of ways according to time, place and circumstance.⁹⁶ But even Hobbes thought there needed to be *some* content to the terms of social cooperation, and not just whatever engenders peace, since otherwise the ‘crasie building’ of the commonwealth will crumble. And if that is the case, then there is no avoiding saying something about the values to be upheld – plural though they may indeed be – by such an arrangement. How else can we distinguish a *modus vivendi* from simply an accommodation to the status quo, or to the entrenchment of inequality and the facts of power both within and between distinct forms of common life? Furthermore, what assumptions are being made about the nature of political and cultural identities and the ways in which they intersect and overlap with each other in complex late-modern political communities? Whatever the failings of contemporary liberal theory for not taking pluralism seriously enough, that Gray is so uninterested in these questions betrays the limits of the pluralism he espouses.

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⁹⁴ Democracy, if it is justifiable, is just ‘a convenient device whose usefulness turns on its contribution to peace and the renewal of valuable forms of common life’ (Gray, *Enlightenment’s Wake*, p. 140).

⁹⁵ See Hobbes’s views on civil and political associations or ‘Bodies Politique’ (discussed in *L 22*): ‘In Bodies Politique, the power of the Representative is alwaies Limited: And that which prescribeth the Limites thereof, is the Power Sovereign’ (*L 22*, 155–6). It follows that Oakeshott’s claim that Hobbes’s *Leviathan* is a *societas* rather than a *universitas*, where the former is characterized (in part) by the tolerance of associations which are ‘eccentric’ or ‘indifferent to the pursuit of the purposes of the association’ and which require no authorization, is also fatally undermined. Cf. *On Human Conduct* (Oxford, Oxford University Press, 1975) pp. 201–5.

⁹⁶ *Enlightenment’s Wake*, p. 140. But compare an earlier essay by Gray, published in the same volume, wherein he argues that a ‘stable *modus vivendi*’ (the qualifier is significant) requires a ‘common stock of norms and conventions’ or even a common culture or nationality (pp. 29, 24). The kind of diversity that is ‘incompatible with civil society in Britain is that which rejects the constitutive practices that give it its identity ... [such as] the rule of law. Cultural traditions that repudiate these practices cannot be objects of toleration for liberal civil society in Britain or anywhere else’ (p. 25, emphasis added). Any attempt ‘to give legal force’ to different group views or practices is ‘likely further to fragment us, and to evoke intolerance among us’ (p. 21).