PART ONE
Introduction

1 Generality, law, and politics

Social sciences analyze the relationships between and among persons, groups, and organizations. This inclusive definition incorporates economic, legal, political, and social interactions. In ordinary market exchange, the individual is simultaneously a demander and supplier, a buyer and seller. In social arrangements, the person may be both a care giver and a care receiver, a lover and a beloved, a gift taker and gift giver, a friend and a befriended. By comparison, in law and in politics such reciprocity need not be present. The individual is subject to the law, but he may or may not be a member–participant of the organized entity that makes–changes or enforces the law. In fiscal politics, the individual is subject to the coerced exaction of taxation and to the possible nonexclusive benefits of governmental programs, but he may or may not be a member–voter–participant in the collectivity that makes basic political choices. In either of these cases, in which the individual is subject to but not a participant in the process, reaction rather than explicit reciprocation describes behavior.

Our concern in this book is exclusively with those structures of social order that qualify as "democratic" in some ultimate participatory sense. We shall not analyze the relationships between individuals and an externally existing maker–enforcer of law and political authority. Critics may suggest that the authority of convention and tradition, especially in law, places any subject–person in a position that is not different, in kind, from that which is present under externally imposed rules. But the individual, as a participant in a continuing process, also plays some part in constructing the order itself. There is no basis for a classification of persons into the two permanently defined sets of subjects and rulers. In another sense, of course, the individual remains always subject to the law and to political dictates, no matter what the degree of participation. Nonetheless, "democracy," defined in terms of potential access to participation in decision structures, remains categorically different from "nondemocracy." The democratic proviso implies that each person has a voice, actual or potential, in making, changing, and enforcing the law and in generating political action under which persons, groups, and organizations behave. But membership and potential participation, as such, do not imply equality either in influence on collective choices that are made or on the separate impact of these choices on persons. The normative argument for equality along these dimensions must be based on the rational choices of members–participants themselves.

A. Are rules discovered or made?

At this point, it is necessary to make a critical distinction between two competing presuppositions as to what law and politics are – a distinction that is related to, but somewhat different from, the conflict of visions noted in the Preface. The first, which has been called a *truth judgment* conception, basically understands and describes the

activity of constitutional law and politics in a metaphor of discovery. That which is to be found exists independently of the process through which it comes into cognition. Persons, as members of an organized community, live together under a set of rules, under laws, and also under political–collective structures. But what brings these laws, these structures, into being? In this conception, political discourse involves a search for the "good" and the "true" for the community. And the putative claim that some members of the group are more qualified to discern the good, the true, and the beautiful is almost impossible to refute in that metaphorical setting. Surely, if that which is good exists only to be found, we must acknowledge that there may be experts whose discovery talents are relatively superior.

Note that, in this truth judgment conception, there is little or no basis for democratic equality in either of the senses mentioned. If there are members of the community who do, in fact, possess relatively superior skills in discovering that which is good, legitimately these members can be allowed relatively greater influence over any final determination. And, if that which is good for the community does, indeed, exist independently of the process of discovery itself, there seems to be no logical linkage between goodness and the distribution of effects among all of the community's members. The fundamental idea, and ideal, of measured democratic equality is self-contradictory in this setting, despite the observed juxtaposition of the discovery metaphor and the participatory ideal in the thinking of so many modern philosophers.

The opposing contractarian conception of law and politics is based squarely in the rejection of any claim that the institutions and the policies that are good for the community are "out there" waiting to be discovered by experts or anyone else. The rules for living together – the basic law and political structure – are, quite literally, made up or created in some participatory process of discussion, analysis, persuasion, and mutual agreement. In this conception of social order, the constitution, inclusively defined, emerges from agreement among those who must abide by the constraints contained within it. The constitutional stage, which involves both law and politics, is understood and described best in terms of an exchange of agreements among participating members of the community. Persons agree to constraints on their own liberties in exchange for comparable constraints being imposed on the liberties of others. The metaphor is that of a social contract. And agreement itself serves as the criterion for goodness or truth.[1] That rule or political action that is good for the community of persons is defined by that option upon which agreement is reached rather than some imagined correspondence with an independently discoverable object of community search.

Note that both the role of the expert and the place of participation become quite different from those implied in the discovery conception. There is, quite simply, little for an expert to discover in a setting where agreement itself signals success. The putative expert is forestalled from making claims to define that which is best for others. The informed observer can, at best, assist in the ongoing dialogue among participants by clarifying and articulating arguments. At this juncture, contractarian discourse finds common ground with the efforts of those philosophers, like Habermas (1983) and Ackerman (1980), who emphasize the relevance and importance of dialogue among participants.

Participation itself also occupies a categorically different place in the stylized contractarian process from that occupied in the truth judgment model. In the latter, participation as such is not important. What reason is there for every member of the community to participate in the discovery of that which exists independently of the process? Only to the extent that a many-person search offers greater assurance of ultimate success in finding the grail can universal or even extensive participation be defended. In contrast, at least as stylized, participation is the *sine qua non* of the contractarian enterprise. The exchange metaphor is convincing. How could exchange take place without participation of the traders? The expression of agreement to the terms of an exchange becomes the necessary criterion for legitimating the result.

As adherents of the contractarian conception, we acknowledge the difficulties in bridging the gap between the stylized model of the agreement process and the political–legal reality that may be observed. Persons find themselves as members of politically organized communities, and they have no sense of having participated in any explicit contract with others on the shape and form of the political–legal structure to which they are subjected. In this respect, there would seem to be relatively little difference in attitudes toward allegedly democratic structures and those that might be known to have been imposed by external authority. We suggest, nonetheless, that the justificatory enterprise becomes quite different in the two cases. Those who would mount a defense of existing constitutional structure can easily present an argument drawn from the truth judgment or discovery metaphor. "That which exists is that which is in the community's best interest, as chosen by the wisdom of the sages or the ages." To the contractarian the question posed is: Could the existing set of rules have emerged from the agreement among all parties who are currently subject to them? Or, in individualistic terms, the proper question is: Could I have agreed to the set of rules that the existing political–legal structure represents?

In approaching these questions, either as an individual or as an assessor of constitutional order, there must be a bias toward affirmation rather than rejection, if for no other reason than existence and historical development – the basis, of course, for traditional conservative evaluation. Assent is more than acquiescence, at least to the extent that an exit option exists. Perhaps it is incumbent upon the critic to treat that which exists as "relatively absolute absolutes" (Buchanan, 1989). But such bias does not equate with making current rules sacrosanct and beyond ultimate critical inquiry. And in such inquiry it is appropriate to raise the central contractarian question. Could the ordered arrangements that exist reflect agreement for all members of the body politic?

B. The uses of the veil

The contractarian enterprise is necessarily individualistic at least in a foundational sense. But who are the stylized contractors? How are the parties to the political–constitutional exchange to be described? The potential objects of agreement are constraints on the liberties of personal behavior – constraints that, presumably, will be mutually beneficial to all parties. If initially, however, persons and groups are in putative possession of endowments and goods that are differentially valued, there

would seem to be differential interests in any exchange, thereby making agreement difficult if not impossible.

At the most basic constitutional level, however, the absence of agreement implies the absence of social order. No person is secure in any claim to value. It is precisely this imagined setting that led Thomas Hobbes (1943/1651) to develop his direful argument in support of the personal surrender of liberties to sovereign political authority as the only means of escape from the anarchistic war of each against all. In contraposition to Hobbes, John Locke's metaphor for the justificatory origins of political order emerged in a more stable historical epoch. Locke (1955/1689) advanced the empirical proposition to the effect that persons enter into potential political agreements already endowed with mutually acknowledged natural rights to person and property. Locke did not answer the Hobbesian question; he simply assumed that it did not arise. Political order finds its legitimacy in natural rights, the recognition of which serves also to limit the range and extension for political authority.

Elements of both the Hobbesian and the Lockean metaphors remain present in modern attitudes toward the legitimacy of existing political order in Western democratic regimes and the structure of individual claims to liberties under those regimes. But neither of these constructions, nor any combination, seems sufficient to sate the modern demand for justificatory argument. Some criterion over and beyond either the dominating motive of personal security or the presumed existence of recognized natural boundaries is needed if the ultimate legitimacy of political coercion is to be established.

Quite apart from any estimate of relative economic position, any potential participant would ideally prefer the imposition of restrictive rules on the behavior of others while remaining at liberty to follow or not to follow rules (Buchanan, 1975a). But each participant will also recognize that others will agree to impose constraints on their own behavior only as a part of a reciprocal "exchange." In this preliminary sense, reciprocation itself implies generality. Constraining rules that emerge from general agreement will tend to be *general* in application. Rules that apply to others must also be applied to one's own behavior. With relative positions clearly identified, however, different participants may place differing evaluations on alternative sets of rules, and agreement may be impossible.

The veil of ignorance and/or uncertainty offers a means of bridging the apparent gap between furtherance of separately identified interests and agreement on the rules that conceptually define the "social contract." Potential contractors must recognize that the basic rules for social order – the ultimate constitutional structure – are explicitly chosen as permanent or quasi-permanent parameters within which social interaction is to take place over a whole sequence of periods. This temporal feature, in itself, shifts discussion away from that which might take place among fully identified bargainers and toward discussion among participants who are unable to predict either their own positions or how differing rules will affect whatever positions they come to occupy. Participants may be led to examine rules from behind a "veil of ignorance" (Harsanyi, 1955; Rawls, 1971) or "uncertainty" (Buchanan and Tullock, 1962) on some presumption that identification is impossible. Criteria of fairness may replace those of advantage; agreement may emerge as the predicted working properties of alternative sets of rules are examined.

It is important to understand how and why the veil of ignorance/uncertainty places severe restrictions on the arguments in discussions among potential contracting parties – discussions that may generate some convergence toward agreement. By necessity, the person who advances an argument in support of one particular rule (or set of rules) must invoke criteria that take on elements of general or public interest. An argument may claim that this or that rule is indeed in the "general" interest (as defined by the anonymity of the veil), and that such a rule is supported, not from altruism, but from the necessary coincidence between individual and general interest.

The veil of ignorance and/or uncertainty is a construction that is helpful in some ultimate evaluation of alternative rules. The construction, as such, however, does not readily allow an objectively identifiable classification of political actions that may or may not meet the abstracted generality norm. Almost any observed political action, no matter how discriminatory in effect, may be rhetorically defended on some veil-of-ignorance argument. In order to establish the generality principle operationally, it is necessary to examine its foundations more carefully.

C. Equality under law

This book has a single theme. The argument is that the generality principle be extended to politics. But extended from what? The basis for the whole discussion involves both the recognition and normative appreciation of the operation and applicability of the generality principle in law. It may be useful to examine these legal foundations for generality briefly before plunging into the analysis of politics per se.

To this point, law and politics have not been separated in our treatment of the inclusive contractarian enterprise. The fundamental concern is with the establishment of normative legitimacy of coercion on the behavior of persons who are themselves participants in the collectivity, the organized social order. At this basic level of inquiry, law becomes a component of the comprehensive political structure. A simple law that prevents my trespass on my neighbor's property is meaningful only to the extent that violations are enforceable by the authority of the state. Further, the very existence of such a law implies some prior enactment by collective agency, or at least some collective acceptance of evolving standards of private adjudication. Nonetheless, in ordinary parlance, we do not elevate the necessary political component of law to center stage. We limit the term *politics* to the explicit current actions of state agencies in changing existing laws and, primarily, to actions involving direct operation of state enterprises, broadly defined (departments, bureaus, commissions, etc.)

In some fundamental sense, the whole of the social interaction process, including the economy, is necessarily "political," because all behavior is constrained by encompassing law that must, itself, find ultimate origin in political action or at least be backed up with fundamental coercive power. But it remains useful, nonetheless, to separate the political from the private sector of interaction, thereby relegating the embodied politics of law and legal structure to the ongoing and partially decentralized activities of jurists rather than politicians. Perhaps predictably, the dividing lines between politics and law may often be difficult to maintain, both in theory and in practice. For purposes of our discussion here, however, the significant point is that

there does indeed exist a rather clear separation between politics and law when the activities are evaluated in terms of principles.

The distinction may be clarified through the introduction of a simple example. Two families occupy contiguous territories. The law of property specifies the dividing line and provides potential enforcement for violation. Each family carries on its own activity *within the law*, so long as it does not trespass. There is no politics, or political interaction, as such. Suppose now, however, that the two families share, at least potentially, in the value that might be produced by draining the adjacent meadow. There is now a necessary political relationship, whether or not it is intentionally formalized.

The very meaning of *law* implies generality in application, at least in modern democracies, and especially as legitimated by contractarian criteria. It is difficult to derive conceptual agreement on laws or rules that explicitly impact differentially on separate persons and groups. Law then becomes legitimate only if all persons could have agreed conceptually, and such agreement is most likely when all persons affected are generally and reciprocally constrained in their behavior. The law that prohibits my trespass on my neighbor's property is legitimate only because the same law prohibits her trespass on my property. Differential treatment under the operation of the law, say, on the basis of gender, age, race, religion, class, location, or political access, is to be condemned as violative of the central normative principle. To suggest that law is and must be organized on this principle of generality or equality does not, of course, carry with it any claim that the legal structure, as it operates, satisfies fully its acknowledged normative standard in this respect. It is, however, difficult to think about the practical operation of a legal structure that is not informed by the generality precept and that does not somehow embody adherence to the generality norm as an ever-present objective.[2]

The generality principle in law implies equal treatment under and by the law – equal treatment for all persons who are or may be affected by those constraints that the law defines. The principle, as such, contains no direction or implication as to the extent of behavior that is brought within the limits of the law. A social order may be described by adherence to the generality principle in legal structure even if many details of personal behavior are severely constrained. That is to say, a regime of equal liberties among all persons may or may not be a regime of extensive liberties. The intrusiveness or nonintrusiveness of law is not addressed by the generality or equality principle, as such.

D. The efficiency of generality in law

"Equal liberties under law" – we agree with John Rawls in claiming that a regime described by the presence of this condition has met the first test for contractarian justice. The contrary presence, that of "inequality under law," would not emerge from contractual agreement among affected parties, whether such agreement be actual or hypothetical. The primacy of this strictly normative argument for generality need not be challenged. But a supporting argument may be adduced – an argument that is based on efficiency in application. A legal structure that embodies equal treatment

is more efficient than one that introduces inequality. Fewer resources are required to make the structure functional.

The analysis behind this proposition is straightforward. But the discussion is made difficult by the categorically different usage of the term *efficient* or *efficiency* in some variants of the modern law–economics discourse, especially those associated with the works of Richard Posner (1972). To suggest that the generality principle enhances the efficiency of the law is quite different from saying that the generality principle in law tends to promote the achievement of economic efficiency, defined as in conventional economic theory. Indeed, the opposing claim with respect to the second argument may seem more reasonable. Generality or equality before the law may reduce rather than enhance the relative achievement of orthodox efficiency norms, especially on some presupposition of economically sophisticated jurists who might, absent the generality constraints, direct resources to relatively more productive uses.

The claim here that the incorporation of the generality principle makes for a more efficient law is limited to the institutions of legal structure; the claim has no specific spillover relevance for resource usage beyond this structure itself. By more efficient law here, we refer only to those properties of generality that facilitate the operation and administration of law itself. Clearly, a recognized standard of equal treatment allows jurists to make decisions more quickly and with less arbitrariness. Further, decisions are more predictable – a quality that, in turn, reduces investment of legal resources in information concerning practices of particular jurists.

To a considerable extent, the administration of law must be decentralized. Law exerts its effect through litigation between and among private parties, and many jurists are confronted with the opposing claims of identified litigants in separate cases. The principle of generality is the basis for *stare decisis* – the practice that allows jurists to reach decisions by reference to like cases confronted by other jurists over a long course of recorded legal history. Absent some version of generality, the central role of precedence in legal practice would be reduced to insignificance. The coherence that precedence offers to the workings of the decentralized, but interlinked, legal nexus would be lost. Almost by necessity, a legal order without some variant of the generality principle would become more centralized, with separate jurists hierarchically tiered in some attempted furtherance of those standards that would be established in lieu of the equality norm. The self-organizing features of existing legal structures that do embody the generality precept to a large extent would be lost, with major implications for overall efficacy in legal procedures.[3]

E. Law and social purpose

The sometimes hackneyed term *law and order* conveys, at least indirectly, the distinctive feature of law that makes the generalization norm more readily acceptable than might seem to be the case with politics. Law, as traditionally understood, provides a framework within which persons carry on their own separate private purposes. Laws establish and enforce the boundaries or limits on admissible behavior. The law, as such, is presumed to have as its primary purpose the facilitation of personal interaction. In this conception, there is no social purpose to the law. Law, as administered

and enforced by agents of the state, is not specifically designed to further explicitly defined social goals, whether these be maximization of economic value, full employment of the labor force, distributive justice, or harmony among organized interest groups.

Given the social purposelessness of law, as understood in this sense, the principle of equality under law (often referred to as *the rule of law*) emerges more or less naturally from considerations of both contractarian justice and efficiency. In this context, game metaphors are helpful. Law defines the rules of the social game, and elementary notions of fairness dictate that the same rules apply to all players. But note, in particular, that the generality norm here is itself defined as an attribute of fairness only because it reflects contractarian agreement. "Equality under law" – this standard is not drawn down from some externally ordered list of social purposes (or external standards of fairness) – a list that is presumed to exist independently of the preferences of the players or participants in the game itself.

If such an externally ordered list of social purposes should exist, equality under law might still survive as one among other social goals. But this principle in law would then be subject to possible trumping by other purposes that might be assigned priority. In this alternative scheme of things, the rule of law, as embodied in the generality precept, loses its pride of place. The principle cannot claim to remain the *sine qua non* of law itself.

It is interesting to observe that the generality principle has, in fact, survived despite the jurisprudential storms of the twentieth century. There have been frequent charges that law has been politicized, that modern jurists have overstepped traditional boundaries. This alleged politicization of law has, however, not often involved explicit departure from the rule of law as such in furtherance of social purpose. Instead, the politicization charges are levied against jurists who extend the range for the applicability of law beyond politically proscribed limits. That is to say, jurists are accused of usurping the role of political decision makers by making changes in law rather than enforcing law that exists while remaining within the constraints imposed by generality norms. This judicial overreaching may, of course, be motivated by social purposes. But jurists seemed to have remained reluctant to allow social purpose to subvert the constraints of generality directly, at least rhetorically. In civil rights cases, courts have often been willing to extend norms for equal treatment to interaction settings that have not, hitherto, been brought within previous interpretations of politically enacted statutes. Courts have, however, only rarely been willing to use overriding social purpose as an argument for providing support for unequal legal treatment.

F. Toward generality in politics

The widespread adherence, both in rhetoric and in reality, to the generality principle in law offers a basis for the extension of a comparable principle to politics. Equality under law informs public understanding in Western cultures. Violations of the equality norm invoke expressions of demonstrated unfairness accompanied by varying degrees of protest. Why, then, do citizens in Western democracies at the same time acquiesce in a politics that does not embody a comparable generality norm? Why is politics allowed

to discriminate overtly among separate persons and groups and without protest when law is held to nondiscriminatory standards?

These and like questions find answers in two of the features that have already been discussed in earlier parts of this chapter. Politics has been considered to be different from law because it is assigned social purpose on varying interpretations of the whole enterprise. And politics is understood by many (theorists, analysts, and practitioners alike) to be a discovery process aimed at finding the good and the true for the polity treated as some organic unit, with a tenuous relationship, at best, to expressed preferences of citizens–participants. In this conceptual interpretation of political enterprise, it would indeed be difficult to mount persuasive argument in support of the generality precept in the abstract. But explicit rejection of this interpretation–understanding is itself central to the modern contractarian construction. In the contractarian foundations for the derivation of legitimate political coercion, there is and can be no overriding social purpose apart from that which might represent and reflect values that are shared by ultimate participants in the process – values that originate only with participants and that are so understood.

For precisely the same reasons applicable to law, a politics that fails to satisfy some variant of the generality–equality norm cannot be deemed to be legitimate. Such a discriminatory politics cannot pass the contractarian test. In reflective equilibrium and behind a veil of ignorance/uncertainty, persons could never agree to the establishment of political institutions that are predicted to discriminate explicitly in their operation. The politics of discrimination would not meet the agreement criterion that defines fairness or justice. And, also importantly, such a politics would necessarily be inefficient in a resource-wasting sense.

Persons who acknowledge the social purposelessness of law may, at the same time, challenge the extension to politics. They may be unwilling to agree that politics has no "social purpose" and that politics is best understood to offer, analogous to law, a parametric framework within which persons may act to advance *their own* purposes, whatever these may be. But how can social purpose be attributed to a polity apart from some abandonment of the precept that values emerge only from individual members? And if social values do exist separately, there is little basis for democracy itself to have independent normative significance.

In the conceptualization upon which our analysis rests, politics becomes the setting for *collective action* in which persons consider it privately advantageous to undertake actions to further shared, but still distinguishable, interests. In this sense, politics, like law, is above and beyond the particularized interests that individuals may seek within the parametric limits. No definition of these interests, whether separately or jointly pursued, is needed, and, indeed, none is even possible at the level of ultimate constitutional evaluation.

As subsequent discussion in this book suggests, the most difficult issue confronted in the whole analysis involves the normative argument in support of generality at the level of postconstitutional politics. Why must the generality precept be invoked in withdrawing normative support for political action that discriminates among separate groups of citizens? Might not *some* discrimination pass muster even under some idealized veil-of-ignorance construction? The response to this question introduces