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What Good is Abstraction? From Liberal Legitimacy to Social Justice

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INTRODUCTION

The stakes could not be higher. Post-World War II political and economic institutions are under unprecedented pressure. The social coalitions that have sustained them are crumbling. Welfare-state capitalism is in retreat, and liberal institutions are besieged. Right-wing populists are cementing their power and consolidating their grip on political and legal institutions around the globe. In the United States, President Donald Trump's judicial appointments, especially to the Supreme Court, are likely to secure the ideological hegemony of the extreme Right-wing for decades to come under the mantle of the rule of law. The answer to these historical changes cannot be a return to the very *status quo* that led to them in the first place. It cannot be argued that what preceded the Right-wing populist wave was a decent social order and well-functioning political system. Instead of seeking a renewal of failed liberal formulas that underpinned a broken political system, what is urgently required is a theoretical comprehension of these

new realities in order to change them and prevent their future iterations. The scale of these dramatic transformations should be matched by theoretical transformations.

In order to have real purchase, political theory and legal theory need to provide adequate tools and frameworks for a critical response to historical conditions of human existence. The poverty of theory is an inadequate response to the increase in inequality and concentrated poverty in wealthy capitalist societies. This Article argues progressive liberal theoretical frameworks are unfit for purpose. They betray a loss of conviction and commitment to the very egalitarian ideals that progressive liberals advocate for. Specifically, this Article critiques abstraction as a mode of argumentation in political and legal theory in which there is a retreat from controversial political and moral territory to establish a consensual political regime and binding legal order. It is not a critique of abstraction—the unavoidable activity of generalizing knowledge and forming concepts (including in mathematics and art)—per se. Nor does it seek to engage in metaphysical debates about "nominalism," as in whether abstract objects and universals exist. Rather, the method of abstraction is endemic to political theory in order to establish general conclusions and to "escape the tyranny of context."[1] The critique zeros in on a specific form of abstraction given its rational failings and objectionable normative effects: namely, the kind of legal-political orders it justifies. It is an internal critique to liberal theory that illustrates that this abstraction does not meet the theory's own standards and fails to achieve its declared objectives. This methodological critique of abstraction is tied to a substantive critique of a normatively objectionable standard of legitimacy to which this form of abstraction leads.

The main family of theories that betray this lack of

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1. Chandran Kukathas, *Contextualism Reconsidered: Some Skeptical Reflections*, 7 ETHICAL THEORY & MORAL PRAC. 215, 221–22 (2004).

conviction is "political liberalism," as developed by eminent scholars such as John Rawls and Ronald Dworkin. Political liberalism draws a clear distinction between the ambitions of liberal justice and the institutional commitments of liberal legitimacy. While both Rawls and Dworkin claim that advanced capitalist and liberal constitutionalist democracies are unjust by the standards their own theories of liberal justice stipulate, they still hold that these are nevertheless legitimate political regimes and political economies. The reason for this gap between liberal legitimacy and liberal justice is abstraction, or proceduralization, in which there is an attempt to narrow down disagreement to allow a convergence over an agreed upon general structure of a political regime amongst differently situated social actors. This leads to an increasing thinning out of the pre-conditions for the permissible exercise of coercive political power. Consequently, progressive liberals allow as legitimate policies and practices, such as welfare-state capitalism and neo-liberalism, that are detrimental to the very goals that they aspire to. Therefore, the egalitarian bark of progressive liberal theory is louder than its egalitarian bite. Ultimately, liberal legitimacy is not merely different from justice but it also defers justice and legitimates injustice.

What is remarkable about all of this is that progressive liberals pay a heavy price (retreating from their egalitarian commitments) for something they cannot achieve (narrowing down disagreement to allow for a consensual mode of governance). The abandonment of progressive ambitions to the elusive tranquility of the center betrays an irrational hope because the center cannot hold: it is neither stable nor static.

Another way to describe this family of political liberalism is that of "liberalism of fear."[2] This conception of liberalism

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2. Judith N. Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND THE MORAL LIFE 21 *passim* (Nancy L. Rosenblum ed., 1989). Rawls himself refers to Shklar's article as part of the family of political liberalism. John Rawls, *Political Liberalism: Reply to Habermas*, 92 J. PHIL. 132, 133 n.1 (1995).

emphasizes the deep suspicion of the state and fear from the abuse of political power; it puts "cruelty and fanaticism at the very head of the human vices."[3] Judith Shklar seeks a freestanding liberalism that avoids unnecessary controversial intellectual territory.[4] Thus, liberalism can be compatible with a wide range of traditions and religions.[5] This liberalism is exclusively oriented to the political sphere.[6] Following Shklar, András Sajó conceptualizes liberal constitutionalism as a "constitutionalism of fear."[7]

But this fear of commitment to progressive ideals ends up producing that which is feared. For example, Rawls' egalitarianism is evident in his rejection of laissez-faire capitalism (because it only guarantees formal equality with a low social minimum) and of welfare-state capitalism (because it allows the concentration of wealth and power in the hands of the few and creates a permanent welfare-dependent underclass).[8] Thus, Rawlsian justice requires the "fair value of political liberties" to prevent the corrupting influence of wealth on the political system, it requires egalitarianism that benefits the least advantaged in society, and it seeks guarantees against the formality of rights by requiring a fair equality of opportunity in access to positions and offices. Yet, Rawlsian legitimacy allows as legitimate a large part of that which liberal justice condemns because these are excluded from the "constitutional essentials."[9] Liberal constitutionalism thereby abandons citizens to anti-

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3. Shklar, *supra* note 2, at 23; *see also* JUDITH N. SHKLAR, ORDINARY VICES 7–44 (1984).

4. Shklar, *supra* note 2, at 24.

5. *Id.* at 26.

6. *Id.* at 31.

7. ANDRÁS SAJÓ, CONSTITUTIONAL SENTIMENTS 115–133 (2011). For an earlier version of this argument, see ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM (1999).

8. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 135–40 (Erin Kelly ed., 2001).

9. *See* discussion *infra* Part I.

egalitarian, neo-liberal policies such as deregulation, privatization, commodification, and taxation schemes that privilege the rich. This is an unjust political economy that distributes wealth upwards to the upper classes, creates huge disparities in wealth and power, impoverishes citizens and dislocates them, and destroys the social fabric in ways that make the citizenry amenable to the siren calls of false prophets.[10]

This Article is divided into three parts. Part I sketches political liberalism's double-move in which prominent scholars like Rawls and Dworkin increasingly abstract from moral and political disagreement by proceduralizing moral and political conflict. This proceduralization leads to the thinning out of the basis for political authority and at the same time it imposes limits on the politics of progressive justice. Part II argues this argumentative move is futile and hence its consequences are not warranted. This is because the legitimacy standards that political liberals proffer (Rawls' "constitutional essentials" and Dworkin's "integrity") are no less controversial than the substantive disagreements over justice they seek to circumvent. Using the example of the liberal commitment to neutrality in institutional design, Part II further illustrates that constraints on politics are controversial and contingent. Neutrality is incoherent because it mandates contradictory outcomes. Ultimately, it is either too thin to secure progressive objectives, or too thick to be consensual. Part III highlights the objectionable nature of this abstraction and responds to potential objections to the argument. It argues abstraction is not merely futile but also leads to objectionable consequences that undermine the very ambitions and prospects of liberal justice.

I.   THE DOUBLE-MOVE OF LIBERAL THEORY AND ITS CONSEQUENCES

A dominant approach in liberalism employs a two-fold

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10. *See generally* DAVID HARVEY, A BRIEF HISTORY OF NEO-LIBERALISM (2005).

move: from the good to justice (since liberalism permits and encourages disagreement over the good and does not want to determine for citizens what ways of life they want to lead) and from justice to legitimacy (since liberal scholars realize disagreements over justice should also be taken seriously but nonetheless can be contained in normative conceptions of legitimacy).

The purpose of this exercise is to show that, first, this theoretical justificatory movement leads to an increasing thinning out of the conception of the socio-political order; second, the alleged objective for this thinning out is circumventing disagreement in order to provide a solid basis for legal and political ordering; but, third, this objective fails in every step. The more disagreement is recognized, the thinner the conception of the political order becomes. The outcome of this process is a considerably thin political and legal ordering without an acceptable conception of legitimacy that can attract the necessary wide allegiance. Finally, this movement is detrimental for the kind of politics that may be pursued within the liberal political order.

A. *From the Good to Justice*

The ethical question of "the good life" is concerned with the particular pursuit of a way of life according to one's ordering of values and one's desired or preferred ends. Liberal "justice," on the other hand, is concerned with the pursuit of norms or general moral rules that are right for everyone and can regulate people's conduct as well as their interactions and relations with each other. The relation between the good life and liberal justice requires a consideration of the move from "comprehensive liberalism" (that presupposes a societal agreement over the good) to "political liberalism" (that presupposes an irreconcilable disagreement over the good). This move suggests the defense of liberal justice cannot be too liberal (and thus comprehensive). Rather, it should be defended on the basis of the thinnest justification possible (political liberalism). It

therefore becomes possible for it to be endorsed by a wide-range of views and ways of life including non-liberal ones.

1. Rawls: From Comprehensive Liberalism To Political Liberalism

Rawls argues the liberal theory of justice as fairness is a "deontological theory."[11] Accordingly, and unlike "teleological theories": "something is good if it fits into ways of life consistent with the principles of right already on hand."[12] The priority of justice over the good does not mean that a theory of justice is innocent of any ideas of the good in its justificatory exercise. Rather, Rawls distinguishes between the "thin" theory of the good and the "full" theory of the good. The principles of justice presuppose the thin theory, which seeks "to secure the premises about primary goods required to arrive at the principles of justice."[13] The primary goods are those goods that any rational person would like to maximize as a means to advance her specific ends regardless of her full conception of the good.[14] Primary goods would include liberties, rights, income, and the social bases of self-respect.[15]

Despite the thinness and universality of the "thin theory of the good," Rawls' is a "comprehensive theory" in *A Theory of Justice*. This theory is comprehensive both because "it appeals to moral values in addition to justice (full autonomy, the good of community)" and because "it invokes philosophical accounts of the nature of agency and of practical reason, of moral objectivity, moral justification, and moral truth."[16] It is this baggage that the move to "political

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11. JOHN RAWLS, A THEORY OF JUSTICE 26 (23d prtg. 1999).

12. *Id.* at 396.

13. *Id.*

14. *Id.* at 62, 395–99.

15. *Id.* at 90–95.

16. SAMUEL FREEMAN, RAWLS 325 (2007). It is a matter of debate whether Rawls is correct in his assessment of his earlier work as being comprehensive or

liberalism" seeks to put aside since it makes the theory of justice more controversial than it should be and is required for justifying the political order.

In *Political Liberalism* Rawls revises the relationship between the good and justice by distinguishing between "political" conceptions of justice and "reasonable comprehensive doctrines."[17] Now he claims that it is not enough for justice as fairness to be a deontological theory that prioritizes justice over the good. Justice should not be grounded in any controversial ethical foundations that might be rejected by reasonable comprehensive doctrines.[18] In order to secure stability for the theory of justice it needs to be ethically "freestanding"—justified independently of any conception of the good—so it can be adhered to by a variety of reasonable comprehensive doctrines.[19] The justification for the principles of justice that will regulate the well-ordered society should be cleansed from any metaphysical or ethical frameworks, specifically those that are not shared by the non-liberal and non-secular. It should neither affirm nor deny controversial ethical propositions.[20] In other words, it needs to be "political" (or "procedural"): invokes political notions only, addresses the political domain (concerned with the "basic structure"—the primary political, social and economic institutions in society—as opposed to the "background culture" of civil society), and regulates political conflict. The grounds for this political justification are to be found in "latent" or "implicit" ideas in the already existing

partially comprehensive. *See, e.g.*, Roberto Alejandro, *What is Political About Rawls's Political Liberalism*, 58 J. POLITICS 1, 15–16 (1996); Brian Barry, *John Rawls and the Search for Stability*, 105 ETHICS 874, 876–80 (1995). This discussion is beside the point for my concerns. The main objective is to show that Rawls makes certain theoretical moves given his own assessment of his own work and of liberalism's possibility to gain normative acceptability in the political world. And that this movement increases the thinness of the theory.

17. JOHN RAWLS, POLITICAL LIBERALISM 10–15, 59–60 (expanded ed., 2005).

18. *See* Barry, *supra* note 16, at 890.

19. RAWLS, *supra* note 17, at 10, 12.

20. *Id.* at xix–xx.

"public political culture of a democratic society."[21] By clarifying "widely shared" ideas, Rawls hopes to avoid the deployment of a wide-ranging philosophical defense of these ideas.[22] Comprehensive doctrines, on the other hand, reside in the background culture, "the culture of the social, not of the publicly political. It is the culture of daily life."[23]

The move to political liberalism creates a bifurcation in the justificatory edifice of liberalism between the citizen and the person in general: that is, between political public justifications deployed by (and addressed to) the citizen and comprehensive justifications deployed in the non-political sphere (background culture) and addressed to the individual in her non-political capacity.[24] Whereas in comprehensive liberalism the main unit is the person in general, in political liberalism the main unit is the person's capacity as a citizen; whereas comprehensive liberalism seeks full moral autonomy that refers to systems of values, political liberalism seeks a more limited grounding of political autonomy.[25] This differentiation is a distinctively liberal position and by no means limited to Rawls.[26] Political liberalism, then, involves a "division of the moral territory" between political theory and personal morality, and egalitarianism is required in the design of collective institutions but not as a matter of personal ethics and individual conduct.[27]

Following this change, it would seem that justice is detached even further from the good. The foundational

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21. *Id.* at 13, 175.

22. FREEMAN, *supra* note 16, at 331–32.

23. Rawls, *supra* note 2, at 140.

24. RAWLS, *supra* note 17, at xxi (calling it "dualism").

25. *Id.* at xlii–xliii, 29–35, and 99–101.

26. *See, e.g.*, Charles Larmore, *Political Liberalism*, 18 POL. THEORY 339, 351–53 (1990).

27. Thomas Nagel, *Rawls and Liberalism*, *in* THE CAMBRIDGE COMPANION TO RAWLS 62, 82 (Samuel Freeman ed., 2003).

justification for justice now rests on narrower grounds. Rawls claims his earlier work invoked partially comprehensive ideas and it assumed that "in the well-ordered society of justice as fairness, citizens hold the same comprehensive doctrine," but these assumptions are now cast away.[28] Thus, this version of liberalism claims to be more accommodationist of a variety of ways of life than comprehensive liberalism,[29] for it claims to be sidestepping many ethical-moral questions.[30]

2. Dworkin: From Comprehensive Liberalism To Political Liberalism

Dworkin presents in *Sovereign Virtue* a self-declared ethical and comprehensive liberalism.[31] Dworkin advocates a conception of the good society and the virtues it encourages among its citizens (such as leading imaginative lives or reflective judgment as in the "challenge model" and responsibility of members not to lead wasted lives).[32] In this conception of justice, Dworkin obscures the line between ethics and political philosophy. This, some scholars have suggested, collapses the distinction between the right and the good and substitutes the deontological character of the theory for the ethical.[33] Yet, it is more accurate to say that

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28. RAWLS, *supra* note 17, at xl, 99–101.

29. *See, e.g.*, Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, 39 PHIL. & PUB. AFF. 3 (2011) (endorsing political liberalism since it is "superior" to perfectionist liberalism, like the one advocated by Isaiah Berlin and Joseph Raz, which is a comprehensive doctrine).

30. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 360–61 (1980).

31. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 4–5 (2000) [hereinafter DWORKIN, SOVEREIGN VIRTUE]. Dworkin presents a more systematized account in his book: RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011) [hereinafter DWORKIN, JUSTICE FOR HEDGEHOGS].

32. DWORKIN, SOVEREIGN VIRTUE, *supra* note 31, at 238–40.

33. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 63 (William Rehg trans., paperback ed. 1998); BERNARD WILLIAMS, IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT 10 n.5 (Geoffrey Hawthorn ed., 2005).

the theory is still deontological (the right is prior to the good) even though it is comprehensive (the right is grounded in and supported by the good, and the good of living well is supposed to be shared). Dworkin's attempt to find an "ethical basis for morality" and "unite ethics and morality"[34] neither relinquishes the universal character of morality nor follows classical teleological theories into embedding it in a specific social structure.[35] That is, encouraging the virtue of living well is not meant to advance a particular conception of the good, nor is it necessarily to be maximized.[36]

Dworkin's attempt suggests, for the later Rawls, a comprehensive doctrine that cannot be a basis for coercive political and legal ordering under conditions of ethical disagreement.[37] Indeed, Dworkin's writings about the justification for coercive power in *Law's Empire* present a decidedly political liberal view of justice. Here, justice becomes one ideal among other important ideals like fairness, integrity, and due process. Like Rawls' *Political Liberalism* which idealizes fundamental ideas found in the tradition and practice of democracies in order to ground the theory of justice in acceptable roots, Dworkin looks at the history and practice of the community understood as a moral community of principle in order to distill the meaning of, and provide the foundations for, justice. Rather than grounding it in a comprehensive conception of a wide-ranging philosophical system—as he does in *Sovereign Virtue* as well as *Justice for Hedgehogs*—he grounds it in *Law's Empire* within the community as an internal concept to the practice.

Justice, Dworkin writes, "is an institution we interpret."[38] To discover the truth about justice, namely,

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34. Ronald Dworkin, *What is a Good Life?*, N.Y. REV. BOOKS, Feb. 10, 2011, *passim*.

35. *Id.*

36. *Id.*

37. RAWLS, *supra* note 17, at 211 n.42.

38. RONALD DWORKIN, LAW'S EMPIRE 73 (1986).

what are the true statements or requirements of justice, one needs first to examine the existing "paradigms" (the competing historical practices and interpretations). In other words, one posits tentative assumptions in the pre-interpretive stage and then makes judgments about what justice really is in the post-interpretive stages. One could arrive at the conclusion that some theories of justice are actually a "mistake": they are not theories of justice at all. Accordingly, theories of justice that radically diverge from and challenge the contemporary paradigmatic understanding of justice, like Nietzsche's or Marx's, are examples of such mistakes.[39]

Part of the constructive interpretive process is to delineate the independence and interdependence between one social practice (e.g., justice) and other social practices (e.g., law, fairness). In order to uncover the difference one asks what is the point of justice, fairness, or law and what interest or purpose do they serve. In addition, the requirements of the social practice are "sensitive to its point" and thus they "are not necessarily or exclusively what they have always been taken to be." Therefore, we "impose *meaning* on the institution [of justice]—to see it in its best light—and then to restructure it in the light of that meaning."[40]

The broad lines of Dworkin's political theory of interpretation can be stated in the following brief terms: the best interpretation of a community—as well as law—is one that is organized and guided by integrity in principle.[41] The best interpretation of integrity is one of a single, coherent, principled common scheme of justice (as opposed to disparate, arbitrary, pragmatic, and inconsistent applications).[42] The best interpretation of justice is neither

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39. *Id.* at 75.

40. *Id.* at 47 (emphasis in original).

41. *Id.* at 214.

42. *Id.* at 178, 219.

based on majority sentiments nor on social conventions, rather, it centralizes equal respect and concern.[43] The best interpretation of equality is that of equality of resources.[44]

Elsewhere, Dworkin argues the political regime should be impartial towards the conceptions of the good held, or ways of life pursued, by the citizenry. This is a basic assumption of the liberal theory of equality, or liberalism's "constitutive political morality," in making political decisions.[45] He also insists, like Rawls,[46] that liberalism "does not rest on any special theory of personality."[47]

B. *From Justice to Legitimacy*

It is within the political conception of liberal justice, rather than the ethical or comprehensive conception, that the contemporary liberal question of legitimacy is raised. And it is this conception that best represents the alleged break between Enlightenment liberalism and post-Enlightenment liberalism, given the heightened awareness that reason does not lead to moral and political consensus.[48] Indeed, political authority—for many leading contemporary liberal scholars—is based neither on the good nor on justice but on legitimacy.

1. Rawls

A "political conception must be practicable," it needs to "fall under the art of the possible."[49] There is no practical use for a political conception of justice if it is not stable. On the

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43. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 214–20 (9th prtg. 2000).

44. DWORKIN, *supra* note 38, at 297–98.

45. DWORKIN, *supra* note 43, at 190–92.

46. RAWLS, *supra* note 17, at 26–27.

47. DWORKIN, *supra* note 43, at 203. *See also* DWORKIN, *supra* note 38, at 440–41.

48. *See, e.g.*, GERALD F. GAUS, CONTEMPORARY THEORIES OF LIBERALISM 1–22 (2003).

49. RAWLS, *supra* note 8, at 185.

one hand, there is a range of just regimes but not all of them are stable. On the other hand, there is a range of stable regimes but not all of them are just. Thus, Rawls argues that stability needs to be for the "right reasons." It is a quest for normative stability of just regimes (the regime would provide reasonable citizens with good reasons for compliance) rather than mere sociological acceptance. The mission of *Political Liberalism* is to theorize when this can be achieved.

Previously, stability in *A Theory of Justice* is achieved because there is a consensus over justice as fairness as true. Not everyone, however, will accept Rawls' own ethical, Kantian justification for his theory of justice in *A Theory of Justice* given the fact of reasonable pluralism (the existence of irreconcilable ethical differences) and the burdens of judgment (that reason leads to disagreement even amongst the reasonable). Not everyone who is reasonable is a liberal and not everyone who is reasonable will accept that moral autonomy is an intrinsic good.[50] Furthermore, there is a disagreement even amongst liberals both on how liberal justice should be justified and what it requires (Kant and Mill, for instance). Hence for *Political Liberalism*, justice as fairness is merely one of several possible liberal political theories of justice, though arguably it is the most reasonable of them.[51] For justice as fairness to be the most reasonable it should prove that it is the most stable theory of justice—this can be achieved by its political nature that guarantees the widest endorsement despite reasonable disagreement. Stability would be guaranteed for three reasons: the basic structure would be regulated by justice as fairness; there will be an "overlapping consensus" endorsing justice as fairness given its political nature; and "public reason" mirrors the political nature of the theory of justice in that public debates by officials, legislatures, voters, and judges concerning fundamental questions of justice would invoke political

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50. FREEMAN, *supra* note 16, at 319–22.

51. RAWLS, *supra* note 17, at xlvi–xlvii, 226–27.

terms and reasons.[52]

The emphasis in political liberalism, then, moves from the "true" to the "reasonable."[53] The required consent for Rawls, however, is hypothetical rather than actual. Rawls is concerned with a theory of normative legitimacy as opposed to a sociological Weberian conception of legitimacy.[54] Rawls, not unlike other scholars like Habermas, rejects Weberian legitimacy.[55] The latter is an empiricist theory assessing sociological acceptance, while theories developed by Rawls and Habermas are reconstructive theories assessing the acceptability of the legal and political order by virtue of "good reasons" that are derived from "hypothetical contract" or "ideal speech" situations. Whereas the organizing concept for Weberian theory is belief, Rawls and Habermas prioritize reason. Weber's legitimation question is how acceptance happens and why the regime is held to be legitimate, Rawls and Habermas ask how the regime can be acceptable (what conditions it needs to meet to be acceptable).[56]

Accordingly, the theory stipulates the conditions under which the exercise of coercive power is legitimate (acceptable; morally justifiable) even though some citizens might consider this exercise unjust.[57] According to the

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52. *Id.* at 44.

53. *Id.* at xx; JOHN RAWLS, *The Idea of Public Reason Revisited*, *in* POLITICAL LIBERALISM, *supra* note 17, at 441 *passim*.

54. MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 31–38, 212–15 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (1968).

55. For Habermas' discussion of Weber's legitimation, see JÜRGEN HABERMAS, LEGITIMATION CRISIS 95–102 (Thomas McCarthy trans., 1975). See HABERMAS, *supra* note 33, at 107, for a discussion of Habermas' principle of legitimacy, or normative validity.

56. For a critique of the Weberian model of legitimacy, compare Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 *passim*, with David O. Friedrichs, *The Concept of Legitimation and the Legal Order: A Response to Hyde's Critique*, 3 JUST. Q. 33 *passim* (1986).

57. Burton Dreben, *On Rawls and Political Liberalism*, *in* THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 27, at 316, 317.

Rawlsian "liberal principle of legitimacy," which "reflects the abiding moral heart of liberal thought"[58]:

> our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.[59]

An individual would accept the coercion of a legitimate system if there is (a) universal reasonable and rational acceptability and (b) general compliance by fellow citizens, (c) so long as the system is not too unjust.[60] There are five important points here.

First, the content of the theory of justice to which the "constitutional essentials" should conform does not change. The principles of justice and the lexical ordering (the priority of the political liberties over equality) between them is the same in both books. The main change is in the form of justification and the account of stability it gives rise to. Rawls claims that this means the same egalitarianism is preserved in the move from comprehensive to political liberalism.[61]

Second, for reasonable citizens, the idea of legitimacy is directed at the general structure of political authority (as represented by the constitution) and not at specific laws since they know that unanimity is impossible.[62] Thus, so long as statutes are enacted by a legitimate regime (that abides by the "constitutional essentials" according to some interpretation of these essentials that falls within the

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58. Charles Larmore, *The Moral Basis of Political Liberalism*, 96 J. PHIL. 599, 605–06 (1999).

59. RAWLS, *supra* note 17, at 217. See *id.* at 137, for a slightly different formulation. *See also* Rawls, *supra* note 2, at 148.

60. *See generally* Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, *in* THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 27, at 394 *passim*.

61. RAWLS, *supra* note 17, at 6–7.

62. RAWLS, *supra* note 53, at 488; Rawls, *supra* note 2, at 148.

bounds of the publicly reasonable), they are legitimate even if they are considered by some to be unjust.[63]

Third, legitimacy "is a weaker idea than justice and imposes weaker constraints on [authority and on] what can be done. It is also institutional, though there is of course an essential connection with justice."[64] Yet, even if the constitution is legitimate, there might be situations in which the injustice of the outcomes is so grave that the constitution ceases to be legitimate. In these cases, the society is no longer a "well-ordered society" (a fair system of cooperation between free and equal citizens):

> But before this point is reached, the outcomes of a legitimate [democratic] procedure are legitimate whatever they are. This gives us purely procedural democratic legitimacy and distinguishes it from justice, even granting that justice is not specified procedurally. Legitimacy allows for an indeterminate range of injustice that justice does not.[65]

Fourth, it follows that there is a gap between legitimacy and justice. Reasonable people recognize they can achieve neither a perfectly just political ordering nor unanimity. These are two different reasons. In *A Theory of Justice*, Rawls invokes mainly the first and in *Political Liberalism*, he emphasizes the second. As for the question of disagreement: when citizens devise the general structure of political authority, they will not insist on including all the principles of justice but will agree, each one from her own reasonable comprehensive doctrine (thus forming an "overlapping consensus"), on a list of "constitutional essentials," that is, a bill of political rights with a social

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63. For a similar focus on the regime-level rather than the statute, see Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345 (2003). However, Michelman's view is more expansive than Rawls' since it takes into account not merely the constitution but the totality of the regime (which means that it includes, *inter alia*, prevalent constitutional interpretations practiced in the state).

64. Rawls, *supra* note 2, at 175.

65. *Id.* at 176.

minimum. Hence, so long as the constitution is "sufficiently just" or "reasonably just" or "just enough" in "view of the circumstances and social conditions," then the general structure of the political regime is legitimate.[66] And so long as laws are enacted and decisions are decided in accordance with this reasonably just constitution—the procedures and conditions it sets forth—they are legitimate laws and decisions.

Concretely, the second principle of justice (which includes both the fair equality of opportunity and the difference principle) will not make it to this list of "constitutional essentials." The importance of the effect of this exclusion on Rawlsian theory cannot be overestimated. After all, the second principle of justice "marks the difference between laissez-faire capitalism and welfare state liberalism" as it "expresses the recognition that class stratification and the resulting inequality of chances in life are social evils bearing on the justice of a society."[67] Rawls says the egalitarianism of his theory rests on three pillars: the difference principle (social and economic inequality is justified if it works to the greatest benefit of the worst off amongst members of society; this can be institutionally expressed through income and property taxation as well as economic and fiscal policies), the fair equality of opportunity principle (which would ensure equal access to all offices and positions), and the fair value of political liberties within the first principle of justice (which would ensure that disparities in wealth do not distort the political process and the equal enjoyment and exercise of political liberties whether in terms of holding public offices or influencing political decisions). The last two ensure that rights are not "purely formal."[68] Thus, the fair equality of opportunity

> requires (in addition to formal equality of opportunity or non-

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66. *Id.* at 175.

67. Nagel, *supra* note 27, at 68.

68. RAWLS, *supra* note 17, at 6–7.

discrimination on grounds of race, gender, religion, etc.) equal educational opportunities, a right to basic health care for all citizens, and governments' limitations of concentrations of wealth when they tend to undermine fair equal opportunities.[69]

Only the fair value of political liberties is part of the "constitutional essentials."[70] Thus, the principles that seek to prevent morally-arbitrary and undeserved social inequalities are sacrificed.

Consequently, Rawls' assertion that his theoretical move does not undermine his egalitarianism is not compelling. The reasons he invokes to justify this sacrifice are essentially appeals to the virtues of moderation and pragmatism. Reasonable people, he maintains, will give up the second principle given their "political wisdom";[71] the suspension of their passions, sentiments, and intensity of desires;[72] their recognition of the "wide differences of reasonable opinion" in such questions (especially given the difficulty to monitor their realization);[73] their ultimate recognition of the lesser urgency and significance of socio-economic rights;[74] and that expanding the list of basic liberties to more than the "truly essential" will "risk weakening the protection of the most essential ones" and thus would undermine the "priority of liberty" (which refuses to sacrifice basic liberties for the purpose of economic improvement).[75]

Given the failure to include all the principles of justice in the basic structure, for Rawls there is a considerable gap between justice and legitimacy. The gap is not merely a natural outcome of the fact of imperfection in human life, but also necessary given the fact of reasonable pluralism. That

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69. FREEMAN, *supra* note 16, at 469–70.

70. *See* Michelman, *supra* note 60, at 406.

71. RAWLS, *supra* note 17, at 156.

72. *Id.* at 190.

73. *Id.* at 229–30.

74. *Id.* at 230, 367.

75. *Id.* at 296.

is, *Political Liberalism* increases the gap between the demands of liberal justice for the well-ordered society, as advocated in *A Theory of Justice*, and the exercise of coercive power in the well-ordered society.[76] The exercise of political power need not await the complete adoption of liberal justice. A welfare capitalist state is for Rawls an unjust state, yet it is a legitimate deployment of political power.[77] Concretely, consider the example of basic health care for all citizens. For Rawls, this a requirement of justice.[78] But its absence does not impact the legitimacy of the regime. The existence of millions of United States citizens without health care is unjust, but a political regime that enables these conditions is legitimate.[79]

Fifth, the stability of political liberalism will be guaranteed by the "overlapping consensus" of reasonable comprehensive doctrines. Each reasonable and rational citizen from her own conception of the good and for her own reasons will come to accept and endorse the principles of justice. It is the fact that comprehensive doctrines and their adherents are reasonable that makes them converge over the principles of justice. They internalize the political conception of justice as part of their conception of the good.[80] If a majority of the citizens comprise this consensus, then the political conception of justice will be stable, otherwise it will not. Those who do not endorse it are simply unreasonable

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76. WILLIAMS, *supra* note 33, at 1.

77. FREEMAN, *supra* note 16, at 395.

78. RAWLS, *supra* note 17, at lvi–lvii.

79. *See, e.g.*, Lisa Girion, *Ranks of Uninsured in U.S. Shrank in '07*, L.A. TIMES (Aug. 27, 2007), https://www.latimes.com/archives/la-xpm-2008-aug-27-fi-census27-story.html; Jessica Glenza, *Number of Uninsured Americans Increases by 7m in Four Years*, THE GUARDIAN (Jan. 23, 2019), https://www.theguardian.com/us-news/2019/jan/23/healthcare-us-americans-uninsured-2014-gallup.

80. Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619, 627 (1994).

that should be coerced by the law.[81]

2. Dworkin

Dworkin's *Law's Empire*, which is concerned with justifying the coercive power of legal ordering, makes a similar move.[82] There he acknowledges a gap between the "true community" (that treats its members with equal concern and respect) and the just community. Although the moral community or the "community of principle" (a community constituted by integrity since its members recognize that they are governed by common principles) is a true community, it is not necessarily just. Indeed, "[a]n association of principle is not automatically a just community; its conception of equal concern may be defective or it may violate the rights of its citizens or citizens of other nations . . . ."[83]

This gap is a result of the fact that there are different desirable ideals and virtues (justice, fairness, due process, integrity) that are at play and might be the subject of disagreement in law and politics. Fairness and justice do not collapse into each other: "fair institutions sometimes produce unjust decisions and unfair institutions just ones."[84] Integrity is needed to express a single, coherent scheme of principle in which these ideals are ranked properly when disagreement occurs.[85] The need for integrity arises precisely because a perfectly-just society is beyond reach. Indeed, in such a society, integrity would be redundant.[86] Under conditions of pluralism—in which citizens disagree over

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81. RAWLS, *supra* note 53, at 489; Dreben, *supra* note 57, at 329.

82. *See, e.g.*, DWORKIN, *supra* note 38, at 190.

83. *Id.* at 213.

84. *Id.* at 177.

85. *Id.* at 178, 219, 404.

86. *Id.* at 176. *See also id.* at 165, 216; RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 95 (2006) (arguing that legitimacy does not need to be perfectly just).

justice, fairness and political morality—a "community of principle" is as a "true community" as any community can get.[87] Different people may have different theories of justice. Indeed, Dworkin himself has his own theory. But the question of law's legitimacy is concerned with the deployment of coercive power and cannot rely on a subjective and non-consensual theory of justice.[88] In a utopian world, citizens might agree on the same principles of justice like Dworkin's or Rawls'. Rawlsian principles of justice, however, do not regulate the ordinary world of politics (not everyone agrees to these principles) and have no bearing on the question of legitimacy.[89] In addition, obligations of justice are "conceptually universalistic" and do not explain obligations to specific communities under historical conditions. Thus legitimacy cannot be grounded in justice. Integrity, rather than justice, is the "parent" of legitimacy.[90] A state is morally justified, and hence legitimate, if it endorses integrity and then it gives rise to a general obligation to obey the law.[91] Legitimacy requires integrity in legislation, adjudication, and in the moral community at large.[92]

Like Rawls, legitimacy for Dworkin is a normative rather than a sociological notion. And it is concerned with the general structure of political ordering: "Political obligation is . . . not just a matter of obeying the discrete political decisions of the community one by one;" rather it is "a more protestant idea: fidelity to a scheme of principle[s]."[93]

Like Rawls, Dworkin thinks that the legitimate political regime is the reasonably just one.[94] In *Taking Rights*

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87. DWORKIN, *supra* note 38, at 214; *see also id.* at 411.

88. *Id.* at 97.

89. *Id.* at 192.

90. *Id.* at 193.

91. *Id.* at 191, 214–15.

92. *Id.* at 166.

93. *Id.* at 190.

94. This view is by no means limited to Rawls and Dworkin. Other liberal

Seriously he writes:

> The constitution sets out a general political scheme that is sufficiently just to be taken as settled for reasons of fairness. Citizens take the benefit of living in a society whose institutions are arranged and governed in accordance with that scheme, and they must take the burdens as well, at least until a new scheme is put into force either by discrete amendment or general revolution.[95]

Thus, there is a range of permissible injustice. But, like Rawls, it should not be too unjust. While Dworkin thinks unjust decisions can be interpreted as mistakes from the standpoint of integrity, they should not be too unjust. If the unjust practice or institution is gravely and pervasively unjust then it cannot be redeemed, as it were, interpretively through a constructive method and it "should . . . be abandoned."[96]

C. *Restricting Politics by Legitimacy*

The picture is complicated by the fact that the move from the good to the just involves a restriction of the good by the just, and the move from justice to legitimacy involves a restriction of demands made on behalf of justice by legitimacy conditions. These conditions impose structural, moral constraints on politics.[97] These restrictions apply not only to politics that violates the principles of justice, but also politics that seeks to advance justice. They might not be restricted in similar ways, but the restriction goes both ways. The legitimacy conditions are justified in imposing such constraints given their non-controversial, public character.

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authors have invoked the idea of a reasonably just regime in different ways. *See, e.g.*, Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792 (2005).

95. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 106 (4th prtg. 1978).

96. DWORKIN, *supra* note 38, at 203–04.

97. WILLIAMS, *supra* note 33, at 2 (discussing models of political theory, of which Rawls and Dworkin are primary examples, that prioritize the moral over the political and thus political theory becomes "applied morality").

1. Rawls

The Rawlsian "priority of liberty," which prioritizes basic liberties over social justice, is "the true core of liberalism."[98] According to this priority: "justice draws the limit," while "the good shows the point."[99] That is, "admissible ideas of the good" can be sustained in an established framework of the political conception of justice as fairness. Consequently, one does not only ascend from the particular, subjective, and controversial to the general, universal, and impartial, but also one is confined by this move. One moves from the good to the just but then the just comes back to supervise the good. Individuals in society have rights that would protect them not only from unreasonable conceptions of the good that others may pursue, but also from mobilizing the coercive power of the state to advance reasonable conceptions of the good that they do not adhere to. Specifically, justice constrains majoritarian considerations of welfare and utilitarian calculus.[100] However, justice does not always constrain the good. The principles of justice that Rawls calls "matters of basic justice" (these include the difference principle and fair equality of opportunity) do not constrain the good in the same way the equal basic liberties do because they are not considered part of the "constitutional essentials."[101]

This distinction between "constitutional essentials" and "matters of basic justice" requires a consideration of the constraints imposed on justice by legitimacy. There are two interrelated ways in which the constraints are manifested: the first is synchronic and the second is diachronic. The synchronic is concerned with what cannot be done in the here and the now. Here, the move from justice to legitimacy

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98. Nagel, *supra* note 27, at 66–67.

99. RAWLS, *supra* note 17, at 174; John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 252 (1988).

100. RAWLS, *supra* note 11, at 3. *See also* DWORKIN, *supra* note 95, at xi.

101. RAWLS, *supra* note 17, at 228–29.

means that legitimacy does not include all the principles of justice and thus justice constrains the good only insofar it is part and parcel of the conditions of legitimacy. That does not mean that one cannot criticize existing arrangements and policies from the perspective of justice. Yet all demands in the name of the just or the good should be raised within the legitimate structure and such demands do not necessarily have the coercive power of the law on their side. They might even be barred from mobilizing state law under conditions of reasonable disagreement by deploying rights to constrain democratic will. If there is no consensus in society over measures to advance the difference principle or the fair equality of opportunity, these measures can be hindered by the deployment of individual rights. What underlies the acceptance of such conditions as legitimate seems to be the following logic: Once the political community secures the first Rawlsian principle of justice (which includes the negative liberties, the social minimum, and the fair value of political liberties), it will not risk anarchy and insecurity for the sake of the difference principle and fair equality of opportunity. In other words, legitimacy confines justice.

It is misleading for Rawls to stipulate that "justice draws the limit" in the priority of liberty. It is more accurate to say, within the Rawlsian framework, "legitimacy draws the limit." In effect, legitimacy constrains both justice and the good. The importance of this qualification is to make clear that fewer constraints than initially proclaimed by theory are imposed on the good, given the gap between justice and legitimacy, and thus more injustice passes muster. Justice limits the good only partially (to the extent that some of its principles became part and parcel of the conditions of legitimacy).

One way to understand this limitation is to see how the advancement of substantive demands that are required by justice is restricted by procedural requirements of legitimacy. It is insufficient for legislative or judicial pronouncements to be substantively just, they need also to

respect accepted democratic procedures and practices. Officials and judges cannot impose the difference principle or health care, for example, on an unwilling populace or legislature.[102] Thus, *contra* Tushnet, a Rawlsian judge cannot use the difference principle in order to advance the cause of socialism.[103] Moreover, Rawls makes clear that the difference principle is not a proper justification for civil disobedience because regime compliance with it is "more difficult to ascertain", and citizens disagree about "economic and social institutions and policies."[104]

The second sense of constraint by legitimacy on justice is historical or diachronic. Rawls adopts a four-stage sequence that is neither actual nor purely theoretical. The first stage is the original position in which the principles of justice are chosen. The second stage is a convention in which the constitution is established. The third stage is the legislative assembly in which the legislators enact laws. The fourth stage is the judicial stage in which judges interpret the laws.[105] Here, Rawls says that once we discover that we have established an imperfect constitution, we embark upon a project of political reform to correct the imperfections in order to achieve a more just society. The continuous project of reform is limited, however, in two ways. First, it is limited in terms of the subject because it is confined to the reflective judgments of the reasonable and not the rational, and the reasonable will be confined by the idea of "public reason" and its companion idea of "civility" and the requirement to appeal only "to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial." Secondly, it is limited in terms of the object of reformist

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102. FREEMAN, *supra* note 16, at 206, 235, 378, 394; RAWLS, *supra* note 11, at 174.

103. Mark V. Tushnet, *Diatribe*, 78 MICH. L. REV. 694 (1980).

104. RAWLS, *supra* note 11, at 327.

105. *Id.* at 195–201.

reflection because the principles of justice are "fixed." Rawls writes: "we cannot change them to suit our rational interests and knowledge of circumstances as we please."[106]

Rawls argues the political autonomy of citizens is preserved both because they live under a sufficiently just constitution and because they have the ability to reform it. Rawls offers here a distinction between founders, who create the political structure, and revisers, who are born into these structures. Founders establish a constitution and the revisers materialize their political autonomy through a continuous process of correcting the imperfections. The fact that revisers are born into a constitutional structure, with "wisdom" and institutions inherited from the founders, does not undermine—Rawls asserts—their full political autonomy. Rawls uses an analogy to Kant's writings in order to support his claim that the revisers' political autonomy is not encroached upon. Reading Kant's writings, Rawls argues, does not deprive us from reaching moral insights: "Why is understanding the justice of the constitution any different?"[107] Surely this is a weak analogy. Revisers are born into the constitutional structure but the reader is not born into Kant's writings. One can read Kant or not, can understand him or not, be influenced by him or not, but one cannot avoid encountering social and political structures. Additionally, citizens are not implicated in constructing and reproducing Kant's ideas in the same way they are in socio-political structures. The question becomes not merely one of possessing the intellectual ability to envisage necessary revisions, but also the potential for the development of political forces that would make these revisions a reality. This potential is shaped by the extant structures, because the "sufficiently just" constitution sanctions social injustice and thus unevenly empowers different groups in society.

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106. Rawls, *supra* note 2, at 153.

107. *Id.* at 156.

2. Dworkin

Dworkinian integrity (being the basis of legitimacy that it is) constrains justice. Although integrity is not necessarily the last word in terms of action,[108] and it is not always the case that justice is defeated when confronted by integrity,[109] the latter does impose meaningful constraints. Accordingly, under the community of principle, citizens have a responsibility to respect the "principles of fairness and justice instinct in the standing political arrangement" even if these are not the best principles when compared to other communities or judged from a utopian vantage point.[110] This community "commands that no one be left out, that we are all in politics together for better or for worse, that no one may be sacrificed, like wounded left on the battlefield, to the crusade for justice overall."[111] This statement implies that one might need to accommodate injustice and those who represent it and defend it in the name of integrity.[112]

In addition, the judge—including Hercules, the judge with infinite resources and time—is constrained by integrity and history. Although a proponent of Dworkinian equality of resources as he might be, he has to settle for less and cannot impose

> economic and redistributive programs that equality of resources demands. Nor, given the various constraints he accepts about how far he is free to read statutes to promote his view of justice, can he read into welfare and taxation schemes provisions equality of resources would approve.[113]

Indeed, Dworkin insists that he himself does not

> read the Constitution to contain all the important principles of

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108. DWORKIN, *supra* note 38, at 217–19.

109. *Id.* at 214.

110. *Id.* at 213.

111. *Id.*

112. JEREMY WALDRON, LAW AND DISAGREEMENT 206 (1999).

113. DWORKIN, *supra* note 38, at 404.

political liberalism. In other writings, for example, I defend a theory
of economic justice that would require a substantial redistribution
of wealth in rich political societies. . . . I have insisted that integrity
would bar any attempt to argue from the abstract moral clauses of
the Bill of Rights, or from any other part of the Constitution, to any
such result.[114]

One may contest the idea that integrity or the legal materials
(such as precedent) or history can considerably constrain the
judge in interpreting and applying the constitution. But the
main point here is that within Dworkin's theoretical
framework, he understands himself and his judges to be
constrained in the domain of legitimacy in ways that the
discussion within the domain of justice is not similarly
constrained.

D. *Conclusion: The Career of Thinning Out*

Doubtless, given the complexity and wealth of the ideas
of the scholars discussed here, a comprehensive reading of
their entire corpus cannot be offered here. Nevertheless, this
theoretical engagement with some core concepts captures the
broad lines of the general moves performed by leading
progressive liberal scholars and its effect on the overall
movement of liberal egalitarianism. Here is a summary of
some of the highlights of this story of the movement of liberal
thought:

First, the good life is too thick and particular and hence
too controversial and unsuitable to serve as a solid
foundation upon which the political-legal order can be
erected. Therefore, there is a need for a thinner basis. But it
cannot be too thin since it should be recognizably liberal.
Justice is such a basis. (This is the move from the good to
justice).

Second, the defense of justice as the foundation for the
liberal order cannot be too liberal (comprehensive), rather it

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114. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN
CONSTITUTION 36 (Replica Books 1997) (1996); *see also id.* at 10.

should be defended on the thinnest basis possible (political liberalism). Otherwise, it will not be acceptable to a wide-range of views and ways of life. It should address individuals in their role as citizens only. (This is the move from comprehensive to political liberalism within the move from the good to justice).

Third, justice is controversial. Even progressive liberal scholars cannot agree on what liberal justice requires. It cannot be assumed even under favorable conditions that justice will have one and only one universally accepted interpretation. Therefore, there is a need for a thinner ground for the political order to secure agreement and hence a solid foundation. But it cannot be too thin because it will be no more than sociological acceptance. For it to be liberal, it needs to contain the minimal conditions of liberal justice that seem to be less controversial. (This is the move from justice to legitimacy).

Fourth, egalitarian distributive justice is not necessarily influenced by the second move (from the comprehensive to the political) but is influenced by the third move (from justice to legitimacy) since it creates a gap between justice and legitimacy and this gap justifies restrictions on the ways in which liberal justice can be advanced and demanded.

It is not suggested here that this process of thinning out is an inherent characteristic of liberal theory, or that this is the only defensible way of reading liberal theory. The main contention here is that the moves described above have been characteristic of contemporary liberal egalitarian theory as its leading scholars have developed it. This interpretation of these moves shows a liberal process of thinning out. The warrant for this thinning out is to narrow down disagreement. But do these moves achieve this goal? The following maintains that they do not.

II. THE IMPOSSIBILITY OF LIBERAL LEGITIMACY

In a double-move, liberal scholars travel from the good to justice and then from justice to legitimacy, that is, from thick

conceptions for regulating social and political life to thinner conceptions, from the particular to the universal. Supposedly, this move allows these scholars to avoid disagreement that is evident in the pursuit of the good life but also recognized with respect to the principles of justice.[115] Liberal scholars do not argue that their theories will eradicate disagreement but that they will considerably reduce disagreement and therefore allow a convergence over an idea of legitimacy of the general structure of legal-political ordering.[116] In turn, this arrival at solid foundations for regulating the political life of the community justifies restrictions on this political life. However, each step in this theoretical framework is controversial. It either presupposes a controversial substance when it claims to be proceduralist and universalist, or rests on indeterminate abstract concepts. The critique of this proceduralization is not merely that it contains substantive ideas but also that this substance (legitimacy standards) is controversial.[117] In other words, the institutional framework for governance and conflict-resolution is no less contentious than the substantive-moral issues it seeks to circumvent. Moreover, the abstract concepts and principles this abstraction leads to do not exclusively dictate a particular form of social life. This is because they are compatible with competing institutional arrangements.[118]

The purpose of what follows is to offer a brief account, by no means exhaustive, of some of the typical kinds of

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115. Rawls calls his conception of political liberalism a "method of avoidance" because it avoids relying on controversial comprehensive doctrines. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 231 (1985).

116. *See* RAWLS, *supra* note 17, at 28; RAWLS, *supra* note 8, at 151.

117. Proceduralism does not imply necessarily a lack of substance. RAWLS, *supra* note 17, at 192 (denying that his theory is procedurally neutral and acknowledging that his principles of justice are substantive). *See also* Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI.-KENT L. REV. 589 *passim* (1994).

118. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97(6) HARV. L. REV. 1276, 1293 (1984).

disagreement that progressive liberal theoretical frameworks give rise to, even amongst the progressive liberals themselves. It is an account of the ways in which the declared purpose of deflecting disagreement is unceasingly undermined. Consequently, rather than containing disagreement, the method of abstraction generates more disagreement. The process of thinning out, therefore, is futile as it does not secure a universally acceptable standard for legitimacy.

A. *Disagreement All the Way Down*

While the focus here will be on the move from justice to legitimacy, the reasons for objecting for each kind of proceduralization (proceduralization of the question of the good by deflecting to justice and proceduralization of the question of justice by deflecting to legitimacy) are quite analogous.[119]

Michelman's critique of the proceduralist turn to legitimacy as an authoritative answer to disagreements establishes that disagreement cannot be papered over by any account of proceduralism and thus substantive judgments that lead to disagreement are inevitable.[120] It is doubtful whether there can be a non-controversial public answer to the question of political authority and legal ordering to which either "everyone" or the "rational and the reasonable" would assent. A major reason for that is the abstraction of rules and principles. MacIntyre observes that these principles are abstract and empty since they do not "guide action" or, if they

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119. For a critique of the detachment of justice from the good and for an argument that this very detachment breeds disagreement rather than narrows it down, see ALASDAIR MACINTYRE, AFTER VIRTUE 39 (3d ed. 2007); Alasdair MacIntyre, *The Privatization of Good: An Inaugural Lecture*, 52 REV. POL. 344 *passim* (1990).

120. Frank I. Michelman, *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, 42 TULSA L. REV. 891 *passim* (2007).

are specific enough to guide action, controversial.[121] Similarly, Michelman points out that it is precisely the alleged proceduralist evasion of controversial substance by fleeing to abstraction (in order to provide grounds for legitimacy) that prevents constitutional legitimation of political acts (given its emptiness and indeterminate nature).[122] Michelman concludes that legitimacy cannot be obtained once and for all but can only be approximated, and it is eventually subject to individual judgment in which all things are considered.[123]

1. Legitimacy's Contract: Rawlsian Constitutional Essentials

Michelman's critique of the centrality of the idea of the constitution to Rawlsian and Habermasian conceptions of legitimacy illustrates their weaknesses. This is because they seek to deflect judgments on the rightness of concrete political acts and legislative enactments to judgment on the regime's overall legitimacy by virtue of its constitution's conformity with acceptable constitutional rules (which express the fundamental terms of the political community).[124]

The problem, however, with such constitution-based notions of legitimacy is that the normative constitution tells us very little about the reality of political authority. The hope that such a constitution will provide a "public" convergence or wide acceptance, notwithstanding intractable and deep disagreements, founders. The retreat to core and abstract universal notions that everyone could agree to will not

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121. MacIntyre, *supra* note 119, at 349.

122. *See, e.g.*, Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1, 13 (2003).

123. *See* Frank I. Michelman, *A Reply to Baker and Balkin*, 39 TULSA L. REV. 649 *passim* (2004); Frank I. Michelman, *Reply to Ming-Sung Kuo*, 7 INT'L J. CONST. L. 715 *passim* (2009).

124. Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101, 121 (2003).

guarantee such an acceptance. Rights guaranteed by constitutions are too abstract to inform citizens' judgments regarding the regime's overall legitimacy. In order to make such a judgment, one will have to include other considerations like the interpretations and applications of these rights and the institutions and practices put in place to interpret and apply them. To use Michelman's phrase, one will have to consider the "governmental totality." But to include such considerations would defeat the purpose of the constitutional contractual idea that requires abstracting from these controversial concrete practices. Furthermore, the fact that the constitution *could have been* interpreted and applied in other ways that *would have been* more congenial to one's orientations is likely to be less material to one's judgment of the political regime as it is practiced *here and now* under the constitution's name.[125]

The difficulties that Rawls faces are representative of the shortcomings of the contractual idea of legitimacy. Central to the Rawlsian liberal principle of legitimacy is the notion of "constitutional essentials" (which include the basic civil and political liberties and a social minimum). It is the conformity to these essentials that renders the regime legitimate. They serve as the yardstick for legitimacy. Yet this yardstick is vulnerable to four challenges: over-inclusion, under-inclusion, inadequacy, and incoherence.

First, over-inclusion

Rights enumerated in the bill of rights are abstract and mean different things to different people at different times. It is precisely the detachment of these rights from their practical, concrete manifestations that makes them abstract background conditions to the legal-political order.[126] Yet a

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125. *Id.* at 122–24.

126. Interestingly, some liberal scholars' answer for this worry is to call for more rather than fewer abstractions. For instance, Ackerman criticizes judicial rulings he disagrees with on account of their deployment of "selective abstractions." Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317,

carte blanche cannot serve as a publicly recognized test for legitimacy.[127] The Rawlsian conception of legitimacy that focuses on an abstract bill of rights is unsuccessful because it is over-inclusive. Citizens cannot be expected to consent to a *carte blanche* in their judgment to grant legitimacy to the regime under which they live. Such a conception is particularly over-inclusive from the Right side. This is because it lacks much of the theory's egalitarianism given the exclusion of some principles of justice (namely, fair equality of opportunity and the difference principle) from the "constitutional essentials." Consequently, the Rawlsian attempt to rectify the deficiency of the formality of rights fails. Therefore, this standard of legitimacy is potentially compatible with conservative and Right-wing institutional arrangements that exacerbate inequality and poverty in society.[128]

Second, under-inclusion

The "constitutional essentials" are under-inclusive from the Left side because progressives would demand the introduction of other essential items to the Rawlsian list.

318, 321 (1992). Ackerman, thus, calls for a systematic approach to the Bill of Rights that deploys a "robust abstractionism." *Id.* at 339. He asks judges to apply the "same level of abstraction" to rights and powers. *Id.* at 346.

127. Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 RATIO JURIS 63 (2000).

128. Famously, the leading neo-liberal theorist Friedrich Hayek declared, "the differences between us [i.e. Hayek and Rawls] seemed more verbal than substantial . . . we agree on what is to me the essential point." FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY, VOLUME 2: THE MIRAGE OF SOCIAL JUSTICE xiii (1976). Hayek here is referring to Rawls' approach of pure procedural justice. He explains that he has "no basic quarrel" with Rawls because they agree that background principles of justice apply to institutions and do not dictate distributive patterns. Thus, once the just institutions are in place the distributive outcomes are just. *Id.* at 100. *See* Andrew Lister, *The "Mirage" of Social Justice: Hayek Against (and For) Rawls*, 25 CRITICAL REV. 409 (2013) (arguing that there are "four main areas of Rawls-Hayek convergence: the importance of 'pure procedural justice,' the irrelevance of merit, the use of a veil of ignorance, and the principle that inequalities should benefit everyone," and that their disagreements are primarily empirical/political rather than philosophical. *Id.* at 411–12.)

Such additional items might include those principles and requirements of justice that Rawls himself proposes but declines to include in the essentials (given his judgment that they are less urgent and their violations are less transparent).[129] Scholars have suggested different ways in which Rawls' concerns can be alleviated. Understanding social and economic rights as "directive principles," to which

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129. For such an argument, see Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 FORDHAM L. REV. 1643 (2004). Shiffrin argues that Rawls does not pay enough attention to questions of race and labor. For racial discrimination to be adequately addressed there is a need for an explicit, formal, anti-discrimination principle in the constitutional essentials. The benefit from such a principle cannot be convincingly addressed by the structures put in place by virtue of the two principles of justice, given the predominantly negative character of rights guaranteed by the constitutional essentials and because racism is not necessarily rooted in material sources. Nor can it be included in the first principle or the difference principle by sheer interpretive strategies. "Not all forms of discrimination have an impact upon the equal enjoyment of the formal basic liberties . . . . For example, racially-based employment discrimination [and] housing discrimination . . . . To put it concretely, it is unclear what specific provision of the two principles would directly condemn as unjust the treatment of Rosa Parks . . . ." *Id.* at 1647. In addition, such a principle would meet the Rawlsian criteria for constitutional essentials: its violation would be transparent—it would not require complex information—and it is urgent. *Id.* at 1660. As for labor, Shiffrin argues that fair equality of opportunity cannot be satisfied by the difference principle given the centrality of work to ways of life in ways that are not reducible to income and wealth. *Id.* at 1666–70. While such a principle might raise questions of complex nature, these would not be very different from challenges facing abstract and vague basic liberties. *Id.* at 1675. For a different view, see Tommie Shelby, *Race and Social Justice: Rawlsian Considerations*, 72 FORDHAM L. REV. 1697, 1708–09 (2004). Shelby claims that racial discrimination can be adequately addressed by Rawlsian theory as it stands without serious changes in the principles and their priority. It seems to me, however, that Shelby misses an important aspect of Shiffrin's argument which is the focus on constitutional essentials that are part of the theory of legitimacy. This means that Shelby's reply is inadequate because Shiffrin's argument attempts to bring the fair equality of opportunity to the status of a constitutional essential against the backdrop of the absence of this principle from Rawlsian legitimacy. Thus, one can accept Shelby's argument that the principle of fair equality of opportunity can address the effects of historical injustice on disadvantaged groups, *id.* at 1710–12, and yet accept Shiffrin's position. If the principle indeed plays that role in the theory of justice then its exclusion from the constitutional essentials means that the political and legal system may not be able to address these issues of injustice (specifically given the fact of reasonable disagreement). In fact, it is for the purpose of playing such a role one would argue that it should be explicitly included in the essentials.

participants of Rawlsian public reason aspire to, rather than enforceable rights, might address the "transparency" objection.[130] Furthermore, the "lesser urgency" objection is not necessarily an argument against inclusion in the essentials. Indeed, an explicit constitutional clause that prioritizes basic political and civil rights can meet this objection.[131] According to these arguments, Rawls' justifications for declining to include the rights entailed by the second principle of justice fail.

Third, inadequacy

It is unclear what kinds of deviations from the "constitutional essentials" should to be tolerated. Rawls never really specifies when the system would be "too unjust" or when the injustice of the outcomes would be so grave to render the universal reasonable and rational acceptability of the "constitutional essentials" immaterial and thus the regime will forfeit its legitimacy.[132] This ambiguity is significant since it is relevant to the question of line-drawing between justice and legitimacy and the disagreement that reasonable people will have on this question. More importantly, when this ambiguity is coupled with the charge of under-inclusion from the Left and over-inclusion from the Right, it leads to an inadequate yardstick for legitimacy. Michelman argues that without the inclusion of socio-economic guarantees in the form of directive principles, the constitution would be morally defective and cannot legitimate the exercise of political power.[133] Likewise,

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130. Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13 *passim* (2003).

131. CÉCILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE 85 (2000).

132. For a similar point see Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, 35 PHIL. & PUB. AFF. 126, 145 (2007).

133. Michelman, *supra* note 127 *passim*; *see also* Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663 (2008). In his later writings Rawls suggests that the difference principle be included in the constitution's preamble as a non-judicially

Tommie Shelby suggests that the Rawlsian "constitutional essentials" are an inadequate measure for whether the political regime has exceeded the limits of "tolerable injustice" because "it does not ensure genuine conditions of reciprocity for the most disadvantaged in the scheme."[134]

Fourth, incoherence

Constitutional rules that regulate politics are not only contentious but also contradictory. Rawls seeks to reconcile liberty and equality,[135] and thus considers the fair value of political liberties a requirement for both justice and legitimacy. Accordingly, restrictions on campaign finance are necessary to prevent the translation of disparities in wealth into electoral influence that corrupts the political system. Rawls considers Supreme Court rulings that struck down attempts to restrict the influence of money on politics as a rejection of the fair value of political liberties.[136] Another reading emerges, however, if one recognizes the possibility of conflict between values. The reasoning invoked by conservative judges to support corporate power would not violate the Rawlsian constraint of "public reason" so long as they primarily invoke "political" reasons rather than conceptions of the good in defense of their position. Indeed, these rulings may be seen alternatively as part of a struggle between two incompatible conceptions of freedom of speech: a libertarian that privileges liberty over equality, an

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enforceable principle. RAWLS, *supra* note 8, at 162.

134. Shelby, *supra* note 132, at 148–49. Rawls suggests that these are questions of individual reflection and decision. *See* RAWLS, *supra* note 11, at 371–82.

135. FREEMAN, *supra* note 16, at 308; RAWLS, *supra* note 11, at 211; RAWLS, *supra* note 8, at 2; JOHN RAWLS, *Kantian Constructivism in Moral Theory*, *in* COLLECTED PAPERS 303, 305 (Samuel Freeman ed., 1999); RAWLS, *supra* note 17, at 326–27, 339, 369.

136. *See, e.g.*, RAWLS, *supra* note 17, at 356–62 (criticizing Buckley v. Valeo, 424 U.S. 1 (1976)). *See also* Ronald Dworkin, *'The "Devastating" Decision': An Exchange*, N.Y. REV. BOOKS, Feb. 25, 2010, *passim* (criticizing Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)).

egalitarian that privileges equality over liberty.[137]

This incoherence in the system of rights is a result of indeterminacy. The abstract notion of rights does not necessarily lead to a determinate result, nor does it necessarily preclude the arrival at any of these contradictory results. Rawlsian theory cannot immunize the scheme of liberties from this indeterminacy. It can be said that Rawls does not allow that one position is as good as another and provides a criterion for judgment in the face of conflicting positions with respect to the interpretations of the abstract principles of justice. This criterion requires the adjustment of basic liberties within a "fully adequate scheme of liberties" and orientates the liberties' specification toward the theory's egalitarian objectives.[138]

However, abstraction is Janus-faced: the abstract nature of rights may be congenial to a thin conception of legitimacy but this very abstractness undermines the attempt to ascribe a determinate content to the interpretation and application of rights in concrete situations. Had this concrete content been inscribed in the "constitutional essentials" *ab initio*, then the theory would have lost its claim to proceduralism that allows the alleged convergence over legitimacy. The Rawlsian legitimate structure cannot dictate the Rawlsian interpretation of the legitimacy standards. If this were the case then his justice standards would be indistinguishable from his legitimacy standards.

Thus, the inclusion of the fair value of political liberties in the "constitutional essentials" is not likely to secure an egalitarian political system because it does not rest on a coherent basis.[139] This is especially the case when the

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137. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 144–45 (2010).

138. Rawls, *supra* note 17, at 331–34. Elsewhere, Rawls writes: "No basic liberty is absolute, since they may conflict in particular cases, and their claims must be adjusted to fit into one coherent scheme of liberties." Rawls, *supra* note 8, at 104.

139. *But see* Amy Gutman, *Rawls on the Relationship Between Liberalism and*

"difference principle"—whose role through progressive taxation is "to prevent accumulations of wealth that are . . . inimical to background justice, for example, the fair value of the political liberties and to fair equality of opportunity"—is lacking.[140]

These kinds of controversies, that Rawls' conception of legitimacy gives rise to, show that his conception fails to achieve what it was set to achieve: reducing disagreement about justice amongst the reasonable and narrowing the field of contestation by "fixing" some of the demands of justice as acceptable "essentials" that are allegedly less controversial than the other demands of justice.

2. Is Dworkin's Integrity Possible?

Dworkin's integrity faces similar difficulties. The reasonably just regime for Dworkin is that which endorses the ideal of integrity. Yet, Dworkin's invocation of integrity is no less controversial than the disagreements over justice it tries to circumvent.

To begin with, the background conditions that integrity presupposes are questionable and the results it seeks to derive from them are controversial. Dworkin's integrity, and hence his notion of legitimacy, is possible if one accepts that there is an identifiable and shared coherent scheme of principles and that judges are able to work out law's integrity by teasing out the fundamental commitments of the community and enacting its political morality. Dworkin introduces the notion of principles in reaction to the view of the law as a collection of rules, a view associated with positivist scholars. The law, according to Dworkin, is

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Democracy, *in* THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 27, at 168 *passim*. Gutman argues the criterion Rawlsian theory provides can help avoid indeterminacy. *Id.* at 183–84. Yet Gutman also cites debates concerning capital punishment, abortion, and pornography to argue that "reasonable disagreements over justice can also pose a distinctive problem for political liberalism" to the extent they may undermine the emergence of an overlapping consensus. *Id.* at 184.

140. RAWLS, *supra* note 8, at 161.

suffused with moral principles and judges draw upon these principles to resolve disputes about what the law is that arise when there is a conflict between rules, an ambiguity of a rule, or a gap in the system of rules. For Dworkin, the law is a coherent whole and a gapless system.

For this view of the law to be possible, the distinction between the domain of principled rights, from which judges draw, and unprincipled policy decisions, the domain of politicians and legislatures, should be workable. However, this distinction can be challenged either by showing that rights discourse includes policy considerations or that legislative processes include principles. On the one hand, Duncan Kennedy argues, judicial reasoning in the elaboration of abstract rights is not immune from ideological influences, nor sharply distinguishable from open-ended policy arguments (e.g., balancing tests in resolving disputes about rights).[141] This suggests that the discourse of rights is not rationally coherent. While indeterminacy is not an inherent or necessary feature of rights, it may nevertheless be produced through the legal actor's work.[142] On the other hand, even if one could conceive of the court as a "forum of principle," one may still believe that the legislature is a forum of principle too and thus deny the advantage ascribed to judges over politicians.[143]

The difficulty in making a sharp and stable distinction between law and politics, adjudication and legislation, and judge and legislator is symptomatic of the incoherence of the

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141. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} 124–27, 315–38 (1997).

142. DUNCAN KENNEDY, *A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation*, *in* LEGAL REASONING: COLLECTED ESSAYS 153 *passim* (2008) [hereinafter KENNEDY, *A Left/Phenomenological Alternative*]; DUNCAN KENNEDY, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, *in* LEGAL REASONING: COLLECTED ESSAYS, *supra*, at 11 *passim*.

143. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 145–46 (1993); JEREMY WALDRON, *Rights and Majorities: Rousseau Revisited*, *in* LIBERAL RIGHTS 392, 419 (1993).

background scheme of principles itself as it includes contradictory values. Abstract rights mediate between these contradictions.[144] Kennedy argues that private law adjudication (as in contract law) exposes two conflicting orientations between altruism and individualism. The first favors substantive standards and the second favors formal rules. This conflict represents a contradiction (both internal to persons and between persons) between two "irreconcilable visions of humanity and society, and . . . aspirations for our common future."[145] These orientations exist in, and emanate from, the larger political culture. The "[l]egal form fails to screen out or significantly reduce the range of ideological conflict" in this culture.[146] Rather, legal rules are "complex compromises" of such a conflict.[147] This conflict "cannot be reduced to disagreement about how to apply some neutral calculus."[148] If private rights are an incoherent idea, it follows that public law that presupposes private rights is no less incoherent.[149] Indeed, public law is no less suffused with contradictory visions of society.[150] This is a *contradiction* rather than a *competition* or a *tension* between principles that may be resolved by higher principles because they

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144. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 259 (1979).

145. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

146. Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 229 (1986).

147. KENNEDY, *A Left/Phenomenological Alternative, supra* note 142, at 168.

148. Kennedy, *supra* note 145, at 1685.

149. Kennedy, *supra* note 144, at 360.

150. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148, 177–78 (1978) (arguing "that the 'public purpose' and 'delegation' doctrines, as judicially fashioned and applied, suggest the coexistence in the judicial mentality of two different, and contradictory, models of local-government legitimacy . . . —an economic or 'public choice' model and a non-economic 'public interest' or 'community self-determination' model").

represent opposing ranking of values.[151]

Against the backdrop of this incoherent framework, integrity neither guarantees "right answers," nor necessarily constrains judges. Judges endorsing integrity can still advance their preferred values by representing policy decisions as rights and principles (for instance, judges valuing liberty will present restrictions on campaign finance as violating First Amendment freedom of speech rights of corporations). Other judges who privilege opposing values may comply with integrity while presenting different policy decisions as rights and principles (hence, judges valuing equality rather than liberty would deny that corporations have freedom of speech rights). Both sides can find some support for their positions in existing materials and precedents.[152] Integrity then does not circumvent disagreement over justice (because judges disagree on what rights people have). Rather, integrity itself becomes a platform for such disagreement.

In addition, disagreement might arise concerning the weight ascribed to integrity in its conflict with other ideals. Disagreement over justice, as Waldron points out, questions the Dworkinian talk about trade-offs between justice and integrity or justice and fairness. This is because there are different ways of weighing between justice and other values. These depend on one's conception of justice. This conception might disagree with Dworkin that integrity or fairness are ideals equal in weight to justice. In other words, disagreements over justice breed disagreements over

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151. Jeremy Waldron, *Did Dworkin Ever Answer the Crits?*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 155 *passim* (Scott Hershovitz ed., 2006). *See also* Altman, *supra* note 146, at 235. Habermas' attempt to defend Dworkin against the CLS critique has also been criticized by scholars as unsuccessful. JAMES L. MARSH, UNJUST LEGALITY: A CRITIQUE OF HABERMAS'S PHILOSOPHY OF LAW 84–88 (2001).

152. KENNEDY, *supra* note 141, at 97–156. *See also* Altman, *supra* note 146, at 223–31.

legitimacy.[153]

Dworkin thus underestimates the intractability of disagreement because he denies value pluralism and idealizes the law in ways that marginalize the role of political disagreement and compromises in law.[154] In practice, law is not necessarily coherent, and even if it were that might not be necessarily morally desirable. Whether one should prefer coherence to the morally desirable depends on the specific context.[155]

B. *The Procedural Republic*

It follows that the restrictions on the good and the just by legitimacy become wanting when one considers that legitimacy is itself highly contestable. If the justificatory moves, on which these restrictions are based, are a matter of reasonable disagreement, then the restrictions themselves lack the non-controversial basis (consensus amongst, and acceptability to, the reasonable) that makes them distinguishable from the controversial substance they seek to circumvent.

The primacy of an impartial procedure as a foundational organizing governmental theme transforms the liberal state into, to use Michael Sandel's phrase, a "procedural republic" that is not committed to any common good nor to a robust egalitarian justice.[156] This procedural republic entails liberal constitutionalism in order to maintain its independence of specific ends while justifying the deployment of the law's coercive power. Constitutional rules and principles cannot, however, control politics because they are no less

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153. WALDRON, *supra* note 112, at 195–98.

154. Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 310, 315 (1992).

155. *Id.* at 312. *See generally* Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375 (1999).

156. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF PUBLIC PHILOSOPHY 4 (5th prtg. 1998).

contentious.[157] As Seidman argues, constitutional law purports to consist of meta-rules that aim at evading political conflict. Yet it ends up reproducing the conflict at a higher level, the level of meta-rules themselves. One cannot justify such rules by referring to the same rules because that will be redundant; they cannot be justified through their consequences because this will be circular; nor can they be justified through a higher level of abstraction since this will merely lead to an infinite regress.[158]

Therefore, limits on politics should be recognized as political and contingent.[159] It is not convincing in this context to engage in question-begging definitional fiats of the political. Some scholars invoke an overly narrow conception of politics in order to represent constraints on politics as non-political (e.g., technical or professional or bureaucratic).[160] Other scholars consider these constraints as political or ideological but in a trivial sense because they simultaneously argue that they are non-controversial and consensual.[161] Such empirically-oriented conceptions, however, treat existing limits on political debates as if they were simply "given facts" or "natural." As such, they do not account for ideological contestation over, or normative justifiability of, the prevailing "consensus" or "common sense" in a specific time and place. Lacking a notion of historical change, they privilege the existing over the possible by presenting the contingent as stable.

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157. *See generally* Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.-C.L. L. REV. 371 (2012) (arguing that the attempt to legitimate constitutional democracies by reconciling constitutionalism with democracy has hitherto failed).

158. LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 21–22 (2001).

159. *See* CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 93 (2000).

160. *See, e.g.*, Frederick Schauer, *The Supreme Court 2005 Term-Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 8–9 (2006).

161. *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 373 (2008).

Limits on politics neither emanate non-controversially from reason (or notions of reasonableness), nor can the domain of the "political" be limited beforehand. Habermas argues that Rawls' theory, in contrast to his own "radical democracy," is constrained by pre-political rights that are privileged over democracy and hence constrain democratic will-formation. Accordingly, Rawlsian political liberalism "merely promotes the *nonviolent preservation of political stability*."[162] However, this alleged difference between Rawls and Habermas is more perceived than real.[163] As Larmore points out, Rawlsian and Habermasian theories are similarly based on a moral norm of respect from which an individual right to equal participation in the formation of collective will is derived. This norm precedes the process of collective will formation and does not originate in it. In other words, democracy presupposes pre-political rights in both theories.[164]

C. *On Neutrality*

In order to exemplify the political and contingent nature of constraints on politics this section examines liberal neutrality. There are two faces to neutrality: neutrality as a justification for political authority and neutrality as a restriction on governmental action. The point of what follows is to illustrate that this neutrality is either too abstract to be useful (egalitarian and progressive) or too concrete to be universally acceptable. Thus, neutrality does not provide a refuge from substantive and controversial judgments.

1. Liberal Neutrality

Liberalism is impartial towards competing conceptions

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162. Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109, 128 (1995) (emphasis in original).

163. Larmore, *supra* note 58, at 617.

164. *See id.* at 622. For a similar critique of Habermas, see Frank Michelman, *Democracy and Positive Liberty*, BOS. REV., Nov. 1996, *passim*.

of the good, such as religions, but it is not morally neutral or skeptic.[165] Liberalism is neutral towards the good but not *vis-à-vis* the principles of justice.[166] Liberal theory is neutral with respect to citizens' choice between Islamic, Christian, and Jewish ways of life, but it is not neutral with respect to a political regime that is based on religion (as in a Christian, Islamic, or Jewish state). The latter is ruled out in liberal theory from the company of legitimate liberal democratic regimes. Unlike a communitarian or a perfectionist state, a neutral liberal state is "a state which does not justify its actions on the basis of the intrinsic superiority or inferiority of conceptions of the good life, and which does not deliberately attempt to influence people's judgments of the value of these different conceptions."[167]

Furthermore, Rawls distinguishes between neutrality-in-aim (the basic structure and public policy are not to be intended to favor any conception of the good) and neutrality-of-effect (the state should refrain from any policies that might facilitate and encourage the adoption of a specific conception of the good).[168] Rawlsian liberal theory requires the first only. The latter, he says, is impractical and is not required by liberal theory.[169] State neutrality towards the

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165. DWORKIN, *supra* note 43, at 203 (denying that liberal neutrality is based on moral skepticism); JEREMY WALDRON, *Legislation and Moral Neutrality*, *in* LIBERAL RIGHTS, *supra* note 143, at 143, 156–60 (denying that liberal neutrality is based on moral skepticism or emotivism; rather neutrality is itself a normative proposition on which legislatures should not be neutral about). While there may be different versions of morality, Larmore considers the "more promising account" to be that which stipulates "that neutral principles are ones that we can justify without appealing to the controversial views of the good life to which we happen to be committed." Larmore, *supra* note 26, at 341. *See also* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 217 (2d ed. 2002).

166. DWORKIN, *supra* note 38, at 441.

167. KYMLICKA, *supra* note 165, at 217. *See also* ACKERMAN, *supra* note 30, at 10–11 (discussing neutrality).

168. RAWLS, *supra* note 17, at 190–95.

169. *See* WALDRON, *supra* note 165, at 149 (discussing neutrality in intention and in consequences and arguing the latter maybe impractical).

good does not mean that, in effect, some conceptions of the good would benefit more from the basic structure and will be able to recruit more adherents than others.[170] Obviously, a majority will benefit more as it will be the dominant culture. So long as the state is not committed to the majority's conception of the good and the basic structure and "constitutional essentials" are not tilted to serve it, Rawls would not complain.[171]

Dworkin presents a similar position. On the one hand, political authority should be neutral towards citizens' ways of life.[172] On the other hand, such an approach would not be neutral in its impact on different ways of life.[173] It is the very fact that there is no neutrality of effect that motivates Will Kymlicka's project on defending group rights within liberalism. Kymlicka seeks to compensate disadvantaged groups to enable them to obtain genuine equality by allowing them to maintain their culture and to have access to the mainstream culture.[174]

However, this recognition of the lack of neutrality-of-effect does not go far enough. In fact, reasonable disagreement persists with respect to supposedly procedural notions like neutrality-in-aim.[175] For example, it is equally plausible that state neutrality would require banning school prayers or its opposite outcome, that is, non-interference in the practice of school prayers. The dispute on the meta-level would seem to replicate the dispute on the concrete level: does neutrality require the imposition of outcomes of neutral democratic procedures or a minimal state allowing private

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170. RAWLS, *supra* note 17, at 193–94.

171. Nor would Martha Nussbaum, *supra* note 29, at 37.

172. DWORKIN, *supra* note 43, at 190–92.

173. DWORKIN, SOVEREIGN VIRTUE, *supra* note 31, at 154, 282–83.

174. *See generally* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995).

175. SEIDMAN, *supra* note 158, at 38.

choices?[176] Ultimately, neutrality-in-aim is an incoherent proposition.

2. Neutrality and Egalitarianism

Neutrality's contestability is illustrated by the fact that progressive liberal scholars have attempted to derive progressive institutional arrangements from neutrality itself. Thus, Ackerman claims that the demands of equality and distributive justice follow from the conversational constraints that neutrality imposes on the justification of the political order.[177] This attempt to derive such a program for social transformation from thin and abstract grounds is far-fetched.[178] Fishkin notes that Ackerman vacillates between strict and loose conceptions of neutrality. The strict conception is too thin and empty to mandate Ackerman's egalitarian objectives, and the loose conception allows substantive content but is indeterminate and thus fails to exclusively mandate the egalitarian objectives that Ackerman's theory is set to establish.[179] For Flathman, Ackerman's neutrality would mandate the distributional goals to which he aspires only at the price of undermining his own primary assumption: the irreducible plurality of conceptions of the good. Since Ackerman's "proposed allocations necessarily involve rankings of and choices among goods and hence among conceptions of good"[180] the suggested "policies are grounded not in Neutrality among conceptions of good but in a preference for one conception of good over others."[181] But this conception is inevitably controversial. Only if it were unanimously accepted in

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176. *Id.*

177. *See generally* ACKERMAN, *supra* note 30.

178. *See, e.g.*, Richard E. Flathman, *Egalitarian Blood and Skeptical Turnips*, 93(2) ETHICS 357, 359 (1983).

179. James S. Fishkin, *Can There Be a Neutral theory of Justice?*, 93 ETHICS 348, 355 (1983).

180. Flathman, *supra* note 178, at 361.

181. *Id.*

society would Ackerman's proposals be consistent with neutrality.[182]

Like Ackerman, Sunstein seeks to derive progressive conclusions from the abstract notion of neutrality. Sunstein objects to the conservatives' conception of neutrality since it assumes the status quo as the natural baseline.[183] Accordingly, one might distinguish between an "activist neutrality", that seeks to challenge the status quo and change it, and a "preservationist neutrality" that seeks to preserve the status quo and leave it intact.[184] Neither of these kinds of neutrality, however, guarantees progressive results. Both can be marshaled on behalf of conservative agendas no less than progressive ones. This is because it depends on which status quo one wishes to preserve or challenge. The status quo itself is controversial. If progressives favor the status quo then they would presumably want to preserve it through "preservationist neutrality." If conservatives dislike the status quo then they might adopt an "activist neutrality." Even if both sides disliked the baseline that is embodied in the status quo, this would beg the controversial question concerning alternatives.[185] One potential difficulty here is cherry picking. There are different aspects in the status quo and progressives or conservatives might like some and dislike others. Needless to say, progressives and conservatives are not monolithic camps (as the disagreement between Dworkin and Owen Fiss, Michelman, and Sunstein on pornography demonstrates[186]) and they would disagree on which aspects

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182. *Id.*

183. Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 5–13 (1992).

184. These are my phrases, not Sunstein's.

185. *See, e.g.,* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 112 (1996) (discussing the example of racial equality under the Equal Protection Clause).

186. DWORKIN, *supra* note 114, at 214–43; OWEN M. FISS, LIBERALISM DIVIDED:

of the status quo they dislike and if so which warrants state intervention. It would seem then that one would be alternating between different conceptions of neutrality depending on the context. "Preservationist neutrality" would be employed when one likes the status quo and therefore rejects state intervention as paternalistic. "Activist neutrality" would be employed when one welcomes state intervention to change the status quo but does not want to be charged with paternalism.

Such an attempt to redefine neutrality does not expose conservative conceptions of neutrality as a mistake as much as expose neutrality as an essentially contested concept even within the progressive liberal camp given the different justifications deployed to justify it and the variety of conclusions that are derived from it.[187] Sunstein considers "preservationist neutrality" a mistaken approach because he thinks it presupposes a status quo that violates liberal norms. That is, his neutrality presupposes substantive liberal values. As previously noted, liberalism may be neutral towards conceptions of the good but not with respect to the principles of justice.[188] Thus, neutrality may not be neutral with respect to inequality because it demands equality. It is less clear, however, which conception it requires: formal or substantive equality; equality of opportunity or resources.

Be it as it may, Sunstein's later theory of constitutional legitimacy that is invoked in his theory of interpretation and his justification of judicial review (which he calls "minimalism") does not necessarily guarantee progressive

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FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER *passim* (1996); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 *passim* (1989).

187. As Waldron notes, neutrality needs to be justified because it is not self-justifying. Different justifications are likely to lead to different notions of neutrality. Additionally, the notion of neutrality is necessarily selective since liberals are neutral with respect to certain questions and not neutral with respect to others. WALDRON, *supra* note 165, at 147.

188. DWORKIN, *supra* note 43, at 203.

results, as he himself points out.[189] Rather than a robust approach of "activist neutrality," he urges judges to avoid certain controversial issues and leave intractable questions "incompletely theorized."[190]

The outcome of these attempts, then, is to expose neutrality's incoherence because it destabilizes and redraws anew the distinction between neutrality and paternalism. This redrawing, however, does not advance progressive politics since it is not necessarily mandated by conceptions of legitimacy deployed by progressive theorists and in fact this politics may be constrained by these conceptions of legitimacy. Worse still, arguments advanced by liberals to advance progressive agendas under neutrality may be used to advance conservative agendas if and when the particular context shifts.

Some liberal scholars, like Schauer, are less troubled by the question of neutrality because they do not have a normative conception of legitimacy. Nor do they have a Lon Fuller-like or a Dworkin-like moral conception of the law. Rather they adopt a sociological conception of legitimacy and a positivistic understanding of the law. If the law is instrumental to achieving the community's moral and political goals, says Schauer, then it is obviously not neutral. Principles are always partial with respect to something irrespective of the level of generality of their phrasing. The process of lawmaking and constitutional interpretation will always be value-laden and thus non-neutral. Whether one supports judicial review or not would depend on the actual consequences it produces and values it advances.[191] Nevertheless, Schauer's position would reject the goals that proponents of "activist neutrality" attempt to advance since

189. Cass R. Sunstein, *The Minimalist Constitution*, *in* THE CONSTITUTION IN 2020 37 (Jack M. Balkin & Reva B. Siegel eds., 2009).

190. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 39–41 (1999).

191. Frederick Schauer, *Neutrality and Judicial Review*, 22 L. & PHIL. 217 *passim* (2003).

these would be considered as an abandonment of long-term deontological values for the sake of short-term policies that are self-defeating over the long-term.[192]

However, the problem is not merely factual (that the law is not neutral), but also normative (whether this lack of neutrality and its consequences are defensible). Justifying a legal regulation by sociological acceptance begs the question because the sociological fact itself needs a justification.[193] Justifying legal regulation by reference to pre-commitments is not compelling either, because these commitments are abstract and controversial.[194]

Ultimately, questions like pornography or campaign finance reform or equal protection, Seidman and Tushnet remind us, are not about a choice between regulation and its absence. Rather, they require a choice between different regulatory regimes.[195] Thus, it is misleading to frame the discussion in binary oppositions like "paternalism v. neutrality" or "intervention v. non-intervention" or "state action v. state inaction" or "positive liberty v. negative liberty."[196] That framing merely reproduces the question in a different trapping. The main issue is whether there is a publicly-available, universally-acceptable, theoretically-principled, anti-paternalist position.[197] Absent such as

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192. Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045 *passim* (2004).

193. Frank I. Michelman, *Constitutional Authorship*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 64, 84 (Larry Alexander ed., 1998).

194. *See, e.g.,* Jeremy Waldron, *Precommitment and Disagreement*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 194, at 271, 285, 292.

195. SEIDMAN & TUSHNET, *supra* note 185, at 130.

196. Dworkin frames the discussion of the regulation of pornography in the terms of a defense of negative liberty against positive liberty. DWORKIN, *supra* note 114, at 214–26. Undermining the distinction between negative and positive liberty, he argues, is the road to tyranny. *Id.* at 215, 239.

197. For a critique of principled anti-paternalism and a defense of ad hoc paternalism both in public and private law, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to*

position, the invocation of neutrality would obfuscate the real issues at hand because it would conceal the existence of paternalism despite its pervasiveness, including in private law (such as contracts, torts and consumer protection).[198] Perhaps, then, a more fruitful line of inquiry would be to decide which forms of intervention are normatively defensible.[199]

III. THE DARK SIDE OF ABSTRACTION

This final section argues that abstraction not only fails to lead to agreement, it is also likely to lead to undesirable consequences. In other words, abstraction is not merely futile; it is also misguided. This is because it mystifies political conflict and underestimates this conflict's intractability, thereby leading to dire consequences for the prospects of realizing liberal justice. In its search for a consensual framework, political liberalism marginalizes the

Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563 *passim* (1982). Kennedy argues that paternalist and distributive motives are pervasive in contract and tort law but these are masked by efficiency or "inequality of bargaining power" arguments. Paternalism is not seen as an acceptable motive for a decision-maker except in exceptional cases of incapacity or lack of will. However, not all paternalist/interventionist actions or non-actions can be rationalized under the notion of "capacity." Kennedy argues that "efficiency" and "capacity" are manipulable abstract notions under which paternalist motives can be introduced into the decision-making process. *Id.* at 587, 644 (discussing efficiency and capacity). A doctrine like "promissory estoppel" in contracts is an example of paternalism. *Id.* at 635. Given the ubiquity of paternalism, Kennedy concludes, principled anti-paternalism becomes no more than a "defense mechanism." *Id.* at 646. But neutrality is not an option for the decision maker. *Id.* at 645, 648–49. Therefore, Kennedy argues for *ad hoc* paternalism. *Id.* at 638.

198. Sunstein presents a different position in later writings. *E.g.*, Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 *passim* (2003). The authors argue that given the findings of behavioral studies libertarian paternalism should direct citizens' preferences towards promoting welfare. Neutrality is not mentioned. For a critique of this position, see Gregory Mitchell, *Libertarian Paternalism is an Oxymoron*, 99 Nw. U. L. REV. 1245 (2005).

199. *See, e.g.*, Robert E. Goodin, *Permissible Paternalism: In Defense of the Nanny State*, *in* THE ESSENTIAL COMMUNITARIAN READER 115, 115–24 (Amitai Etzioni ed., 1998).

question of institutional design and thus defers the advancement of that which progressive-liberal justice requires.

A. *The "Virtues of Abstraction"*

Rawls argues that abstraction is not merely a question of avoiding disagreement but it also provides a clarification device for the nature of disagreement. Rawls writes:

> The work of abstraction . . . is not gratuitous: not abstraction for abstraction's sake. Rather, it is a way of continuing public discussion when shared understandings of lesser generality have broken down. We should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots.[200]

However, the preceding discussion points to a different conclusion. It is not merely that abstraction as a disagreement-avoidance-minimization-postponement device fails. It also conceals the intractable nature of political disagreements.[201] By presenting a state of affairs regarding the availability of "a common stock of concepts and norms which all may employ and to which all may appeal,"[202] liberal political rhetoric falsely suggests that political disagreements can be rationally settled. This political rhetoric conceals the depth of value conflicts by presenting them as no more than conceptual confusions or interpretive mistakes and hence deceptive appearances.[203]

The "higher the level of abstraction . . . we . . . ascend to" (to use Rawls' phrase), the emptier the agreement it leads to. The emptier this agreement, the more illusory its nature, and the more incapable is this abstraction in providing us with a "clear view" of the "roots" of political and social

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200. RAWLS, *supra* note 17, at 45–46.

201. MACINTYRE, *supra* note 119, at 253 (emphasis in original).

202. *Id.* at 252.

203. Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 916 (2010).

conflicts. Rather than discussing the "roots" of conflict, political discussions are diverted into an abstract debate. Neither the abstract debate is likely to be resolved, nor does it dictate specific resolutions to the concrete debates that are embedded in the specific social, political, and historical context.

The method of abstraction abstracts the legitimacy of political and legal ordering from controversial conceptions of the good and reasonable disagreements about justice. Thus, it relegates much of the intractable, controversial issues to the non-political sphere. By doing so, it disconnects some of the political disagreements from their wellspring. Many of the political discussions become more technical or legalistic versions of the real issues lurking behind the views taken by the contestants. Indeed, abstraction may lead to highly-specialized and obscure discussions.[204] These discussions mystify the issues at hand.[205] Disagreements might be misrepresented by participants or mistaken by observers to what they are not, or even disconnected entirely from the real issues at hand.

Dworkin argues that abstraction is beneficial because it makes debates more civilized and less heated and increases the potential for their resolution.[206] However, the point here is not whether intractable disagreement is heated or not, expressed in civilized ways or not. What is at stake is not the form of disagreement, rather, the main question at hand is the intractability and the persistence of this disagreement (with respect to legitimacy too). The method of abstraction presents a false picture of agreement over fundamental issues that regulate the political sphere. It represents legitimacy as a solid rock, an island of consensus, that is

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204. *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 80 (1999).

205. GUY ROBINSON, PHILOSOPHY AND MYSTIFICATION: A REFLECTION ON NONESENSE AND CLARITY 5–7 (2003); Sultany, *supra* note 157, at 454–55.

206. DWORKIN, SOVEREIGN VIRTUE, *supra* note 31, at 240.

acceptable to anyone who is reasonable and within which other disagreements can be managed and moderated.

The history of moral and philosophical debates does not lend credence to the hope that abstract questions are likely to be more resolvable.[207] These are no less intractable than the ethical questions that political liberalism seeks to set aside. One reason for the irresolvability of abstract moral questions is the absence of "consensus with regard to moral principles from which answers to contested moral questions might actually be derived."[208]

A possible objection to this argument may focus on the advantage of "narrowing the differences" as opposed to irresolvability. If there is a chance that a sizable fraction of the citizenry would find, say, Rawls' principle of legitimacy acceptable and endorse it, would not that narrow down the differences amongst them? And hence would it not represent a moral or a practical gain that would justify the deployment of the method of abstraction?

This objection conflates two meanings of abstraction: abstraction-as-common-ground and abstraction-as-emptiness. Even if the common ground were achieved it would turn out to be an empty or incoherent common ground and as such it does not necessarily reduce disagreement. On the one hand, the answers provided to abstract questions do not necessarily dictate specific answers to the controversies arising in concrete contexts. On the other hand, moral, philosophical and legal discourses are indeterminate and can be deployed by holders of competing positions to justify their views in concrete cases.[209]

Even if there were an effect of narrowing the differences this cannot confidently be attributed to normative endorsement as it may emanate from socialization and

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207. POSNER, *supra* note 204, at 50.

208. *Id.* at 63.

209. *Id.* at 53; *see also id.* at 268.

sociological acceptance of authority. Moreover, narrowing the differences is a descriptive question that has a normative dimension. Disagreement exists also with respect to the desirability of narrowing the differences. And how will we narrow the differences between those who do not perceive narrowing the differences as a gain and those who do?

B. *Marginalizing Institutional Design*

Liberal scholars justify the gap between progressive liberal ambitions to justice and progressive liberal commitments to legitimacy (the proceduralization via abstraction) by virtue of the recognition of reasonable disagreement. This recognition leads to justifying specific notions of legitimacy and rationalizing certain institutional arrangements that fall short of what liberal justice requires. These notions of legitimacy remain controversial no matter how thinly conceived. Therefore, it is not only disagreement that is concealed but also politics is misconceived and watered down. This is because abstraction has also the effect of marginalizing the project of institutional design.

Progressive liberalism cannot be evaluated without taking into account both its claims to justice and its commitments to legitimacy. William Connolly writes:

> Current liberalism cannot be defined merely through its commitment to freedom, rights, dissent, and justice. It must be understood, as well, through the institutional arrangements it endorses. Its unity grows out of the congruence between these ideals and their institutional supports. If the first principle of liberalism is liberty, the second is practicality. Liberal practicality involves the wish to support policies which appear attainable within the current order . . .[210]

Indeed, the move to political liberalism, and even more so to legitimacy, includes some notion of practicality. Rawls writes:

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210. WILLIAM E. CONNOLLY, *The Dilemma of Legitimacy*, *in* POLITICS AND AMBIGUITY 72, 83 (1987).

> [T]he aim of justice as fairness as a political conception is practical, and not metaphysical or epistemological. That is, it presents itself not as a conception of justice that is true, but one that can serve as a basis of informed and willing political agreement between citizens viewed as free and equal persons.[211]

However, the retreat to legitimacy that embodies this notion of practicality leaves political liberalism suspended between a reality it simultaneously condemns and accepts. Indeed, "principled liberalism is neither at home in the civilization of productivity nor prepared to challenge its hegemony."[212] It does not endorse the welfare capitalist economy (because it is unjust), yet it does not reject it either (because it is legitimate), nor does it insist on the required measures to overcome these unjust conditions. Indeed, "liberal egalitarianism's institutional commitments have not kept pace with its theoretical commitments. This has led to a tension, perhaps even a crisis, in the politics of liberal egalitarianism."[213]

This crisis is likely to endure because liberal egalitarianism, for historical and theoretical reasons, cannot keep pace with its theoretical commitments. The recognition of the legitimacy of existing arrangements would make sense from the perspective of progressive liberal ideals of justice if these arrangements were likely to lead to the approximation of justice.[214] That is, if liberal conceptions of legitimacy

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211. Rawls, *supra* note 115, at 230.

212. CONNOLLY, *supra* note 210, at 84.

213. KYMLICKA, *supra* note 165, at 91.

214. For instance, Dworkin calls the United States "a decent working democracy" even though unjust conditions persist. He writes: "In a decent working democracy, like the United States, the democratic conditions set out in the Constitution are sufficiently met in practice so that there is no unfairness in allowing national and local legislatures the powers they have under standing arrangements." DWORKIN, *supra* note 114, at 32. Elsewhere, in explicating his theory of justice, he writes: "The prosperous democracies are very far from providing even a decent minimal life for everyone . . . ." DWORKIN, SOVEREIGN VIRTUE, *supra* note 31, at 3. Though unjust, the solution may not require any radical institutional changes: "The distributional schemes now in place in the United States and Britain, haphazard and patchwork though they are, could

provided members of society with the required resources and institutional prescriptions for advancing the legitimate towards the just. As far as one can draw lessons from the last decades of United States history, there is no progress towards liberal justice. The socio-political developments since, say, the writing of *A Theory of Justice* have been contrary to Rawls' ambitions.[215] The rise in conservative forces, including in the Supreme Court, have advanced neo-liberal and anti-egalitarian policies that only increased social and economic inequalities.[216]

In his recent work, economist Thomas Piketty illustrates that there is an overall historical tendency in capitalist societies toward increasing inequality in wealth and income.[217] He stresses that the history of inequality is

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plainly be improved by a more just tax system, for example, and any redistribution towards those at the bottom, that would not impose fresh liberty deficits. Neither Britain nor the United States (nor, I believe, any other country) has yet achieved a defensible scheme of distribution." *Id.* at 169. He adds, "we have not achieved, or even approached, a defensible distribution for us. We have not done even what we technically can to ameliorate distributional inequality; our failures have been of will, imagination, and, mainly, justice." *Id.* at 172–73.

215. Raymond Geuss, *Neither History Nor Praxis*, 11 Eur. Rev. 281, 286 (2003).

216. *See, e.g.*, Elizabeth Kneebone et al., Brookings Inst., *The Re-Emergence of Concentrated Poverty: Metropolitan Trends in the 2000s passim* (2011); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998,* 118 Q. J. Econ. 1 *passim* (2003); Alan Cowell, *In Britain, Minding the Income Gap*, N.Y. Times (Nov. 25, 2011), https://www.nytimes.com/2011/11/26/world /europe/26iht-letter26.html ("The figures recorded the greatest imbalance in the United States, where a notional one-tenth of 1 percent of the population was listed as controlling 7.5 percent of America's riches. The corresponding figure for the top 0.1 percent of Britons—roughly 60,000 people—was 5 percent of the country's wealth, on a par with the nouveau riche and mineral rich in South Africa, but twice the level in France and other European nations, like Sweden, that pride themselves on a degree of virtuous égalité."); Alexander Stille, *The Paradox of the New Elite*, N.Y. Times (Oct. 22, 2011), https://www.nytimes.com/ 2011/10/23/opinion/sunday/social-inequality-and-the-new-elite.html (noting that the United States became more inclusive by expanding equal rights to different groups and at the same time more tolerant of economic stratification becoming "one of the most unequal democracies in the world").

217. Thomas Piketty, Capital In The Twenty-First Century 1, 27 (Arthur Goldhammer trans., 2014).

"deeply political" and "is shaped by the way economic, social, and political actors view what is just and what is not, as well as by the relative power of those actors and the collective choices that result."[218] He maintains that the sustainability of "extreme inequality" depends not only on repressive methods but also on "the effectiveness of the apparatus of justification."[219]

It becomes pertinent then to examine how the "ought" can be realized in reality under such adverse conditions because ignoring them would be detrimental to the theory's egalitarian objectives.[220] Instead, liberal egalitarians have been either concerned with ideal theories of justice that lacked institutional prescriptions for their implementation, or that their institutional prescriptions (as a matter of justice) were too modest to achieve what their own ideals imply (given their focus on redistribution of income through tax and transfer schemes within the welfare state) and thus do not change the conditions that undermine the attainment of these very liberal ideals.[221] Something similar can be said about Habermas' attempt to tame the economy:[222] "taming colonization [of the life-world] is insufficient if the inequality in wealth and income within the economic sphere is left untouched."[223]

The problem is not merely that liberal egalitarianism is either ideal or modest. Rather, the primary difficulty lies in the fact that the liberal theoretical edifice—no matter how ambitious as a matter of justice—maintains a gap between the "is" and the "ought." In this move, justice recedes to a mere "ought," a regulative idea, an external evaluative standard, a suspended ideal, or a delayed good, rather than

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218. *Id.* at 20.

219. *Id.* at 264.

220. Habermas, *supra* note 33, at 64–65.

221. Kymlicka, *supra* note 165, at 91.

222. Habermas, *supra* note 33, at 410.

223. Marsh, *supra* note 151, at 7.

an immanent potentiality in existing forms of life that can be realized in the world.

In fact, it is the very move to legitimacy that deflects liberal egalitarian attention from discussions over the required institutional changes, and from analyzing the historical conditions under which these changes can be realized. Consequently, the practicality that underpins the method of abstraction is self-defeating because abstraction is devoid of "practical utility."[224] Indeed, "[i]n the making of public policy, abstract theory is a good with very little cash value."[225] There is an evident tension between outlining an institutional program that a political regime committed to justice should pursue and thin conceptions of legitimacy that seek the widest acceptability possible. The thinner—the more "political," the more abstract, and the more proceduralist—progressive liberalism becomes, the less it is able to secure or mandate its own ambitions to justice. The thinner it becomes, the more it privileges the existing over the possible.

In light of this, the institutional commitments that follow from the endorsement of welfare-state capitalism or neo-liberalism as legitimate are more wanting. The problem with political liberalism is threefold. First, it is unclear how the move to legitimacy would bring progressive ideals to fruition given the thinness of the legitimacy standards. Second, abstract liberal legitimacy is malleable to anti-egalitarian corruptions and neo-liberal manipulations. Third, progressive liberals accept these corruptions and manipulations as legitimate. Their own theories of liberal legitimacy have a legitimation effect on outcomes they oppose.

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224. Kukathas, *supra* note 1, at 215, 219.

225. *Id.* at 223.

IV. CONCLUSION

At this historical juncture of fast-paced political, social, and legal change, this Article is an initial step toward a critical reflection on leading liberal frameworks that theoretically respond to the world of events and intervene in it. While it is beyond the scope of this Article to outline an alternative to political liberalism,[226] it puts forth an internal critique of inherited frameworks. This is a crucial step toward exposing the need for alternatives given the increasing signs of atrophy in the existing social and political order. It may be satisfying to reconstruct liberal theories to defend more radical conclusions than their original authors would have allowed.[227] It remains instructive, however, that these leading theorists were reticent in the first place as if obstructed by a straitjacket of their own making. By critically engaging the theoretical framework to which major liberal authors contribute, this Article probes whether this framework is adequate. Ignoring the instability and inadequacy of the framework, liberal egalitarians often reduce the question to one of disagreement about the means to address poverty and inequality, such as the justiciability of social and economic rights.[228] Yet it is crucial to inquire whether the framework itself is deficient and thus should be transformed or transcended.

Central to this liberal theoretical framework is a method of abstraction in which progressive liberals retreat from their initial egalitarian commitments to a more limited stipulation of the necessary background conditions for the deployment of the state's coercive power under conditions of disagreement over justice. This method is untenable and its consequences

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226. *See, e.g.*, TONY SMITH, BEYOND LIBERAL EGALITARIANISM: MARX AND NORMATIVE SOCIAL THEORY IN THE TWENTY-FIRST CENTURY (2017).

227. *See, e.g.*, WILLIAM A. EDMUNDSON, JOHN RAWLS: RETICENT SOCIALIST (2017).

228. *See, e.g.*, Frank I. Michelman, *Poverty in Liberalism: A Comment on the Constitutional Essentials*, 60 DRAKE L. REV. 1001, 1019 (2012).

are normatively objectionable from a progressive (liberal egalitarian) standpoint. It neither secures an acceptable foundation for the legal-political order that escapes the disagreement that besets liberal justice, nor is it capable of securing its egalitarian ambitions. The question, then, is whether the thinning out process in the search for liberal legitimacy is a worthwhile progressive project. The legacy of political liberalism is that legitimacy is not only different from justice, but it also defers justice and legitimates injustice.

Liberal legitimacy is different from liberal justice because it requires from the political community less than what justice requires. In fact, legitimacy presupposes the absence of justice and the inability to attain it, given reasonable disagreement. Liberal legitimacy is supposed to include some of the requirements of liberal justice (indeed, this inclusion makes it a normative conception of legitimacy that identifies a "reasonably just" political regime). Yet the existence of legitimacy is the testimony for the absence of justice because a gap between legitimacy and justice exists nonetheless.

Liberal legitimacy defers liberal justice. First, its institutional commitments constrain the advancement of justice and in fact may hinder its attainment. Second, its abstract formulations cannot secure the requirements of justice. Indeed, liberal legitimacy cannot secure the conditions for its own existence (since reasonable disagreement concerning legitimacy itself persists), let alone for the existence of liberal justice. Finally, its abstract, procedural, "political" concepts have the effect of concealing the depth of disagreements in society and hence may preclude an understanding of the conditions required for achieving justice.

Last but not least, liberal legitimacy legitimates the very injustice that liberal justice condemns. This is because political liberalism accepts as legitimate forms of political economy (e.g., welfare-state capitalism and neo-liberalism)

that contravene liberal egalitarianism. Despite the injustice that these political economies produce, political liberalism allows that they can be the product of acceptable procedures, acceptable institutions, and acceptable forms of reasoning that were envisaged by political liberalism itself. While political liberalism criticizes the injustice of these practices, its proponents have produced arguments and justifications that diminish the sense of urgency in tackling the gravely unjust conditions these political economies create. No matter how loudly political liberalism protests inequality, it has little grounds to object to the deployment of the state's coercive power to advance anti-egalitarian policies. This is because it lends the unjust state the stamp of normative acceptability.