The Background to Politics in an Age of Pluralism and Polarization

by

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ABSTRACT

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## Abstract

A diverse variety of liberal thinkers agree that the peace, order, stability, and well-being of government and society rest upon a fundamental bedrock of shared opinion, sentiment, sympathies, meanings, understandings, beliefs, etc. They appear largely correct in making this supposition, for the requirement is built into the very logic of liberal democratic thinking. And yet, the very plausibility of such a shared political background has come into question particularly acutely for the present generation, and, in large part, as a result of the twin forces of pluralism and polarization.

The two central questions engaged by this study are: (a) is it still conceptually plausible to presuppose such a background, and if so, (b) under what terms does it make sense; in what way should this background be understood?

This study tackles this set of questions by means of a critical analysis of select and especially prominent, representative intellectual schools of the twentieth century, for which the theme of pluralism is meaningfully central: (a) John Rawls and Jürgen Habermas (as exemplars of the political liberal project), (b) Michel Foucault and contemporary North American neo-Foucauldians (of the discourse of difference), and (c) Carl Schmitt (of the reactionary politics of meaning). The three Parts of the study are dedicated to these three schools.

The guiding hypothesis of the study is the contention that political order is always already premised upon a shared political *Leitkultur* (guiding cultural horizon), that is, some sort of implicitly understood cultural formation, whose structure is mis-described as being either freestandingly postmetaphysical; strictly the work of completely self-transparent, pure human reason; or a subtle vehicle for pernicious normalization. As such, pluralism and polarization is

always already bounded within this guiding cultural horizon. Presupposing that the three selected schools are meaningfully representative of the intellectual, pluralist alternatives available in the early twenty-first century, the critical analysis of these three schools bears out the study's central hypothesis.

# Contents

# Citation Abbreviations (Selected)

**Note:**

Main works, collected editions, or frequently cited essays that have been given abbreviations. See the chart below. In the notes, where page numbers are divided by a forward slash ( / ), citations refer to the text in the original language first. Translations have been modified where noted. For the most part, citations of ancient and medieval sources follow the conventions of classical philology. Only if I quote from a particular translation or if very few critical editions of the text exist, will the specific edition used be listed in the bibliography. Citations to notebooks or correspondence will always include the date and, where relevant, the sender and addressee. Full references are given in the bibliography.

**Wendy Brown**

| Abbreviation | Original | Translation (if available) | Original Publication Date |
|---|---|---|---|
| E | *Edgework* | | 2005 |
| PH | *Politics out of History* | | 2001 |
| RA | *Regulating Aversion* | | 2006 |
| SI | *States of Injury* | | 1995 |
| WSWS | *Walled States, Waning Sovereignty* | | 2010 |

**William Connolly**

| | | | |
|---|---|---|---|
| AI | *Augustinian Imperative* | | 1993 |
| CCAM | *Capitalism and Christianity, American Style* | | 2008 |
| DPPT | *Democracy, Pluralism and Political Theory* | | 2008 |
| EP | *Ethos of Pluralization* | | 1995 |
| FT | *Fragility of Things* | | 2013 |
| ID | *Identity\Difference* | | 1991 |
| N | *Neuropolitics* | | 2002 |

| P | *Pluralism* | | 2005 |
|---|---|---|---|
| PTM | *Political Theory and Modernity* | | 1988 |
| TPD | *Terms of Political Discourse* | | 1974 |
| WNS | *Why I am not a Secularist* | | 1999 |

**Michel Foucault**

| AS | | *Archaeology of Knowledge* | 1969 |
|---|---|---|---|
| CFD | | *Chomsky-Foucault Debate* | 2006 |
| DE | *Dits et Écrits: 1954-1988* | | 1994 |
| EW | | *Essential Works* | 1997-2001 |
| FL | | *Foucault Live* | 1996 (1989 [1st ed.]) |
| FR | | *Foucault Reader* | 1984 |
| HS | | *History of Sexuality* | 1976-1984 |
| LCP | | *Language, Counter-Memory, Practice* | 1977 |
| MC | | *Order of Things* | 1966 |
| OD | *L'ordre du discours* | *Order of Discourse* in *Untying the Text,* 51-78 | 1971 (1970 [lecture date] |
| PK | | *Power/Knowledge* | 1980 |
| PPC | | *Politics, Philosophy, Culture* | 1988 |
| SP | | *Discipline and Punish* | 1975 |
| TS | | *Technologies of the Self* | 1988 |

**Jürgen Habermas**

| | | | |
|---|---|---|---|
| AS | | *Autonomy and Solidarity* | 1986 |
| BFN | | *Between Facts and Norms* | 1992 |
| BNR | | *Between Naturalism and Religion* | 2005 |
| CES | | *Communication and the Evolution of Society* | 1976 |
| DW | | *Divided West* | 2004 |
| EFP | | *Europe: The Faltering Project* | 2008 |
| FHN | | *Future of Human Nature* | 2001 |
| IO | | *Inclusion of the Other* | 1996 |
| JA | | *Justification and Application* | 1991 |
| KPS | *Kleine politische Schriften* | | 1981- |
| LC | | *Legitimation Crisis* | 1973 |
| LM | *Law and Morality* | | 1986 |
| LSS | | *On the Logic of the Social Sciences* | 1967 |
| MCCA | | *Moral Consciousness and Communicative Action* | 1983 |
| NC | | *New Conservatism* | 1985-87 |
| PC | | *Postnational Constellation* | 1998 |
| PD | | *The Philosophical Discourse of Modernity* | 1985 |
| PMT | | *Postmetaphysical Thinking* | 1988 |
| PPP | | *Philosophical-Political Profiles* | 1981 |

| | | | |
|---|---|---|---|
| PSI | | *On the Pragmatics of Social Interaction* | 1984 |
| PT | *Philosophische Texte* | | 2009 |
| RR | | *Religion and Rationality* | 1981-1997 |
| STPS | | *The Structural Transformation of the Public Sphere* | 1962 |
| TCA | | *The Theory of Communicative Action* | 1981 |
| TJ | | *Truth and Justification* | 1999 |
| TT | | *Time of Transitions* | 2001 |

**Georg Wilhelm Friedrich Hegel**

| | | | |
|---|---|---|---|
| PhG | *Phänomenologie des Geistes* in Werke, vol. 3 | *Phenomenology of Spirit* | 1807 |
| PR | *Grundlinien der Philosophie des Rechts* in Werke, vol. 7 | *Elements of the Philosophy of Right* | 1821 |
| PW | | *Political Writings* | 1999 |
| Werke | *Werke* (Suhrkamp) | | 1969-79 |

**Martin Heiddegger**

| | | | |
|---|---|---|---|
| GA | *Gesamtausgabe* | | 1975- |

**Bonnie Honig**

| | | | |
|---|---|---|---|
| DF | *Democracy and the Foreigner* | | 2001 |
| EP | *Emergency Politics* | | 2009 |
| PTDP | *Political Theory and the Displacement of Politics* | | 1993 |

**Immanuel Kant**

| | | | |
|---|---|---|---|
| GS | *Gesammelte Schriften* | | 1900- |

| | | | |
|---|---|---|---|
| KrV | | *Critique of Pure Reason* | 1787 (1781 [1st ed.]) |
| PP | | *Practical Philosophy* | 1996 |
| PW | | *Political Writings* | 1991 |
| RRT | | *Religion and Rational Theology* | 1996 |

**Karl Marx and Friedrich Engels**

| | | | |
|---|---|---|---|
| MER | | *Marx-Engels Reader* (2nd ed.) | 1978 |
| MEW | *Werke* (Dietz) | | 1959- |

**Friedrich Nietzsche**

| | | | |
|---|---|---|---|
| KGW | *Werke: Kritische Gesamtausgabe* | | 1967- |

**John Rawls**

| | | | |
|---|---|---|---|
| BI | *A Brief Inquiry into the Meaning of Sin and Faith: With "On My Religion"* | | 2009 |
| CP | *Collected Papers* | | 1999 |
| JF | *Justice as Fairness: A Restatement* | | 2001 |
| LHMP | *Lectures on the History of Moral Philosophy* | | 2000 |
| LHPP | *Lectures on the History of Political Philosophy* | | 2007 |
| LP | *Law of Peoples* | | 2001 (1999 [1st ed.]) |
| PL | *Political Liberalism* | | 2005 (1993 [1st ed.]) |
| TJ | *A Theory of Justice* (1st ed., | | 1971 |

reprint)

| | | | |
|---|---|---|---|
| TJ2 | *A Theory of Justice* (Revised ed.) | | 1999 |

**Carl Schmitt**

| | | | |
|---|---|---|---|
| Antworten | *Antworten in Nürnberg* | | 2000 |
| BdP | *Begriff des Politischen* (2nd ed.) | *Concept of the Political* | 1932 (1963 [reprint]) |
| BdP1 | "Begriff des Politischen" (1st ed.) | | 1927 |
| BdP3 | *Begriff des Politischen* (3rd ed.) | | 1933 |
| D | *Diktatur* (2nd ed.) | *Dictatorship* | 1928 (1921 [1st ed.]) |
| DA | *Über die drei Arten des rechtswissenschaftlichen Denkens* | *On the Three Types of Juristic Thought* | 1934 |
| DC | *Donoso Cortés in Gesamteuropäischer Interpretation* | *Telos,* no. 125 (2002): 80-115 = pp. 41-114 of *Donoso Cortés* | 1950 |
| Drei Stufen | "Drei Stufen Historischer Sinngebung" | "Three Possibilities for a Christian Conception of History" | 1950 |
| ECS | *Ex Captivitate Salus* | | 1950 |
| G | *Glossarium* | | 1991 |
| GLP | *Geistesgeschichtliche Lage des Heutigen Parlamentarismus* (2nd ed.) | *Crisis of Parliamentary Democracy* | 1926 (1923 [1st ed.]) |
| GuU | *Gesetz und Urteil* | | 1912 |
| HdV | *Hüter der Verfassung* | | 1931 |
| HoH | *Hamlet oder Hekuba: Die Einbruch der Zeit in das Spiel* | *Hamlet or Hecuba: The Intrusion of the Time into the Play* | 1956 |
| HP | *Hugo Preuss* | | 1930 |

| | | | |
|---|---|---|---|
| L | *Der Leviathan in der Staatslehre des Thomas Hobbes* | *Leviathan in the State Theory of Thomas Hobbes* | 1938 |
| LdER | *Die Lage der europäischen Rechtswissenschaft* in VA, pp. 386-429 | "The Plight of European Jurisprudence" | 1950 (1943/44 [lecture dates]) |
| LL | *Legalität und Legitimität* in VA, pp. 263-50 | *Legality and Legitimacy* | 1932 |
| LuM | *Land und Meer* | *Land and Sea* | 1942 |
| NdE | *Nomos der Erde* | *Nomos of the Earth* | 1950 |
| PR | *Politische Romantik* (2nd ed.) | *Political Romanticism* | 1925 |
| PT | *Politische Theologie* (2nd ed.) | *Political Theology* | 1934 (1922 [1st ed.]) |
| PT2 | *Politische Theologie II* | *Political Theology II* | 1970 |
| PuB | *Positionen und Begriffe* | | 1940 |
| R | *Reichsstatthaltergesetz* | | 1934 |
| SBV | *Staat, Bewegung, Volk* | *State, Movement, People* | 1933 |
| Staatsethik | "Staatsethik und Pluralistischer Staat" in PuB, pp. 151-65 | "Ethic of State and Pluralistic State" in Mouffe (ed.), *Challenge of Carl Schmitt,* pp. 195-208 | 1930 |
| SGN | *Staat, Großraum, Nomos* | | 1995 |
| Sichtbarkeit | "Die Sichtbarkeit Der Kirche" | "The Visibility of the Church" in *Roman Catholicism and Political Form,* pp. 47-58. | 1917 |
| Staat als Mech. | "Der Staat als Mechanismus bei Hobbes und Descartes" in SGN, pp. 139-51 | "The State as a Mechanism in Hobbes and Descartes" in *Leviathan in the State Theory,* pp. 91-103. | 1937 |

| TDN | *Theodor Däublers Nordlicht* | | 1916 |
| TdP | *Theorie des Partisanen* | *Theory of the Partisan* | 1963 |
| VA | *Verfassungsrechtliche Aufsätze* | | 1958 |
| VL | *Verfassungslehre* | *Constitutional Theory* | 1928 |
| WdS | *Wert des Staates und die Bedeutung des Einzelnen* | | 1914 |

**Max Weber**

| FMW | | *From Max Weber* | |
| MSS | | *Methodology of the Social Sciences* | |
| PE | | *Protestant Ethic and the Spirit of Capitalism* | 1905 |
| PR | | *Political Writings* | |
| WG | *Wirtschaft und Gesellschaft* | *Economy and Society* | 1921 |

**Stephen White**

| ELMC | *Ethos of a Late-Modern Citizen* | | 2009 |
| SA | *Sustaining Affirmation* | | 2000 |

# 1. Introduction

It is not without reason that our currency articulates a principle of fundamental importance to our life as a republic: *E pluribus unum.* With few exceptions, reflective and self-aware liberal thinkers agree that the peace, order, stability, and well-being of government and society rest upon a fundamental bedrock of shared opinion, sentiment, sympathies, meanings, understandings, beliefs, lifeworld, consensus, and/or citizens' implicit sense that together they constitute a "we." In this regard at least, liberal thinkers as diverse as David Hume, James Madison, Abraham Lincoln, Alexis de Tocqueville, John Stuart Mill, Max Weber, Friedrich Hayek, Robert Dahl, John Rawls, Michael Walzer, Richard Rorty, and Jürgen Habermas are in perfect agreement.[1] Taken as a whole, these various ideas point to some political cultural substrate of some nature or another, which is more or less shared, however imperfectly, across a given population of citizens. This thing I call here the "background" to politics. It is the source of unity that transfigures our plurality.

Surely, these diverse thinkers are correct in their insistence that some such background is built into the very logic of liberal democratic thinking. Liberal democratic thinking is perennially caught in a double-bind, from which no democratic logic can ever truly escape. Broadly speaking, democracy may be conceptualized either as a non-transformative or as a transformative project, which is to say, either it takes citizens simply as they are, in which case, democratic practice is

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[1] E.g., Hume, "Of the First Principles of Government" and "Of the Origin of Government" in *Essays Moral, Political, and Literary,* 32 and 40; Madison et al., *Federalist,* no. 49, p. 262; Lincoln, "Portion of Speech at Republican Banquet in Chicago, Illinois" and "First Lincoln-Douglas Debate, Ottawa, Illinois" in *Speeches and Writings,*1:385 and 524-25; Tocqueville, *Democracy in American,* 1.2.10, p. 358; Mill, *Considerations on Representative Government* in *Collected Works,* 19:546; Weber, WG, 16/31; Hayek, *Law, Legislation, and Liberty,* 3:8, 151, cf., 171; Dahl, *Preface,* 132-33, cf., 83, 119, 143; Walzer, *Spheres,* xiv, 19, 82, 151, 283, 311, 313, 320, cf., 29; "Liberalism and the Art of Separation," 321; Rorty, *Contingency,* 64; "Priority of Philosophy to Democracy" in *Philosophical Papers,* 1:177, cf., 186, 190. Rawls and Habermas are discussed at greater length in subsequent chapters.

purely procedural, or it imagines that the practice of democracy, at its best, has an inborn capacity to transform democratic subjects. An image borrowed from Rousseau may make plainer the distinction I wish to draw.[2] Non-transformative democrats believe that democracy properly tracks only the *volonté de tous,* that is, the will of all each taken separately, privately, and individually; while transformative democrats hold out for the idea of a *volonté générale,* maintaining either that there is something about democratic self-governance that transforms democratic participants, thereby facilitating a rough convergence of views and/or that there is some regulative principle or set of indispensable civic virtues, which appropriately constrain collective will-formation. Almost every contemporary theory of democracy can be categorized along these lines.

Both of these conceptions of democracy, however, run into problems and conceptual difficulties. At least in limit cases, each conception of democracy is confronted by a well-established and cogent, liberal fear, drawn from the political experiences of either the nineteenth or twentieth century.

Broadly speaking, the non-transformative conceptualization of democracy is functionally equivalent to a model of economic preference aggregation writ large. This view of democracy is conceptually indistinguishable from the rule of the numerically larger group of citizens that is the majority. It may perhaps view democratic contestation as appropriately regulated by a purely formal constitutional arrangement, but so long as it maintains that the constitution is itself revisable along purely procedural lines, the equation of this view with the rule of the majority remains basically sound. In limit cases, however, and given certain sociological descriptions of

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[2] Rousseau, *Social Contract,* 4.1, pp. 121-22, 4.2 ¶ 8, p. 124.

populations, this conception of democracy dangerously nears the territory of the great nineteenth-century, liberal fear of a so-called "tyranny of the majority."[3]

On the other hand, the transformative conception of democracy seems to run equally grave risks. All transformative conceptions of democracy either posit a certain set of civic virtues indispensable for democratic practice, offer a regulative principle that will appropriately constrain deliberation and collective will-formation, or presuppose that the engagement in democratic practices itself yields transformative results. However, the presupposition concerning the transformative potential of democracy is merely hypothetical. Moreover, it is perfectly reasonable to assume that any party who perceives that the proposed civic virtues or regulative ideas conflict with what they take to be their essential interests will inevitably experience these principles as oppressive. Thus, the transformative conception of democracy, in these limits cases, teeters on the precipice of Jacobinism—a view of popular self rule that maintains that the people "want" something that they themselves can hardly recognize as consonant with their own desires precisely as they understand them. The term, "totalitarian democracy," and the idea of "negative liberty" were both coined by post-war liberal critique precisely in order to describe something *like* this phenomenon.[4]

Of course, these twin perils emerge only as limit cases, but political thought always organizes itself with a view to limit cases, so this, in principle, is no objection to our organizing our thoughts in this way.

Only with the assumption of some importantly shared and reasonably robust background does either conception of liberal democracy escape these twin perils. Only if we assume citizens are

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[3] Tocqueville, *Democracy,* 1.2.7, pp. 239-42; Mill, "De Tocqueville on Democracy in America [II]" and *On Liberty* in *Collected Works,* 18:156, 176 ff., 200 and 219.
[4] Talmon, *Origins;* Berlin, "Two Concepts of Liberty" in *Four Essays,* 118 ff.

not so divided at a fundamental level can non-transformative democracy escape from the prospective ill of majoritarian tyranny. And only if we assume that the background to politics is sufficiently robust is there any hope at all that the virtues and practices demanded by transformative democracy will fall within limits that citizens generally find acceptable, thereby averting totalitarian democratic disaster.

But assuming the importance of this background, we are still obliged to question whether a supposition like this even makes any sense today? Extremism and polarization have become the *Leitmotiven* of the present; multiculturalism and pluralism, the watchwords of yesterday. Is it even still possible to speak of, or to presuppose, the unproblematic existence of a relatively shared, background political culture? Is it still possible in a globalizing age in which nations are not only fractured by what appear to be deep ideological fissures, but also where the myriad faiths, ethnicities, and various group histories of citizens render pluralism an indisputable "fact"—namely, something to which theory *must* bend or else die the slow and agonizing death of sheer irrelevance?

In the midst of pluralism and polarization, is there, after all, some background that nevertheless meaningfully holds us together? Fully mindful of the profound demographic changes and the increasingly rancorous partisan bickering of of our time, no small number would answer this question with a resounding *No.* The more recent call for "realism" in political theory is only one of the more recent examples of such a denial.

But can we even conceive of politics without such a presupposition? Can we make sense of the very possibility of politics without invoking some backgrounded, substrate on the basis of which any kind of agreement is made possible? Assuming, for the moment, its indispensability, what form does or should it take; or, how should we think of it? As reason? Power? Authority?

These cannot be idle questions for anyone who wonders what precisely pluralism and polarization might mean for our age, and whether there can be a meaningful—and thus philosophically non-illusory—substrate for potential agreement within an increasingly pluralistic and polarized society which at least conceives itself to be democratic.

## 1.1 The Task of the Present Study

My intention here is to reexamine this question by means of a critical study of select and especially prominent, representative, twentieth- and twenty first-century intellectuals, each of whom have left an indelible mark on the world of letters. These three paradigmatic views are represented here by (a) John Rawls, Jürgen Habermas, and the political liberal project, (b) Michel Foucault, William Connolly, and the neo-Foucauldian discourse of difference, and (c) Carl Schmitt and the reactionary politics of meaning. Despite their otherwise quite profound differences, what each of these three, exemplary, representative views all share is that they each revolve around a genuinely meaningful and consistent pluralist core, and that their respective projects each have profound, and yet deeply divergent, ramifications for the way in which we might conceptualize the background to politics.

The first aim of this study is exposition and critique. I aim to elucidate respectively the three schools' central features and preoccupations and their core conceptual difficulties. In so doing, I intervene in the interpretive debates and major controversies surrounding their respective bodies of work.

In both exposition and critique, the central theme, the background to politics, will serve as the guiding thread of the argument. Is it necessary, or at least difficult to avoid, presupposing some backgrounded structure to our political practice in order for that practice to remain intelligible *as*

a practice? If so, what is the significance and nature of this background? In what terms should we think of it? Does it even make sense to think in these terms, especially in light of the very serious challenges posed by an age of pluralism and polarization?

In critically examining these representative schools and intellectual traditions, I aim to view them from the inside outward, as it were. For the most part, then, I intend, thereby, to engage in what the later, Marxian tradition calls "immanent critique," by treating the concerns of ideal-typical, representative thinkers seriously and, for the most part, on their own terms.[5] This seems, in fact, to be the only manner of critical analysis that has any hope of actually carrying conviction.

Secondly, I aim to bring these three disparate traditions into conversation. More specifically, I bring the critical concerns and pre-occupations of each into conversation with one another.

Finally and most importantly, by engaging these three, diametrically opposed, pluralist traditions, I illuminate the theoretical terrain with which we are confronted in the early, twenty-first century whenever we attempt to theorize the background of politics. In doing this, I not only bring to light the strengths and weaknesses of the three respective projects, but I also point a way out from the peculiar dangers posed by an age of pluralism and polarization.

A note about method is in order. In this study, I have constructed three "ideal types."[6] These I have called the "political liberal project," the "discourse of difference," and the "reactionary politics of meaning." To construct ideal types—that is, to speak of schools of thought—requires as a matter of procedure that one select expositors of each representative position. In critically

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[5] E.g., Benjamin, "The Concept of Criticism in German Romanticism" in *Selected Writings,* 1:155; Adorno, *Prisms,* 28-32; Marcuse, *Reason and Revolution,* 59, 309, 338. Cf., Marx, *Economic and Philosophic Manuscripts of 1844* in MER, 70. See also Jay, *Dialectical Imagination,* 63.
[6] Cf., Weber, "Objectivity in Social Science and Social Policy" in MSS, 90.

investigating these ideal types, one does not engage with them *as* ideal types—which would be a bit like fencing with shadows of one's own making—but rather with the most compelling and sophisticated exemplary figures of that ideal type, who thus substantively illuminate the ideal-typical construction.

The virtue of a careful, critical examination of archetypal intellectuals is that these representative figures each give the wider sensibility an unparalleled, theoretical rigor; articulacy; paradigmatic clarity; depth of thought; and noteworthy consistency.

This procedure of ideal-typical construction may at times entail accentuating certain elements of a thinker's vision—elements which the authors themselves perhaps did not emphasize a great deal, but which nevertheless play an important conceptual role in the coherence of their outlook. It may even mean pursuing the implication of certain stated elements in a particular vision of society and politics far further than the author may have intended, though always in a direction which appears to be, nevertheless, licensed by the general thrust of his or her work.

In claiming that this study will illuminate the theoretical landscape of the early twenty-first century, a lot necessarily hangs on the adequacy of my selection. So, a word about selection is due.

After having taught a course entitled "Left, Right, and Center," at Duke University in 2013, I became convinced of the diagnostic value of confrontations between radically and mutually opposed views. With the three ideal types I've selected, we have, to put it really very crudely, the liberal center and representative non-liberal thinkers from the far left and right. Each a consistently pluralist view, these three stake out the theoretical terrain. The sharp and unadulterated, typological contrasts so formed bring the terrain and the stakes of disagreement more sharply into focus. It is my contention that these three ideal types represent the fundamental

alternatives for conceptualizing the background of politics today, that is, so long as the fact of human plurality is taken seriously. The cogency of this claim will need inevitably to be judged by the reader.

Admittedly, however, an exploration of this type cannot be comprehensive. For instance, this exploration does not treat systematically any of those who belong to the Hobbesian-Humean tradition, that is, that loose tradition of thought that is deeply skeptical of the efficacy of all abstract, moral injunctions, and which maintains, in rough outline, that the achievement of a just and stable political order is largely a matter of institutional design; incentive structures; the balancing of forces; and engaging the passions, desires, and interests of the sort which are thought to be basic and shared by all of humanity. This is a powerful view, but there was not space for it in this study. I believe, but cannot substantiate here, that the recent "realist" critique in political theory owes a lot to the intuitive appeal of this tradition of thought, and I will address it briefly, though perhaps inadequately, in the subsequent chapter.

## 1.2 Outline of the General Arc of the Study

The introduction to each chapter contains an overview or synopsis of that chapter's argument, and it will not do to try the reader's patience by recapitulating the bulk of that material here. Instead, I offer here only the briefest of overviews of the general arc of the study and thus of the various, representative views, each of which is treated in its own separate Part.

Part I treats what I call postmetaphysical liberalism, and, in particular, John Rawls' political liberal project. Today, this project provides the most serious, contemporary account of liberal legitimacy sensitive to the "fact" of human difference. Tying itself to a regulative ideal of reasonable, moral consensus, the political liberal project lays out a framework for democratic deliberation, establishing, thereby, a strong contrast with the morally neutral valences of the

fluctuating, social equilibria of interest group pluralism. Though understood to be the work of human reason, the structural details of this framework are, strictly speaking, logically antecedent to the results of actual democratic deliberation amongst equal, democratic citizens.

Among other things, political liberalism aims to articulate, at a high level of sophistication and conceptual refinement, the moral intuitions governing the mutually reinforcing conceptions of liberty and equality basic to the liberal democratic tradition. In so doing, the project seeks to preserve, perhaps above all else, the anti-creedal and anti-paternalistic qualities of that tradition. For our purposes, the political liberal project's most important feature is its desire to articulate a freestanding and postmetaphysical vision of a just political order. This desire is importantly embodied in its formulation of the liberal principle of legitimacy. All of its central, distinguishing concepts—the idea of the reasonable, overlapping consensus, public reason—are designed to meet this desire. I associate this politically liberal matrix of ideas with what I call its aspiration for worldview neutrality.

As it turns out, political liberalism is ultimately unable to redeem its claim to establish worldview neutrality. This point is best illustrated by drawing attention, first, to the fundamental role that the idea of basic, universal equality in the abstract plays within the thought "structure" of political liberalism; and secondly, to this idea's problematic status when viewed from the vantage point of a thoroughgoing naturalism. Also, to the extent that this naturalist view is an important part of our culture, political liberalism cannot relieve the pressure by invoking a singular and univocal tradition of moral enquiry that we purportedly share. Situating political liberalism in a long-standing tradition I call the discourse of dignity, I conclude that political liberalism is forced to abandon its specific articulation of the liberal principle of legitimacy.

Next follows an excursus on the second most prominent postmetaphysical liberal, Jürgen Habermas, in which I conclude that although he demonstrates heightened sensitivity to the importance of the discourse of dignity, his thought ultimately remains trapped by the same dilemmas faced by Rawlsian political liberalism.

Part II treats the discourse of difference, whose central, representative figure is Michel Foucault. Its more directly political expression is represented here by the pre-eminent, North American neo-Foucauldians, i.e., Wendy Brown, Bonnie Honig, Stephen White, and especially William Connolly. The discourse of difference does not disagree in principle with political liberalism's more basic aspiration for worldview neutrality in the public sphere. Rather, it claims that these worthwhile aims are continually frustrated under the standard, bourgeois, "equal rights before the law" liberalism. Foucault's "genealogical" project aims to redeem a claim like this one, by highlighting the deeply constitutive force of what he calls "power." Drawing upon its Nietzschean heritage, the discourse of difference views political appeals to reason and to collective moral judgment as (often unwitting) rhetorical tactics which implicitly favor a given, power-laden social formation. The discourse of difference represents one of the most serious, contemporary intellectual challenges to the possibility of non-coercive moral consensus within liberal democratic horizons.

The challenge it represents is serious and thoroughgoing, but its critical energies generate its own set of problems. Foucault himself leaves under-explained how to conceive of the ultimate status of the ethos that motivates his own critical project (the "insurrection of subjugated knowledges"). More contemporary, sympathetic thinkers struggle in various ways with his legacy, preferring initially to fill this lacuna with an (agonal) democratic project, whose success, I set out to show, is fundamentally premised upon a large scale cultural revolution, which would

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install a culture of deep respect. Reflecting more seriously upon how to articulate the nature of the sources that motivate its own critical project, the discourse of difference has more recently turned toward "ontotheology." Though this points in a more promising direction than Foucault's initial presentation, the discourse of difference's distinctions—"weak" versus "strong" ontotheology—ultimately leave more unexplained than clarified.

Part III treats Carl Schmitt, who will serve here as the exemplar of what I call the "reactionary politics of meaning." Like the discourse of difference, Schmitt fixates on the challenges posed by limit conditions and penumbral ambiguity. The two schools are also in complete agreement in their perception that authority (or power) remains an indispensable category of political analysis. Yet, their multiple lines of agreement are overshadowed by their wholly opposite intent. Perhaps the greatest significance of Schmitt's work is its ability to give the lie to the discourse of difference's implicit, and sometimes explicit, claim that if we recognize the fact of deep, rhizomatic pluralism, we will inevitably find ourselves attracted to an agonal conception of democratic society.

Schmitt's dogged analysis of liminal, political events aims ultimately to bolster his claim that a semi-autonomous, substantive core of authority (what he calls "sovereignty") stands behind all political practice, so long as it remains truly "political"—in his own idiosyncratic sense of that term. His critique of parliamentary procedure and his own conception of constitutional theory revolve around this core contention. Politics, on his view, concerns matters of great meaning and significance for humans as such. Various sorts of human groupings arise wherever humans live side by side, but a truly political human grouping is present only when that entity's status as a group has reached a level of sufficient intensity that, at least prospectively, those who belong to it could be called upon to shed blood on its behalf.

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The ultimate darkness of Schmitt's thought remains quite forbidding, and it is uncertain whether he ever transcended the empty, formalistic legal theory he so vigorously attacked. Finally, he ultimately fails to explain adequately how liberalism is ill prepared to furnish a constitutional ethic that is substantive or political his sense of the term. That Rawls' own constitutional theory approaches quite near that of which Schmitt declared liberalism incapable gives yet further reason to doubt this central element of Schmitt's polemic.

## 1.3 Guiding Hypothesis of the Study

Though ultimately I endorse none of the three views surveyed here as my own, it is by critically re-assessing each of these exemplary views that we can achieve greater clarity about the problems we face today and thereby gauge what actual prospects remain for theorizing the background to politics, especially in light of the challenges posed by the present age of pluralism and polarization.

Important lessons can be gained from each school. Among other things, we gain, from the political liberal project, an appreciation for the idea of a moral background to democratic politics. Also of considerable imporance is what I call its "romantic moment"—i.e., its fully conscious self-association with a distinctive tradition of moral enquiry. However, other features of the project are in deep tension with this genuine insight. From the discourse of difference, we learn the importance of analyzing all liminal political phenomena—a critical stance which sustains a standing challenge to each and every innocuous sounding claim to universality, neutrality, or reasonableness. Also of significance is its strong awareness of the constitutive power of background culture ("power"). But should we allow all of its insights and critical claims to overwhelm us, we shall quickly discover that we have nothing positive to say about what is worth preserving and that even the most purportedly minimalistic view of democracy will not be able to

sustain itself without recourse to ideas whose privileged status is inexplicable within its own framework. From Schmitt, we learn the political importance of threshold level, underlying agreement, and how we might plausibly think of this as being substantively embodied in the constitution, viewed not as a purely formal litany of rules, nor as the precipitate of self-reflective reason boiled down to its minimal essentials, nor as the product of supra-positive natural laws, but rather as the result of the constitutive power of a united people. But his almost congential distaste for liberalism and any abstractions in moral reasoning prove almost impossibly distracting for anyone committed to living in the present day world.

The guiding hypothesis of this study is that political order, including liberal democratic political order, is always importantly premised upon the availability of some sort of loosely shared *Leitkultur*—an idea which we might roughly translate as a guiding cultural horizon.[7] With this idea of a guiding cultural horizon, I refer to some sort of implicitly understood cultural formation, whose structure is mis-described as being either freestandingly postmetaphysical or strictly the work of completely self-transparent, pure human reason. Given that it is, *ex hypothesi,* inappropriate to characterize this guiding cultural horizon as something comprised of substantive premises to which all "reasonable" persons might plausibly be expected to assent *qua* reasonable persons, it should not be understood as somehow neutral or universal in its characteristic orientation.

The health and longevity of any political society, even the possibility of collective action and reform, is in deep ways predicated upon the general availability of a relatively shared guiding cultural horizon, in which is embodied a usually implicit and unexpressed ethos, sensibility, or

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[7] The notion was first introduced by Tibi, *Europa ohne Identität.* However, though I invoke this term, I have no intention of following his or any other's usage of the term, nor of engaging the political controversies this term has generated in the German speaking world.

outlook, which is ordinarily experienced from the first person perspective as having a binding force. When we use the expression "common sense," it is precisely to this thing that we are gesturing.

The precise figuration of our own guiding cultural horizon is rarely something with which we're well acquainted in any specific detail, or something on which most of us reflect often or at all, and especially not in circumstances of relative calm or general agreement amongst fellow human beings. In fact, it may be the case that full and completely transparent self-understanding is perennially outside of our grasp, so long as we are ourselves fully situated within that which we seek to understand. Or, to invoke a famous image: Hegel may be correct to insist that we cannot jump over our own time and that the "owl of Minerva begins its flight only with the onset of dusk."[8]

That some such center of gravity exists is, I contend, a supposition one does well to make in order to make sense of any political culture, insofar as it is a distinctive and determinate political culture, namely, one that is not characterized by political actors speaking no common language, sharing no common premises, and thus talking past one another. A distinctive guiding cultural horizon can be said to exist so long as it remains possible, from the outside, to refer to that political society as a *one,* as opposed to a *many.* A background, moral horizon of this sort remains an indispensable background condition to political life. To appreciate the importance of this idea is also simultaneously to appreciate the importance of the virtue of political centrism for a democratic society.

That the idea of a guiding cultural horizon is invoked here at all is only a corollary of a general supposition concerning the nature of human *cognition* and, in particular, concerning practical

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[8] Hegel, PR, Preface, pp. 26-28/21-23.

reason. This view has been well articulated elsewhere by several leading figures in the post-Heideggerian, philosophical tradition.[9] Also—although I do not wish to suggest that positive empirical research provides dispositive proof for any one particular view concerning the nature of practical reason—it is not without significance that some of the most exciting, recent research in social psychology appears to provide further support for the idea.[10] I will not set out to systematically defend this position here, but only to state baldly and as succinctly as possible my understanding of this view and what it entails. This is quite enough, I believe, when one's principal purpose is only to clarify the guiding hypothesis that informs the study.

On this view, practical reason is always already situated, and for this reason, human understanding has a necessarily pre-judgmental structure. We do not construct our normative world from the bottom up, nor is this a world whose natural suitability for humankind may be rediscovered anew by the self-reflective exercise of reason by each new generation. Instead, we encounter this world as something given to us. We are always already shaped by some background moral structure, and the pre-understandings furnished by this background have a certain binding power over us. Politics is importantly premised upon some content that is given, as it were, prior to reflection. This is neither to be lamented as a constraint nor to be perceived as a description of a limitation we may someday transcend. Instead, recognition of the productive role played by our guiding cultural background is an important part of what it means to possess a comparatively more self-transparent understanding of one's own normative world.

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[9] E.g., Gadamer, *Philosophical Hermeneutics,* 9; *Truth and Method,* 265 ff., 300 ff., 566 ff.; *Reason in the Age of Science,* 135-36; "Hermeneutics and Social Science," 314-15; Taylor, "Interpretation and the Sciences of Man" in *Philosophical Papers,* 2:15-57; *Sources,* 3-107, 495-521; MacIntyre, *Whose Justice,* 326 ff. Cf., Heidegger, *Being and Time,* esp. §§ 31-34. Most recently in A. Sandel, "Reasonable Prejudice"; *Place of Prejudice.*
[10] E.g., Haidt, *Righteous Mind,* esp. 26, 67 ff.

A guiding cultural horizon is described here as a structure with pre-judgmental characteristics that have binding power over us. To say this does not, however, mean that it is a static, unchanging given. A guiding cultural self-understanding can, of course, shift, and in fact it does shift. This is a truism that can be quickly derived from even the most superficial knowledge of history. Still, this does not mean either that it is constantly shifting, nor does it suggest that a shift exhibits no underlying patterns of continuity, nor does it entail that we as intellectuals are in a position to legislate content and substance in whatever way suits our fancy. Instead, we must always work with what we've got.

This view does not conceive of the substantive content of our own guiding cultural horizon as the work of purely self-reflective reason. To say this does not entail, however, that idea of a guiding cultural horizon is somehow incompatible with the idea of rationality. On the contrary, any number of scenarios might arise that call for adaptive self-transformation, and to the extent that a given problem is surmounted, this is to count as a gain in rationality. For instance, our intuitions, we may discover, might conflict with one another in important ways; or a new situation or important dilemma might present itself, and our given way of thinking about matters may prove somehow inadequate for making sense of this new situation. In cases like these, a reconfiguration, reformulation, or reorientation may represent a gain in rationality, especially to the extent that it allows us to more adequately organize our thoughts, to more adequately make sense of a given situation, or to resolve what appeared to be a dilemma or impasse. Such judgments are, however, irredeemably provisional, that is, always taken to be sound until shown to be otherwise.

To insist on the importance of something like the idea of a guiding cultural horizon is far from saying that we cannot criticize our own practices. Manifestly this is something that happens, and

it is a meaningful, in contrast to a meaningless, activity. The important point, however, is that we always *begin* standing as we are, *from within.* That this critical activity is meaningful, that others are able to make sense of the bases upon which we engage in this activity, and that a possible ground is even available for prospective agreement—rest in important ways upon the point from which we begin. For us to reason at all about anything normatively significant, there is need that we and our interlocutors experience this background as binding for us—at least initially and (undoubtedly) provisionally. We are always already members of a guiding cultural horizon. We might be something else after this, but this is always already what we are to begin with.

To insist upon the importance of something like the idea of a guiding cultural horizon is also not to reject the importance of human variety, difference, etc. The idea of a guiding cultural horizon may well replicate some of the constitutive explanatory work that the Foucauldian school ascribes to the idea of "power," but it is, nevertheless, inappropriate to characterize this idea as an ever-present source of *pernicious* normalization that does violence to us as symmetrically situated aspirants to freedom. Instead, it may prove be the case that it is only ever within the background horizon supplied by the guiding cultural horizon that our disputes and differences meaningfully emerge as disputes and differences, and that, for this reason, pluralism may be always already bounded in this way. This, however, is not so fatal an idea as is sometimes supposed. Any liberal state that is strong and stable can tolerate an extraordinary amount of diversity and difference. At the most abstract level, none of the representative views surveyed here are of such a character as, for instance, to require that the Amish use smoke detectors, to insist that the hijab be proscribed, to necessitate that minarets be torn down, or to compel one to declare a bris a criminal act. To maintain that our lives unfold within the frame of a determinate guiding cultural horizon is in no way inconsistent with making considerable space for diverse ways of living; and, perhaps more to

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the point, how or why we engage in, and are even able to sustain, such a practice over the long haul, across generations, and particularly when we find divergent practices strange, disruptive, or silly are important parts of what the idea of a guiding cultural horizon is able to explain. This will especially be the case, if my claim in a later chapter about human dignity proves to be sound. At a level of some abstraction—that is, at the level at which most of the following is pitched—the debates between rival pluralist views rarely have very much to do with concrete public policy, but instead, they ultimately cash out as debates about the most appropriate understanding of that age of human history to which we have given the name "modernity."

A notion like the idea of a guiding cultural horizon is invoked here somewhat reluctantly, and largely in the belief that it may prove impossible for liberal democratic self-governance to be cogently defended against the most sophisticated critics of the non-liberal left and right without invoking some such idea. Representatives from both of these schools make an appearance in this study, and I have made every effort to bring their critical concerns to bear upon the political liberal project. Accepting an idea like this is hard, and I am under no illusions about its counter-intuitive character.

The success or failure in redeeming (or making more plausible) the study's guiding hypothesis does not hinge upon a systematic elaboration of a political philosophical system, starting from uncontroversial first premises or idealized, heuristic thought experiments, from which logical entailments can be deduced or inferred. Instead, its success will depend upon its success or failure in, first, identifying, in a compelling manner, the conceptual strengths and weaknesses of the intellectual positions herein discussed, and secondly, upon whether or not the positions selected are sufficiently representative of the intellectual alternatives meaningfully available to us today—

at least of those that take the idea of pluralism seriously and have been articulated to a satisfactory degree.

This idea of a guiding cultural horizon, in the way I have described it, is simply a modern take on an ancient theme, well known to Greco-Roman antiquity. The Greeks called this idea *homonoia;* the Romans, *concordia.* Though it is probably inadequate as a translation, we can gloss this recurring idea as "concord."[11]

It is only in the past handful of generations that an idea like this has become controversial, and it has become especially controversial even more recently as we have slid even more resolutely into an age of pluralism and polarization. In fact, it has become so controversial that many contemporary liberals are, if not antagonistic to the idea, at least uncomfortable with it, so much so that one might be forgiven for supposing the idea to be somehow incompatible with any reasonable conception of liberalism. However, it should be borne in mind that for certain strands of eighteenth- and nineteenth-century liberalism, the idea was perfectly at home. To conclude, I'll draw attention to three representative figures, each of whom is commonly recognized as belonging to the thought-world of liberalism: Mill, Tocqueville, and Edmund Burke.

In one of his essays, Mill chastens the eighteenth-century *philosophes,* who, on his view, ignored altogether the requisite "condition[s] of permanent political society." Here, he had principally in mind those conditions that mitigate or forestall the "natural tendency of mankind to anarchy." Political stability, it would appear, requires a sentiment of allegiance to something fixed, settled, permanent, and beyond discussion. This object may differ in character from one

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[11] Democritus, DK 68 B 250, 255; Aristotle, *Nicomachean Ethics,* 8.1 1155a22-23, 9.6 1167a22-b3; Plato, *Statesman,* 311b8-c6; *Republic,* 431d9-432a9; Cicero, *De Republica,* 2.14.27, 2.42.69; Augustine, *City of God,* 1.15, 2.21, 17.14, 19.13, 19.16-17, 19.24, cf., 15.8, 19.21.

regime type to another, but that something of this sort abides satisfies an important condition of

peaceable and ordered stability. In this sense, then, political stability presupposes the

> existence, in some form or other, of the feeling of allegiance, or loyalty. This feeling may vary in its
> objects, and is not confined to any particular form of government; but whether in a democracy or in a
> monarchy, its essence is always the same; viz. that there be in the constitution of the State *something*
> which is settled, something permanent, and not to be called in question; something which, by general
> agreement, has a right to be where it is, and to be secure against disturbance, whatever else may
> change.… In all political societies which have had a durable existence, there has been some fixed
> point; something which men agreed in holding sacred; which … in short … was in the common
> estimation placed beyond discussion.[12]

Similar sentiments are on full display in the writings of one of Mill's most illustrious of

contemporaries and epistolary partners: Tocqueville. At the most fundamental level, stable

government rests upon something far deeper than the simple fact of shared laws, institutions,

interests, and a commonly recognized executive power. On the contrary, it is only when citizens

view the world, almost instinctively, under a similar aspect that political society truly begins to

take shape.

> What maintains a great number of citizens under the same government is much less the reasoned will
> to live united than the instinctive and in a way involuntary accord resulting from similarity of
> sentiments and resemblance of opinions. I shall never agree that men form a society by the sole fact
> that they recognize the same head and obey the same laws; there is a society only when men consider a
> great number of objects under the same aspect; when on a great number of subjects they have the same
> opinions; when, finally, the same facts give rise in them to the same impressions and the same
> thoughts.[13]

Though commonly we might assume otherwise, moral and intellectual authority is as much a

feature of democratic societies, as it is of those in past ages. It is importantly true that citizens

receive any number of ready-made beliefs as authoritative for them, on trust and ordinarily

without engaging in extensive discussion or self-reflection about them. That this is so goes a long

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[12] Mill, "Coleridge" in *Collected Works,* 10:133-34.
[13] Tocqueville, *Democracy in America,* 1.2.10, p. 358. Cf.: "The federal system not only needs good laws, but
circumstances must also favor it. All peoples who have been seen to confederate had a certain number of common
interests that formed the intellectual bonds of the association. But beyond material interests man also has ideas and
sentiments. In order that a confederation subsist for a long time, it is no less necessary that there be homogeneity in the
civilization than in the needs of the various people that compose it" (1.1.8, p. 158).

way not only toward explaining the collective unity of political society, but it also serves to lubricate the rough path of collective action.

> Dogmatic beliefs are more or less numerous according to the times. They are born in different manners and can change form and object; but one cannot make it so that there are no dogmatic beliefs, that is, opinions men receive on trust without discussing them…. Now it is easy to see that there is no society that can prosper without such beliefs, or rather there is none that could survive this way; for without common ideas there is no common action, and without common action men still exist, but a social body does not. Thus in order that there be society, and all the more, that this society prosper, it is necessary that all the minds of the citizens always be brought and held together by some principal ideas; and that cannot happen unless each of them sometimes comes to draw his opinions from one and the same source and unless each consents to receive a certain number of ready-made beliefs… It is ... always necessary, however it happens, that we encounter authority somewhere in the intellectual and moral world. Its place is variable, but it necessarily has a place. Individual dependence can be more or less great; it cannot be boundless. Thus, the question is not that of knowing whether an intellectual authority exists in democratic centuries, but only where it is deposited and what its extent will be.[14]

It is, of course, well known that Burke shared a view much like this one. Though overly sentimental about constitutional monarchy, Burke's romanticized view of royal life should not be allowed to distract us too much in our appraisal of his thought. After all, he was one of the first great liberal theorists of the idea of representative government. On his view, it is our pre-reflective prejudices that function as the guardians of our duty, furnishing reliable, cognitively internalized motives for compliance with just and good norms. The specific task of the intellectual is not to deconstruct these prejudices, but to determine which among them are deserving of continued approbation, and thus worth preserving. Though in a certain sense pre-reflective, these prejudices are not, per se, irrational. On the contrary, the rationality of complying with them is directly proportional to the degree to which they have both survived the clash with reality and opposed views and also have allowed whole peoples to prosper over an extended period of time.

> In England … we still feel within us, and we cherish and cultivate, those inbred sentiments which are the faithful guardians, the active monitors of our duty…. In this enlightened age I am bold enough to confess, that … instead of casting away all our old prejudices, we cherish them to a certain degree, and

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[14] Tocqueville, *Democracy in America,* 2.1.2, pp. 407-8.

… we cherish them because they are prejudices; and the longer they have lasted, and the more generally they have prevailed, the more we cherish them. We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them. If they find what they seek, (and they seldom fail) they think it more wise to continue the prejudice, with the reason involved, than to cast away the coat of prejudice, and to leave nothing but the naked reason; because prejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence.[15]

It is very likely the case, I believe, that these views—accentuated in the way that I have—are in strong tension with the task of philosophy as it is understood by thinkers as diverse as Descartes, Locke, and Kant.[16] That they are inconsistent with the idea of liberalism is, however, an entirely different question.

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[15] Burke, *Reflections on the Revolution in France* in *Select Works,* 2:181-82.

[16] E.g., Descartes, *Discours de la Méthode* in *Oeuvres,* 6:10 ff.; Locke, *Of the Conduct of the Understanding* in Grant et al., eds., *Some Thoughts,* § 10, p. 184; Kant, *Kritik der Urteilskraft* and *Was ist Aufklärung?* in GS, 5:294 and 8:36.

## I. Liberal Democracy after Metaphysics: The Aspiration for Reasonable Worldview Neutrality

## 2. The Political Liberal Project

Familiarity breeds contempt. Within the discipline of political theory, this old saw is especially true of John Rawls. By now, much ink has already been spilt. Why add a single drop more?

The answer is straightforwardly simple: necessity.

Though now more than two decades old, Rawls' account remains unparalleled in sophistication, aspiration, and depth. It is the touchstone for all sympathizers and critics alike who wish to confront the twentieth century's most serious exposition of philosophical liberalism. His goal had been, as he says, to "generalize and carr[y] to a higher level of abstraction" the fruits of liberal theory hitherto.[1] No one else has come as close as he has to accomplishing this aspiration, and for this reason, no one else commands the audience that he does in this regard. His is still the most comprehensive, serious, and philosophically defensible, liberal account of the background of politics, which aspires to tie itself thematically to the fact of pluralism and simultaneously to eschew controversial metaphysical premises. Whether we like it or not, we cannot help but theorize politics in the wake of this political liberal tradition.[2]

But first a methodological note about how I read Rawls' corpus. It is certainly true that the germs of the Rawls' "later" or mature view are not explicitly present in his writings in their express form until, perhaps we might say, the period between 1980 and 1987 or so, which is a decade to one and a half decades after the publication of his landmark *Theory of Justice* (hereafter

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[1] Rawls, TJ, 11. Cf., PL, xv.

[2] Naturally, there have been numerous, sophisticated contributions to both the justification and elaboration of the political liberal or public reason project, in the years following Rawls' landmark, inaugural presentation. Because of the sheer quantity of this scholarly material and the numerous, important, and sometimes truly significant normative and philosophical differences across this body of scholarship, they cannot all be treated in detail here. Methodologically, this is part of what ideal-typical construction in political theory sometimes requires. For two of the most recent and significant contributions in this tradition, see Quong, *Liberalism;* Gaus, *Order.*

*Theory*). However that may be, in what follows, it is one of my running claims that there is an underlying continuity in the development of his thought; or, to put a finer point on it: the fundamental ideas and assumptions laid out in the beginning were bound to yield something like the political liberal reconfiguration. Though the developmental path his thought took was not necessary, per se, it was, nevertheless, highly likely, and this is the case for reasons purely internal to his account. As a consequence of this view, it is not correct to maintain—as some do— that the original presentation of a theory of justice is the superior one, one which is better suited to have a regulative role in a well-ordered society (or overarching society of societies).[3] The political liberal project remains in many essentials only a partial revision of the earlier one presented in *Theory.* Although he now calls the conception of justice as fairness as articulated in *Theory* a "comprehensive doctrine," justice as fairness is still held to be "the most reasonable conception" of political order. Its structure, content, basic ideals, and principles remain "substantially the same." At least with respect to substantive content, "not very much … needs to be changed," and the account of justice as fairness in *Theory* is to have "a special place" amongst the panoply of possible, reasonable, political conceptions of justice.[4] Rawls' self-assessment is, I believe, basically correct. Despite the material changes and new foci, underlying continuity prevails.

Finally, a word about focus. Though I contend that there is basic, underlying continuity between the two major phases of his career—those phases punctuated by the publication of his two largest and most discussed monographs—many central themes of Rawls' work will be

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[3] *Pace,* e.g., Barry, "John Rawls and the Search for Stability"; Pogge, "Rawls on International Justice"; Kymlicka, *Multicultural Citizenship,* 158 ff.
[4] Rawls, PL, xv-xvi, xl, xli and n. 8, xlvi-xlvii and n. 20, lviii, cf., xxxvii, 7, 177 n. 3, 290-91. Cf., "Idea of Public Reason Revisited" in PL, 487-89.

treated quite cursorily. For instance, I presuppose that the reader already has working knowledge of at least the first third of *Theory*. I will offer no systematic discussion of, for instance, the type of deliberations, and the conclusions reached, in the original position, and, for the most part, I will simply assume that the conclusions Rawls draws concerning these deliberations are the correct ones, given the stated premises. The focus will be instead the central ideas and concepts of *Political Liberalism,* especially as they relate to the fact of human plurality, reconstructing, as sympathetically as possible, what I take to be the logical outline of political liberalism's response to this fact. The earlier writings will be discussed only to the extent that they shed light on the later writings, or, occasionally, in order either to remark upon patterns of continuity and discontinuity in his thought or to note the chronology of the emergence of key concepts in his work. This latter point is relevant only to the extent that it establishes the degree to which key developments in his thought—often attributed to his efforts to deflect criticism—are better understood in terms of his solving difficulties strictly internal to his own account.

In what follows, we first examine the recent realist critique, which, if sound, would be devastating for the political liberal project. At least in the case of Rawls, the critique is found wanting. To the contrary, his effort to articulate a background to democratic politics is, in fact, a great mark of realism in his theory (§ 2.1).

In the next three sections, I lay out the basic outline of the general structure of Rawls' political thought and its motivating concerns, waiting to fill in the content of the central concepts of *Political Liberalism* until afterwards. Pluralism and the conditions it imposes upon appropriate conceptions of equal freedom play an important role in Rawls' thought throughout, and this complex of ideas is linked in important ways to his principled, liberal anti-paternalism. This set of ideas becomes increasingly argument-orienting in his work (§ 2.2). Rawls' political liberal

project, as it presents itself, is oriented largely around the problem of legitimate stability and understanding how it is possible that these plural citizens, whose worldviews are fundamentally incommensurable, can each in their own way be committed liberal democrats. That the fundamental question came to be phrased in this way is not a result of external critique, but instead arose as a result of tensions internal to Rawls' own political thought. The challenge of promoting stability is best expressed, when presented in contrast to a view he calls modus vivendi democracy. With this in the background, Rawls asserts a fundamental priority of liberty, an idea which is to be embedded within the basic structure of society. All of these considerations importantly shape political liberalism's understanding of democratic practice (§ 2.3). Next, we examine a distinctive feature of political liberalism: its promotion of the priority of the right to the good. This provides an opportunity to revisit the myriad level of senses Rawls attributes to the adjective and substantive noun, (the) good, and this enables us to be clear at which level the priority of right is targeted. In the later work, this claim of right-priority entails an orientation to collective human life that is distinctively "political" in character. This discussion shall provide us with the resources to appreciate precisely what it means to say that a liberalism is a *political* liberalism. Attributing an aim I call "worldview neutrality" to the political liberal project, I tie this concern closely to political liberalism's liberal principle of legitimacy (§ 2.4).

In the next three sections, I clarify the meaning, significance, derivation, and construction of three of political liberalism's most important ideas: first, the overlapping consensus (§ 2.5); second, the idea of the reasonable (§ 2.6); and last, the idea of public reason (§ 2.7). Having outlined the general structure and motivating concerns of his thought, and clarified the central concepts of the political liberal project, we can revisit the theme of neutrality, in order to specify in far greater detail which sort it is that political liberalism entails (§ 2.8).

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This completes, in broad strokes, the account of the essential parts of the intellectual framework that is political liberalism. This sets the stage for querying more critically in the next chapter the degree to which political liberalism succeeds in being strictly political.

## 2.1 Tilting at Windmills?: The Realist Critique

In light of recent, trenchant criticism, it is no longer as clear as it had once been that reading Rawls repays the effort. Referring to themselves as "realists," a movement has recently taken shape which owes its strength to a widespread discontent with neo-Kantianism and "political moralism" in political thought and the excesses of immoderately "ideal" theory.[5] There is wide agreement that John Rawls is the principal target of this critique. Without a doubt, these critics are correct in maintaining that it is a decisive mark against any set of ideals, if it should be established that no human population, particularly those with which we are best acquainted, cannot but fail to meet these ideals under any plausible scenario.

To a certain extent, the "realist" critique is salutary, in the sense that our ideal theories may have veered a bit too far in the *ideal* direction. But we should also be clear about the target and adequacy of the critique.

According to one of its founding documents, the first mark of a realist political philosophy is a focus on "*real motivation.*" This means that the ideals and aspirations are "politically relevant, only to the extent to which they do actually influence behavior in some way." It is not enough

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[5] For the classical, synoptic entrée to this bourgeoning debate, see Galston, "Realism in Political Theory." See also Geuss, *Philosophy and Real Politics;* Williams, *In the Beginning.* Shklar, "Liberalism of Fear" is often identified as an early forerunner. In a short time, the literature has grown enormous. See, e.g., Philp, "What is to be done"; "Realism without Illusions"; Simmons, "Ideal and Nonideal Theory"; Sleat, "Legitimacy in Realist Thought"; Sigwart, "Logic of Legitimacy"; Waldron, "Political Political Theory"; Forrester, "Judith Shklar"; Mantena, "Another Realism"; Schlosser, "Herodotean Realism"; Estlund, "Utopophobia"; Honig et al., "New Realism"; Baderin, "Two Forms of Realism in Political Theory"; Hendrix, "Where should we Expect Social Change"; Chahboun, "Nonideal Theory"; Gray, *Black Mass;* Shapiro, *Flight;* Erman et al., "Political Legitimacy in the Real Normative World"; "Three Failed Charges"; Hall, "How to do"; Finlayson, "With Radicals"; Wiens, "Motivational Limitations."

that they simply "'look good'" on paper or that they please us.[6] A political philosophy is worthless if beings like us could not, under any plausible scenario, be motivated to comply with its stated requirements.

The critique hits home splendidly in the case of Immanuel Kant, the purported patron saint of contemporary liberal theory. To summarize—though hopefully not to the point of caricature—the core of Kantian moral philosophy is the idea of unconditional, categorical duty given by the noumenal self to itself by means of a thought procedure, which tests general maxims of action for their prospective universalizability. If it is to have any distinctive meaning at all, duty must have categorical force and oblige everywhere, always, and unconditionally, that is, it must still oblige us even when it conflicts with the other purely contingent, given facts that characterize our embodied existence as historically-situated, social beings. On this view, the compelling force of duty must be distinguished from the context-dependent and consequence-sensitive hypothetical conclusions of prudential reasoning or situational judgment, both of which rely dangerously upon an individual agent's purely contingent, heteronymous preference schedule, which is itself shaped by culture, tradition, prejudice, bias, prevailing social mores, habits, environment, idiosyncratic inclination, biological makeup, egoistic self-interest, plans or projects, etc. In acting upon maxims that meet the demanding set of criteria suggested by the notion of duty as a categorical imperative, we allow our rational self to predominate over natural contingencies and social accidents; and in so doing, we act autonomously. In the final analysis, the only permissible motive for normatively-relevant action is respect for the universalizable maxim of action as such.

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[6] Geuss, *Philosophy and Real Politics,* 9.

The fulfillment of duty promises neither happiness nor satisfaction, and if it does result in these things, it does so only accidentally.[7]

At important junctures, Kantian political philosophy often winds up reading a bit like "applied" ethics or morality, in the specifically derogatory sense used by the newly emergent realist school of political thought.[8] For Kant, politics, in its proper sense, *is* applied ethics. Because we deduce our political obligations from the same line of reasoning by means of which we discover our moral obligations as private persons, an isomorphism between the two arises, thus disqualifying any purported contradiction between politics and morality (with the latter conceived along Kantian lines).

> Morality … belongs essentially … to the practical sphere. And if we have once acknowledged the authority of this [moral] concept of duty, it is patently absurd to say that we *cannot* act as the moral laws require.... Hence there can be no conflict between politics ... and morality.... A true system of politics cannot ... take a single step without first paying tribute to morality.... All politics must bend the knee before right.[9]

Ultimately, what results from this normative orientation to the world is a position that Weber classically called the "ethic of conviction"—an ethic which is governed exclusively by a pure, Kantian "value-rationality." The politician exhibiting an ethic of conviction uncompromisingly pursues the absolute imperatives prescribed by some good and just cause, completely without regard to the consequences.[10] The question of concrete, human motivation of a political population subject to the moral imperatives is here discarded. Whether or not our knowledge of human psychology or of human history furnishes us with examples of the prescribed, moral behavior is ultimately immaterial. Kant tells us again and again that he is describing a moral code for "rational beings" as such, and that the merely empirical objection that we are not yet

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[7] Kant, *Groundwork for the Metaphysics of Morals* in PP, Ak. 4:385 ff.
[8] E.g., Williams, *In the Beginning,* 2 ff.; Geuss, *Philosophy and Real Politics,* 6 ff.
[9] Kant, *Perpetual Peace* in PW, 116, 125.
[10] Weber, "Politics as a Vocation" in FMW, 120-28; WG, 12-13/24-25.

acquainted with such moral beings just misses the force of the argument.[11] This line of thought

results in Kant's famously unbending dictum: *Fiat iustitia, pereat mundus.* Let justice be done,

though the rest of the world perish.[12]

Though indubitably Kant himself is an easy target for a realist critique, the characteristically

realist objections have considerably less traction with Rawls' work, or, to put it more accurately,

considerably less traction than the critique claims for itself. Rawls is surely a Kantian in certain

respects, but only in a modest sense and with a whole host of important qualifications. Rawls

himself says as much, writing that his theory "departs from [Kant's] text at many points" and is,

as such, "not, plainly, Kant's view, strictly speaking." He wishes, as he puts it, to "detach the

structure of Kant's doctrine from its background in transcendental idealism," replacing it with a

"procedural interpretation" rooted within what he calls a "reasonable empiricist framework."[13]

The prospective actualizability of his conception of politics was always at the forefront of

Rawls' attention, particularly the question of actual motivation from the perspective of the

citizen. As early as 1971, Rawls rejects as irrational the ethic of conviction. Such a "doctrine of

the purely conscientious act" simply cannot serve as a regulative ideal for the basic structure of a

just society.[14] "All ethical doctrines worth our attention," writes Rawls, "take *consequences* into

account in judging rightness. One which did not would simply be irrational, crazy."[15] Further, any

theory of justice must meet the demands of "psychological stability" and must not overly burden

the already very real "problems of the strains of commitment" to principles of justice. It would

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[11] Kant, *Groundwork for the Metaphysics of Morals* in PP, Ak. 4:407-08, 420, 425, 433. Cf., *Perpetual Peace* in PW, 133.
[12] Kant, *Perpetual Peace* in PW, 123, cf., 125.
[13] Rawls, PL, 285; "Kantian Constructivism" in CP, 304, cf., 339-40. Cf., TJ, 251-57 (§ 40), 264; LP, 87; "Kantian Conception of Equality" in CP, 264.
[14] Rawls, TJ, 477-78, cf., 569.
[15] Rawls, TJ, 30, emphasis added, cf., 95, 159.

be, for citizens, "highly unwise if not irrational to choose principles which may have *consequences* so extreme that they could not accept them in practice." In fact, his critique of the utilitarian tradition consists, at least in part, in the claim that, from the perspective of individual citizens, utilitarianism may demand of individual citizens a level of self-sacrifice that may "exceed the capacity of human nature." In contrast to it, justice as fairness is "more realistic."[16] Thus, he openly acknowledges that "it is … a consideration against a conception of justice that, in view of the laws of moral psychology, men would not acquire a desire to act upon it even when the institutions of their society satisfied it." A conception of justice must, therefore, be able to "generate its own support." Thus, even in his earlier writings, his conception of justice was fundamentally premised upon the psychology of "moral learning," namely, the possibility that citizens might "develop a desire to act in accordance with" the principles of justice.[17]

In his later work, these themes become yet more prominent. As he puts it there, he hopes to describe a just order suitable for the "ordinary human world," which is composed neither of saints nor of egoists.[18] "We strive for the best we can attain within the scope the world allows." We do not want to rely "too much on scarce motives."[19] Furthermore, Rawls will acknowledge that while the moral psychology implicit within his moral philosophy is not derived from research conducted in empirical social science, that same science *could* falsify it. In this specific sense, then, the findings of "natural psychology" do indeed "limit" the conceptions of moral psychology that philosophers may deploy. Moral philosophy must respect the "stringent … conditions" imposed by what we discover, or know from history, about human nature. On Rawls' view, it is

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[16] Rawls, TJ, 176-78, emphasis added. cf., 145.
[17] Rawls, TJ, 138, cf., 145, 176, 261, 455-56, 458-62, 490-96 (§ 75), 515. Rawls takes very seriously the now very familiar principle that ought implies can (236 ff.). Cf., LP, 44-45, cf., 66, 71, 112 and n. 44.
[18] Rawls, PL, 54.
[19] Rawls, PL, 87-88.

precisely his invocation of a postulated and potentially plausible moral psychology that explains why it is that his conception of the well-ordered society is "practicable" and "not utopian"—at least in its basic intention.[20] In a very specific sense, moral and political philosophy can be utopian, but it must always be "*realistically* utopian," aiming to take "'men as they are,'" and never abstracting for one moment from human psychology. The institutions by which we orient our lives "must be ones that we can understand and act on, approve, and endorse."[21]

Though we may justly contest Rawls' account of moral psychology at the level of contemporary empirical research or even—though presumably a good deal less reliably—on the basis of our own intuitive sense of how human beings are, it cannot be said that he fatally overlooked the question of the realism of the type of motivation presupposed by his theory of justice. In this light, it is perhaps not surprising that one of the founding members of the realist school asserts the he is actually "not in the first instance interested in the details of Rawls's view … but wish[es] to treat him merely as a representative of a particular style of theorising about politics," acknowledging elsewhere that perhaps the matter is a bit more complicated than he lets on.[22] The realist critique does not actually hit the intended mark, because it all too frequently avoids taking its target's claims on their own terms, instead preferring to treat the target as a representative ideal type of a diffuse, late twentieth-century school of neo-Kantianism in liberal, political philosophy.

As is well known, Rawls begins with "ideal theory." This procedure requires that he first investigate what he calls "strict compliance" theory, before turning to any instances of "partial" compliance. Strict compliance moral theory allows itself to outline a theory of justice,

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[20] Rawls, PL, 86-87 and n. 34, cf., 158-68 (IV.6-7), 346-47. Cf., "Kantian Constructivism" in CP, 321-22, 351-53.
[21] Rawls, LP, 11-23 (§ 1), esp. 6-7, emphasis added, cf., 13 ff., 112 n. 44.
[22] Geuss, *Philosophy and Real Politics,* 70, 89, 105-06 n. 32.

*temporarily* abstracting from the question of motivation (compliance). Viewed from this perspective, instances of non-compliance are "discounted as *exceptions*." "Nonideal" theory is pursued only after an ideal conception of justice has been chosen. Rawls argues that some degree of ideal theory is required for any self-aware political actor who purports to "guide the course of social reform."[23]

It may well be imprudent to maintain the methodological assumption of strict compliance. Nevertheless, Rawls is quite correct to insist on the importance of ideal theory, even for a theory that aspires to be realistic. Clear and pertinent, if not hackneyed, examples seem to support this intuition. For instance, we might have serious doubts that a society like ours will ever experience *full and complete* racial and sexual equality (of opportunity, say, or some other metric), but these doubts—justified or not—do not impugn the ideals themselves, or at least, were we to question these ideals as a result of our doubts, more argument would be required beyond simply stating our doubts.

Rawls is, moreover, absolutely correct to insist that the *justification* and *grounds* of liberal democratic constitutionalism—its institutions and its practices—are not topics which can safely be ignored. They need to be part of a citizen's implicit understandings and thus a part of his education. Though this is certainly not the stuff of day to day politics, these matters are, we may suppose, always operating in the background of the public political culture.[24] A society for which this is not true is not in good shape, for the answers we are able to give to these questions, and the confidence we have in them, shape the background thoughts within the public political culture,

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[23] Rawls, TJ, 8-9, 145, 245-46, emphasis added. Cf., PL, 284-85; LP, 89-90.
[24] Rawls, LP, 102; "Fifty Years after Hiroshima" in CP, 571.

which inevitably, albeit subtly, color our expectations of our social world, the attitude with which we confront it, and the experiences we will have of it before we even come to politics.[25]

The basic underlying *aspiration* of Rawls' theory is eminently realistic. One certainly does not need to be an abstract, arm chair moral theorist to share Rawls' underlying concern. It is, for instance, a basic premise of Weberian social science that social orders are the most stable only when their members experience the order as having a legitimate basis experienced as binding upon them, and that fundamentally this basis is irreducible either to purposive rationality or to purely habitual behavior.[26] How to characterize this background is certainly up for debate, but avoiding the question itself is certainly no realist qualification. However much we may dispute certain details of Rawls' political liberal construction, it is this abiding aspiration to thematize the background to democratic politics that constitutes the great realism of his theory.

## 2.2 The Meaning of Modernity: Pluralism and Freedom

The problem of articulating the background to democratic practice faces great obstacles in light of the late modern condition, after the liberal revolution of the seventeenth, eighteenth, and nineteenth centuries, and especially after the profound demographic changes witnessed in the twentieth-century. All viable conceptions of political order which are oriented towards realizing equal freedom must now take seriously the fact of human plurality. Here stands one of the core preoccupations of the political liberal project, a concern which shapes its understanding of freedom and places limits upon the type of social order permissible under contemporary conditions.

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[25] Rawls, LP, 128; PL, lix.
[26] Weber, WG, 16/31.

Here we would do well to begin in an unlikely spot, with the fabled Oxford don, Isaiah Berlin. Despite their differences, Berlin lurks always in the background of Rawls' conception of pluralism, and therewith Rawls' conception of freedom.[27] Rawls' point of departure is but a modification of Berlin's view. In fact, his understanding of the general trajectory of the liberal tradition is decisively shaped by Berlin's overarching narrative. "A crucial assumption of liberalism," writes Rawls, "is that equal citizens have different and indeed incommensurable and irreconcilable conceptions of the good… Liberalism accepts the plurality of conceptions of the good as a fact of modern life." This, he says, is "the liberal presupposition." Rightly or wrongly, he attributes this view to John Locke, Immanuel Kant, Benjamin Constant, Alexis de Tocqueville, and John Stuart Mill. However, the notes appended to these claims make clear that it is, he believes, only "implicit" in the classically liberal account, and that he really has Berlin in mind, in whose scholarship "support for this opinion is found."[28] Pluralism, as Berlin puts it, "recognize[s] the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another." We are, as humans, faced by "choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others." Confronted simultaneously by both the tragedy but also the necessity of choice between ways of life, the force that carries the day is the human will exercising its capacity for free choice. It is, moreover, because of this very situation of necessary choice that we should place "such immense value upon the freedom to choose."[29] Pluralism of this variety, however, does not entail moral

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[27] Rawls, PL, 197-98 and nn. 32-33, cf., 57. For other discussion, see, e.g., TJ, 202 n. 3; PL, 299 n. 16; 332 n. 42. I agree here with the assessment of Crowder, "Value Pluralism," 820-22 that while Berlin is a bit more radical than Rawls (in, for instance, his suggestion that basic values themselves [not just conceptions of the good] are pluralistic and irreducibly incommensurable [e.g., liberty, equality, justice, loyalty]), Rawls' view is nevertheless dependent upon some form of Berlin's basic account.

[28] Rawls, PL, 303-04 and n. 19; "Social Unity and Primary Goods" and "Justice as Fairness: Political not Metaphysical" in CP, 360-61 and n. 2 and 412-13, cf., 382 and n. 24, 386.

[29] Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty,* 171, 168.

anti-realism, per se. It can still hold on to a certain degree of value objectivity to the extent that it

claims that all important human values are rooted in the human condition, which entails that the

range of incommensurable ways of life exists always on a *finite* spectrum.[30] In a world like this,

the freedom to choose, the unobstructed liberty to direct our lives without outside influence,

becomes a thing of absolute value. "Genuine belief in the inviolability of a minimum extent of

individual liberty entails some … absolute stand."[31]

In Rawls' earlier work, the idea of plurality appears to play only a muted role, or at least it is

not presented as an argument-orienting concept as it is in the later work. Something like it,

however, seems to be implicit in the idea of the "circumstances of justice," more specifically, in

the "subjective" side of those circumstances, which stipulates that citizens are simply expected, as

a matter of course, to hold conflicting conceptions of the good.[32] The idea of pluralism itself

makes explicit appearance only in his polemic against utilitarianism and ethical intuitionism.

Whereas the former errs in that it does not recognize the distinctness (i.e., plurality) of persons,

the latter misfires in its dogmatic insistence that first principles are irreducibly incommensurable

and that there exists no higher order, rational operation sufficient to rank them, forcing us to

simply balance these incommensurable principles against one another, aided only by an

ineliminably *ad hoc* act of intuition.[33]

Yet even in the earlier work, Rawls' view is actually quite a bit closer to the principled

pluralism of intuitionism than might appear at first glance. Especially with respect to individual

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[30] Berlin, "My Intellectual Path" in *Power of Ideas,* 11-12; "Pursuit of the Ideal" in *Crooked Timber,* 11-12.
[31] Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty,* 165.
[32] Rawls, TJ, 126-27. As his thinking develops and human plurality becomes an increasingly argument-orienting concept, he draws increasingly frequent attention to this idea. E.g., "Kantian Constructivism" and "Social Unity and Primary Goods" and "Justice as Fairness: Political not Metaphysical" and "Idea of an Overlapping Consensus" in CP, 323, 327, 329 and 371 and 412 and n. 32 and 445. In PL, 66, the subjective circumstances of justice are identified with the fact of pluralism as such, rather than with the fact of reasonable pluralism
[33] Rawls, TJ, 29, 34-40 (§ 7), 191, 317, 412, 553, 563; PL, xv, cf., 90-99 (III:1).

life plans, he basically accepts intuitionism's claim about ultimate indeterminacy. Toward the close of a *Theory,* the question arises whether there exists some "procedure" by means of which we could decide "rationally" between life plans. Sadly, there is not. We can clarify and even narrow our choices, but, in the final analysis, taking the place of some higher order rational principle or procedure is an underlying choice or decision. Viewed from the perspective of rationality, the basic shape of probably incommensurable life plans is something *indeterminate.*

> We eventually reach a point ... where we *just have to decide* which plan we most prefer without further guidance from principle…. We have to allow for the … probability … that sooner or later we will reach *incomparable aims between which we must choose*…. We may narrow the scope of purely preferential choice, but we cannot eliminate it altogether. *The indeterminacy of decision* seems to arise … from the fact that a person has many aims for which there is no ready standard of comparison to decide between them when they conflict.… Significant intuitionist elements enter into determining the good.[34]

As in the Berlinian view, this underlying indeterminacy shifts the point of emphasis towards choice and decision, which—on this view, at least—elevates the significance of freedom.[35]

On this sort of view, human beings are to be viewed as free, self-determining beings all the way down; or at least for the purposes of justice, they are to be conceived as such. Presupposed for the purposes of justice, this sort of autonomy is best conceptualized if we think of the selection of the principles of justice as being a case of "pure procedural justice." Because there is no "independent" or "antecedently given" criterion of right, all principles of justice are freely chosen by means of a procedure believed to be fair.[36] In this sense, all of our obligations are "self-

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[34] Rawls, TJ, 551-52, 560, emphasis added, cf., 416-24 (§ 64), 449-51, also 201. Because reasonable constraints (i.e., constraints that appeal to explanations intelligible as reasons) are invoked, a claim to objectivity (if only in its constructivist sense) is made, and because its content is pulled from a tradition (and thus not created out of whole cloth), Rawls, "Kantian Constructivism" and "Priority of Right" in CP, 354-55 and 462-63 n. 24 distinguish this view from the value-skepticism of what he calls "'radical' choice," which he associates with Nietzsche, Weber, and existentialism.

[35] Rawls, TJ, 563.

[36] Rawls, "Kantian Constructivism" in CP, 310-12, cf., 315, 351, 353-54. Cf., TJ, 84-89, 274-80, 304-15; PL, 72-73, 76, 259, 273, 281-82.

imposed." These can only "arise as a result of our voluntary acts."[37] In a phrase made famous by its repeated invocation by a critic, Rawls avers that "the concept of right is prior to that of the good," and that we need not "give form to our life by first looking to the good independently defined … for the self is prior to the ends which are affirmed by it."[38]

A decade after its initial presentation, this implied notion of selfhood was subjected to withering critique. One critic simply declared it to be a form of "bad sociology."[39] Rejecting this sociological objection, another lampooned the philosophical anthropology implicit within this view as that of an "unencumbered self … prior to and independent of purposes and ends," who remains permanently ignorant of the "partly constitutive" "common vocabulary of discourse and … background of implicit practices and understandings" that fill out his identity. Were this depiction actually to have regulative influence, such a person would be "denied … the possibility of membership in any community bound by moral ties antecedent to choice." Such a view of the self is appropriate only for a citizen living in a thinned out "procedural republic."[40] (In the next chapter, I will argue, quite to the contrary, that the implicit conception of selfhood is actually quite *thick; not thin.*)

The perception of some fundamental shift in later works on the meaning of freedom is ultimately misleading. To be sure, later writings do stipulate that the conception of "full

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[37] Rawls, TJ, 113, 206, cf., 343, 347. Following Hart's sense of the term, "natural," Rawls reserves conceptual space for a category of duties that are "natural," stipulating that these do not rest upon their voluntary, self-given character. It is, however, quite difficult to see how this claim could be sustained in light of the fact that the binding character of these duties is said to derive from their having been selected in the original position, which, if it is anything at all, is a heuristic device for conceptualizing voluntary, self-given obligations (14 ff. [§ 19], 335 ff. [§ 51]). That is precisely the point of the so-called "Kantian interpretation" of the original position, i.e., that it is an expression of autonomy and thus represents the procedural abstraction from both nature and society (251-57 [§ 40], esp. 251, 255-57). In other contexts, e.g., discussing teleological doctrines, he is wary of invocations of purportedly natural duties (e.g., 328). See Hart, "Are there any Natural Rights?," esp. 175-76; *Concept of Law,* 192 ff.

[38] Rawls, TJ, 31, 560. Frequently cited by Sandel, e.g., *Liberalism and the Limits of Justice,* 19; *Liberalism and its Critics,* 5; *Democracy's Discontent,* 12.

[39] Walzer, "Liberalism and the Art of Separation," 324, cf., 321.

[40] Sandel, *Liberalism and the Limits of Justice,* 11-13, 48-50, 150, 172, 178; "Procedural Republic," 86-87, 91 ff.

autonomy" is "political not ethical." This appears, however, to entail no significant structural changes in the underlying idea, so far as I can tell, apart from the restriction of this notion of autonomy solely to the selection of principles of justice, in express contrast to a moral conception pertaining to the governance of the entirety of one's life.[41] Still, for the purposes of justice, each citizen's life plan is to be viewed as self-given. "Political speaking," all of the non-political, prior loyalties, commitments, attachments and affections corresponding to our worldview are to be viewed as something we "impose ... on ourselves," for it is within our legal and political competence to determine whether we freely accept or reject these, and to view the matter in any other light is to give up on the idea of freedom of conscience.[42] At the end of the day, seeing as the principles of justice selected under conditions of political autonomy constitute the basic parameters of acceptable life plans, this "political not ethical" tag may well represent a distinction without a difference.

The same basic voluntaristic tropes familiar from the early work recur also in the later work. Though the language and points of emphases have certainly undergone transformation, the underlying understanding of human freedom is largely the same. Human beings are free in that they are "*self-originating*" and "*self-authenticating* sources of valid claims." Freedom, among other things, means independence from any pre-given set of ends. "Free persons do not think of themselves as indissolubly tied to any particular final end, or family of such ends, but regard themselves as always capable of appraising and revising their aims in the light of reasonable considerations." Citizens are never to be conceived as merely "passive carriers of desires" Our

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[41] Rawls, PL, 77-81 (II:6), cf., xli-xliii and n. 8, 28, 90, 107. Cf., "Idea of Public Reason Revisited" in PL, 455-56. This notion of full autonomy is to be distinguished from the more abstract "rational autonomy" presupposed for characterizing the nature of deliberation undertaken in the original position [PL, 72-77 (II:5), 304 ff.].)
[42] Rawls, PL, 221-22, cf., 31, 277.

ability as free agents to shape our ends is part of what it means to fulfill the conditions of "responsibility"—responsibility in the sense that one is willing and able to shape one's ends to meet circumstances, social conditions, and in particular, the demands of justice. Those unable (unwilling?) to adapt are best treated as medical or psychiatric cases.[43]

The persistent tropes of self-origination link up with an important strand within the liberal tradition, whose significance for the political liberal project is paramount. Central to twentieth-century, high liberalism' conception of liberty is the idea that an autonomous act is only one which is wholly self-determined, which is to say, independently formulated by a self-sufficient agent. Its quality as an autonomous act remains opaque and impervious to the gaze and evaluation of and by an observing other. As one friendly critic puts it, there can be no "second-guessing of the subject by any one else." This idea constitutes an essential part of the tradition's categorical objection to all forms of "paternalism."[44]

Contemporary, principled anti-paternalism is heir to important themes from the eighteenth- and nineteenth-century liberal tradition, articulated perhaps nowhere more clearly than in Kant and Mill. "No one," writes Kant, "can compel me to be happy in accordance with his conception of the welfare of others, for each may seek happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law." To do otherwise is to treat citizens as "immature children who cannot distinguish what is truly useful or harmful to themselves," which would be consonant with "the greatest conceivable despotism."[45] Citing a subsequent figure in the

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[43] Rawls, PL, 30, 32-34, 72, 100, 185-87, 280, emphasis added; "Kantian Constructivism" and "Social Unity and Primary Goods" in CP, 330-31, 334-35 et passim and 369-72, emphasis added, cf., 345-47, 350, 353. Cf., LP, 33.This specific understanding of the idea of responsibility seems implicit in, e.g., TJ, 30 ff., 449 ff.
[44] Taylor, "What's Wrong with Negative Liberty" and "Kant's Theory of Freedom" in *Philosophical Papers,* 2:217 et passim and 333.
[45] Kant, "On the Common Saying: 'This May be True in Theory; But it does not Apply in Practice'" in PW, 74.

tradition of German Idealism, Mill expresses a similar sentiment, if perhaps a good deal more eloquently.

> He who lets the world ... choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties.... It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being? Human nature is not a machine to be built after a model ... but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.[46]

Rawls takes his place within this traditional strand of liberal anti-paternalism, and this was an important feature even in the early works. This has important bearing, moreover, upon the place of pluralism and freedom within Rawls' thought more broadly. *Theory* suggests that while the principles of justice are and should be invariant across a society, it is not only a good thing that conceptions of the good differ, but expecting unanimity on conceptions of the good would eventually bring one into flagrant contradiction with the ideal of freedom of choice. With respect, then, to the quality of a fellow citizen's life plan, our considered judgments about the lives of others can play only a "merely advisory" role.[47] It is a matter of justice, even, that the quality of individual citizens' life plans are off the table. "As citizens we are ... for the purposes of justice to avoid any assessment of the relative value of one another's way of life."[48] "The relative merits" of the various conceptions of the good are not appropriate topics for a theory of justice.[49] Except for children and those who are "mentally disturbed," all citizens are assumed to be "rational and able to manage their own affairs." Any other assumption would bespeak a certain degree of paternalism.[50]

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[46] Mill, *On Liberty* in *Collected Works,* 18:261-62.
[47] Rawls, TJ, 447-48.
[48] Rawls, TJ, 442, cf., 214. Cf., "Social Unity and Primary Goods" in CP, 373.
[49] Rawls, TJ, 94.
[50] Rawls, TJ, 248-49.

Still, anti-paternalism in no way requires us to give up altogether on ethical "objectivity." Rawls certainly "does not presuppose that the ends of different persons have the same intrinsic value." In fact, "from the standpoint of everyday life," it is simply not true that all ends are of equivalent value, and that all agents equally capable of achieving the ends specified by their conception of the good. "Comparisons of intrinsic value can obviously be made." In fact, there is no reason at all to suppose that all persons are equally capable of attaining the highest forms of life. Further, there is no basis for supposing that "the conscientious [moral] judgments of each person ought absolutely to be respected," for personal moral judgment is very clearly something about which one can be disastrously "misguided." Still, from the perspective of justice, and all qualification notwithstanding, all citizens are to be treated as though they were of equal worth or dignity, for they all meet the standard of equal moral personhood.[51]

This anti-paternalistic temper finds its apotheosis in his discussion of what he calls the "Aristotelian Principle," wherein Rawls introduces the reader to a fictional man, "whose only pleasure is to count blades of grass in various geometrically shaped areas such as park squares and well-trimmed lawns." Though perhaps the editors of the *Diagnostic Statistical Manual* might raise vigorous dissent, Rawls affirms that this way of life is "good for him."[52] From the perspective of political justice, compulsive, artisanal lawnscaping is qualitatively indistinct from the other types of satisfaction constitutive of other ways of life.

In *Political Liberalism,* this anti-paternalistic understanding of freedom intersects with a newly prominent conception of human plurality. With this transformation, the anti-paternalistic temper ceases to apply strictly to an individual's choice of life plans, decontextualized from identity-

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[51] Rawls, TJ, 328-29, 518-19.
[52] Rawls, TJ, 432-33.

shaping forms of life, but extends even further to cultures, religious traditions, and ways of life—

i.e., those meaning-giving loci of identity-formation to which Rawls refers when he uses the term

"comprehensive doctrine." In what follows, taking my cue from an intuitive Habermasian

interpretive decision, I will, for the most part, hereafter gloss Rawls' inartful, because perfectly

non-colloquial, concept of "comprehensive doctrine" with the term "worldview."[53]

In these later writings, human plurality becomes an argument-orienting concept. At its most

basic level, the political liberal project is presented as being itself the result of having adjusted the

theory of justice developed in Rawls' earlier writings to the requirements of a plural, internally-

variegated, multi-ethnic, multicultural, diverse population of many faiths and non-faiths, leading

to a reformulation which resolves problems internal to the theory itself and thereby ensures real

stability.[54] In any modern, liberal democratic society, we are confronted by the fact of human

plurality.

Though the formal nomenclature arrived only later, the basic contours of this constellation of

ideas appear as early as 1980-82.[55] By 1987, he had begun formally to describe this condition as

"the fact of pluralism."[56] Six years later, he had taken to describe this same, only slightly

modified idea as the "fact of reasonable pluralism." Giving a largely epistemic explanation of

worldview divergence, Rawls points out that plural citizens exercising their respective faculties of

reason rarely arrive at identical conclusions concerning the moral, philosophic, or religious ideas

that form the basic backdrop of most citizens' day to day lives. This is simply the "normal result"

or "inevitable outcome" of the exercise of practical reason within the context of liberal

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[53] Habermas, "'Reasonable' versus 'True'" in IO, 75; "Religious Tolerance as Pacemaker" and "Equal Treatment of Cultures" in BNR, 261 and 305.

[54] Rawls, PL, xv-xvii, xxix-xxx, xxxv-xxxvi, xli.

[55] Rawls, "Kantian Constructivism" and "Social Unity and Primary Goods" in CP, 329 and 381 ff.

[56] Rawls, "Idea of an Overlapping Consensus" in CP, 421-22, 425 and nn. 6-7, 427, 429-31, 439-40, 442-43, 445, 447-48.

constitutional democracy, and for this reason it is "a permanent feature" of democratic societies today. Given the nature of human reason under conditions of freedom, no single one of these worldviews is or even can be universally shared within that society. These numerous but all reasonable worldviews are not just different from and conflicting with one another, but even incompatible, irreconcilable, and fundamentally incommensurable with one another. This fact of worldview incommensurability, however, does not of itself vitiate the reasonableness of any one particular worldview, for there simply is no "public and shared basis of justification" from which this judgment could even be meaningfully rendered. So, when all is said and done, these plural worldviews are best described as "incompatible yet reasonable."[57] All of this Rawls presents as the lesson of "historical experience."[58] Moreover, this condition is not at all to be lamented as something "unfortunate."[59]

Whereas in 1987, Rawls would allow that some of this might actually be "a disputed question" (e.g., the idea of the thoroughgoing incommensurability of conceptions of the good), a little over one decade later he would simply declare it a virtually indisputable truism.[60]

## 2.3 The Problem of Legitimate Stability: Modus Vivendi Democracy and the Priority of Liberty

Every important contribution to political theoretical enquiry can be understood as a response to a particularly pressing, concrete problem. In this respect, Rawls' is no exception. The entire political liberal project is motivated by one, constantly recurring, fundamental question: "How is it possible that there may exist over time a stable and just society of free and equal citizens

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[57] Rawls, PL, xvi-xvii, 36-37, 61, 133, 370-71, cf., xxxvi n. 3, 4, 135 and n. 2, 303.
[58] Rawls, PL, xxv, 4, cf., 63, 140. Cf., "Kantian Constructivism" in CP, 329. It seems likely that Rawls considers the fact of reasonable pluralism to be a distinctively *modern* phenomenon, arising only in the last three to five centuries. See, e.g., PL, xxii ff., 154; LP, 11-12.
[59] Rawls, PL, 37, 144.
[60] Cf., Rawls, "Idea of an Overlapping Consensus" in CP, 425 with LP, 124.

profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?" Put even more starkly, how is it possible for all of them to be "wholehearted," committed citizens, rather than just passively acquiescent clients of a state system experienced as a top-down imposition to which they (or at least some of them) must constantly struggle to accommodate themselves?[61] Resolving this question is "*the* aim" of political liberalism.[62] There is clear evidence as early as 1982 that Rawls had been slowly drifting towards this revised way of formulating the decisive question.[63] It is to confronting this possibly insoluble question that the labors of the political liberal project are dedicated. This is the problem of political and social stability under conditions of liberal modernity. Answering this problem yields a very specific understanding of democratic self-governance.

This topic of stability is raised in his earlier work, but not adequately—as we shall see presently. To even address the question of stability, we must first leave the justificatory domain of the original position, and shift our attention in order to view the resulting consensus from the perspective of "everyday life."[64] We must view political order no longer simply from the abstraction of the original position, but from the point of view of actual participants. To be stable and thus to be truly efficacious, a theory of justice must "generate its own supportive moral attitudes." Citizens, generally speaking, must possess "a settled intention" and "strong and normally effective desire" to comply with any theoretically-established, shared conception of justice.[65] Succinctly and more to the point, citizens must develop what Rawls calls a "sense of

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[61] Rawls, PL, xviii, xxxviii, cf., xxv, xxxvii, 4, 10, 47, 133. Cf., "Idea of Public Reason Revisited" in PL, 458.
[62] Rawls, PL, xix, emphasis added.
[63] Rawls, "Social Unity and Primary Goods" in CP, 360-61.
[64] Rawls, TJ, 496-97.
[65] Rawls, TJ, 399, 454, 527-28.

justice," that is, a desire to allow one's behavior to be, more or less, regulated by principles recognized to be correct and just according to a theory of justice.[66] How this is possible and even likely must be explained by any theory of justice, for, failing that, the problem of stability becomes insurmountable. For it to be worth anything at all, a theory of justice must "engage our affections."[67]

In *Theory's* penultimate section, Rawls aims to meet this dilemma by demonstrating a basic "congruence" between the good and the right—between an individual's life plan and his sense of justice. This is what would be required in order to show that the sense of justice required by justice as fairness is good as such. In meeting this condition by means of demonstrated congruence, motivated compliance ceases to be an issue, and therewith the problem of stability dissolves. However, for this congruence to mean anything at all, it must hold for a society where there are none of the heuristic restrictions imposed by the original position. These persons all know their determinate conception of the good in concrete specificity.[68]

The trouble, however, is that you can't execute such a feat of demonstrated congruence if you sincerely maintain, on the one hand, that the "human good is heterogeneous" and, on the other hand, that the state "does not establish a dominant end."[69] This truth arises most strikingly in the penultimate chapter of *Theory*. There, Rawls contends that the desire to act justly and the desire to act autonomously are "practically speaking the same desire" and that this desire "reveals what the person is." However, almost immediately thereafter, he goes on to acknowledge that, strictly speaking, after exiting the thought experiment of the original position (which is, by design,

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[66] Rawls, TJ, 567-77 (§ 86), cf., esp. 398 ff., 454, 474, 491, 514 ff. Cf., "Sense of Justice" in CP, 96-116.
[67] Rawls, TJ, 476 ff.
[68] Rawls, TJ, 567-77 (§ 86), cf., 456, 513-14, 520.
[69] Rawls, TJ, 528, 554, cf., 565-66. That the matter turned essentially on this point seems to be conceded in "Reply to Habermas" in PL, 388 n. 21.

limited only to the thin theory of the good), it is not necessarily the case that all persons as persons would find that their regulative desire shaped by their conception of the good consisted of the yearning to express their natural autonomy. This fact, however, would frustrate the proposed congruence. If such persons should predominate in any given society, then "under such conditions penal devices will play a much larger role in the social system." To these persons now subjected to penal sanctions, Rawls has only the following to say: "Their nature is their misfortune."[70]

If, however, it is the case, as Rawls comes later to maintain—and which is fully consistent with his earlier formulations—that there is an indefinite number of reasonable worldviews, each oriented around its own conception of the good, and these various worldviews are themselves incommensurable, then it is pellucidly clear that the attempt to articulate the unqualified congruence between the right and the good is a failed enterprise from the get go. Further qualifications are required. Constraints must be added for congruence to obtain.[71] We must, first of all, come to understand what it means to be "reasonable," and, if the reasoning is not to be completely circular, this term cannot simply mean that it accepts justice as fairness. We will return to this topic in a later section.

Looking back some two decades later, Rawls could acknowledge that the *Theory's* conception of political order and stability was fundamentally "unrealistic," because it presented justice as fairness as a fully comprehensive worldview, which all citizens were expected to endorse, completely irrespective of their own individual worldview.[72]

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[70] Rawls, TJ, 572-76.
[71] The idea of the right-good "congruence" does also appear in *Political Liberalism* (e.g., text and "Reply to Habermas" in PL, 11, 140, 169, 317 and 378, cf., 151), but this, I contend, must always be understood with the types of qualifications that that text adds, so that it is understood as one option among many possibilities.
[72] Rawls, PL, xv-xvi.

It is sometimes suggested that the reformulation of Rawls' argument arose as a result of criticism from, e.g., so-called "communitarians," in addition to feminists, Marxists, and poststructuralists.[73] However, as I have already suggested above, Rawls' difficulties arose internally. In this sense, Rawls is absolutely correct to maintain that the changes in his thought were not, in any truly substantive sense, occasioned by outside critiques—communitarian or any other sort.[74] As I will point out in the next chapter, Rawls' fundamental realignment was *already* underway by 1980.[75] However, all of the most prominent, relevant publications from this so-called "communitarian" critique post-date this re-alignment.[76] Instead, these later reformulations are better understood as Rawls' own realization of the fundamental conflict between two elements *internal* to his earlier account of justice: his understanding of the conditions of stability, on the one hand, and his understanding of freedom under conditions of modernity, on the other. This later work should be understood as the attempt to work out internal tensions, and not as the attempt to integrate theses and conditions formerly exogenous to his account of justice.

According to the revisions inaugurated by Rawls' mature political thought, a political society is stable, (a) first, if "a substantial majority" or "sizable body" of citizens willingly and freely affirm and/or comply with the public, political conception of justice; and (b) secondly, if the demands imposed by this consensus are "not too much in conflict with" the "essential interests" of citizens. The public conception of justice must "not conflict too sharply" with the respective worldviews of citizens.[77]

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[73] E.g., Kymlicka, *Liberalism, Community, and Culture,* 9, 58, 61; *Multicultural Citizenship,* 160, 215 n. 16.

[74] Rawls, text and "Reply to Habermas" in PL, xvii n. 6 and 388 n. 21, cf., xxix, 27 and n. 29, 29.

[75] This is both my own assessment of the evidence and the opinion of Rawls, PL, xvii, xxxii-xxxiii.

[76] E.g., MacIntyre, *After Virtue* (1981); Sandel, *Liberalism and the Limits of Justice* (1982); Walzer, *Spheres of Justice* (1983); Taylor, *Philosophical Papers* (1985 [its contents, however, do include some articles published prior to 1980]).

[77] Rawls, PL, 38, 65, 134, 141. Cf., TJ, 454, 499 ff.

So, to return to the question with which this section began: how does a society made up of citizens of conflicting and even incommensurable worldviews come together politically in order to pursue common projects? One very tempting answer to this problem consists of a popular and seemingly intuitive re-description of democratic practice, and it is in direct contrast with this re-description that the general thrust of Rawls' political liberal project comes into its own. This re-description implicitly or explicitly rejects the idea that democratic unity or background consensus is possible. No morally-inflected background consensus based upon shared human reason (supported by an already existing public culture) can be accurately interpreted as being unequivocally in the interests of all, that is, as favoring no one party over another. On this model, the democratic public sphere is pictured instead as something like a marketplace, where citizens compete with one another in order to promote their self- or group-interests. Political outcomes track the fluidity of the formation and dissolution of interest groups that cooperate to form pluralities in parliamentary politics. This being the case, any momentarily settled consensus is, for all intents and purposes, completely indistinguishable from the compromise that results from bargaining. The model of stability implicit within this democratic vision is the idea of an equilibrium or balance of existing forces within society. Stability is nothing other than a "fortunate convergence of interests." In broad outline, this is the Hobbesian type position Rawls calls "modus vivendi" democracy.[78] Though the term does not appear in his earlier writings, the notion is unmistakably there.[79]

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[78] Rawls, PL, 147; "Justice as Fairness: Political not Metaphysical" and "Idea of an Overlapping Consensus" in CP, 410 and 421-22 and n. 1, 446. Cf., "Reply to Habermas" in PL, 389, 391-92 and n. 27.
[79] E.g., Rawls, TJ, 357-58 and n. 16, 521-22, cf., 197 n. 2, 222, 226, 361 n. 18, 492-93 and n. 22. Cf., "Kantian Constructivism" in CP, 324.

It is sometimes alleged that this idea of a modus vivendi is a boogeyman of sorts—a position that no one ever held.[80] This, however, seems quite unlikely. Madison's Federalist 10 and that intellectual outlook that later came to be called "interest group pluralism" bear striking resemblance to it, at least in spirit.[81] More importantly, perhaps, as the moral background to politics withers, on the ground politics approaches this ideal type asymptotically; and with the cooperation of on the ground reality, this description of democratic practice suggests itself quite forcefully. Perhaps democratic politics is largely about the balance of forces and the equilibria thereby established, with the temporarily unsuccessful party accepting defeat in order to rally troops for the next round, and only those of childlike intellect think that we can do better than this. To be sure, this depiction has a certain powerful appeal. But if this is a liberal view, it is only ever one by accident, for there is an ever-present danger that demographic and sociological forces will succeed in transforming the regime into something else. Modus vivendi democracy in its pure and unadulterated form has no comforting words to say to this prospect.

Stability as such is ultimately insufficient. An equilibrium in the balance of power is not, by itself, fully adequate. Political liberalism seeks an account of stability that is more than merely "apparent." The sort of stability sought by political liberalism is deeper than a simply happenstantial form of stability, conceived either as an equilibrium, as a fortuitous convergence of interests, or as something to which one acquiesces simply for lack of better options for the time being. These types of stability are, in actual fact, not quite as stable as they purport to be. The idea, then, is to achieve a form of stability that prevails irrespective of relative shifts in the distribution of political power. Should the relative strength of one faction be on the upswing, they

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[80] E.g., Neal, "Vulgar Liberalism," 629.
[81] Madison et al., *Federalist,* no. 10, pp. 42-49*; Dahl, *Preface.*

will not disenfranchise others. And should their political fortunes dwindle, they shall not reach for rifles. Such a condition is what Rawls comes later to call "stability for the right reasons."[82] With the idea of stability for the right reasons, Rawls wishes, in effect, to speak of *legitimate* stability, in contrast to stability as such.[83]

The fundamental, underlying objective of political liberalism is to articulate the contours of the consensually accepted background in terms of which a healthy and stable liberal democracy can be differentiated from a mere modus vivendi democracy. Following a centuries long tradition in rule of law liberal constitutionalism, most (Anglo-American) readers are probably accustomed to understand a society's written constitution (and surrounding interpretive tradition) as the bedrock of this consensual background, the framework within which legitimate democratic contestation can unfold. In an abstractly qualified sense, this is partly true of Rawls; but in another way, it is also misleading, because, on Rawls' view, a just constitution, by itself, while necessary for a well-ordered society, is not itself sufficient for establishing and maintaining a well-ordered society. On its own, a liberal democratic constitution is "just but imperfect."[84]

More often than not, Rawls' language and conceptual apparatus becomes ethereal, abstruse, and thus hard to pin down whenever he attempts to specify that thing standing in the background establishing the basis upon which social consensus is possible. Here Rawls introduces the admittedly vague concept of the "basic structure of society." This basic structure is irreducible to a group of rules or to a single institution, but refers instead to the social system as a whole, i.e., its main political and social institutions that serve as the "encompassing institutional framework" for

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[82] Rawls, PL, xxxvii-xxxviii, 147-48, cf., xl, xli, xlv, xlviii, lvi, lix, 142 ff. Cf., "Idea of Public Reason Revisited" in PL, 458-60; LP, 12-13 and n. 2, 44-45 (§ 5.1).
[83] Rawls, text and "Reply to Habermas" in PL, 143-44 and 390 et passim, cf., however, 427-29.
[84] Rawls, TJ, 353-55, cf., 196 ff., 221 ff., 296 ff.

cooperation between citizens. Though itself irreducible to any one of them taken on its own, illustrative constitutive parts of this basic structure include the constitution; the legal and economic order; the manner in which government interacts with civil society at the most abstract level, up to and including the family and the institution of marriage; and even "the character and attitudes" of citizens. The basic structure refers ultimately to the manner in which these various formal, institutional, characterological, and structural elements in the background of society fit together into one unified whole.[85] If perhaps only metaphorically, Rawls repeatedly refers to a hypothesized "constitutional convention," that is to be guided by the substantial content that organizes the basic structure of society.[86] The result of this hypothetical convention would then be what he calls elsewhere "the fundamental charter" of society.[87] But ultimately, what he has really set out to do is to articulate a "political morality," which could function as the "moral basis" standing in the background of the practice of democratic self-governance.[88]

Rawls' view of the basic structure of society is, then, to be distinguished sharply from the "impoverished" understanding of the liberal tradition, which views "constitutional consensus" as a "purely formal" consensus within which the play of interests might unfold. At least in this criticism of broader trends in the tradition of liberal thought, Rawls is here in complete agreement

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[85] Rawls, TJ, 7, 9, 57, 259, cf., 3, 54, 58, 84, 236; PL, xli and n. 7, 11-12, 35, 201-02, 257-88 (VII), esp. 257-58 and 301-02. In *Political Liberalism,* Rawls sometimes appears to distinguish "constitutional essentials" from the basic structure of society, the former referring to those principles articulated in a written constitution and the latter referring to economic arrangements left unspecified in a written constitution. E.g., PL, xlviii n. 23, cf., VI.5. However, p. 301 refers to the constitution as a part of the basic structure, which is consistent with the view articulated in *Theory.* I have not done a thorough review of the evidence, but I surmise that Rawls distinguishes the basic structure of society from constitutional matters *only* in his discussion of the idea of public reason, but everywhere else his conception of the basic structure includes this idea. The first edition of *Political Liberalism* was comprised of revised material spanning over a decade (1978-1989), and it is possible that not everything fell perfectly into place. I can only guess that Rawls would have corrected this apparent and strange inconsistency in the proposed revisions to *Political Liberalism,* which he did not live to complete.

[86] E.g., Rawls, TJ, 357, cf., 196-97 and n. 2, 200, 211, 215, 231, 248, 259, 449; text and "Reply to Habermas" in PL, 336 ff. and 397 ff.

[87] Rawls, TJ, 5, 181, cf., 11, 131.

[88] Rawls, TJ, 221, 363, cf., viii, 182, 367, 385.

with this critique which is shared broadly by Hegelians, Marxists, and socialists.[89] Rawls' minor modification of the traditional liberal constitutionalist view establishes what might be succinctly described as the fundamental priority of liberty to democracy. Though in this context the language of modus vivendi is not raised, the basic idea is implicit. The accent shifts to the longstanding problem of how best to conceptualize democratic majoritarianism within the framework of liberal constitutional democracy. The higher law of the fundamental charter must be protected against majoritarianism.

This view results in what Rawls, following a colleague, describes as a "dualist" constitutional theory, which distinguishes sharply between ordinary legislation and law that is somehow more fundamental, and which is ordinarily fixed during a constitutional convention and inscribed in a written constitution understood as a holistic unit. In contrast to a strictly formal understanding of the constitution, a politically liberal constitution represents a "principled expression" of the people's original "constituent power," as signaled by the phrase "We the People" in the Preamble. During ordinary politics, sovereignty rests in no one spot in particular. Rejected altogether is the notion of parliamentary supremacy. "Ultimate power" resides across the complex of the three branches of government, with their relationship to one another established constitutionally and with all equally responsible to the people. However this may be, the originary exercise of the people's constituent power expresses the desire of a sovereign people "to govern itself in a certain way." This constituent power is then embodied as a "higher law" within the constitution, and ever after, it enjoys a "higher authority" above all subsequent types of ordinary legislation. This constituent power remains so embodied, and does not devolve once more back upon the people, at least so long as the regime stands. After ratification, constitutional essentials are "fixe[d] *once

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[89] Rawls, PL, lvi and n. 34.

*and for all,"* hermetically sealed against the vicissitudes of "transient majorities" or pernicious interest groups. Congress is not competent to discard the basic law at will, and the highest court will function as the guardian of the constitution. The people as bearers of constituent power gave themselves this higher law, and the court's role is merely to uphold the democratic substance of higher law embodied in the constitution it interprets.[90] Within this dualist constitutional theory, the democratic substance of the people, as embodied in the constitution and as interpreted by a high court, has normative priority over democratic procedure or pure, undifferentiated democratic sovereignty.

Within Rawls' scheme there exists a fundamental "priority of liberty," which entails that "liberty can be restricted only for the sake of liberty itself."[91] Basic rights and liberties are "inalienable" and "beyond all price." There is no conceivable conditions under which citizens could alienate their own basic liberties or those of any other. Anything that contravenes these basic liberties is "void *ab initio*" and has "no legal force."[92] It is right and proper to preserve the priority of liberty in any society, like the United States, which meets "'reasonably favorable conditions,'" which is to say that their culture, traditions, economic characteristics, and skill with liberal democratic institutions do not hinder its implementation.[93]

But what kind of liberty does Rawls have principally in mind? Preliminarily, we do well to recall that liberty of conscience serves as Rawls' paradigmatic case for illustrating equal liberty

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[90] Rawls, text and "Reply to Habermas" in PL, 231-34 and n. 12 and 405-06, 415 and nn. 59-60, emphasis added, cf., 228 and 433-34, cf., however, 399. Though Rawls attributes this view to Locke, it is really a modified version of Ackerman's "dualist" view of democratic constitutionalism with a particular work of Lockean scholarship superimposed over it. See Ackerman, *We the People,* vols. 1-2; Franklin, *John Locke and the Theory of Sovereignty* (mis-cited as *Sovereignty of the People*). Rawls cites Locke, *Two Treatises,* 2.134, pp. 355-57, 2.141, pp. 362-63, and he might as well have cited 2.149, pp. 366-367, but careful review reveals that Locke says nothing more there than that parliamentary supremacy is, in fact, premised upon delegated power or authority from the people (and various other related terms), and that this delegated power devolves upon them when parliament betrays their trust.
[91] Rawls, TJ, 244, cf., 204, 541-48 (§ 82).
[92] Rawls, PL, 365-67 and n. 82; "Social Unity and Primary Goods" in CP, 372 n. 11.
[93] Rawls, PL, 297.

and the relationship between its justificatory logic and the original position.[94] Liberty of

conscience is, in general, a prominent, recurring theme in his writings, used often as the

paradigmatic case or orienting concern.[95] In fact, it is not implausible to interpret political

liberalism—as some do—as an extension of the idea of liberty of conscience to much of human

life.[96] Broadly speaking, however, Rawls is concerned with all of those liberties, which critics

typically call the *bourgeois* rights or liberties, e.g., freedom of expression, of association, of

conscience, of thought, of trade, of occupation, of movement, or of any chance behavior except

where restrictions are expressed in legal form, which is disclosed in advance and known to all,

specified at a suitably general level, equally applicable to all, and corresponding to a non-

arbitrary, significant, and readily identifiable state interest (i.e., the rule of law); the right to own

personal property, and to bodily integrity.[97] To be sure, some of these basic liberties may conflict

with one another. The goal, however, is to arrange them into a "fully adequate scheme" of the

"family" of basic liberties that is equal for all persons, and which brooks no considerations of

efficiency or perfectionist values.[98] Rawls does, however, leave completely open the question of

market order as regards the ownership of the means of production. Both bourgeois capitalism and

market socialism (so far as it respects basic rights) are fully consistent with his theory of justice.[99]

Though Rawls resists the implications of his own theory, his prioritization of liberty entails a

number of important consequences for his conception of civic participation. Rawls' place within

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[94] Rawls, TJ, 205-11 (§ 33), esp. 206, 215; PL, 310-24 (VIII:5-6). In *Theory,* Rawls expressly acknowledges that the generalization of the argument to the other liberties may dilute the general force of the argument
[95] E.g., Rawls, "Outline of a Decision Procedure for Ethics" and "Kantian Constructivism" and "Social Unity and Primary Good" in CP, 16 ff. and 327 and 372; PL, 154, 190, 335.
[96] E.g., Kymlicka, *Multicultural Citizenship,* 155 ff.
[97] Cf., Rawls, PL, text and "Reply to Habermas" in PL, 291 ff., 298, 308 335-36, 342 ff. et passim and 418-19 and n. 65.
[98] Rawls, PL, 291, 295, 332-33, 356-59 et passim. This phrasing represents a revision of his formulation in *Theory.*
[99] Rawls, TJ, 258, 265-74 (§ 42), esp. 271; text and "Reply to Habermas" in PL, 7-8 n. 7, 298 n. 14, 328, 364 and 410 n. 50, 416.

the tradition of classical liberalism is obvious and unmistakable. On this view, as he recounts, the political liberties of democratic participation are of "less intrinsic value" than those, which I have above called the bourgeois liberties. The liberty of democratic participation has value principally for the purely instrumental reason that a population with suffrage is thought to be the best arrangement for maintaining the rights of persons against would be kings. To invoke the language of Benjamin Constant, which Berlin made famous in the twentieth century, the priority of liberty seems very much to mean, above all, the liberty of the moderns, in contrast to that of the ancients. The Rousseauian, civic humanistic view of political life is, if not inconsistent with, then, at least in tension with the idea of political liberalism, so far, at least, as this view maintains that the value of democratic participation is irreducible to the instrumental one of protecting basic liberties, and that it is instead constitutive of what it means to be a free people. To be sure, Rawls does list other possible benefits of the liberty of democratic participation, beyond the merely instrumental one. For instance, it might "enhance the self-esteem" of citizens, instill within them a "sense of duty and obligation," "educat[e] … public spirit," generate "affective ties" beyond one's own family and voluntary associations, and thereby have bearing upon the "moral quality of civic life." He also adds that his theory "allows … [but] does not require" that one take this classically liberal, instrumental view of democracy. However, this neat distinction, as he makes expressly clear, holds up only so long as "favorable conditions" obtain, such that one's hand is never forced to make a categorical decision about the "relative total importance of the different liberties."[100]

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[100] Rawls, TJ, 229-30, 233-34; PL, 206, 298-99, cf., 290 n. 1, 330; Berlin, "Two Concepts of Liberty" in *Four Essays,* 163 ff.; Constant, "Liberty of the Ancients compared with that of the Moderns" in *Political Writings,* 309-28. Cf., "Kantian Constructivism" in CP, 307; "Reply to Habermas" in PL, 404 n. 39, 410, 420-21.

Elsewhere, Rawls is simply more candid. It is simply a "fact that the various liberties are not all on a par."[101]

Ultimately, liberty is not co-original with, but instead fundamentally prior to, democracy. As such, Rawls is at great pains to distinguish himself from a view of democracy he calls "(bare) majority rule." "There is nothing to the view … that what the majority wills is right." The idea of right and principles of justice have nothing to do with any "actual political process," but are specified instead by this or that reasonable political conception of justice. While it is true that "the majority principle must as a practical necessity be relied upon to some degree," democratic proceduralism must always be bounded by some fundamental order that envelopes it. The procedure of democratic will formation must be "restricted by the mechanisms of constitutionalism," and it must "satisfy the conditions of background justice." These establish the perimeter of "the allowed bounds" and "permitted limits" within which the majority principle has its validity. They furnish a "guiding framework" for democratic deliberation. The restrictions provided by this guiding framework "mitigate the defects of the majority principle" and generate "a more considered and deliberate decision." It is only by filtering the democratic will through liberal constitutional procedures and restrictions that a "*reasoned* democratic will" can possibly emerge. Majoritarian democracy, in contrast, generates only "mere preferences," and these preferences have "no value" and "no weight," so long as they cannot be substantiated against the background of the principles of justice implicit within the basic structure of society, which is itself established prior to democratic practice and is designed to ensure equal liberty for all. Majoritarian rule and its "inevitable imperfections" are those sorts of things we just have "to put up with"—assuming, at least, that background injustice is not manifestly severe. We put up with

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[101] Rawls, TJ, 247.

it in large part because there is no other "feasible procedure" and because an agreement to some procedure for legislation is preferable to no agreement at all.[102]

How ultimately should we think of basic human rights? Elsewhere, and in response to criticism, Rawls insists that his conception of liberal basic rights has nothing at all in common with historical notions of natural law. He does not, he insists, claim that basic rights possess a certain pre-political, a priori status. He does not, he insists, elevate such notions above the process of democratic self-determination, nor should these rights be understood as external constraints.[103]

Yet, despite his insistence to the contrary, it's not terribly difficult to understand how a critic might have suspected him of harboring such a view, or, to put it perhaps more precisely, the functional equivalent of such a view. One clear and concrete example may suffice as illustration. It is a genuinely serious question whether a two-thirds majority is ever competent to, say, deploy Article V in order to repeal the First or Fourteenth Amendments, thereby establishing a state religion or undermining the conceptual foundation for equal citizenship. We do not need to actually suspect that this will happen in the near future for the answer given to this question to shed considerable light on the character of the answerer's political thought. Rawls himself answers this question with a careful and considered but nevertheless clear No. No court and no executor of laws are required to respect these proposed amendments, for they are flagrantly and manifestly "invalid." If such amendments were actually implemented, they would not be, properly speaking, amendments to a constitution, but, instead, would constitute either revolution or constitutional breakdown.[104] That his view expressed here has implications for conceptualizing the meaning of popular sovereignty does not appear to arise as a question here.

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[102] Rawls, TJ, 228-29, 354-56, 362, 450, cf., 212, 246; PL, 156, 232-33, emphasis added.
[103] Rawls, "Reply to Habermas" in PL, 396-421 (IX:3-4), esp. 396, 405-06, 410, 412.
[104] Rawls, PL, 238-39 and n. 25. "Reply to Habermas" in PL, 405 n. 40 affirms this discussion.

Rawls' final view on the matter is quite clear when expressed elsewhere: "The sovereign people may not justly (but may legitimately) enact any law violating … [basic] rights." Here legitimate means correctly enacted according to purely procedural majoritarian rule, but not necessarily in agreement with a higher notion of justice, yet nevertheless within a certain leeway of it. He is, however, also clear that the presumption of legitimacy "depends on the justice of the constitution"—a claim which manifestly establishes justice (and not legitimacy) as the regulative, principal idea. This being the case, it is no longer certain that the parenthetical qualification concerning legitimacy adds anything decisive to the original formulation of popular sovereignty.[105]

Certain types of democratic theorists have interpreted this specific type of liberal democratic constitutionalism as being somehow anti-democratic, designed to stifle democracy, if not in intention, then at least in effect. Inevitably, they argue, this system tends to displace what is properly democratic controversy onto the courts.[106] In a certain sense, this is true of Rawls. The fundamental importance that judicial review would almost undoubtedly need to have in a society guided by Rawls' theory of justice is well enough known.[107] Still, there is little reason to suppose that this is any more true of Rawls than, say, of most other flavors of contemporary, liberal democratic political thought that take the idea of rights seriously, at least of those views ascendant within the academy today.

What is distinctive, however, is the specific kind of neutrality for which political liberalism calls, and this is the theme of the next section.

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[105] Rawls, "Reply to Habermas" in PL, 416, 427-33 (IX:5.3-4).
[106] E.g., Wolin, "Norm and Form," 32; "Liberal/Democratic Divide," 98-101. Cf., Waldron, "Core of the Case against Judicial Review"; *Law and Disagreement.*
[107] E.g., Michelman, "Justice as Fairness, Legitimacy, and the Question of Judicial Review"; "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice."

## 2.4 The Aspiration for Worldview Neutrality: The Liberal Principle of Legitimacy and the Priority of (the Political) Right

For our purposes here, the most important and salient feature of the political liberal project is its *aspiration* for neutrality.[108] As we shall see in more detail in a later section, the *aspiration* for neutrality does not mean neutrality of consequences or of effect, but instead only the aspiration to articulate a set of principles and/or procedures, to which all relevant members affected could or would prospectively agree after sufficient reflection on the basis of the common faculty of reason, which they are said to share by virtue of participation in the human species, thus establishing a framework of cooperation acceptable to (nearly) all within which political life can unfold and according to which political conflict can be resolved without justifiable existential resentment. Hereafter, I shall refer to this aspiration as "worldview neutrality," and its meaning should always be understood to include the entire constellation of ideas I have laid out in this paragraph. (In a later section, we will explore the types of neutrality with which worldview neutrality is not consistent.)

This aspiration for *worldview* neutrality is nowhere more clear than in political liberalism's "liberal principle of legitimacy," which states that all "exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals *acceptable to their common human reason.*" In addition, this principle applies, "so far as

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[108] The turns of phrase, "aspiration to neutrality" and "liberalism of neutrality" are borrowed from Sandel, *Democracy's Discontent,* 7; Taylor, *Ethics of Authenticity,* 17-18, 51, 117, respectively. Early and more explicit proponents of state neutrality in post-war, Anglo-American high liberal theory are Ackerman, *Social Justice,* 11 ff.; Dworkin, "Liberalism" in *Matter of Principle,* 181 ff. For a helpful discussion of the concept of "neutrality" as deployed in liberal theory, see Neal, "Vulgar Liberalism," 625-29. Explicit calls for state neutrality are recently receiving renewed attention, most prominently by Patten, *Equal Recognition;* "Liberal Neutrality: A Reinterpretation and Defense"; "Liberal Neutrality and Language Policy."

possible," to legislation and governmental acts that touch upon basic matters of justice. This is the conception of legitimacy that would be selected in the original position.[109] Failure to accept this conception of legitimacy suffices to disqualify a conception of justice from being deemed a "liberal" one.[110] This completely innocuous sounding articulation of basic legitimacy is in no way unique to the late modern, Anglo-American political liberal tradition, but is widely shared in late twentieth- and twenty-first-century, high liberal theory (as we shall see in a later chapter on Habermas' political thought). For present purposes, this specific formulation of liberal legitimacy is the core of the issue, for it is here that the aspiration for worldview neutrality is plainest.

At least as early as *Theory,* Rawls had expressly claimed ethical, metaphysical, and religious neutrality for his project. The theory of justice does not "invok[e] a priori considerations." The conception "implies no particular metaphysical doctrine or theory of knowledge." It appeals only "to what *everyone* can accept." It draws only upon "common knowledge and understanding of the world." He disclaims that there is any "privileged place for the views of some over others." With the theory of justice, there is "no implication of a particular philosophical theory." It "does not rely on any special metaphysical or philosophical doctrine." It eschews "any controversial ethical elements." Its elaboration is not parasitic upon the "existing desires or present social conditions" of any historical group of human beings. The argument is pitched solely at the level of "common sense," by which is meant the "generally shared ways of reasoning and plain facts accessible to *all*." "There is no necessity to invoke theological or metaphysical doctrines to support [the] principles" of justice.[111]

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[109] Rawls, PL, 137 and n. 5, emphasis added, cf., xliv, 217. Cf., "Reply to Habermas" and "Idea of Public Reason Revisited" in ibid., 393 and 446-47.
[110] Rawls, PL, 143.
[111] Rawls, TJ, 13, 213-14, 261, 263, 454.

As already mentioned in an earlier section, *Theory* is premised upon the so-called priority of the right to the good. However, because of the variety of ways in which the term, good, is deployed, it is necessary to be clear and specific about which precise sort of good it is to which the slogan, the priority of right, refers. Ideas of goodness are *not* dismissed politically irrelevant. Complicating the matter is the fact that Rawls speaks of the good in at least three different registers: (a) first is the thin theory of the good (made up of [i] the idea of goodness as rationality and [ii] the account of the primary goods); (b) second is a determinate conception of the good (or what is called a comprehensive doctrine, in the later work, and what I call here a worldview), and (c) last is the full theory of the good.

Despite the stated priority of right, it is nevertheless the case that one cannot escape from theorizing the good altogether. Any attempt to do so is apparently quite futile. So, in the last third of *Theory,* Rawls sets himself the task of thematically justifying what he calls a "thin theory of the good."[112] This thin theory of the good is the first, relevant sense of the good with which Rawls operates, and it is made up of two fundamental parts: (i) the idea of goodness as rationality and (ii) an account of the primary goods.

Expressed at the most formal level, the good of the individual can be described by the phrase "goodness as rationality." This good is understood best as "the satisfaction of rational desire." Here the satisfaction of rational desire is understood in a "purely formal" sense. In the limit case, it consists in the pursuit of an "objectively rational" life plan whose many (possibly conflicting) ends are ordered by means of deliberatively rational act of reflection upon the "relative intensity" or "comparative importance" of these ends to the agent. This deliberatively rational faculty then prescribes the means for the satisfaction of his "more fundamental desires" in light of the relevant

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[112] Rawls, TJ, 395 ff.

facts and circumstances, all the while assuming that the agent correctly assesses all relevant facts;

makes no errors in rational choice calculative reasoning; can foresee with perfect clarity the

outcome of his choices; and is perfectly self-transparent such that he truly understands what it is

he wants and thus cannot discover, after having pursued to the very end one specifically

formulated life, that he may, after all, have made a mistake that he regrets. In light, however, of

our imperfect knowledge, we can have only "reasonable belief" and can only form conjectures

about the matters of concern to us. Still, we nevertheless invoke this same faculty of deliberative

rationality. Though we aspire to meet the conditions of objective rationality, a life plan pursued

under conditions of imperfect knowledge is "subjectively rational." The abiding, regulative

aspiration to fulfill the long string of conditions prescribed by objective rationality describes

ultimately what it means to be "happy."[113] If these conditions of goodness as rationality are met,

and the agent is successful in implementing his rational life plan, then it is perfect nonsense to say

that he would have fared better had he pursued some other plan.[114] This account of goodness as

rationality remains basically unchanged in the later work.[115]

By design, goodness as rationality contains within it absolutely no purposeful directionality.

This fact would ultimately hinder the conceptual coherence of the original position, were no

further considerations introduced. It would be completely impossible for participants in the

original position to make intelligent decisions about anything at all if they did not have at least

some non-formal, abstract sense of what is good for human beings generally speaking. Without

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[113] Rawls, TJ, 25, 30, 93, 416-17, 421-22, 424, cf., 409, 433, 449, 548-51.
[114] Rawls, TJ, 564.
[115] E.g., Rawls, PL, 176-78 and n. 3, 207-08 and n. 40, cf., 50 ff. The original account was strictly formal and thus perfectly consistent with a political conception of goodness.

some orientation provided by some notion of goodness, these agents would have no sense at all about how to weigh alternative proposals. They would be simply fumbling about in the dark.

To solve this dilemma, while still remaining within the framework of the thin theory of the good, Rawls introduces an index of so-called "primary goods." Everything else being equal, human beings are supposed to prefer more rather than less/fewer rights, liberty, opportunity, income, wealth, and self-respect. As it is articulated in the first formulation in the earlier work, these so-called primary goods are primary in the sense that, by hypothesis, they, as a group, constitute the necessary, minimal conditions for carrying out any rational agent's preferred life plan according to his own thicker theory of the good, and, for this reason, these purely instrumental goods can be assumed to be desired equally by all.[116]

In subsequent elaborations, characterized variously either as revision or as the removal of ambiguity, this account shifts ever so slightly. As Rawls makes clear, this account of the primary goods has nothing at all to do with the results of an empirical historical, anthropological, or sociological study, whose aim it would have been to determine the common denominator of instrumental goods necessary to lead a recognizably human life. It is also not a clumsy and haphazard makeshift solution, invoked in completely *ad hoc* fashion in order to avoid a self-imposed problem of interpersonal comparison generated by the methodological exclusion of determinate conceptions of the good from the procedure in which principles of justice are chosen. Instead, the index of primary goods describes those goods necessary for exercising moral personality. This is an end which is conceived to be the "highest-order interest" of persons, and it consists in realizing and exercising their moral powers, viz., their capacity to understand and act

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[116] Rawls, TJ, 62, 92-95, 142, 159-60, cf., 411, 433-34. Earlier, in "Outline of a Decision Procedure for Ethics" in CP, 13, he had referred to the same concept as "enabling goods."

upon just principles and to pursue a rational life plan oriented around some conception of the good, whatever it may be. Admittedly, the index is itself constrained by regulative assumptions, but these regulative assumptions are supported by psychological facts presumed to be true on the basis of common sense knowledge. Without constraints of some such sort, the formulation of an index would prove altogether impossible.[117]

The account of primary goods is neither (unfairly) prejudicial nor is it perfectionist in intent or outcome. A purely instrumental list of goods is conceptually distinct from a monistic standard of paradigmatic human excellence. For this reason, to presuppose an index of primary goods is "entirely different" from orienting political life around a thicker conception of the good.[118] Unlike a thicker, teleological conception of the good, this thinner theory of the good—which rests upon "only the most general assumptions" about human motivation and instrumental goods—is deemed to be acceptable and appropriate knowledge for participants in the original position largely because "within wide limits [it] does not prejudge the choice of the sort of persons that men want to be."[119] The predictable objection that this account of the primary goods is *unfairly* prejudicial (capitalistic, atomistic, etc.) does not hold water.[120] The claim that Rawls is an atomist, we shall later have reason to question; and, as already mentioned, the theory of justice is quite indifferent as to which group (the state or private persons) own the means of production. One of the principal virtues of the account of primary goods is that it prevents claims of justice from

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[117] Rawls, "Kantian Constructivism" and "Social Unity and Primary Goods" in CP, 312-15, cf., 318 n. 7, 334 and 359, 364-68 and n. 5, 370-71 and n. 9, 373-74, 385-87; PL, 39-40, 178-90 and nn. 8, 20 (V.3-4), 202-03 and n. 35, cf., 75-76, 106, 207, 278 and n. 13, 290, 307-09 and n. 22, 370. In TJ, 424-33 (§ 65), esp. 426, the function of this postulated highest-order interest had been supplied by the so-called "Aristotelian Principle." Without explanation, "Reply to Habermas" in PL, 413 ff. et passim shifts to describing these interests as "high*er*-order" rather than "high*est*-order."
[118] Rawls, TJ, 328.
[119] Rawls, TJ, 259-60.
[120] Rawls, "Fairness to Goodness" in CP, 267-85.

being strongly indexed to any chance citizen's worldview, and, in this way, it avoids public policy that cannot but be "socially divisive."[121]

This thin theory of the good performs only the functional role of facilitating interpersonal comparisons for the purposes of both the original position and judgments concerning the justice of the basic structure of society. After departing from the thought experiment of the original position, however, citizens are presumed to have a conception of the good far more robust than this thin theory of the good.

This second meaning of the good is the now standard one and is the primary sense in which it is ordinarily used. To have what Rawls calls a "determinate conception of the good" means simply to have a set of fundamental aims and higher-order desires, understood along the lines of a scheme of final ends conjoined with an overarching view of the world within which this scheme of ends make sense, which itself generates corollary aspirations, attachments, commitments, and loyalties. It is this notion of goodness that is commonly glossed as being a way of life.[122] It is *this* idea of the good, in particular, to which justice stands in a relationship of priority.

By 1985, Rawls had introduced the idea of a "comprehensive doctrine," which he now contrasts with a strictly "political" conception of justice (a theme to which we shall return shortly).[123] Roughly speaking, this new language of comprehensive doctrine refers to that same thing to which Rawls, in earlier work, referred when he spoke of citizens as having what he called a determinate conception of the good. A comprehensive doctrine can be of a moral, philosophical, or religious character, and it includes within itself a basic conception of what makes up a good or

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[121] Rawls, PL, 329-30.
[122] Rawls, "Kantian Conception of Equality" and "Fairness to Goodness" and "Kantian Constructivism" and "Social Unity and Primary Goods" in CP, 255 and 279 and 310, 312, 331 and 381-82; PL, 19-20.
[123] Rawls, "Justice as Fairness: Political not Metaphysical" in CP, 408 et passim.

valuable human life, for which certain characterological attributes are desirable; how and in what way persons should interact with family members and others within one's own community; how one should, generally speaking, govern one's own conduct; and other features that help to give determinate shape and form to a human life. Such a comprehensive doctrine can be either "fully" or (what it more often the case) only "partially" comprehensive, with the difference between the two residing in the wider or narrower scope covered or range of subjects to which the doctrine applies and the level of specificity (i.e., whether it is "precisely" or only "loosely" articulated as a system). A partially comprehensive worldview is "not systematically unified" in the way that a comprehensive one is. A partial worldview may even be "fragmentary and incomplete." In general, it is presupposed not only that all citizens affirm some such doctrine, but, moreover, that such doctrines in their manifold multiplicity constitute the "'background culture'" of daily life within any given society.[124] Although he is clearly uncomfortable with this now standard usage of the term—in light of its distinct usage in the context of the philosophy of mind—he will sometimes even describe this idea of comprehensive doctrine as representing a person's "identity."[125] Sometimes he will also gloss the idea with the phrase "way of life."[126] As already mentioned earlier, I will generally refer to this idea of comprehensive doctrine with the language of "worldview."

  The notion of the priority of right is targeted at this level. From the very beginning, justice as fairness rejected all teleological doctrines of the perfectionist variety. Were we to allow participants in the original position to invoke some determinate conception of the good (moral, religious, or otherwise), and then to seek its advancement, the potential threat to equal liberty

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[124] Rawls, PL, 12-14, 40, 74, 100, 135, 145-46, 168, 175, 208, cf., xx, 152 n. 17, 154-55 and n. 20.
[125] Rawls, "Idea of an Overlapping Consensus" in CP, 431-32 n. 17; PL, 30-32 and n. 34, 146 n. 13.
[126] E.g., Rawls, PL, 195, 319.

would be unconscionable. All teleological doctrines are, in principle, inconsistent with the notion of equal liberty. There exists no set of assumptions that could be built into a (single principle) teleological conception of the good, which could provide a "firm basis" or "secure foundation" for the right of equal liberty. It simply cannot be done. Moreover, the sort of tunnel vision it requires to actively promote such a view bespeaks a certain intellectual pathology. "To subordinate all our aims to one end … strikes us as irrational, or more likely as mad. The self is disfigured and put in the service of one of its ends for the sake of system."

The more sophisticated, rational intuitionist varieties of teleological reasoning that are less monistic in character also misfire, if not in this first way, then at least in another. To the extent that they are inevitably forced to rely upon irreducibly subjective elements (e.g., intuition, aesthetic preference, feelings) and apply these in an *ad hoc* manner, they admit unacceptably dangerous "uncertainties" into a theory of justice.[127]

Whether procedural certainty is vitally important, and thus an important overriding, regulative concern for a theory of justice, are matters left unaddressed by Rawls' critique of internally pluralist, rational intuitionist, teleological modes of reasoning.[128] It is at least worth recalling that Aristotle had maintained that "precision ought not to be sought equally in all discourses…. Concerning each sort [of discourse], it is a mark of education to seek [only] as much accuracy as the nature of the thing admits."[129]

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[127] Rawls, TJ, 327-28, 330-31, 554, cf., 316 ff., 554-60 (§ 84). Cf., "Kantian Constructivism" in CP, 343 ff.

[128] Some later writings appear partially to back away, to some degree, from the idea of procedural certainty. E.g., Rawls, "Kantian Constructivism" in CP, 348, 357-58, cf., however, 350.—It much to be regretted that Rawls does not ever seriously engage a sophisticated, contemporary exemplar of this line of thinking, for instance, Charles Taylor—a fact which is all the more remarkable, given that the most relevant essay (Taylor, "Diversity of Goods" in *Philosophical Papers,* 2:230-47) was first published in an important essay collection to which Rawls was also a contributor: Sen, et al., eds., *Utilitarianism and Beyond.* Rawls' sole reference to Taylor's work is brief, overly dismissive, and not strictly relevant to this point here. Rawls, PL, 206 n. 38 (= CP, 469 n. 30).

[129] Aristotle, *Nicomachean Ethics,* 1.3 1094b12-13, 23-25, cf., 1.6 1096b30-31, 1.7 1098a26-29.

The content of each citizen's determinate conception of the good is not relevant from the perspective of justice. This, as we saw in a prior section, is an important part of liberal anti-paternalist sentiment, which is strongly tied to Rawls' conception of freedom. Nevertheless, Rawls does, indeed, set out to give a strictly formal account of each citizen's determinate conception of the good, and this account yields what he calls the full theory of the good, i.e., goodness to which the principles of justice are applied.

Under the "full theory of the good," the citizen's determinate conception of the good or worldview is conjoined with the principles of justice, which regulate it.[130] These principles themselves, as should already be clear, had been selected with the aid of the idea of goodness as rationality and the primary goods. In essence, this full theory of the good preserves the stipulated priority of the right, in the sense that what is good as such, or what is good for us, is always conditioned or hemmed in by the principles of right. In fact, it is precisely because the right so constrains the good that the radical indeterminacy, which besets every individual's choice of life plan, is not quite so daunting as it might have seemed, but is instead "relatively innocuous."[131] This full theory of the good remains operative in the background of *Political Liberalism,* though approving mention of it is confined strictly to the notes.[132]

Only lives lived within the principles of right have value, significance, or deserve due consideration. The principles of right receive "absolute precedence," and it is only within their "boundaries" that life plans are permitted "free play." Those life "plans that happen to be out of line must be revised."[133] The satisfaction of any desire that is inconsistent with the principles of

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[130] Rawls, TJ, 396, cf., 434-35, 439, 550, 561.
[131] Rawls, TJ, 563-64.
[132] Rawls, PL, 177-78 nn. 3-4, 208 and n. 41.
[133] Rawls, TJ, 565-66. Cf., "Kantian Constructivism" in CP, 331.

right "has no value at all." As a claim, it simply "ha[s] no weight."[134] "Something is good," writes Rawls, "only if it fits into ways of life consistent with the principles of right already on hand."[135]

As mentioned in an earlier section, the idea of human plurality becomes an argument-orienting concept in Rawls' later work. This shift of focus yields the so-called fact of pluralism, whose consequences for conceptualizing the priority of right are paramount. If one assumes, as Rawls does, that modernity is characterized by this fact of pluralism, and that this is a natural result of the free play of human reason, and that this pluralism descends into the deep structural level of worldviews, then several consequences appear to follow: (a) first is the inadequacy of any one worldview to integrate a society, (b) second is the fact of oppression, (c) third is the resolute rejection of all forms of worldview favoritism, and (d) finally is the normative undesirability of society conceived along the lines of *Gemeinschaft,* or community, in the technical sense of that term. These I will call the consequences of liberal modernity.

As a first consequence, there exists no one comprehensive worldview that could "be endorsed by citizens generally," which is to say that no one worldview can "serve as the basis of society."[136] Members of the political liberal polity "cannot agree on any moral authority, whether sacred text, or institution. Nor do they agree about the order of moral values, or the dictates of what some regard as natural law."[137] What "the dominant tradition" in moral and political philosophy had been trying to do since Graeco-Roman antiquity is actually impossible. There exists no comprehensive worldview that could possibly be "appropriate" as the basis for a just society.[138]

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134 Rawls, TJ, 327, 261, cf., 450.
135 Rawls, TJ, 396.
136 Rawls, PL, 10.
137 Rawls, PL, 97.
138 Rawls, PL, 134-35.

Included amongst the list of comprehensive worldviews ill equipped to serve as the shared basis of liberal democratic society are the liberal doctrines expressed by, among others, Mill, Kant, Hume, Ronald Dworkin, Joseph Raz, and even the writings of the historical John Rawls of 1971. Despite the fact that political liberalism seems often to call for virtues similar if not identical to those associated with this historical tradition of moral enquiry, it is nevertheless the case that any liberal ethic—oriented around, for instance, an ideal of self-reflective individuality or critical autonomy understood as a distinctive way of life—is to be understood as a comprehensive doctrine. Not all reasonable citizens can be presumed to assent to such a doctrine, and, by hypothesis, any such doctrine is also not likely to perdure as a common worldview shared by all under conditions of freedom.[139] In promoting as ethical ideals the liberal values of autonomy, individuality, and reflectivity, perfectionist liberalism—as this view is sometimes called—ultimately does not take the fact of pluralism quite seriously enough. Liberalism understood in this way is "but another sectarian doctrine."[140]

A second consequence of liberal modernity is the fact that it is "only by the oppressive use of state power" that any one worldview could prevail, across a modern society, as the "shared understanding" of its citizens. This axiom Rawls calls "'the fact of oppression.'"[141] Today, we still live in the shadow of the sixteenth and seventeenth centuries. We can forget the lessons of the great Wars of Religion only at our own peril. With such world historical proportion, there arose, between the plurality of worldviews, a "clash" of "transcendent element[s] not admitting of compromise." This "irreconcilable latent conflict" now lies dormant anywhere and everywhere,

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[139] Rawls, PL, xvi, xxvii, xl-xliii and n. 8, 37-38 and n. 39, 78, 135 nn. 1, 3, 199-200, cf., xxxvii, 98-99, 145, 159, 169, 211 n. 42. Cf., "Reply to Habermas" and "Idea of Public Reason Revisited" in PL, 375, 400 and 456, 486.
[140] Rawls, "Justice as Fairness: Political not Metaphysical" in CP, 409.
[141] Rawls, PL, 37, cf., 54, 303-04. Cf., "Kantian Constructivism" in CP, 329.

contained only by sensible policies or those intermittent periods of exhaustion that always pre- and post-cede the slaughter. Either we have unending but intermittent "mortal conflict" or we have a political liberal conception of justice. "The Reformation and its aftermath" are "the historical origin of political liberalism."[142] Those who ignore this historical wisdom will soon discover that they succeed only in dividing their shared world into camps of "friend" and "foe."[143] This is the choice with which we are confronted. We can either have violence and coercive oppression or we can have political liberalism. Either/or. *Inter religio et politicus liberalismus nihil medium est.*

As a third consequence—and assuming we wish to avoid the oppressive use of state power— we must scrupulously eschew all forms of worldview favoritism. We should recognize that, as a matter of constitutional doctrine and basic public policy, it is entirely inappropriate to privilege the worldview of one group over another. "Basic institutions and public policy are not to be designed to favor any particular comprehensive doctrine."[144] Historically speaking, this insight is one of the more prominent, "common theme[s] of liberal thought."[145] By now it has simply become a "practical impossibility" to integrate an entire society around the truth-claims of one particular worldview.[146] Claiming truth status for one's conception of justice is always a "sectarian" move, and one which is "likely to foster political division."[147] Thus, we must instead "try, so far as we can, neither to assert nor to deny any particular comprehensive religious, philosophical, or moral view, or its associated theory of truth and the status of values."[148]

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[142] Rawls, PL, xxi-xxviii, xxxviii-xxxix, esp. xxvi, cf., 303. Cf., TJ, 205 ff.; "Idea of Public Reason Revisited" in PL, 459; LP, 21.
[143] Rawls, "Idea of Public Reason Revisited" in PL, 442.
[144] Rawls, PL, 194, cf., 196. Cf., TJ, 212.
[145] Rawls, PL, 190.
[146] Rawls, PL, 63.
[147] Rawls, PL, 129, cf., 180.
[148] Rawls, PL, 150.

The final consequence of the fact of human plurality pulls together the above reflections, and it consists in the recognition of the basic undesirability of conceptualizing society along the lines of a *Gemeinschaft,* or community—to invoke Ferdinand Tönnies' famous notion.[149] When used as a sociological term of art, "community" is the name given to any political grouping oriented around a "partially or fully" comprehensive worldview. For reasons that should be apparent already, such a conception of politics is normatively problematic. Political society is not "an organic whole with a life of its own distinct from and superior to that of all its members in their relations with one another." Community "is no longer a political possibility for those who accept the constraints of liberty and toleration," for it is inevitably the case that the idea of political community "leads to the systematic denial of basic liberties."[150]

However this may be, political society may quite appropriately be understood along the lines of what Rawls calls a "social union of social unions," wherein sustaining just institutions is a shared, collective goal of all citizens. This collective goal may quite permissibly be viewed and valued as a "significant," "comprehensive," "mutual," or even as an "intrinsic good" that is irreducible to the aggregate good of all citizens. In fact, if we want, we can go so far as to speak of this collective goal—the maintenance of just institutions—as one of the "shared finals ends" that citizens have in common. A social union so conceived establishes a politically-relevant "framework" within which "everyday life" and its myriad, subordinate social unions unfold. When institutionalized, it "define[s] the bounds within which our deliberations take place." What distinguishes it from a community, however, is the fact that it "does not establish a dominant end"

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[149] Tönnies, *Gemeinschaft und Gesellschaft.*
[150] Rawls, PL, 40-43 and nn. 43-44 (I:7), 146, 201; TJ, 264.

as specified by some presupposed comprehensive worldview, but, on the contrary, strives "to accommodate ... human diversity."[151]

Articulating a basis for social unity whilst responding to these difficulties is, however, easier said than done. Political liberalism aspires to overcome these difficulties through its "method of avoidance," by means of which it hopes "to leave aside philosophical controversies." The general, regulative idea is to "apply the principle of toleration to philosophy itself."[152] Doing so is seen as one of the essential preconditions of "impartiality."[153] Political liberalism abandons as foolish, dangerous, and illusory "the zeal to embody the whole truth in politics."[154] Political liberalism just "does without the concept of truth." About such matters, political liberalism "neither asserts not denies…. Here it does not speak."[155] In like fashion, political liberalism simply "bracket[s] the problem of moral truth," leaving such matters to be decided strictly within the field of private comprehensive worldviews.[156] Similarly, religious truths are also taken "off the agenda."[157] Disputes about "the highest things" tend, as we know, to generate "intractable struggles." For this reason, political liberalism takes these "most divisive issues," and it simply "removes them from the political agenda."[158] Political liberalism does not pretend to speak "from the standpoint of some wider view." Strictly speaking, it does not claim for itself an ethical or philosophical "foundation." An ambition to do so would be basically "delusional."[159] This argumentative

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[151] Rawls, TJ, 527-29, 563, cf., x, 107, 565, 571, 582; PL, 320-23, 201-11 (V:7-8), esp. 202, 204-08, cf., 371. Cf., PL, 71 n. 10.
[152] Rawls, "Justice as Fairness: Political not Metaphysical" in CP, 395, cf., 388, 404 n. 22. Cf., PL, 9-10, 29, 154; "Idea of an Overlapping Consensus" in CP, 434, 437.
[153] Rawls, PL, xix-xx, xxviii. Pp. 16-17, cf., 50 presents a possibly different sense of impartiality: orientation to the general good in altruistic fashion.
[154] Rawls, "Idea of Public Reason Revisited" in PL, 442. Cf., PL, 243.
[155] Rawls, PL, 94, 127
[156] Rawls, "Independence of Moral Theory" in CP, 288; PL, xx, 116, cf., xxxviii. Cf., "Reply to Habermas" in PL, 395.
[157] Rawls, PL, 151.
[158] Rawls, PL, 4, 157.
[159] Rawls, PL, xviii, 210-11 and n. 42.

strategy of rejecting the idea of the whole truth for the purposes of politics appears in Rawls' writings with unmistakable clarity as early as 1980.[160]

As it is developed over the course of Rawls's work, the priority of right comes to entail the resolute rejection of the truths of morality, religion, and metaphysics as an adequate basis for a modern, pluralistic society. Yet there must still be a locus of human experience shared by citizens that can serve as the basis for political integration and threshold unity, at least if democracy is to avoid the perilous slide into modus vivendi democracy. The name Rawls gives to this domain of human experience is the "political."

Given its common currency in ordinary speech, it is necessary to be very clear what Rawls means to say with the invocation of this term, the political. To say that a conception of justice is "political," in Rawls' specific sense of that term, means a multitude of different things, all of which are irreducible to one single idea.

In political liberalism, the idea of the political has the following three aspects: (a) First, a conception of justice is political in the sense that it represents a "freestanding," "self-standing," or postmetaphysical view, which is to say that it is neither identical with, nor simply derived from, nor part of any one particular, comprehensive worldview. This orientation entails that a conception of justice can be developed, presented, and expounded independently of any such "wider background." In itself, political liberalism neither presupposes nor implies a "wider commitment to any other doctrine" on the part of citizens. This first aspect is the most important meaning of the adjective, "political." It is, what I would like to call the governing sense of the meaning of the political. It is, moreover, the aspect of the political that is most directly tied to the idea of worldview neutrality. Rawls' most striking presentation of this aspect of the political

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[160] Rawls, "Kantian Constructivism" in CP, 328-29.

occurs in two later essays: "Political values are not to be … view[ed] … from any definite context. They are not puppets manipulated from behind the scenes by comprehensive doctrines"; and "the express contents of … [comprehensive] doctrines have no normative role in public justification; citizens … remain within the bounds of the political." The separation from worldviews is perfect and complete.

(b) Secondly, a conception of justice is political in the sense that it is narrow in scope, insofar as it applies only to the basic structure of society and not to an entire way of life.

And (c) finally, a conception of justice is political in the sense that its content is socially immanent, which is to say that the normative content on which it draws is best understood as the material that is already "implicit" within the public political culture of any chance democratic society that has "worked reasonably well over a considerable period of time."[161]

For the time being, we do well just to recognize that this third aspect of the idea of the political is not conceptually related to the first, i.e., the more important, governing aspect of the idea. The grounds for saying that this first aspect of the political is the most important (governing) sense of the political is the observation that Rawls continues to use the term "political" in his work on international relations—a context in which it would be completely inappropriate to invoke the third aspect of the idea of the political, inasmuch as there, in that context, there truly is no common culture in which content might be said to be implicit.[162] If there are tensions that arise

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[161] Rawls, text and "Reply to Habermas" and "Idea of Public Reason Revisited" in PL, xlii, 9-14, 38, 174-75, 223 and 387 and 452-54, 485, 490, cf., 27, 29, 40 and 374-81. I've reformulated Rawls' initial, thematic presentation to emphasize what I consider the most important features and to make more clear how all the parts relate to one another, as I see them. While he does discuss the meaning of metaphysics in other, unrelated contexts, namely, as a sub-discipline of academic philosophy (e.g., "Reply to Habermas," 379 and n. 8; TJ, 512), he not only declines to give a specific definition of what is meant by the expression, "metaphysical doctrine" (PL, 29 n. 31), but he also allows the phrase, "political not metaphysical," to be defined only by "context" (PL, 10 n. 10; "Reply to Habermas," 377 n. 6), yielding a semantic ambivalence that leads me to conclude that "freestanding" and "not metaphysical" are functionally equivalent ideas.—How the notion of "doctrinal autonomy" (PL, 97-99, 113) relates to the idea of the political remains quite unclear to me.
[162] Rawls, LP, 3, 7 et passim, cf., 15.

between these three aspects of the concept of the political—and there likely are—these are tensions that Rawls did not himself ever resolve.

By at least 1987-88, Rawls' liberalism had become an expressly "*political* liberalism"—a reformulation of the idea of the priority of right, that was hereafter to have "a central role" in his conceptualization of justice.[163] While he does not consider political liberalism, at least as a general view, to be a completely novel idea, it had not yet, he maintains, been worked out in all of its manifold detail till the publication of *Political Liberalism* in 1993.[164]

For this domain of the political to adequately serve the role ascribed to it, namely, to preserve the priority of right, it too must have priority. This priority of the political must entail that political values are to be understood as "very great values" of the sort that are "not easily overridden," and for this reason, that they are "ordered prior to" and "normally outweigh" the other sorts of values, with which they might come into conflict. That this is so is "central" to the meaning of the political liberal project. All forms of reasoning about the good "must be tailored to meet the restrictions imposed by the political conception of justice and fit into the space it allows."[165] That this prioritization of the political is possible at all and therefore not utopian rests, Rawls believes, on his hypothesis that, for most people, their worldviews are only partially rather than fully comprehensive—a fact which permits a wider spectrum of flexibility for accommodating restrictions imposed by the priority of the political.[166]

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[163] Rawls, "Idea of an Overlapping Consensus" and "Priority of Right and Ideas of the Good" in CP, 444, 446-47 and 449-51, 453-54, 457, 460, 462-66, 469, 471, emphasis added. In the introduction dated to 1992, he writes that the idea of political liberalism "began to take shape" in the late 1970's, but that he had a "clear understanding" of the idea "only in the past few years" (PL, xxxi).

[164] Rawls, "Reply to Habermas" in PL, 374 n. 1. Simultaneously and apparently independently of one another, Larmore, *Patterns* had been developing a conception of "political liberalism," which though importantly different in certain ways (Larmore espouses a modus vivendi conception and is *far* more vocal in his advocacy of [procedural] neutrality), was animated by similar concerns (i.e., how to be fair to the heterogeneity of worldviews within modern societies). See also Larmore, "Political Liberalism" in *Morals of Modernity,* 121-51.

[165] Rawls, text and "Reply to Habermas" in PL, 137-39, 155, 203 and 392-94 and n. 29, cf., 146, 156-57, 168-70, 209.

[166] Rawls, PL, 168, 208-09.

Consistent with its method of avoidance, political liberalism rejects the whole truth and calls for a purely political understanding. This characterization, however, invites potential misunderstanding. Here we do well to emphasize that political liberalism understands itself to be grounded neither in skepticism, nor in indifference, nor even in agnosticism. It does not treat religion, moral duty, or conceptions of the good as either a mere preference, as something of which one should be uncertain, or as something to be valued only lightly. Not only is this, humanly speaking, something impossible, but, were political liberalism to positively require skepticism, indifference, or agnosticism, this would decrease, rather than increase, social stability, inasmuch as such a conception of justice would instantly prove to be an anathema to myriad worldviews, for which such a conception of justice would be completely unacceptable.[167]

How all of this is possible is not intuitively obvious. Articulating a possible solution leads into the central theme of Rawls' later work, which is the topic of the next section: the overlapping consensus.

So far, in the above, we have responded to recent challenges, which, if correct, would be disastrous for the political liberalism; we have sketched the bare outline of Rawls' political thought and a number of its motivating concerns (a particular conception of freedom importantly tied to the fact of human plurality and the priority of liberty over modus vivendi democracy); and we have explored the idea of the priority of right and its later, slightly modified forms (the priority of the political and the liberal principle of legitimacy), the last of which, as I remarked, is importantly connected to what I have described as political liberalism's aspiration for worldview neutrality. Next, we turn, in much greater detail, to the central concepts of his thought: the

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[167] Rawls, PL, 62-63, 150, 203, cf., 171-72; TJ, 243, cf., 212, 214. Cf., "Kantian Constructivism" and "Social Unity and Primary Goods" in CP, 329 and 385.

overlapping consensus, the idea of the reasonable, and public reason. A proper appreciation of all three of these should help us to clarify the nature of the claim to neutrality that the political liberal project is able to make. This will conclude our positive reconstruction of the structure, motivating concerns, and central concepts of the political liberal project.

## 2.5 The Moral Background to Politics: the Overlapping Consensus

Fundamentally, it is Rawls' celebrated metaphor of the "overlapping consensus" that explains precisely how to overcome the apparent tension between political liberalism's wish to provide an account of legitimate stability that is strictly political in character, without dissolving into skepticism, agnosticism, or indifference.

This metaphor, as well as the idea behind it, has a clear and documentable lineage in his writings. The language of the overlapping consensus appears for the first time in the section on civil disobedience in *Theory,* where it had only a minimal role. In this discussion of a narrowly circumscribed topic, he momentarily scales back his idealizing assumptions about society, insisting no longer that everyone must agree on the same principles of justice. "There can … be considerable differences in citizens' conceptions of justice provided that these conceptions lead to similar political judgments…. This is possible, since different premises can yield the same conclusion." This consensual social condition he describes here as an "overlapping … consensus." This sort of consensus, he suggest, suffices as an adequate substrate to which would-be civil disobeyers may prospectively appeal in their principled acts of disobedience.[168] By 1982, something *like* the idea of overlapping consensus had resurfaced in his writings, but this time as a

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[168] Rawls, TJ, 387-88, cf., 476. PL, xvii and 15 n. 17 (= CP, 390) suggests that the similarity is only terminological, and his later idea invokes a wholly "different sense" of the term. On my view, this assessment seems incorrect.

device for explaining stability.[169] It is not until 1985, however, that Rawls begins to refer to this more global idea by expressly invoking the metaphor of the overlapping consensus.[170]

Political liberalism's overlapping consensus is designed to secure cooperation on matters of justice despite profound disagreement about moral, philosophical, and religious questions amongst a heterogeneous, variegated, and pluralist population, without purporting to somehow stand above this plurality and adjudicate amongst the various comprehensive worldviews which present themselves in a pluralistic society. Doing so will ensure that the consensus obtaining within society is able to maintain its strictly political character. The idea of overlapping consensus asks that citizens affirm, for reasons internal to their own comprehensive worldview, certain principles of justice and political order that can serve as a basis for society.[171] Although, the overlapping consensus is "political" in character, strictly speaking, it also represents "a moral conception" at the very same time. Though a strange claim at first glance, this proposition makes sense so long as we keep in full view the origin of the content of the overlapping consensus. The content which makes up the overlapping consensus is ultimately derivative, in the sense that it is directly derived from the points of overlap provided by citizens' respective, comprehensive doctrines. Each individual citizen has his own moral reasons for affirming the state. Because all citizens affirm the overlapping consensus "on moral grounds," which are intelligible as moral grounds within their own respective, comprehensive worldviews, the overlapping consensus, despite its political character, is also moral—that is, in this derivative sense. Ultimately, the consensus is affirmed for its own sake, but it is affirmed for the various and conflicting, different ethical, religious, and/or metaphysical reasons that emanate from within individual citizen's own

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[169] Rawls, "Social Unity and Primary Goods" in CP, 386.
[170] Rawls, "Justice as Fairness: Political not Metaphysical" in CP, 390 et passim.
[171] Rawls, PL, 134.

private worldviews, upon which each citizen draws in shaping an overlapping consensus. "All those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides.… Citizens … accept the political conception as true or reasonable from the standpoint of their own comprehensive view, whatever it may be."[172]

Liberal anti-paternalism arises at this point with full effect. No one, for the purposes of justice, need concern themselves with the details or with the quality of the reasons or concerns that motivate politically liberal citizens to affirm the overlapping consensus. The crucial point for understanding the overlapping consensus is that all citizens must "individually decide for themselves" the relationship that their own worldview bears to the overlapping consensus that underwrites the public political conception of justice.[173] Nothing prevents us from supposing that there exists some worldview that has special insight into which moral judgments are true. However this may be, it is ultimately immaterial whether plural citizens endorse the overlapping consensus "for the right reasons as specified by the one true doctrine." Naturally, citizens can be "correct for the wrong reasons," and, under conditions of plurality, it is to be expected that the consensus may be affirmed for reasons, which, at least when viewed from the outside, are incorrect in the deeper sense of that term, that is, by the sense specified by the hypothetical, one true doctrine.[174] In fact, all of them might conceivably be false.[175]

Despite the purely derivative character of the content of the overlapping consensus, which seems to impart an ethical quality to the consensus, it is nevertheless still appropriate to speak of

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[172] Rawls, PL, 147, 150, cf., 11, 134, 168-72 (IV:8).
[173] Rawls, PL, 38. Cf., "Reply to Habermas" in PL, 386-87.
[174] Rawls, PL, 127-28, cf., 153-54 n. 19.
[175] Rawls, PL, 58.

that consensus as freestanding, and thus political, in the governing sense of that term. How this claim is even possible conceptually is quite counter-intuitive. Ultimately, Rawls explains this phenomenon with a set of interrelated ideas. As a matter of justification, Rawls introduces the idea of two stages of exposition. During the first stage, a political conception of justice is outlined in a freestanding manner. It is not until the second stage, when the question of stability arises, that the notion of overlapping consensus is even introduced.[176] Deploying the expository device of the original position, the first stage yields a freestanding conception of political justice, which is itself in no way affected by the content of the worldviews that happen to exist in society, that have existed in society, and that can be imagined to exist some day in society. At this point in the exposition, there is no thought of striking a compromise with, or achieving a balance of forces between, concrete worldviews. At this level of exposition, the abstraction from worldviews is complete and total.[177] The freestanding political conception of justice yielded by the first stage of exposition is hereafter conceived as a "module," which citizens are to "embed" within their own comprehensive worldview. As a module, the political conception fits into each citizen's worldview, but it does not itself determine, in advance, the various comprehensive worldviews that are able to support it.[178] With the citizens having done this, the second stage of exposition comes to a close, resulting in the overlapping consensus.

The intention of the two stage exposition is to preserve the freestanding, political character of the overlapping consensus. The underlying hope is that the promise of this freestanding conception will have a transformative influence upon citizens—that the freestanding module will

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[176] Rawls, PL, 64-65, 133-34, 140-41 and n. 7, cf., 37, 158, 163, 241-42 and n. 31.
[177] Rawls, PL, xlv, 25 n. 27, 39-40, 65, 141-42.
[178] Rawls, text and "Reply to Habermas" in 12-13, 144-45 and 386-87, 392.

"shape … [comprehensive] doctrines toward itself."[179] It should be added, however, that the first stage of exposition presents a sort of political justification which is only *pro tanto* in character. It is conceivably possible that citizens' reasonable worldviews may contribute to the political conception's revision, should this conception prove inadequate in covering all, or nearly all, matters of basic justice.[180]

Yet the account of legitimate stability is not yet complete. As mentioned much earlier, Rawls' original account of stability had proven unsatisfactory, largely because its attempt to demonstrate a basic "congruence" between the good and the right did not take seriously the tension that arose as a result of his maintaining, on the one hand, that the human good is "heterogeneous" in character and, on the other hand, that the state does not aim to establish a "dominant end." In effect, his account of stability did not take seriously the fact of human plurality. In his revision, he trades the idea of perfect congruence for the far subtler, more nuanced approach of the idea of overlapping consensus. While attractive on the face of it, the metaphor, strictly by itself, does not suffice as an answer to Rawls' fundamental question: how is it possible for *all* citizens, despite their various and incommensurable worldviews, to be good liberal democratic citizens, as opposed to merely passive clients of the state?

In his reformulations, Rawls appears, at least, to take the depth of citizen's pre-political commitments far more seriously. Part of the impetus for reformulation—though not the primary impetus, to be sure—was his taking more seriously this social psychology of commitment. Rawls assumes that when we, from the first person perspective, "affirm" our own worldview, we do so in the belief that it is "true" and/or "reasonable" to do so.[181] Moreover, he acknowledges that

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[179] Rawls, "Reply to Habermas" in PL, 389.
[180] Rawls, "Reply to Habermas" in PL, 386, cf., 389, 392-93 and n. 29.
[181] Rawls, PL, 60.

moral and religious convictions are ordinarily experienced as though they were "non-negotiable" and "binding absolutely."[182] He even allows that citizens may permissibly take their moral or religious worldview entirely on faith or through mere socialization, never once examining it in the light of reason. "They are not to be criticized for this."[183] Some citizens may even define themselves by their constitutive attachments, cultural ties, commitments, affections, devotions, and loyalties in such a deep way that the very thought of their viewing themselves in any other light is inconceivable and perhaps even psychologically impossible. These attachments "are normally too strong to be given up."[184] In fact, everything else being equal, it is normally a "good" thing that they have such attachments.[185] That these phenomena are common enough, and possibly even the norm, is part of the facts of "political sociology."[186]

But the important point to recognize here is that, according to the liberal view, "persons are citizens first," and they "have no prior identity before being in society."[187] A citizen's worldview-constituted moral identity and set of attachments must, in the final analysis, "adjust and reconcile" themselves to the requirements of justice.[188] This is, in essence, the meaning of the priority of right. Acknowledgment of these deep, constitutive ties can be countenanced, provided that we never lose sight of the priority of right. "Within different contexts we can assume diverse points of view toward our persons … *so long as* these points of view cohere together when circumstances require."[189]

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[182] Rawls, PL, 311 (= "Basic Liberties and their Priority," 26); TJ, 207.
[183] Rawls, PL, 314, cf., 311-13, 366-67 (= "Basic Liberties and their Priority," 30).
[184] Rawls, PL, 31, 277 (~ CP, 331-32; = "Basic Structure as Subject," 61).
[185] Rawls, LP, 61.
[186] Rawls, "Reply to Habermas" in PL, 389-90.
[187] Rawls, LP, 66; PL, 41.
[188] Rawls, PL, 31.
[189] Rawls, "Kantian Constructivism" in CP, 332, emphasis added.

Replacing the idea of right-good congruence is a new claim that effectively divides a citizen in two, if only for analytic purposes. Under political liberalism, a citizen has, at minimum, two distinct identities: they are, on the one hand, a person with a public or institutional identity; and, on the other hand, they have a non-institutional or moral identity. These two identities are not identical. Thus, a citizen's "overall view" of the world will be comprised of two elemental parts—one their (full or partial) worldview and the other their political conception of justice. Sometimes the political conception will neatly coincide with their worldview, in which case, the citizen's embrace of the political conception will be a consequence of his own worldview, with which it is continuous or compatible. Other times a political conception of justice may simply be "an acceptable approximation" or "at least not in conflict with" the citizen's worldview. A stable overlapping consensus, however, cannot be "too much in conflict with citizens' essential interests." Thus, at the very least, the political conception of justice needs to be "within the leeway" of one's own worldview—i.e., something the citizen can accept, if only "reluctantly." The overarching objective is to establish "a sufficiently inclusive concordant fit" amongst worldviews. Meeting these conditions will enable us to say that, in such cases, the good and the right are "complementary." Importantly, however, there is no requirement that the political conception be isomorphic with, or identified as, one's own worldview. Perfect and uniform congruence of these two identities across the civic body is not necessary. This is an essential part of the genius of the idea of the overlapping consensus.

The dualism that does arise within a citizen's overall view is, on Rawls' account, not a philosophical problem, per se. Instead, it arises within political liberalism owing to "the special nature of democratic political culture."[190] Diremption and democracy are two peas in a pod.

But making sense of how it is possible that the two parts of a citizen's overall view gel with one another is a task that requires some further regulative principle or constraining idea. It is not enough simply to assert that political values are "very great values." This hardly solves the dilemma, for it is nothing more than mere stipulation. Instead, a principle must be found in terms of which we may appropriately qualify a citizen's non-institutional identity, such that we might have confidence that worldviews might conceivably overlap. One must have a very clear idea of what regulative idea appropriately constrains life plans if one is adequately to establish a relationship of complementarity between a political conception of justice and each citizen's respective worldview, and in a way that respects the fact of plurality. The notion of the political and the metaphor of the overlapping consensus only get you part of the way. This regulative idea is the theme of the next section.

## 2.6 The Idea of the Reasonable

As Rawls makes clear and sometimes only intimates, stability ultimately turns on the relationship of the right to the good. Replacing the model of right-good *congruence,* the notion of overlapping consensus establishes a relationship of *complementarity* between a citizen's two distinctive identities. Still, this relationship of complementarity remains fundamentally underdetermined until the idea of human reason is introduced. This is *the* regulative idea that constrains life plans such that the relationship of complementarity might plausibly obtain.

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[190] Rawls, text and "Idea of Public Reason Revisited" in PL, xix, xxi, 11, 30-31, 38, 134, 158, 173, 175, 246 and 458, cf., 140, 168-72 (IV:8) and 487.

Sometimes Rawls is taken to be the consummate secular Enlightenment thinker of the present era.[191] Though understandable, and not completely incorrect, painted in such broad brush strokes, this accusation misses the mark for the most part. Even in the early writings, Rawls had rejected, as inconsistent with equal liberty of conscience, the idea of an "omnicompetent laicist state."[192] It is not inappropriate to see much of his later writings as an attempt to spell out just precisely what this rejection would entail. With good reason, Rawls remains skeptical that there is some one unified project called the Enlightenment. Still, if it is taken to mean the idea of founding a politics on human or "secular reason" understood as a comprehensive worldview, this is something political liberalism expressly rejects. Nothing about political liberalism is, per se, premised upon the demise of faith, and in fact its own formulations presuppose religion's continuation.[193] Were this not the case, the political liberal project would be much ado about nothing.

On these points, I see no compelling reason to doubt Rawls' sincerity. Still, his assurances alone are certainly insufficient to carry the argument. A lot, here, would appear to hang on how precisely Rawls understands the faculty of human reason, and this faculty takes principally two politically-related forms in Rawls's work: the idea of the reasonable and the concept of public reason. In the following two sections we will consider each sequentially.

Though I have emphasized throughout the underlying continuity in Rawls' political thought, if there are dramatic breaks in his thought, this is the point at which they occur. The later writings introduce a novel, operative conception of human reason, rearticulating what precisely it means to be reasonable.

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[191] E.g., Connolly, WNS.
[192] Rawls, TJ, 212.
[193] Rawls, text and "Idea of Public Reason Revisited" in PL, xviii, xxxviii and 452, 457-58, 486. Cf., LP, 104 n. 30.

Entirely misleadingly, *Theory* had presented itself as a part of the "theory of rational choice."[194] Accordingly, *Theory's* operative conception of human reason was said to be "the standard one" used in rational choice and the social theory premised upon this type of econometric analysis. A rational decision "in the ordinary sense" presupposes that the agent possesses a coherently formulated preference schedule, and that when choosing between competing options, he regulates his behavior in such a way that he is able to maximize the attainment of his preferences to the furthest extent that he is able. This account of rationality also supposes that, with respect to his relationship with others, agents are "mutually disinterested," which entails the "absence of strong and lasting benevolent impulses."[195]

Fairly early on, it became apparent that something important was missing. By 1980-82, Rawls had introduced a new concept, "the reasonable" to begin to fill out this lacuna. Though still underdeveloped at that point, he distinguished this idea of the reasonable here from the notion of rationality. The constraints of the original position that institutionalize fundamental symmetry are mis-described if characterized as arising out of the notion of rationality. Now, he maintains that these constraints "express" the idea of the reasonable—an idea, which, in contrast to rationality, is a "more obscure notion."[196] By 1985, he had even more resolutely abandoned the idea that rationality could be "the sole normative concept" within his conception of justice, which, he acknowledges, had been the (again, misleading) impression given by the literal sense of select passages from his work.[197] His later work consistently and thematically distinguishes rationality from the reasonable. These two are "distinct and independent basic ideas," and neither is

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[194] Rawls, TJ, 16, cf., 14, 583.
[195] Rawls, TJ, 142-43, 12, 14, 16-17. Cf., PL, 50-52, 83.
[196] Rawls, "Kantian Constructivism" in CP, 316 et passim; "Basic Liberties and their Priority," 41, cf., 22, 55, 88 (=PL, 324, cf., 306, 340, 370).
[197] Rawls, "Justice as Fairness: Political not Metaphysical" in CP, 401 n. 20 (= PL, 25 n. 28, 53 n. 7, cf., 306 n. 21).

reducible to the other.[198] However this may be, the reasonable stands in a relation of priority to the rational, for the reasonable "frames and subordinates" the rational.[199]

Historically speaking, reason has ordinarily been understood as that faculty by means of which man has a relationship with the truth. In contrast to this view, the relationship of the idea of the reasonable to the truth is a good deal hazier, and, to some degree, completely beside the point. Owing to its desire to articulate a freestanding, political conception of justice, political liberalism's method of avoidance would forbid such strong truth-claims. The idea of the reasonable is pitched then as a perfect complement to this prohibition, for to speak in terms of the reasonable, as opposed to the truth, is to speak from a "more limited point of view."[200] Ultimately, from the perspective of political liberalism, it will be citizens themselves who specify, for their own purposes, the relationship between the truth and the reasonable. "It is up to each comprehensive doctrine to say how its idea of the reasonable connects with its concept of truth."[201] Political liberalism does not, and should not, have anything to say on the matter. Moreover, it is not the mark of the reasonable that it generates judgments that are true, for it is perfectly conceivable that a reasonable worldview generate judgments that are perfectly false—at least some of the time.[202] The concept of the reasonable is, then, decidedly "not an epistemological idea." To be reasonable as such and to "*count* as reasonable" are radically different notions. We *count* as reasonable even those worldviews which we regard as "plainly unreasonable, or untrue." There is no essential conflict between deeming someone reasonable, despite believing them to be badly and sorely mistaken. Instead of its being perceived as an

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[198] Rawls, PL, 51-53.
[199] Rawls, PL, 25 n. 28, 339, 367.
[200] Rawls, PL, xx.
[201] Rawls, PL 94, cf., 128-29.
[202] Rawls, PL, 58.

epistemic notion, then, the idea of the reasonable is wrapped up with the "political ideal of democratic citizenship."[203] The reasonable is, then, better described as being a "moral sensibility," "disposition," or "virtue."[204]

Justifiably, Rawls worries that this moral sensibility of the reasonable may appear at first to be thoroughly "vague and obscure," and so, for this reason, he sets out to delineate the various aspects of what it means to be reasonable. The idea of the reasonable means, in effect, a number of distinct but interrelated things. Rawls speaks first of various "aspects" of the idea. (a) To be reasonable expresses, first of all, the desire to interact with others under "fair terms of cooperation" and to be recognized for doing so. (b) In addition, it expresses the willingness to accept both "the burdens of judgment" and the consequences of this acceptance. (c) Next, to be reasonable means that one exhibits features of "'a reasonable moral psychology.'" This last aspect is, however, one which Rawls emphasizes less frequently than the first two.[205] In addition to these first three aspects, Rawls relates the idea of the reasonable to human collectivity concepts, and this extension adds, at times, subtle additional connotations to the concept of the reasonable. So, finally, in its extended usage, the idea of the reasonable can be used to modify (d) worldviews and also (e) political conceptions of justice.

The first aspect of what it means to be reasonable consists in a willingness to interact with one's fellow citizens on fair terms of cooperation and to be recognized as doing so. This first

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[203] Rawls, PL, 60 and n. 13, 62, 127, cf., 87.

[204] Rawls, PL, 49 nn. 1-2, 51, 81-82, 163.

[205] These "aspects" of the idea of the reasonable are discussed thematically in Rawls, text and "Idea of Public Reason Revisited" in PL, 48-51 and nn. 1-2, 53-54, 81-86 and 488, cf., 94, 127-29. Cf., "Reply to Habermas" in ibid., 375, 394-95, 417; LP, 87. Interpretation of the Rawlsian idea of the reasonable is far-ranging, and, to save space and the reader's patience, I will not substantively engage any of this literature, except to note a couple of exemplars. Spragens, "Democratic Reasonableness," 195 ff. sees the reasonable as a vague, underspecified device for invoking intuitions. Freeman, "Public Reason," 2035 ff. suggests that it is fruitless even to look for a proper definition of the reasonable in Rawls' work, but still sees great value in the notion. Hertzberg, "Both Citizen and Saint," 87-102, 129-32 offers a broad five part taxonomy of the reasonable, but some of it is inferred as opposed to explicitly present in the text.

aspect of the idea of the reasonable is itself grounded in a distinctive conception of society. Society, on this view, is a "fair system of social cooperation." Moreover, this conception is described as being the "fundamental organizing idea" with which political liberalism begins, and the idea itself supplies the "content" with which all political conceptions of justice are to work. Consistent with the third (but non-governing) aspect of the concept of the political, this conception of society preserves its strictly political character by way of the contention that this idea is "implicit" in the "public culture" of a democratic society. In fact, it is held to be one of "*the most deep-seated convictions* of a modern democratic state."[206]

In illuminating the first aspect of the reasonable, Rawls naturally starts by unpacking the meaning of this fundamental idea: the conception of society as a fair system of social cooperation. Intimately related to this fundamental conception of society is a Rawlsian term of art: the notion of "fair terms of cooperation," which refers to those terms of cooperation that each person "may reasonably accept," or on terms that it is "reasonable to expect everyone to endorse," or, at the very least, on terms that they "could not reasonably reject," so long as he knows that others, who are themselves also free and equal, do so as well, and under the knowledge that the each will abide by these terms, and not exempt himself, even when his exempting himself would be manifestly to his advantage. These are the terms of cooperation that all free and equal citizens can acknowledge without "resentment," "humiliation," or "bad conscience." This notion of the fair terms of cooperation as outlined here provides the content to Rawls' related concepts of "reciprocity," "mutuality," and "mutual respect."[207] When Rawls refers to the virtue of a "sense

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[206] Rawls, PL, 9, 14-15, 20, 299-301, emphasis added.
[207] Rawls, text and "Idea of Public Reason Revisited" in PL, xlii-xliv, 16, 49 and n. 2, 54, 84, 300-03 and 446, 488. Cf., TJ, 21, 459-60; LP, 35.

of fairness," he probably has this same basic idea in mind.[208] This aspect of the reasonable, and, in particular, the idea of reciprocity, represent political liberalism's "intrinsic (moral) political ideal." Though this ideal exhibits a moral character, it is nevertheless strictly political.[209]

Admittedly, this first aspect of the meaning of the idea of the reasonable is somewhat vague. But, notwithstanding the fact that the adjective, reasonable, is used here to elucidate the meaning of the idea of reasonable—a significant problem, to be sure—it is, I hope, tolerably clear what Rawls is getting at, at least in rough outline. As mentioned, the first aspect of the idea of the reasonable supplies the content for the ideal of reciprocity. As Rawls explains elsewhere, the regulative idea standing behind the ideal of reciprocity is the contention that the "exercise of political power is proper only when we *sincerely believe* that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions." This contention says, in effect, the same thing as the liberal principle of legitimacy, except that added to it is the idea of sincere belief, and the notion extends no longer simply to the basic structure of society, but also to completely ordinary legislation, etc.[210]

It is, however, with the further aspects of the reasonable, and in particular, the second and related aspect, that Rawls further fleshes out what it is in which reasonableness consists.

The second aspect of what it means to be reasonable is that one accepts the burdens of judgment. These burdens of judgment refer to two levels of analysis, which can be broken down into (a) first, an assessment of the human condition and causes of the burdens of judgment, and (b) second, a set of consequences that appear to follow from this assessment.

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[208] Rawls, PL, 122-23, 194 and 154-68 (IV:5-7), esp. 163, cf., 69.
[209] Rawls, PL, xlii, xlv.
[210] Rawls, PL, xliv, emphasis added.

At the level of assessment, the phrase, the burdens of judgment, refers to the many *causes* of possible disagreement that cause human judgments to diverge rather than converge. This idea refers to those differences of judgment that are of the sort whose resolution is not obvious and self-evident, owing to, among other things, the complex and conflicting nature of the evidence available to us; the vague and indeterminate character of almost all of our concepts, which requires that we rely upon judgment and interpretation in order to meet the demands of hard cases; the manner in which our assessment is always colored by our own worldview (or "total experience"); the way in which conflicting norms make an overall assessment difficult, up to and including those hard decisions where there exists no one single clearly preferable way to balance conflicting norms. This loose, but non-exhaustive depiction represents the circumstances which render convergence in judgment difficult, and which therefore limit the extent of possible agreement, even when reason and good will are equally shared by all parties.[211] Hereafter, I shall simply gloss this depiction of the *causes* of the burdens of judgment as the "conditions of indeterminacy" that one encounters in rendering judgments (my language; not Rawls). This gloss has the added benefit of alerting the reader to the notion of life plan indeterminacy that appeared in his earlier writings (discussed in an earlier section), thereby highlighting further underlying continuity in Rawls' thought.

The *consequences* of the burdens of judgment are roughly six-fold: (a) First, to understand these burdens of judgment and the conditions of indeterminacy they entail is to understand how it could come to pass that not all persons, even within the same society, affirm the same comprehensive worldview. (b) The second consequence of the burdens of judgment is the appreciation that one's own comprehensive worldview has been shaped and adopted under the

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[211] Rawls, text and "Reply to Habermas" in PL, lviii, 54-57, 63 and 428-29, cf., 121

very same conditions of indeterminacy as everyone else's. (c) The third consequence of the burdens of judgment is the recognition that, in light of these conditions of indeterminacy, it is at least "not unreasonable" to affirm and embrace as our own some chance comprehensive worldview, if we should choose to do so. (d) The fourth consequence of the burdens of judgment is the recognition that is inappropriate to make use of the power of the state to repress other worldviews, at least *if* this imposition is understood to be grounded in epistemic superiority. (e) The fifth consequence of the burdens of judgment is the recognition that the liberal doctrines of freedom of thought and conscience are an appropriate response to these conditions of indeterminacy. (f) And finally—and this last point is the most important—to understand all of the preceding consequences, which follow from the conditions of indeterminacy, is ultimately to understand the way in which the burdens of judgment "set limits" to the type and manner of justification that can be made to other citizens.[212]

The idea of the burdens of judgment is the linchpin of Rawls' philosophical justification of the practice of toleration. With this account of the burdens of toleration, Rawls is able to explain why practices of toleration are not—as has been noted already—tantamount to agnosticism, indifference, or skepticism about truth claims. Instead, liberal toleration is better understood as the cultivated practice of "epistemic abstinence"—to borrow, if only to repurpose, Raz's apt phrase.[213] In the final analysis, the idea of the reasonable, and in particular, its first two aspects, bleed into the notion of being tolerant. This is precisely why Rawls describes the notion of reasonableness as providing something like "a basis for toleration" that is sufficiently "reflective."[214]

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[212] Rawls, PL, 60-61.
[213] Raz, "Facing Diversity" in *Ethics in the Public Domain,* 60-96.
[214] Rawls, text and "Reply to Habermas" in PL, 48 and 395, cf., 58, 62. Cf., LP, 16 and n. 8.

The third aspect of what it means to reasonable entails that one exhibit features of a "'reasonable moral psychology.'" To summarize an idea that Rawls makes unnecessarily complex, this idea of a reasonable moral psychology entails that one is the sort of person who is motivated to act by what Kant had called a "good will," or, in Rawls' language, that one is the type of person for whom it is possible to form desires that are "principle-" or "conception-dependent," and to be motivated to act upon these same desires. This is a slightly roundabout way of saying that one is able to act in the way one's intellect tells one it is right to act. So formulated, this is an entirely self-conscious rejection of Humean-inspired contemporary conceptions of moral psychology that are overly reductive in describing the types of motives upon which persons can be presumed to be capable of acting.

The content of this reasonable moral psychology becomes a bit more substantive, however, when, in a long footnote, Rawls appears to equate this idea of conception-dependent desire with T.M. Scanlon's "principle of moral motivation"—a principle which hypothesizes that humans "have a basic desire to be able to justify our actions to others on grounds they could not reasonably reject." Rawls adds that although he believes this idea is "closely connected" to the idea of the reasonable, he expressly does not wish to "attempt to show the connection," nor even to "say how it comes about." He is compelled, moreover, to add that this idea represents, in fact, something "more than a psychological principle of motivation."

That one possesses a reasonable moral psychology entails also that believing the basic structure of society is just represents a (generally) sufficient motive to do one's part to sustain it, so long as one is assured that others do the same; and also that doing so tends to generate

widespread trust and confidence dispersed throughout a population, increasing in intensity as a function of time.[215]

In general, the idea of a reasonable moral psychology postulates that a political conception of justice supported by an overlapping consensus is able to "fashion a climate" for itself, within which citizens are able to develop the requisite motivations sufficient to meet their duties and to block sufficiently countervailing psychological inclinations. In this way, it is an idea closely related, if not identical, to what Rawls calls a "sense of justice."[216]

Perhaps the most important, overarching feature to note at this juncture is the relationship of the idea of the reasonable (and its various aspects) to the liberal principle of legitimacy, which, recall, states that political power is exercised appropriately only so long as its motivating ideals and principles could be endorsed by all free and equal citizens by means of their shared faculty of human reason. As already noted, the first aspect of the reasonable expresses the willingness to govern one's public life in accordance with the liberal principle of legitimacy. Next, the second aspect of the reasonable provides epistemic warrant for practices of toleration required for doing this. Finally, the third aspect of the reasonable provides a hypothesized moral psychology suggesting that such a society so governed is not an entirely unrealistic proposition. To be reasonable means, in effect, that one not only accepts this conception of legitimacy, but also that one agrees to regulate one's own behavior in accordance with it and also possesses a psychology according to which this agreement becomes more than just empty talk. As a concept, the idea of

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[215] Rawls, PL, 49-50 n. 2, 82-86 and nn. 31, 33, cf., 124, 163; Scanlon, "Contractualism and Utilitarianism." Here, I collapse two "aspects" of the reasonable that Rawls, for reasons that are unclear to me, prefers to separate. Earlier, Rawls, TJ, 472-79 (§ 72) had dubbed this same moral psychology "the morality of principles," grounding it in then prominent research on developmental psychology.
[216] Rawls, PL, 141-43, 252.

the reasonable carries within it the liberal principle of legitimacy. The one seems to entail the other.

Generally speaking, the above three aspects of the idea of the reasonable are formulated so as to apply to persons. The final two senses of the idea refer, in contrast, to human collectivity-oriented concepts: worldviews and political conceptions of justice. This shift in object coincides with the term's accrual of additional connotations, and for this, if for no other reason, these last two senses of the term merit separate consideration.

On top of the three aspects of the reasonable discussed above, to be reasonable means also that one affirms a reasonable worldview. The definition of a reasonable worldview is, however, "deliberately loose," so as to avoid the accusation that the political liberal project is self-servingly "arbitrary and exclusive." A reasonable worldview exhibits several integral characteristics: (a) it is "more or less" coherent and consistent in its view of the world; (b) it articulates values that are "especially significant" to it, and prescribes how conflicts of values are generally to be resolved; (c) it belongs to a slowly evolving tradition, which itself transforms under the pressure of reasons it views as "good and sufficient" from its own perspective; and finally (d) it "can be affirmed in a reasonable way," which is to say not "blindly or capriciously." These are the "rather minimal necessary conditions" a worldview must meet in order to be deemed reasonable.[217] Reasonable worldviews, moreover, accept the essential elements constitutive of the liberal democratic constitutional tradition. This follows, in many ways, from the meaning of the first two aspects of the idea of the reasonable.[218] We recognize *un*reasonable worldviews not, per se, by this or that

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[217] Rawls, PL, 37 n. 38, 59-60 and n. 13, emphasis added. Rawls gives three attributes, supplying the fourth in a note. Cf., LP, 87. Nussbaum, "Perfectionist Liberalism," rightly questions whether this account of reasonable worldviews rules out too much (for instance, worldviews that are piecemeal and not wholly consistent; worldviews that have no constitutive relationship to the past; or faiths that are based upon what are paradoxes, at best, and outright contradictions, at worst, e.g., the idea of the Triune God).

[218] Rawls, text and "Idea of Public Reason Revisited" in PL, xvi and 483, 488. Cf., LP, 87.

unreasonable conclusion they generate, but instead with a view to the overall balance, for it is perfectly admissible that a reasonable worldview may generate an unreasonable conclusion. What is definitive of a reasonable worldview, however, is that it generates reasonable conclusions "most of the time."[219]

Equipped with this regulative idea, the reasonable, and the additional connotations it acquires when used to modify worldviews, Rawls is able to draw a conceptual distinction that is crucial for the political liberal project. There is, on the one hand, "the fact of pluralism as such," and, on the other hand, the "fact of *reasonable* pluralism." Reasonable pluralism is limited only to the set of reasonable worldviews. Because it is limited to this restricted set of worldviews, to welcome and embrace this type of fact of human plurality is not the same thing as counseling that we "bend … to existing unreason."[220] Ultimately, the type of human plurality in which Rawls is interested is not pluralism as such (what he calls "simple pluralism") but rather reasonable pluralism, that is, pluralism made up of a set of reasonable worldviews.[221]

Without this idea of the reasonable, the device of overlapping consensus would yield nothing of much significance. Having been suitably constrained by the idea of the reasonable, the fact of reasonable pluralism does not mean that all historically existing, contemporary, or imagined and conceivably human worldviews need somehow be accommodated in the overlapping consensus— a stipulation, which, if pursued rigorously, would render points of overlap either wafer thin or practically non-existent, and the idea of overlapping consensus would collapse under its own weight. In contrast, with the idea of the reasonable, the metaphor of overlapping consensus is able

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[219] Rawls, PL, 244 n. 32, cf., liv n. 31, 253. "Idea of Public Reason Revisited" in PL, 483 may contradict this claim. I am uncertain in how to read the text.
[220] Rawls, PL, 36, 144, emphasis added, cf., 24-25 n. 27, 63-65.
[221] Rawls, PL, xvii, xxx-xxxi, 163-64.

to graduate and become a reasonable overlapping consensus, insofar as the overlapping consensus is itself comprised only and exclusively of "all" reasonable worldviews.[222] The problem, mentioned earlier, of the unlikelihood of complementarity between a citizen's two identities, is thereby solved.

Finally, the idea of the reasonable is also used to qualify political conceptions of justice. One may be inclined to think such a qualification superfluous, because if reasonable worldviews are the content of the overlapping consensus supportive of the political conception, then we might suppose that, by the transitive property of reasonableness, the political conception itself is also reasonable. True as this may be, it misses part of the story, for, as mentioned in an earlier section, Rawls' conception can maintain its claim to articulate a freestanding (i.e., political) conception of justice only by maintaining a two-stage exposition, in which the question of motivated compliance (i.e., overlapping consensus and stability) arises only at the second, later stage of exposition. Thus, it is necessary also to qualify political conceptions of justice as reasonable, in addition to worldviews.

In the first instance, the qualifier, reasonable, as applied to political conceptions of justice, has important implications for regime type. Rawls acknowledges forthrightly that there is no conceptual necessity that a political conception of justice (qua political) be liberal in orientation. Still, he stipulates that it is a "basic requirement" of all *reasonable* political conceptions of justice that they be "broadly liberal in character," by which he means at least three things: first, that they accept the liberal principle of legitimacy; second, that they recognize the priority of liberty construed along the lines understood by the liberal democratic constitutional tradition; and third, that they have a robust welfare-state orientation, inasmuch as they aim to "assure" that citizens

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[222] Rawls, PL, 15.

have "adequate" access to something like primary goods. In addition, any candidate to be considered an acceptable political conception of justice must recognize the first two aspects of the reasonable, as discussed above, namely, the idea of fair terms of cooperation and the burdens of judgment.

Under this genus of liberal political conceptions of justice, there are numerous liberal species. Thus, Rawls' own preferred political conception of justice (justice as fairness) is not the only game in town. Though he believes that they are not likely, in Rawls' considered judgment, to prove to be the "the most reasonable" of such conceptions, other strictly political conceptions of justice are certainly permissible. It would, in fact, be quite "unreasonable" of Rawls to deny this.[223] It is worth remarking that despite its clear and generally uncontroversial filiation with the tradition of liberal thought, libertarianism is excluded *ex ante* as "unreasonable." This view, Rawls considers to be "an impoverished form of liberalism" at best. As Rawls appears to insinuate, persons of this ilk either do not seriously believe in a meaningfully robust sense of equality or they do not understand "common sense political sociology" as it relates to the workings of the market.[224]

The idea of the reasonable does significant normative work within political liberalism. I will mention only the two most significant. First, and perhaps most significantly, the idea of the reasonable, as we have seen, constrains life plans and worldviews in such a way that the idea of an overlapping consensus of a normatively meaningful variety can be articulated cogently. The idea of the reasonable is, in this way, the principal regulative idea in terms of which it becomes possible and appropriate to speak of establishing a meaningful and plausible relationship of

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[223] Rawls, text and "Idea of Public Reason Revisited" in PL, xlvi-xlix, 223 and 441, 446-47, 454, cf., xlvi, xlvi-xlvii and n. 19, lv-lviii, 6-7, 156-57, 214, 226 and 450-51 and n. 27. Cf., "Reply to Habermas" in PL, 374-75; LP, 14, 49-50.
[224] Rawls, PL, lv-lvi, cf., 262-69 (VII.3-4), 286-87, also 318 and n. 29, 324-31 (VIII:7), 356-63 (VIII:12); LP, 49.

complementarity between a political conception of justice and each citizen's respective worldview. Next, the idea of the reasonable's significance consists in the role it plays in qualifying political conceptions of justice, which, as we shall see in the next section, provides the "content" of public reason.

## 2.7 The Proper, Public Use of Shared Human Reason: The Concept of Public Reason

So far my discussion of the central concepts of Rawls' thought and their interrelation to one another had been dedicated largely to the problem of articulating a conception of stability that respects both plurality and freedom. This is the question that Rawls had foregrounded, by suggesting that the political liberal reformulations made to his project revolved largely around this difficulty. For this reason, it was perfectly natural to focus our attention there. Still, we would like to know what democratic practice in the concrete actually looks like under political liberalism, especially the sort of democratic practice that concerns fundamental matters of justice. The idea of public reason answers to this question.

Though introduced formally and systematically only in 1993, the concept of public reason, albeit in quite under-developed form, appears in his writings as early as 1982.[225] Still, and despite the late date at which it was fully articulated, I believe it plausible to say that all of the major concepts developed in post-*Theory* reformulations are all leading up to something like this idea. Public reason represents, in broad strokes, a summation of all of the major concepts developed as a result of Rawls' reorientation. With the idea of public reason, it is finally the case that the fact of pluralism, the liberal principle of legitimacy, the concept of the political and its priority, the

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[225] Rawls, PL, 212-54 (VI); "Basic Liberties and their Priority," 10, 51, 62, 65, 70-71 (= PL, 296, 336, 346, 348, 354-55).

idea of the reasonable, and the metaphor of the overlapping consensus finally coalesce into one complex idea. At the same time, with the idea of public reason, these more abstruse ideas become more concrete, to the extent that the idea of public reason constitutes a regulative ideal for the practice of on the ground, democratic politics, in contrast to a set of comparatively more recondite claims about the most appropriate principles that should regulate the basic structure of society. However, though deceptively simple at first glance, the meaning of the idea of public reason is far from straightforward.

Here, I will not attempt to define reason, but will focus instead on what is trickier and far more relevant: This would be to specify what it is entailed by the *public* use of reason. Public reason is *public* principally in the sense that (a) it is the reason *of* the public, i.e., of the citizens; (b) it concerns matter that are essentially public, i.e., the good of the public; and lastly and most importantly, (c) its content is public, in the sense that it is derived from a political conception of justice that is shared by the public.[226] To understand "public" through a contrast with what is held to be "private" is, however, deeply misleading. The more appropriate distinction is between public and non-public.[227] This contrast will become plainer shortly.

What public reason entails can be best identified by considering its several constituent features: (a) its overarching purpose, (b) its governing principle, (c) its content, (d) its guidelines of inquiry, (e) the duties and civic virtues its implicit conception of citizenship specify, and (f) the subject to which it applies.[228] Collectively, these features establish the parameters laying out the "limits of public reason," beyond which the public use of reason has no competence to tread.[229]

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[226] Rawls, PL, 213.
[227] Rawls, PL, 220 n. 7, cf., xix. Cf., "Idea of Public Reason Revisited" in PL, 442.
[228] Here I do not strictly follow the five "aspects" of public reason identified in Rawls, "Idea of Public Reason Revisited" in PL, 442.
[229] Rawls, PL, 153, cf., 169, 215-17, 219, 246, 247-54 (VI:8), esp. 247, 251, 253.

Public reason's first constituent feature is its overarching purpose. If the priority of liberty is to be preserved, and not to be infringed through unjust, illiberal legislation, the public use of reason must be somehow "regulated."[230] As something public, the ultimate purpose of public reason is to afford one's society a "public point of view"—public here in the sense of its being one that is "publicly recognized" and thus shared by the public. It is from this vantage point, supplied by a "shared and public political reason," that conflicting claims are most appropriately to be adjudicated.[231] With the idea of public reason, political liberalism aims to specify more concretely what it would mean to settle all fundamental questions of basic justice by means of "political values alone"—with political values meaning here those values that are expressed by a political conception of justice, which is itself supported by a reasonable overlapping consensus.[232] Public reason's "idea of the politically reasonable" enables political liberalism to replace notions of truth or the right as understood by comprehensive worldviews, at least for public purposes.[233]

Rawls leaves no doubt as to the importance of public reason for the practice of democracy. In his hands, the two thoughts are inseparably linked. The idea of public reason is itself "characteristic" of a democracy; or put even more strongly, the idea of public reason is an integral "part of the ideal of democracy itself."[234] Within a democratic polity, the fundamental role of public reason is to impose "discipline" upon public discourse, so as to facilitate the emergence of an "orderly contest" between opposing views.[235] Guided by the idea of public reason, democratic politics under political liberalism becomes a truly "deliberative democracy."[236]

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[230] Rawls, PL, 296.
[231] Rawls, text and "Reply to Habermas" in PL, xix, 9 and 384-85 n. 16.
[232] Rawls, PL, 169, 214, cf., 137-38.
[233] Rawls, "Idea of Public Reason Revisited" in PL, 441, 481-84 (6.2-3), esp. 481, 484, 488. Cf., LP, 55.
[234] Rawls, text and "Idea of Public Reason Revisited" in PL, 213 and 441, cf., xlix n. 24.
[235] Rawls, PL, 227.
[236] Rawls, "Idea of Public Reason Revisited" in PL, 448, 488. Here and in general, Rawls identifies himself with Cohen, "Deliberation and Democratic Legitimacy," but differentiates himself from Gutmann et al., *Democracy and*

The second constituent attribute of public reason is its core, motivating idea—its governing principle. As I have already stated, one of the defining features of the political liberal project is what it calls the liberal principle of legitimacy, which, recall, states that political power is exercised appropriately only so long as its motivating ideals and principles could be endorsed by all free and equal citizens by means of their shared faculty of human reason. In sections above, I have suggested that this principle is not only definitive of political liberalism's implicit aspiration for worldview neutrality, but also that it drives the logic of the idea of the reasonable. Perhaps unsurprisingly, then, the governing idea of public reason is this very same principle.[237]

The third constituent feature of public reason is its distinctive content; more specifically, the specific origin of its content. Public reason's "content" derives ultimately from the "family of reasonable political conceptions of justice." This, however, is not a static quantity, for it can change with time.[238] Whatever political conception of justice it is that happens to be shared within a given society will serve as "the basis of public reason."[239] Within the public forum, the society's regnant political conception of justice will "guide" and provide the "framework" for public reason, singling out which type of reasons are to be "publicly recognized ... as valid and sufficient" for public, political discourse.[240]

In specifying its content in this way, the idea of public reason connects up with the idea of the reasonable, specifically as that idea is applied to political conceptions of justice. Having been

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*Disagreement,* which he believes to be based upon a comprehensive worldview (PL, 446 n. 19, 448 n. 21)—as is, Rawls believes, Habermas' ("Reply to Habermas" in PL, 373 et passim, cf., 430-31). That "Reply to Habermas," 384 says that "citizens' debates may, but need not, be reasonable and deliberative" is a strange claim, and I'm not quite sure what to make of it.

[237] Rawls, text and "Idea of Public Reason Revisited" in PL, 217, 224-25, 241, 243 and 446-47.

[238] Rawls, PL, li, 223, cf., xlvii, 253-54. Cf., "Idea of Public Reason Revisited" in PL, 450, 453, 455 n. 35, 467, 481, 486; LP, 14, 57.

[239] Rawls, PL, 48, cf., 128, 169.

[240] Rawls, PL, 9-10, 226, xlviii.

applied to political conceptions of justice, the idea of the reasonable shapes public reason. This is does by qualifying all admissible political conceptions, which then go on to provide the content of, and basis for, the exercise of public reason. The restrictions that the reasonable imposes upon political conceptions of justice have already been discussed in the previous section, so there is no need to discuss them at length here. As we shall see below in a discussion of the civic virtues entailed by public reason, the idea of the reasonable recurs there too, albeit under a different name.

The fourth constituent feature of public reason is its laying out what it takes to be the appropriate "guidelines of public inquiry." In this, it specifies principles of reasoning, rules for identifying and assessing evidence, and criteria for identifying which questions and what information are politically relevant. These guidelines govern the application of substantive principles to matters of public policy, in particular, by stipulating that our public discussions are not to appeal to "the whole truth," but instead only to "plain truths." Stated more concretely, this means that while it is unacceptable to appeal in our public reasoning to comprehensive worldviews, we may safely appeal to general beliefs and forms of reasoning that are "presently accepted" and known to "common sense," in addition to the finding of natural and social science, so long as these findings are sufficiently uncontroversial.[241] The derivation of these guidelines of public reason is two-fold. These guidelines are entailed not only by political liberalism's principle of legitimacy as a substantive principle, but they should also to be viewed as those guidelines of enquiry that would be chosen by representative persons in the original position. Should, however,

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[241] Rawls, PL, 223-27 (VI.4), esp. 223-25, cf., 139, 162.

the original position be rejected as an appropriate criterion for identifying appropriate guidelines, then we must supply some other similar such "test," which could serve that same purpose.[242]

The best test to determine whether the reason we use satisfies the guidelines of inquiry required by public reason is ultimately a thought experiment that evokes the ideal, institutional practice of a nation's high court. To satisfy ourselves that the reason we use is appropriate for the public forum, we need only ask ourselves "how would our argument strike us presented in the form of a supreme court opinion?" If thinking through that question doesn't flap us, then we can have reasonable confidence that we have satisfied the conditions of public reason.[243] It is with a view to this test that Rawls will declare that "public reason is the reason of [the] supreme court," or perhaps less extravagantly, that the reason of the Supreme Court is "the exemplar of public reason." Unlike any other institution, the Supreme Court's charge is to carry out its duty exclusively by means of public reason. Rawls hypothesizes—but does not set out to show what would require a massive tome—that the history of the Supreme Court is the history of the march of public reason through the world, at least so long as we take the long view and exclude such profound blunders as its upholding the Alien and Sedition Act of 1798, the Dred Scott case, and other such glaring examples. As an institutional exemplar of public reason, the Supreme Court educates citizens in the appropriately public use of reason.[244]

The fifth constituent aspect of public reason is the duties and civic virtues for which it calls, some of which in content, if not in name, we have already encountered in the discussion of the idea of the reasonable. Of course, every self-respecting liberal conception of political justice must

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[242] Rawls, PL, 62, 225-27, cf., xlix. Cf., "Idea of Public Reason Revisited" in PL, 450.
[243] Rawls, PL, 254. "Idea of Public Reason Revisited" in PL, 444 ff., cf., however, 478; LP, 56 exchange this with the idea of legislation.
[244] Rawls, PL, 216, 231-40 (VI:6), esp. 231, 233-34 and n. 18, 236-37, 240.

ultimately recognize the fact that citizens are "at liberty" to vote and conduct their public affairs "as they wish."[245] Still, recognizing the elemental fact that liberty entails liberty to do ill as well as good does not, of itself, compel political liberalism to the silence of frustrated quietism. Public reason is not, as a political practice, something whose exercise is prescribed by law. It is, instead, a view of how things could be when they go well. It represents, then, "an ideal conception of citizenship."[246]

In terms of concrete political implications, the civic virtues entailed by the practice of public reason and its ideal of citizenship are similar to those entailed by the idea of the reasonable. This should come as no surprise, given that the guidelines of public reason expressly correspond to the first aspect of the idea of reasonable, namely the desire to propose fair terms of social cooperation.[247] More specifically, what this means is that the ideal of citizenship implicit within the practice of public reason generates a "duty of civility." This non-legal (moral) duty has a "central place" in political liberalism's conception of public reason, and it demands several things of us. First, in order to discharge our duty of civility, we should meet the "criterion of reciprocity," which, for Rawls, is shorthand for specifying the first aspect of the idea of the reasonable (discussed above in the previous section). To meet this criterion, we should be able to explain our own public policy advocacy in terms of the strictly "political values of public reason," that is, the types of values which we "sincerely" believe "in good faith" that other citizens could reasonably be expected to endorse, or, at the very least, values which they could not reasonably reject. Secondly, our embrace of the duty of civility entails that we must be willing to genuinely listen to others. And lastly, we ought to exhibit the virtue of "fairmindedness," which is to say

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[245] Rawls, PL, 367.
[246] Rawls, PL, 213, cf., 244 n. 33, 253. Cf., "Idea of Public Reason Revisited" in PL, 445; LP, 56.
[247] Rawls, PL, 62 n. 17.

that we must be willing to provide reasonable accommodations to those unjustly affected adversely by existing public policies.[248]

The sixth and last constituent characteristic of public reason is the subject to which it applies. This feature can be broken down further into two related ideas: (a) the topics to which it applies, and (b) the spheres to which it applies.

The characteristic limits imposed by public reason do not apply indiscriminately, but rather to a carefully defined set of *topics.* These guidelines apply not to all matters of public policy, but only to the more fundamental level of the basic structure of society; or, more specifically, to those matters which concern constitutional essentials (i.e., the structure of government and basic rights and liberties) as well as basic justice (i.e., social and economic justice). For public reason to be "complete," it should be able to resolve "all, or nearly all" of these fundamental political matters. Admittedly, agreement is more readily forthcoming on constitutional essentials than on matters of basic justice, the latter of which concerns more speculative matters, which are difficult to measure and assess definitively, and about which experts also disagree. For this reason, basic justice admits of larger scope for reasonable disagreement than do matters of constitutional essentials. The "great majority" of fundamental matters should be resolved by following the guidelines of public reason. However, with the more quotidian matters of public life, of the sort which legislatures face on a regular basis, although it is "usually highly desirable" to follow the guidelines of public reason, it is not, strictly speaking, required by political liberalism.[249]

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[248] Rawls, text and "Idea of Public Reason Revisited" in PL, xliv and n. 14, xlviii-xlix, liii, 217-18, 226, 236, 253 and 442, 444-45, cf., 447, 465. Cf., LP, 14, 55-56.
[249] Rawls, PL, 214-15, 225, 227-30 (VI.5), 241, cf., xlviii n. 23, 235, 240, 244 and n. 33, 246, 252. Cf., "Idea of Public Reason Revisited" in PL, 442 n. 6, 454-55.

Similarly circumscribed is the *sphere* to which public reason applies. The guidelines of public reason do not apply to "background culture" or to civil society, broadly understood. Nor are these guidelines relevant for the deliberations we have with ourselves or with members of other sub-political associations (e.g., churches, universities).[250] These matters are, in Rawls' technical sense, non-public. These guidelines do, however, apply just as soon as a person enters the "public political forum," and these guidelines apply no less to ordinary citizens as to elected officials and other members of government. Activities conducted in the public forum include, among other things, public discourse and debate ("political advocacy in the public forum"), the conduct of political campaigns, and even an individual's voting behavior. With this last subject, political liberalism expressly rejects the still very prevalent idea that voting is a strictly personal or private matter, to be decided either according to private interest or advantage, on the one hand, or according to one's worldview-shaped convictions, on the other. Such a view political liberalism must reject, because incompatible with the duty of civility. Thus, when we vote about fundamental matters, as with all of our other forms of public behavior, we need "sincerely" to believe that what we propose can be justified in terms of political values that other persons could reasonably be expected to endorse, we need to be willing to explain to others how this is the case, and not only do the political values we invoke need to be reasonable, each taken on its own, but even further our votes should meet a higher condition of meta-reasonableness by expressing "a reasonable combination and balance" of such values, which can be recognized as reasonable in this way by other citizens. Even should it prove to be the case that following this precept yields

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[250] Rawls, text and "Idea of Public Reason Revisited" in PL, 215, 220 and 443-44 and n. 13, cf., 13-14 and 463 n. 51. "Reply to Habermas" and "Idea of Public Reason Revisited" in PL, 382 and n. 13 and 443-44 n. 13, 451 n. 28, cf., xlviii n. 22 equates Habermas' conception of the public sphere with Rawls' idea of background culture. I believe this mistaken. In contrast to Habermas, Rawls says that the "political advocacy in the public forum" does not make up part of the background culture (what Habermas calls the public sphere; PL, 215, 252).

public discourse that seems shallow and superficial or falls radically short of expressing the most basic grounds we have for actually supporting this or that policy, the duty of civility requires that we restrict ourselves to these strictly political values and balance them in this way.[251]

There is, of course, no a priori guarantee that a stand-off will not arise between rival, reasonable groups, and, in fact, they should be expected—at least so long as we take seriously the idea of the burdens of judgment and the conditions of indeterminacy these burdens yield. Still, if we are to honor our duty of civility, we must remain wholly within the framework of public reason. Moreover, should all parties abide by these limits, then simple majoritarianism, whatever conclusion it may yield, is fully reasonable and rightly binding.

But here a subtle, almost imperceptible, shift can be detected in Rawls' formulation. In almost all other contexts, Rawls will emphasize that the values invoked and reasons we give satisfy the first aspect of the reasonable, that is, ones that can reasonably be endorsed by all citizens, or at least not reasonably rejected, which, also, is what it means to satisfy the criterion of reciprocity. Here, however, when he comes to discuss these stand-offs, the subject to which endorsement applies shifts from reasons, values, and/or terms of cooperation to the bare idea of process itself. In a stand-off, it is necessary that "all must be able to reasonably endorse the *process* by which a decision is reached." This process yields "legitimate law."[252] At least during stand-offs, it would appear that citizens can do no more than endorse bare proceduralism—with the stipulation, of course, that those suited to take part in the procedure are bearers of reasonable worldviews.

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[251] Rawls, text and "Idea of Public Reason Revisited" in PL, 215-17, 219-20, 241-43 and 443, 487, cf., xlviii, 252-53. Here I pass over in silence Rawls' tendentious comments about abortion, which he has subsequently retracted (cf., 243-44 n. 32, 246 with liii-lv and n. 31, 479-81 and n. 80; "Reply to Habermas" in PL, 394 n. 32).

[252] Rawls, text and "Reply to Habermas" and "Idea of Public Reason Revisited" in PL, lii-liv and 393 and n. 30, 428-29 and 478-81 (§ 6.1.b.), esp. 478, 488, emphasis added, cf., 240-41 (VI:7.1-2). Compare with his strikingly different discussion of an "impasse" in LP, 123, which, I can only assume, is differently described because it relates to international, as opposed to domestic, politics.

Though he strenuously resists the conclusion—determined to argue that public reason is "complete" in the specific sense he gave it above—here is the point in Rawls' narrative that indeterminacy returns.

From the above discussion, the requirements of public reason should be tolerably clear. To summarize: public reason serves to provide society with a public point of view, it is guided by the liberal principle of legitimacy, its content is derived from the family of broadly liberal political conceptions of justice, its guidelines of inquiry are to be defined either as those that would be selected in the original position or as the type that would seem appropriate if given in a Supreme Court opinion, it entails a duty of civility, and it applies principally to all public discussions of the basic structure of society (constitutional essentials and matters of basic justice). Its defining feature is supplied by what I've called its governing principle, namely, the liberal principle of legitimacy, which I've consistently tied to political liberalism's aspiration for worldview neutrality. To put it most succinctly, public reason asks that we eschew worldview-parochial principles and forms of reasoning, embracing only those that we can reasonably expect all other persons qua persons to endorse. In satisfying all of these myriad requirements, citizens participate in a genuinely deliberative democracy.

Nevertheless, Rawls does allow important exceptions to his general prohibition against worldview parochialism in the public sphere, though he does not present them *as* exceptions. The exceptions he allows vary importantly between 1993 and 1997, and so we shall treat the two main sets of ideas each in turn.

In 1993, Rawls allowed generally only two sorts of exceptions to the strict practice of public reason. (a) The first exception is oriented toward restoring trust during apparent standoffs. In a just and well-ordered politically liberal society, supported by an overlapping consensus, it may

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come to pass that a serious and deep dispute arises between two parties, say, between secularists and devout Christians, concerning the legitimacy of faith-based schools, and specifically in light of the constitutional interpretive precedents that have long ago established the separation of church and state. The dispute between these two parties may even reach such a fevered pitch that the two parties come to doubt the sincerity of the other, doubting in particular that they do affirm the reasonable overlapping consensus they at least publicly purport to affirm. In such a case, it may prove appropriate for certain, representative religious leaders to enter the public forum to explain how their comprehensive worldview aligns them with the reasonable overlapping consensus, and, more specifically, how their comprehensive worldview leads them to affirm the political values they have invoked in public debate. Doing so may alleviate doubts and promote mutual trust and public confidence, and is, for this reason, undoubtedly in the interest of the practice of public reason.[253]

(b) The second exceptional case, however, is far more interesting. This exception is designed to legitimate historical invocations of worldview parochialisms that may, in actual fact, never have had any pretensions of establishing a connection to the idea of public reason. As a matter of historical fact, some of our most important presidents (e.g., Abraham Lincoln), Civil Rights reformers (Martin Luther King, Jr.), and early nineteenth-century Abolitionists invoked comprehensive worldviews, i.e., Christian scripture and related ideas, when engaged in advocacy in the public forum. On the face of it, their collective behavior represents a flagrant violation of public reason; and yet, it would be a terrible thing if political liberalism were forced to view their important, world-historical speech as somehow illegitimate. To meet this very clear dilemma, political liberalism allows that the actual limits and demands of public reason may "vary

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[253] Rawls, PL, 248-49. Cf., "Idea of Public Reason Revisited" in PL, 463-65.

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depending on historical and social conditions." "In certain situations" where a society is not well-ordered and where there exist deep disputes about the basic structure of society, it may prove appropriate to invoke values derived from a comprehensive worldview, provided that the one so doing has or *could have* reasonably conjectured that doing so would bring about "the necessary historical conditions" sufficient to establish a just society "in the longer run." To do this is, in effect, to honor the ideal of public reason, in spirit, though not in letter. After having absorbed this exceptional case, Rawls dubs this the "inclusive view" of public reason.[254]

In a new introduction to the paperback edition of *Political Liberalism* (dated 1995) and in an important lecture published for the first time in 1997, Rawls revises this account to some extent. Now, Rawls articulates a "wide view" of public reason that is "more permissive" than the inclusive view mentioned above, and he views it as trimming back and simplifying the original account. On this newly revised, wide view of public reason, the principles and modes of reasoning peculiar to a reasonable comprehensive worldview may permissibly be introduced in the public forum, provided that "in due course" and "in good faith" reasons of a strictly public and political character are or *could* be given that support it. This last clause, Rawls calls "the proviso" of public reason. It cannot be decided in the abstract what precise type of behavior in actual debate counts as a satisfaction of this proviso. Instead, these details must be worked out in practice by the relevant persons in this or that society, and for that task, one must have "good sense and understanding" and a feeling for the distinctive qualities of the political culture.[255]

These last three sections complete our discussion of the three most important concepts introduced by the political liberal reformulation: the overlapping consensus, the idea of the

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[254] Rawls, PL, 247-54 (VI:8), esp. 247-51, 254.
[255] Rawls, text and "Idea of Public Reason Revisited" in PL, xlix-l and nn. 25, 27 and 453, 462-63, cf., 463-64 and n. 54. Cf., LP, 125.

reasonable, and the idea of public reason. Having done so, we can finally conclude by specifying in greater detail the precise sort of neutrality to which political liberalism expressly lays claim.

## 2.8 The Type of Neutrality in Political Liberal Worldview Neutrality

Earlier, I had stated that worldview neutrality is the most important element of the political liberal project. But, as we have seen, the success of the project rests upon a set of regulative principles whose principal purpose is to constrain, which, at least in the colloquial sense of the term, is the very opposite of what we mean ordinarily when we speak of neutrality. At this point, it is helpful to recall that I have used this phrase, worldview neutrality, as shorthand for a complex of ideas introduced in an earlier section, and I tied it to the liberal principle of legitimacy, which, I contend, is the central idea not just in political liberalism's conception of worldview neutrality, but in the political liberal project more broadly. Still, it must be acknowledged that worldview neutrality is not a term that Rawls himself uses, and so one must be very clear about what it is not, if only for the purpose of forestalling misunderstanding. It is, for instance, perfectly inaccurate to characterize political liberalism's worldview neutrality as a sort of thoroughgoing neutralism—which is to say, neutrality whose character rests on its being neutral with respect to the type of good invoked (for instance, only instrumental goods), with respect to procedure, with respect to opportunity to affirm any chance worldview, or with respect to outcome. With these aspirations, political liberalism has nothing in common. All of this becomes especially clear in his later work, but it was already clear enough in the earlier writings. Still, disclaimers of this variety do not amount to an abandonment of neutrality altogether. Substantiating and clarifying this claim is the burden of this final section.

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Though it was not yet treated thematically as a topic in its own right, it's tolerably clear that thoroughgoing neutrality was not the aspiration of the earlier writings. Not even in the earlier writings is it claimed that the original position is "ethically neutral."[256] In these early writings, Rawls is also perfectly willing to acknowledge, for instance, the role that shared institutions, practices, and beliefs play in shaping and socializing the citizen, and thus the impossibility of neutrality of outcome. "Some decision concerning ... background arrangements is fundamental and cannot be avoided.... The basic structure of society … shapes the wants and aspirations its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are…. These matters are, of course, perfectly obvious and have always been recognized." Thus, it is always the case that any conception of justice will, if only implicitly, "define a partial ideal of the person."[257]

Though these thoughts and others like them receive more thematic attention in the later work, they were at least implicit all along. That political liberalism does not call for thoroughgoing neutrality is completely unsurprising, given that such an aim is implicitly rejected by one of the central claims articulated for the first time in the early writings. That any just social order shapes persons is little more than a direct consequence of what it means to say that the right is prior to the good. From the perspective afforded by this principle, this person-shaping process is perfectly appropriate. At base, the priority of the right means that there are constraints imposed on life plans, and these constraints define which are the "permissible" worldviews, where permissible is determined exclusively with a view to whether or not it falls within the confines imposed by the

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[256] Rawls, TJ, 579, 584-85. Cf., "Fairness to Goodness" in CP, 270.
[257] Rawls, TJ, 259, 261, cf., 416, 424-25; Cf., "Kantian Conception of Equality" and "Fairness to Goodness" and "Independence of Moral Theory" in CP, 254-55, 257 and 277-78, 282 and 293, 299, 301.

principles of right.[258] Worldviews that fall outside of the principles of right are said to have "no weight."[259]

The basic structure of society molds a distinctive culture, with its own determinate form, which itself, in turn, shapes and forms individuals. Repeating almost verbatim some of the language and general ideas from the *Theory* passage cited above (about the tendency of the basic structure to shape a person's character), Rawls, in *Political Liberalism,* adds that "the basic structure shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of the good."[260] Any political conception of justice, if it is to have any regulative influence upon society, must inevitably find itself encouraging and discouraging, even forbidding and excluding, certain patterns of behavior up to and including patterns of behavior that are themselves constitutive of identifiable ways of life or worldviews. "The principles of any reasonable political conception," writes Rawls, "*must* impose restrictions on permissible comprehensive views, and the basic institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether."[261] This is a feature not a defect. "The principles of justice ... [are] *designed* to form the social world in which our character and our conception of ourselves as persons, as well as our comprehensive views and their conceptions of the good, are first acquired."[262] This is precisely what any reasonable political conception of justice will do. So far as it is successful, it will "bend comprehensive doctrines toward itself, shaping them if need be from unreasonable to reasonable."[263] All of this is just a "social necessit[y]"—something to be recognized as one of "the facts of common sense

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[258] Rawls, PL, 74 and Lecture V, esp. pp. 174, 176, 180, 184-85, 190-195 (V:5), 198, 209.
[259] Rawls, PL, 174, 209.
[260] Rawls, PL, 269.
[261] Rawls, PL, 195, emphasis added.
[262] Rawls, PL, 41, emphasis added, cf., 68.
[263] Rawls, PL, 246

political sociology."[264] Protesting or lamenting this fact is a bit like arguing with the tax collector—futile and naïve.

Any social order encourages some patterns of behavior over others. Political liberalism is no exception in this regard, and, in fact, it is vitally important to political liberalism that it encourage certain patterns of behavior over others. Following the pioneering work in liberal theory of the 1990's, it has now become something of a commonplace that liberal democratic polities are themselves fundamentally premised upon a set of civic virtues supportive of that type of regime.[265] The question arises, however, whether it is appropriate—despite political liberalism's strident, anti-teleological stance and rejection of perfectionist liberalism—to speak in the language of "virtues" when discussing the common denominator pattern of behavior required by the priority of right in political liberalism. To some extent, at least, the answer is yes.

Political liberalism does indeed "affirm the superiority of certain forms of moral character and encourage certain moral virtues."[266] The above discussion has occasionally named some of the virtues required by political liberalism, and, as should have been reasonably evident from the discussion, these virtues play a not insignificant role in political liberalism's account of justice. Here I will mention only the most prominent of political liberalism's political virtues: reasonableness, civility, fairmindedness or a sense of fairness, reciprocity, mutuality, tolerance, and mutual respect for persons. These, and others like them, are "the cooperative virtues," which make political liberalism possible. Taken as a group, they are "very great virtues" and should be seen as being a "part of society's political capital." They are "basic to the political conception of

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[264] Rawls, PL, 193, 197. Cf., "Reply to Habermas" in PL, 389-390.
[265] E.g., Macedo, *Liberal Virtues;* Galston, *Liberal Purposes;* Dagger, *Civic Virtues;* Berkowitz, *Virtue and the Making of Modern Liberalism;* Spragens, *Civic Liberalism.*
[266] Rawls, PL, 194, cf., 123, 147 (= CP, 460).

justice." In fact, this set of virtues establishes "the ideal of a good citizen of a democratic state."[267] It is indeed the case, then, that good liberal citizens will possess "a certain moral character."[268] With all of this in the background, Rawls is quite correct to insist that, on this question, there is no fundamental antagonism between political liberalism and the "classical republican" tradition—a view he associates with Tocqueville (and Machiavelli). Civic virtues are indeed a prerequisite of any well-ordered society.[269]

The important point to bear in mind, however, is that political liberalism's advocacy on behalf of these virtues is "justified" only on strictly political grounds. They do not, and cannot, make claims about what is good for a human being as such. Within political liberalism, these virtues have only the purely instrumental goal of sustaining a politically liberal society. This point is crucial to maintaining the idea that the distinctive moral character of the good citizen of a democratic state is comprised of strictly "political virtues," whose status as virtues entails neither the idea of a perfectionist state nor that of society conceived as a community.[270]

At the end of the day, these political liberal virtues all entail almost the exact same thing: the cultivated willingness and desire to live one's life in accordance with the liberal principle of legitimacy, at least in those instances when one bumps up against another. Stated baldly, these political liberal virtues seem perfectly innocuous, and, up until the moment that they demand that we fundamentally reformulate our own life plans and conceptions of ourselves, we are inclined to believe them generally undemanding and quite unimposing. They are, after all, by definition,

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[267] Rawls, PL, 122, 157, 163, 194-95, cf., 224.
[268] Rawls, LP, 25, cf., 15.
[269] Rawls, PL, 205 and n. 37.
[270] Rawls, PL, 194-95 and n. 29 (= CP, 460-61 and n. 21).

perfectly reasonable. Their content can be specified and justified, in some way or other, with reference to the meaning of the reasonable, in Rawls' specific sense of that term.

As we have seen, any politics that has anything substantive to say about character, even if only in a "political" register, will inevitably harbor exclusionary implications. These implications specify the limits, as it were, of toleration.

Infinite tolerance is neither reasonable nor to be expected. Political liberalism expressly assumes that reasonable worldviews will be part of an "enduring majority" within society.[271] However that may be, political liberalism is not so jejune as to suppose that all "unreasonable," "irrational," "mad," "psychopathic," and "aggressive" worldviews will simply disappear once justice reigns on earth. On the contrary, it supposes that such persons will "always" exist within modern societies. This is an "unfortunate," but nevertheless "permanent fact of life." These will not be folded into the overlapping consensus. Instead, a theory of justice must always, then, concern itself with the strictly "practical task" of "containing" these unreasonable persons, in the same way a general would attacking soldiers or the epidemiologist, the spread of a pandemic. Dealing adequately with this type of "threat" is a prerequisite for the stability of a just society.[272] There will always be those who—driven by vainglory, thirst for power, sheer financial interest, religious enthusiasm, or misdirected nationalist fervor—will seek to dominate others. The hope is that the politically virtuous citizenry will be ever vigilant against their siren song.[273] As a general rule, justice neither requires, nor entails, nor even permits that tolerance be extended to those whose worldviews are in direct conflict with principles of right and/or involve the violation of the

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[271] Rawls, PL, xlvii.
[272] Rawls, text and "Idea of Public Reason Revisited" in PL, xvi-xvii, 39, 51, 63-65 and n. 19, 144 and 441 n. 3, 488-89.
[273] Rawls, 205.

basic rights and liberties of other citizens.[274] Completely unacceptable are any worldviews or cultures that cannot flourish without the repression and degradation of certain categories of persons. Fifth- and fourth-century Athens may have given us great plays, and antebellum Virginia, our third and one of our greatest Presidents, but it is sheer lunacy to lament the passing of these cultures, which were premised upon the institution of slavery.[275]

In addition, as a class, the intolerant have no just claim to toleration, and their liberties may justly be "curb[ed]."[276] The intolerant certainly have no just complaint against those who do not tolerate them, because there is no shared principle of toleration to which they can appeal, for which they themselves have not already performatively shown contempt. Still, this does not give license to the tolerant to persecute the intolerant willy nilly. On the contrary, they may restrict the equal liberty of the intolerant only in those situations in which the behavior of the intolerant manifestly threatens the stability and/or security of their shared, constitutionally-regulated existence or the equal liberty enjoyed by all citizens.[277]

With all of this now in the background, we can better appreciate the sort of neutrality desired by political liberalism, in large part by understanding the type of neutrality it expressly disclaims. Before launching into his thematic discussion of the topic, Rawls registers some discomfort with the idea of neutrality, given its ambiguity and consequent susceptibility to misunderstanding. In the light thereof, Rawls discusses several plausible senses of neutrality, in order to specify precisely which of these it is that he rejects and which he accepts: (a) The first possible candidate is instrumental neutrality, which maintains that a theory of justice is neutral insofar as the only

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[274] Rawls, PL, 187.
[275] Rawls, PL, 196.
[276] Rawls, TJ, 247.
[277] Rawls, TJ, 216-21 (§ 35). Cf., "Idea of Public Reason Revisited" in PL, 488-89.

notion of good it uses are purely instrumental. (b) Second is procedural neutrality, which maintains that a theory of justice is neutral insofar as it is justified without invoking any moral values, except for those values that are neutral in character (e.g., impartiality, consistency in the application of general principles to similar cases, equal opportunity to be heard in a dispute) or those which arise from practices that are universal in character (e.g., the principles of free rational discussion). (c) Third is neutrality of good affirmation, which maintains that a theory of justice is neutral insofar as it ensures that all citizens may affirm any conception of the good that suits them. (d) Fourth is neutrality of effect, influence, or outcome, which maintains that a theory of justice is neutral insofar as the state strives to have no influence upon the likelihood that individuals will choose this or that type of worldview. And (e) last is neutrality of aim, which maintains that a theory of justice is neutral insofar as the basic structure of society is not formulated with worldview parochial intentions.

The first four of these conceptions of neutrality ultimately prove inadequate. Political liberalism can be neither instrumentally nor procedurally neutral (a-b), for the principles of justice it yields are clearly "substantive" in character. It also cannot be neutral in terms of the neutrality of good-affirmation (c), because the idea of the priority of right already imposes restrictions on what are to be considered "permissible" worldviews. The question of neutrality of outcome (d) is a bit trickier, but it too represents a wholly misdirected goal, because completely "impracticable," given what we know about the way in which societies and cultures work. Any given society cannot but promote certain types of lives at the expense of others. Societies do not include an infinitely wide panoply of different types of lives. The particular culture and institutions of a given society are not hospitable to every imaginable way of life. This leaves Rawls with the idea of neutrality of aim (e). A theory of justice is properly neutral in the sense that it is neither

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"designed" nor "intended" to "favor" or "promote" any one particular comprehensive worldview.[278] Though this idea of neutrality of aim does not capture all of the constituent parts of what I have called worldview neutrality (it says very little, for instance, about what would be entailed in the practice of *justifying* a political, freestanding view), neutrality of aim remains, nevertheless, perfectly consistent with it.

It may well be true that political liberalism's neutrality of aim—which is only a part of what I have called its worldview neutrality—will discourage (or at least not encourage) certain types of worldviews. In itself, this is no objection to political liberalism. It is, for instance, completely unobjectionable in the case of those worldviews that conflict with the principles of right. Unwilling to live under fair terms of cooperation and failing to understand the burdens of judgment, such persons are, by definition, unreasonable.

Still, a more difficult case arises with those who do not perfectly fit this profile. There exist, for instance, certain types of religious worldviews that are, for a variety of reasons, of the sort that under a liberal culture they simply fail to gain, or struggle to maintain, adherents, and for this reason either "die out," "decline," or "survive only barely." The most theoretically interesting of these groups ("sects," as Rawls calls them) are those who reject liberal modernity and its culture root and branch. In the United States, perhaps the most famous and most radical of such groups would include those Anabaptists profoundly influenced by the teachings of the sixteenth-century minister, Menno Simons; but other, similar or less radical groups may also suffice as examples.

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[278] Rawls, PL, 191-97 and n. 22 (~ CP, 458-62 and n. 14). In specifying the various senses of neutrality, Rawls draws upon Dworkin, "Liberalism" in *Matter of Principle,* 181-204; Raz, *Morality;* Galston, "Defending Liberalism"; Larmore, *Patterns,* 40-68 (and thus indirectly on Habermas). Rawls' own presentation of the types of neutrality is less systematic and clear than it could have been, so I have attempted to separate out the ideas he treats, supplying, in some cases, headers that do not appear in his text. Cf., Rawls, "Reply to Habermas" in PL, 421-34 (IX:5); LP, 14-15 and n. 6.

At least in its stated intention, political liberalism aims to "honor, as far as possible, the claims of those who wish to withdraw from the modern world," and yet political liberalism's account of the political virtues is not so undemanding that it can simply bid them adieu with an air of live and let live. The conflict comes to a head particularly in the case of primary and secondary education. If the children of these sects are to be sufficiently prepared to be good, politically liberal citizens, they will require, at minimum, an education which informs them of their constitutional and civic rights (e.g., that neither apostasy nor heresy are legal infractions) and perhaps also some purely informative knowledge about the world in which they live. This education does not prescribe a way of life, per se, and so, at least presumptively, it does not run afoul of the fact of oppression, which political liberalism expressly proscribes. But even if these educational practices inadvertently loosen the hold that a student's traditional upbringing has upon him, this is only an "unavoidable consequence" that has "to be accepted."[279]

Rawls' initial reaction in 1975 to this line of thought was nothing short of blassé: Some worldviews may simply go the way of the dinosaurs, but this is neither an indication of arbitrary unfairness nor does it even amount to an objection deserving of serious consideration. The loss of groups that cannot persist and attract members under conditions of equal liberty is nothing to be lamented. "If a conception of the good is unable to endure and gain adherents under institutions of equal freedom and mutual toleration, one must question whether it is a viable conception of the good and whether its passing is to be regretted…. It is not necessary that a well-ordered society be a situation of perfect fairness."[280]

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[279] Rawls, text and "Idea of Public Reason Revisited" in PL, 196-97, 199-200 and 459-60, cf., 194 n. 28, 367.
[280] Rawls, "Fairness to Goodness" in CP, 280, cf., 279, 281, 284-85.

More than a decade later, however, his tone and the substance of his comments had shifted considerably. In response to criticism, Rawls expressly disclaims this earlier view. He now "reject[s] the idea … that only unworthy forms of life lose out in a just constitutional regime. That optimistic view is mistaken." The fact that "there is no social world without loss" is a "human tragedy," which we must accept. Nevertheless, such loss is certainly something we may "regret" and even "lament."[281]

Full and thoroughgoing neutrality is not to be had. In fact, it is not even desirable for the most part; and in the limit case, it is something we must simply accept, though, in his later work, he allows that we may, if we like, experience regret over this fact. Liberal culture, even *political* liberal culture, is still a culture in a loose, sociological sense of that term. As noted earlier in this section, since even the early writings, Rawls was perfectly willing to acknowledge the findings of commonsensical social theory, namely, the almost invariant tendency of shared institutions, practices, and behaviors to shape, in advance, the sorts of desires and the types of person that one is likely to have and to be. Still, despite the fact that it exercises a formative, shaping influence upon persons, political liberalism exhibits several features which appear to save it from the charge of illicit bias, thus preserving much of its appearance of fairness: (a) first, political liberalism aspires to meet the standards of publicity; (b) secondly, it is thin; and (c) lastly, it is fair *to persons*.

First, the fact that liberal political culture exhibits socializing pressures is itself no objection to it. Admittedly, it is true that, because these pressures are experienced by the child from an early age, it very clearly cannot be maintained that the way that this culture shapes his character is

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[281] Rawls, "Priority of Right" in CP, 462-63 and nn. 24-25, 465, cf., 455 (= PL, 197-98 and nn. 32-33, 200, cf., 187 n. 17). The critic was Galston, "Defending Liberalism."

something he has "freely accepted" in the full sense of that term. Contrary to what some liberal intellectuals suppose, the right of emigration is not, as a qualification, sufficient to impart a voluntary character to the entire arrangement. Still—and this is the important point—it is open to every citizen to come later to freely accept this culture and political order after having independently surveyed the situation by means of reflective judgment. This constitutes "the outer limit of our freedom."[282] Thus arises the full significance of one of Rawls' freedom-preserving stipulations: the idea of "publicity." Political liberal culture does its best to ensure that this character-shaping process is as transparent as possible, that the grounds and string of inferences upon which its normative program rests are available for review by anyone who will but consult them.[283] A political culture whose logic is fully public is the only sort of society which a citizen can freely accept, if only after the fact.

Secondly, a politically liberal cultures appears poised, at least, to claim that it is somehow thinner than some other cultures with which history acquaints us. This is expressly claimed by, say, Kymlicka—a kindred spirit.[284] And Rawls himself does sometimes seem to intimate as much. By 1982, Rawls had begun to claim that political liberalism "allow[s] sufficient scope" to worldviews. "A sufficiently wide range of ends can be accommodated" within it.[285] Following this same line of thought, he will, in 1985, describe political liberalism as "sufficiently inclusive."[286] "A just liberal society," he will write two years later, "may have far more space than other social worlds."[287] Interestingly, the *only* context in which Rawls uses the peculiar

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[282] Rawls, PL, 222, cf., 277.
[283] Rawls, "Kantian Constructivism" in CP, 326-27; PL, 68.
[284] Kymlicka, *Multicultural Citizenship,* 87-88.
[285] Rawls, "Social Unity and Primary Goods" in CP, 367, 386. The similar material in PL, 307 was first published that same year.
[286] Rawls, "Idea of an Overlapping Consensus" in CP, 440 (= PL, 158).
[287] Rawls, "Priority of Right" in CP, 463 n. 24 (= PL, 197 n. 32).

phrase, "just *and* good," is that in which he sets out to describe those societies that contain within themselves "sufficient space" for worldviews worthy of attachment to flourish.[288] Finally, Rawls writes in his *Law of Peoples* (1999) that "a liberal society … does not, *as a liberal society,* have a *comprehensive* conception of the good."[289] His own emphasis here on the word "comprehensive" may suggest perhaps that a liberal society's implicit conception of the good—to the extent that it has one embodied, say, in its idea of the reasonable—may be partial and thus thinner than other conceivable conceptions.

Yet, it's not quite clear how much to make of this notion of thinness or sufficient space. In an insightful note that appears first in an essay from 1987, he suggests that the idea of sufficient space is purely "metaphorical," for in abstraction from the spectrum of comprehensive worldviews deemed permissible by the political conception of justice, there simply isn't any admissible "criterion" to be found for differentiating sufficiency from insufficiency. Also, the idea of sufficient space, scope, or inclusivity seems, at first blush, to be a quantitative concept, which would be to say that those conceptions of justice that are sufficiently inclusive exclude the *fewest*—in contrast to other enumerated conceptions, that is. And yet, he also disclaims the relevance of this quantitative dimension. "Numbers," he writes, "are not the measure of success."[290] So, the idea of sufficient space or thinness may ultimately prove to have arrived stillborn.

Lastly, if it is anything at all, political liberalism claims to be fair. This is perhaps its distinguishing feature. So, it is natural to ask: fair to whom or what? The answer to this question

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[288] Rawls, PL, 209-10, cf., 174, 187, also 461 (the view of another). "Fifty Years after Hiroshima" in CP, 567 is ambiguous, but strictly speaking, it does not fit this pattern.
[289] Rawls, LP, 34, cf., 40.
[290] Rawls, "Priority of Right" in CP, 463 and n. 25 (= PL, 197-98 and n. 33). The further corresponding material of relevance added to the monograph has no parallel in the essay (cf., PL, 147, 210 with CP, 449-50, 470 ff.) He disclaims the quantitative dimension expressly for the first time in "Fairness to Goodness" in CP, 280.

is crucial and also instructive. Political liberalism is fair not, per se, to conceptions of the good themselves taken either at random or as they happen to be in any chance, historical society, but fair instead *to persons* understood as free and equal beings. Fairness is directed at persons; not at the good.[291] This distinction is of the essence. At the end of the day, this, surely, is the most important point regarding the fairness of justice as fairness. This, ultimately, is the sense in which it is fair, for any other sense of fairness is unable to face all of the difficult limit cases—those limit cases that Rawls describes as human tragedies.

The objective of political liberalism is to achieve "reconciliation through public reason."[292] But his aim is *only* to show *how* this *might be* possible; and, if possible, if it is coherent.[293] The aim is not, ultimately, to show that it is necessary or even that it is likely to come to pass in this or that concrete circumstance, let alone in our own. Rawls expressly says as much. Political liberalism "makes no attempt to prove, or to show, that such a consensus would eventually form."[294] And even should it be established, there exists no set of liberal institutions or constitutional designs sufficient to guarantee that it will prevail against illiberal majority coalitions. However, to draw attention to this is only to draw attention to "a fact about political power as such," a fact whose consequences are hardly unique to political liberalism and thus not of much significance for theorizing justice.[295] The determination of the feasibility of establishing and maintaining a

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[291] Rawls, "Fairness to Goodness" and "Priority of Right" in CP, 284-85 and 472; PL, 39-40, 184-85, cf., also, 195-200 (V:6).
[292] Rawls, "Justice as Fairness: Political not Metaphysical" in CP, 395. Cf., text and "Idea of Public Reason Revisited" in PL, lviii, 157 and 487.
[293] Rawls, PL, xxxix.
[294] Rawls, PL, xlv-xlvi.
[295] Rawls, PL, 233.

politically liberal, well ordered society is ultimately a "speculative question," about which one can make only "an educated conjecture." In fact, it "may not be possible under many historical conditions." That it is possible is only an "assumption," but one which we'd do well to make.[296]

With this in the background, we are well placed to understand Rawls' unflagging invocation of the language of "hope" in his work. He speaks so often in this register because, concerning such things, "there can be no guarantee" of success a priori.[297] That a consensually overlapping background conception of justice will blossom within our—or any society, for that matter—rests ultimately upon what he calls a "reasonable faith."[298] Our reconciliation to our social world ultimately requires only that we know of the possibility of justice, not that we realize it. Plausible enough knowledge of a distant goal gives meaning to the efforts we make in the here and now. It is only if we sincerely believe that it is possible that we can escape the twin dangers of resignation and cynicism.[299] "If justice perishes," wrote Kant (and which Rawls repeatedly echoes), "there is no longer any value for mankind to live upon the earth."[300]

Rawls would like very much to shift the burden of evidence to the chamber of the critic. Whether or not public reason is actually adequate to resolve all or nearly all matters concerning the basic structure of society or is somehow too restrictive, and whether the distinction between the reasonable and the true holds up under pressure, and whether its conception of the person is quite as innocent as it purports to be—these are, on Rawls' view, questions that ultimately cannot be decided in the abstract. Before relinquishing political liberalism and its corollary concepts,

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[296] Rawls, PL, lx, 15, 126, cf., 219.
[297] E.g., Rawls, text and "Reply to Habermas" in PL, 65, 252 and 375, 389, 392, cf., xxi, xxix, xxxvii-xxxix, xlv, 8, 10, 40, 100, 140, 150, 152, 156, 192, 246 and 376, 380, 384.
[298] Rawls, "Idea of an Overlapping Consensus" in CP, 448. Cf., PL 101, 172; LP, 23.
[299] Rawls, LP, 124-28 (§ 18), esp. 127-28.
[300] Kant, *Rechtslehre* in GS, 6:332; Rawls, PL, lx; LP, 128 n. 7.

we'd need first to carefully consider each and every purported problem on a case by case basis to determine how, whether, and to what extent it poses a problem for the overall account.[301]

The chapter that follows refuses these terms of debate, attempting to take a more synoptic view of the project. Principally, I am interested in what I will refer to as Rawls' "structural" concepts and how to make sense of their derivation and ultimate status within political liberalism.

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[301] Rawls, text and "Reply to Habermas" and "Idea of Public Reason Revisited" in PL, li and 395 and 485.

## 3. Testing the "Political" Character of Political Liberalism: The Metaphysics of Human Dignity and the Romantic Moment

Political liberalism is motivated by a political problem whose problematic status has been exacerbated under modern conditions of pluralism and polarization. This problem is the problem of political integration. How do individuals living side by side under conditions of pluralism become a political entity—without infringing upon their equal liberty? How do we get one from out of many, particularly if we wish to remain liberal democrats of generous disposition? *E pluribus unum* is now followed by a question mark. Unlike the discourse of difference, which will be the subject of Part II, political liberalism recognizes that it cannot simply dispense with this concern altogether—that it must articulate *some* conception of backgrounded consensual identity, for, failing that, constitutional democracy collapses into modus vivendi democracy, and with that, the motivating concern of the political liberal project (stability) would be completely neglected.

As we have seen in the previous chapter, the political liberal project posits a strong distinction between "political" and "comprehensive" conceptions of political order. All of its philosophic armature is devoted to the redemption of this distinction. This posited distinction is the basis for its claim to achieve reasonable worldview neutrality in the midst of palpable pluralism. But is the political liberal project actually insulated from comprehensive doctrinal dimensions in precisely the way it supposes, and in that sense, free-standing? Can it be? If the answer to these questions is no, then the liberal principle of legitimacy would seem to fail, as would its implicit aspiration for worldview neutrality. Here, we will pursue this question with a view to one of political liberalism's central moral ideas: basic human equality.

In what follows, I first introduce the problem and the terms in which the problem will be pursued: the notion of basic human equality; the idea of what I will call political liberalism's

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"structural" concepts, where each of these concepts is in some way tied to this idea of basic human equality; and the framework of naturalism (§ 3.1). Next, I draw attention to the on-going controversies surrounding the notion of basic human equality and related normative concepts, in order to suggest that we are not dealing here with some self-evident truth. In examining the adequacy of several proposed philosophical bases for human equality, I suggest that basic human equality is best conceptualized as being premised upon a non-natural ("metaphysical") attribute, which we shall hereafter call "dignity" (§ 3.2).

Afterward, and having left open the question as to why human beings possess this non-natural attribute, I narrate, in very broad strokes, the history of what I will call the "discourse of dignity," with particular attention given to the theologically-thick, sacral character this tradition ascribes to the attribute, dignity (§ 3.3). Thereafter, I substantiate my claim that political liberalism, contrary perhaps to first impression, is itself a part of this discourse of dignity, and its being a part of this tradition suggests that the conceptual-structural level of political liberalism may be *ex ante* importantly pregnant with non-political, metaphysical ideas (§ 3.4). Next, I clarify why the structural parallels that I allege to exist between contemporary invocations of universal human dignity and the history of the idea are of any significance at all, as opposed to quaint accidents or superficial similarities (§ 3.5).

The remainder reconsiders political liberalism's possible response to the problematic status of the moral postulate of universal, human dignity and the adequacy of that response. This response consists of a topic, whose discussion I have long-delayed: political liberalism's self-conscious invocation of a particular tradition of moral enquiry (i.e., political liberalism's "romantic moment," as I call it) (§ 3.6). The benefits of the romantic moment are clear, but its costs are also considerable. In view of its purported solution, I compare political liberalism with "postmodern

bourgeois liberalism," laying out what I call the "Rorty problem," i.e., political liberalism's very clear desire to avoid the collapse of these two schools of thought. However, insofar as it takes its own romantic moment seriously, political liberalism proves less than adequate in meeting the Rorty problem, inviting the conclusion that it simply presupposes the value of liberal culture, and, to this extent, also fails to secure worldview neutrality (§ 3.7). In addition, some have suggested that political liberalism's romantic moment renders it helpless in the face of inter-traditional conflict (i.e., conflict within the tradition of liberal democracy). Whether this is true or not, I leave undecided. This notion of inter-traditional conflict, however, does foreground the more serious question of the conflict between pure naturalism and the essential presuppositions of the liberal democratic tradition—*both* of which are importantly part of our contemporary heritage. Highlighting *this* conflict draws further attention to political liberalism's irredeemably permanent inability to remain worldview neutral (§ 3.8).

I conclude that political liberalism does well to drop its liberal principle of legitimacy, which, in the previous chapter, I had identified as the core idea in what I had dubbed its aspiration for worldview neutrality.

## 3.1 The Idea of Equality

You can always learn a great deal about someone's political thought by examining what it is they take to be self-evident. This is especially the case when the same thinker disclaims the very notion of self-evident truth. In Rawls' case, this self-evident truth is the idea of human equality, not equality of talent, of ability to contribute to society, of the intrinsic value of self-chosen life plans, of income earning potential given similar opportunity, of motivation, etc., but rather more simply just *basic* human equality conceived abstractly. For all the talk of moral philosophy eschewing all self-evidentiary claims, the provisionality of each and every conviction, and the

necessity of being open to revising any and all moral intuitions, the reader will not be able to find any instance in which this notion of basic human equality is ever seriously questioned, and, more to the point, it could not be removed without the whole intellectual architecture tumbling down upon itself.

Instead, this idea of basic human equality has something like theoretic-structural, axiomatic status, and this architectonic status is reflected in numerous discussions. For instance, the idea of equal citizenship is "reasonably taken as fixed, as correctly settled once and for all." It is, so to speak, "off the political agenda."[1] Racial discrimination and slavery are, in particular, self-evidently unjust. As he puts it, this is one of "our firmest convictions" and thus a "fixed point" in any theory of justice. It is a "settled conviction."[2] Similarly, basic human rights are "a special class of rights of universal application and hardly controversial in their general intention. They are ... required of all peoples.... A decent ... society must respect ... human rights ... because they simply have these rights by the law of peoples."[3]

The idea of universal, basic human equality conceived abstractly is the central thought animating much, and perhaps very nearly all, of Rawls' political thought, very possibly across the entirety of his career, and certainly across his two major monographs. Only with such a view of basic human equality in the abstract would it ever make sense to suppose there might be a *pro tanto* or *prima facie* obligation to treat all humans equally, with the idea's *prima facie* validity having no meaningful ties to contingencies or attributes of the person (thus, valid in the abstract);

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[1] Rawls, PL, 151 and n. 16. Cf., TJ, 4.
[2] Rawls, TJ, 19-20, cf., 149. This is, however, an odd thing to say for someone who maintains in other contexts that "the strength of conviction is irrelevant when questions of justice arise" (361). Cf., text and "Reply to Habermas" in PL, 8, 122-25 and 431.
[3] Rawls, "Law of Peoples" and "Fifty Years after Hiroshima" in CP, 554 and 566. Rawls' conception of *ius gentium* is a purely "political" one (529 and n. 2).

with a presumption in favor of the obligation, irrespective of consequences this may have for a larger social unit (in terms, say, of the greater good or social harmony); and with the obligation being curtailable only on the basis of *acceptable* reasons (with the word "acceptable" being admittedly vague and the actual site of controversy between various, egalitarian views). Only with such a view of basic human equality in the abstract would it make sense to regard the world with the gaze of what the twentieth-century neo-Kantian tradition calls "the moral point of view," i.e., the point of view that abstracts from all other attributes and contingencies that otherwise differentiate persons.[4] Only with such a conception could it possibly make sense to say that this point of view corresponds with "the appropriate conditions" for specifying principles of justice.[5] This idea of basic human equality represents, in actual fact, an exceedingly strong claim, and that it seems perfectly natural and intuitive to many of us is only testimony to a widespread phenomenon: every age's unerring ability to forget the novelty and erstwhile strangeness of its own central, moral claims.

Political liberalism expresses this idea of basic human equality by means of a two-fold schema. The first part of this schema is the idea of society as a fair system of social cooperation, and the second is a conception of human beings (or citizens) conceived of as having equal moral personality. Taken together, these two "companion ideas" serve as the "fundamental organizing idea[s]" of political liberalism, functioning as the conceptual "source" of political liberalism's scheme of basic rights and liberties. In *Political Liberalism,* no argument is ever given for either of them, apart from the remark that they are (purportedly) "implicit" within our culture.[6] Consistent with the third aspect of the meaning of the political (discussed in the previous

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[4] Baier, *Moral Point of View.*
[5] Rawls, PL, 23.
[6] Rawls, text and "Reply to Habermas" in PL, 9, 35, 43, and 417, cf., 15, 339.

chapter), these are dubbed strictly "political" ideas. (A discussion of the significance of, and possible problems associated with, this implicitness claim will be delayed to later sections of this chapter. For the time being, we do well to recall only that this third aspect of the idea of the political has no conceptual relationship to the first, and more important, governing aspect of the concept of the political, namely, the idea of being freestanding or postmetaphysical.)

In elucidating the first aspect of the idea of the reasonable in the previous chapter, we already discussed the meaning of society conceived as a fair system of social cooperation. This idea, recall, specifies a determinate type of society in which the inhabitants propose only those terms of cooperation to one another which they could reasonably expect the other inhabitants to endorse. The conception of personhood we will not discuss in any detail until later in this chapter. Suffice it here to say that this conception of personhood stipulates that all citizens are, for the purposes of justice, to be considered equal to one another. In weighing the two against one another, it should be apparent that this conception of personhood is actually the more fundamental concept of these two companion ideas, inasmuch as the conception of society as a fair system of cooperation would hardly seem to be a compelling idea, were this conception of personhood not already known to be acceptable.

These two ideas—equal moral personhood and society as a fair system of cooperation—represent what I will call the fundamental "first-order," "structural" concepts of political liberalism. They are called "first-order," because they are underived (inasmuch as no express argument is given for them). They are called "structural," because they fundamentally shape the structure of thought that is political liberalism. They are its scaffolding, as it were. Any concepts derived at only one remove from these first-order structural concepts, or which tacitly invoke the same or a similar idea, will be called "second-order" structural concepts.

The first-order structural ideas have already been named (equal moral personhood and society as a system of fair cooperation), and, as remarked above, the idea of equal moral personhood is, of the two, the more fundamental, first-order structural concept. Pursuant to the sense I gave it, there are a number of important second-order structural concepts in Rawls' thought, a few of which have received extensive discussion of varying length in the previous chapter. Here I will mention only two of the most important. First is the original position; and second, the idea of the reasonable.

These second-order, structural concepts both derive their meaning directly from the first-order structural concepts, and then, in their own way, play a formative role in specifying the meaning of other essential ideas within political liberalism. The original position represents an instantiation of the so-called moral point of view, which, as already intimated, presupposes the validity of something akin or identical to political liberalism's most fundamental, first-order structural concept (equal moral personhood). The importance of the original position for political liberalism is manifold. For now I mention only that the liberal principle of legitimacy is expressly presented as that principle that would be selected in the original position, and also, that the guidelines of enquiry constitutive of public reason are said to be those that would be chosen in the original position. As already mentioned, the idea of the reasonable (in particular, its first aspect) is itself directly derivative from one of the first-order, structural concepts (society as a fair system of social cooperation), whose own validity, as I've already suggested, rests upon its companion idea, that is, the idea of equal moral personhood. As should have been apparent from the previous chapter, the idea of the reasonable plays a number of essential roles in political liberalism. First, it provides sense to the idea of both a *reasonable* worldview and a *reasonable* political conception of justice. A set of the first (i.e., *reasonable* worldviews) provides the content and basis for the

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overlapping consensus; and a set of the second (i.e., *reasonable* political conceptions of justice), for the idea of public reason. These summary remarks establish, I believe, both the derivation and some of the importance of these second-order structural concepts—concepts without which, political liberalism would become unrecognizable.

It is important to recognize that the work done by these structural concepts is done *prior* to the formation of any overlapping consensus. In large part, this explains why I have chosen to describe these ideas as being "structural." Here, we should recall, from the prior chapter, that political liberalism operates with the idea of two stages of exposition, and that without these two stages, separated as they are, there would be no sense in saying that political liberalism was "political" in character. In the first stage of exposition, a strictly political, freestanding conception of justice is selected, and it is said to be freestanding, because originating in the *original position* (i.e., a second-order, structural concept). In the second stage of exposition, and for the purposes of assuring stability, this same political conception of justice is tested against the worldviews within a given society, the hope being that this political conception of justice can be embedded as a "module" within the circumscribed set of worldviews marked as *reasonable* (i.e., another second-order structural concept), thus setting the conditions for the establishment of a *reasonable* overlapping consensus. As I hope should be clear, *all* of the normative force of political liberalism's structural concepts is brought to bear *prior* to the formation of the overlapping consensus. This point is significant and not to be overlooked, though its significance may not become fully apparent until a later section.

To summarize the above, we should simply note just two important points: first, these structural concepts (first-order, second-order, etc.) all express, either directly or derivatively, the idea of basic human equality as discussed above, that is, conceived abstractly à la the moral point

of view. And secondly, these structural ideas do important normative work, and were the first-order, underived ideas removed, political liberalism, as a philosophical project, would become simply unrecognizable. Thus, with a touch of understatement, we may say both that these structural concepts are important for political liberalism, and that they are premised upon an idea of basic human equality.

However, this idea of basic human equality, I submit, is neither intuitively obvious nor apodictically self-evident. Why accord it the important structural role it has? The answer to this question will be the fundamental theme of this chapter.

In answering this question concerning the ultimate status of the postulate of basic human equality, Rawls cannot simply advert to the original position. That he appears to do so, if only very occasionally, we must treat as an oversight.[7] The original position is, as I have already indicated, itself part of the question.

The idea that there are "no antecedent notions or principles" which "guide" or "constrain" deliberation in the original position cannot, in all seriousness, be maintained.[8] In actuality, the original position is itself constituted by what I have called political liberalism's structural concepts, and these themselves operate as guiding constraints. Thus, we would like to know why the equalitarian *restrictions* constitutive of the moral point of view are acceptable, and also why the equalitarian *conclusions* of the philosophical construct are to be accepted, rather than to be taken as a piece of evidence that some element of the construct that yielded these results is somehow flawed, which would induce one to revise or scrap some of the stipulations within the

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[7] E.g., Rawls, PL, 124-25.
[8] Rawls, PL, 315, cf., 306 ff., 324, 340.

procedure. What primes the contemporary reader for the universalist equalitarian conclusions at which Rawls' argument arrives?

The original position itself does not supply an answer to these questions. It isn't designed to, so this is hardly a mark against it. But this admission does not dissolve the question.

In both the first chapter and in the closing page of his *Theory,* Rawls evinces a perfectly clear awareness of this dilemma, writing that "the conditions embodied in the description of the original positions are ones that *we* do in fact accept. Or if we do not, then perhaps *we* can be persuaded to do so by philosophical reflection." A theory of justice must not be "deduced from self-evident premises." Be that as it may, the original position is ultimately itself only an "expository device" whose value rests upon its "intuitive" character. Invoking the first person plural, Rawls suggests that the constraints imposed by this heuristic device correspond to "what *we* are prepared to regard as limits on fair terms of social cooperation," which is equivalent to saying that we recognize the device's constraints as being "reasonable."[9] At least with regard to this particular question, the text of *Political Liberalism* adds nothing fundamentally new, apart from insisting upon what was already tolerably clearly in *Theory,* namely that the original position is no more than a heuristic "device of representation." However, here, in this later text, Rawls will speak less hesitantly than he had before and simply state outright that the original position's conditions do correspond to "our considered convictions."[10] *Law of Peoples* also adds nothing new, and the bulk of its own relevant discussion is actually—as Rawls acknowledges—simply copy-pasted text from the relevant section of *Political Liberalism.*[11]

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[9] Rawls, TJ, 21, 587, emphasis added, more generally, 577-87 (§ 87). The latter, almost identical formulation reads: "The conditions embodied in the description of *this situation* are ones that we do in fact accept. Or if we do not, then ['perhaps' has been deleted] we can be persuaded to do so by philosophical *considerations of the sort occasionally introduced*."

[10] Rawls, PL, xxix, 24-27, cf., 62, 75, 103-06, 143 n. 10.

[11] Rawls, LP, 30-34 and nn. 34, 37 (§ 3.1-2).

There is no doubt that thought experiment procedures can serve heuristic purposes for clarifying our thoughts, but the procedural rules themselves cannot simply be arbitrary; or, if they are completely arbitrary, then they should present themselves as such. Furthermore, whether or not we do, in fact, accept, the procedural restrictions, because they are intuitively acceptable, is an empirical question that cannot be answered from an armchair. Whether we do accept them has also a lot to do with the consequences of accepting them, and because in any fundamental political dispute, there are always winners and losers, we may plausibly suppose that the party that loses out, within the framework of political liberalism, might not actually accept that consequence with a grin. To all of this, I'm confident Rawls would agree. Moreover, none of this can possibly be an idle question, at least not for anyone who is not absolutely certain that his own intuitions are somehow natural or providentially necessary.

The question here is not whether Rawls is right or wrong to maintain this moral postulate of basic human equality conceived abstractly à la the moral point of view. This is, in fact, completely beside the point. The question is, instead, why and how does he know that it is fitting and appropriate to maintain such a postulate. In asking this question, the intention is not the perverse one of categorically elevating epistemology above moral philosophy—a trend in academic philosophy that Rawls is undoubtedly correct to question.[12] Such an exercise usually bears the fruit of a sort of "meta-ethical" enquiry that bears no relationship to the first person experience of making ethical decisions, and thereby loses sight entirely of its object of study. Still, and even if this methodological injunction is generally salutary, the question of moral knowledge is not thereby relieved.

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[12] Rawls, "Independence of Moral Theory" in CP, 286-91, 301-02. Cf., "Kantian Constructivism" in CP, 241-43.

There are, of course, answers to this question, which we'll explore in later sections, but the answers that are ultimately compelling pose different, no less significant, difficulties for the political liberal framework if pursued far enough. We shall return to this question again in greater detail in a subsequent section's discussion of the idea of reflective equilibrium and what I will call political liberalism's "romantic moment," but, for the time being, we must postpone that discussion, because this cluster of ideas is best understood as an ambiguous response, rather than as a solution, to the problem—a topic better discussed alone and in its own right, and after the nature of the problem is fully in view.

But here a cautionary word is in order. To pose this problem afresh—as I am trying to do here—is *not at all* to deny the premise. Instead, the idea here is that it is only by interrogating one of our deepest held beliefs as forcefully as possible that we have any hope at all of achieving self-clarity. The line of thought I propose to follow here will undoubtedly seem counter-intuitive at first. If, however, I succeed in making the intuition seem less intuitive on the basis of lines of reasoning that are neither unduly extravagant nor incomprehensible to those to whom they are addressed, then I will have succeeded in at least the first and more modest step of what I have set out to do. The basic idea is, as much as possible, to make a familiar idea seem strange. To confuse this intention with that of laying the groundwork for a politics of inegalitarianism is a mistake that must be assiduously avoided. Whether or not this is possible is for the reader, and not the author, to decide.

One last, purely propaedeutic note: Rawls is absolutely correct to insist that moral and political philosophy need not limit the types of descriptions and prescriptions it gives to those familiar to the natural and social sciences. Its concepts, categories, and ideas need not, strictly speaking,

derive directly from, for instance, behavioral science or neuropsychology, in order for there to be meaningful.[13]

At this juncture, however, it is worth recalling that Rawls does maintain that the (natural and social) sciences are to serve as the "publicly shared method of inquiry" in the society he describes. The sciences are to provide the "rules of evidence and forms of reasoning" to complement "common sense" in the effort to adjudicate conflicting claims about factual states of affairs. On this view, then, science will rightfully have "an influential role" within the public culture.[14] Moreover, he describes his own view as one that is firmly situated within an "empiricist framework."[15] With this in mind, it is not inappropriate to assess Rawls' structural, moral concepts in light of a framework that today frequently goes under the name of "naturalism." It is doubly appropriate given the status of this framework within our society and the tendency of political liberalism to rely upon ideas latent within society.

For my purposes here, I'm not particularly interested in distinguishing between different flavors of naturalism, nor in wading into the disputes that separate various philosophical exponents today.[16] For the purposes of this present discussion, I'll define naturalism as a framework of understanding constituted by a conjoined ontological and epistemic claim, which I formulate as follows: that which exists, is knowable (i.e., warrantedly assertable), and is meaningfully explicable is itself *potentially* observable (and thus, falsifiable) by means of senses

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[13] Rawls, PL, 87-88.

[14] Rawls, "Kantian Constructivism" in CP, 324-28. Cf., TJ, 213, 548; "Idea of an Overlapping Consensus" in CP, 429; PL, 67, 139, 162, 224.

[15] Rawls, PL, 285.

[16] For a more nuanced discussion, see, Baker, *Naturalism,* esp. 1-27. Flanagan, "Varieties of Naturalism," esp. 433-34 doubts that there is any common core to the positions called "naturalism," apart from the rather vague rejection of "supernaturalism." The meaning Rawls, BI, 107, 119 imputes to this term in his early theological works does not, as he knows, follow standard usage, and is thus much broader than the one I give here, though it is certainly not unrelated. The mentions of "naturalism" in his political philosophical works are infrequent and shed very little light on definitional matters.

(or instruments aiding them) and by following the methods of natural science (i.e., the methods of enquiry to which any chance, contemporary body of practitioners of sufficient competence might agree).

The definition is provisional and is offered for strictly operational purposes. It is offered only to flesh out the meaning of a term that possibly is not already familiar. I don't presume much to hang on the particular formulation of this definition, and if revised, I think it would only need to be revised along the margins, and these revisions would not affect the general point I will make in the following.

Given that this is a discussion about political philosophy, I also presuppose that the sort of naturalism discussed here must, in order to be relevant, be intelligible to a citizen with a higher education, who is, nevertheless, a non-specialist, and even possibly of the type who finds persnickety philosophical distinctions tedious to the extreme. This qualifier should yield a presumption in favor of simplicity over overly fine distinctions, and admittedly, and much to my chagrin, my operational definition has already trespassed upon this presumption. So, in full awareness that the reformulation is even more inadequate than the original operational definition, I will attempt to express the thought as clearly as possible in terms recognizable, I think, to any layman: the only things that exist and which we can know about can be determined by the commonly recognized methods of natural science.

Finally, I assume throughout that this view (or one very much like it) is intellectually respectable and has intuitive appeal for a statistically significant portion of the population of contemporary, advanced industrial, liberal democracic societies, notwithstanding the (very real) possibility that many of their other beliefs may be in conflict with it, completely unbeknownst to them. In fact, I presume to go so far as to describe this view as our culture's "dominant mode of

understanding." Whether this last claim is true or not is an empirical one, which I cannot pretend to resolve here, but I think that the direction in which money flows in contemporary culture's temples of wisdom supplies ample testimony in support of the contention.

## 3.2 Universal Human Equality, the Discourse of Dignity, and Controversy about First Principles

In this section, we will have occasion to interrogate the philosophical bases for ascribing basic human equality to all persons, universally and in the abstract. Rejecting a number of possible explanations, I argue that a non-natural (metaphysical) attribute, traditionally called "dignity," represents the most compelling basis. In doing this, however, I remind the reader that the idea of perfect consensus on this bedrock idea is only a chimera.

In the history of humanity, the ideas upon which Rawls' argument rests represent conceptual innovations. Viewed from a broader perspective, the conclusion (and the heuristic mode of reasoning supportive of it) are anything but obvious, self-evident, or intuitive.

The suggestion that this idea of the moral point of view, which structurally incorporates the notion of basic human equality, is somehow ahistorically self-evident must be met with resounding denial. The radical egalitarianism of shared human dignity became a world-historical political slogan only in the late eighteenth century, and it became a real political force largely only in the nineteenth and twentieth centuries. How far this notion of universal human dignity is from being self-evident is given by unmistakable testimony from the witnesses we have from the philosophical discourse of antiquity. "Equality," writes Aristotle, "seems to be justice, and it is, but [only] for equals [and] not for all."[17] In classical antiquity—as he dutifully reports— "everyone agrees that justice in distribution must be somehow in accordance with merit." To

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[17] Aristotle, *Politics,* 3.9 1280a11-12, cf., 3.12 1282b18-22, 7.14 1332b37 Cf., *Nicomachean Ethics,* 5.3 1131a22.

them, it was obviously self-evident not only that "the better man always deserves something greater," but also that seeking more than what one had was completely "unjust whenever contrary to merit."[18] The gradations amongst mankind, according to this view, are rather extreme. In fact, there exists a class of human beings that are so defective in both body and intellect that they ought to be used as tools by other persons, which is to say that nature has destined them to be slaves.[19] A contemporary theory of class ideology may prove successful in explaining these statements sociologically, but it cannot possibly challenge the claim about their being self-evident to he who expressed them.

As a descriptive claim (that is, as a statement pertaining to factual states of affairs), to say that human beings are equal *as such* is a confused manner of expression to which we've all undoubtedly grown accustomed. Here, continual repetition is a potent source of obfuscation. A discussion of human equality eschewing reference to properties, attributes, or characteristics is simply too vague to tell us much of anything of value, amounting either to empty or completely platitudinous speech. With this general sentiment, sincere and reflective egalitarians generally tend to agree.[20]

We must have the important questions fully in view: In what respect are human beings equal, how are we confident that the dimension selected is the relevant one, and—relatedly—why does equality in this respect have significance for politics and/or moral theory? These two axes can be summarized as asking about: (a) first, the property, and (b) secondly, the property's relevance or normative significance. Here I suppose that any adequate discussion must possess an answer to

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[18] Aristotle, *Nicomachean Ethics,* 5.3 1131a25-26, 4.51123b28; *Politics,* 5.3 1302b5-14.
[19] Aristotle, *Politics,* 1.4-1.5 1253b23-55a3.
[20] See the classic statement in Williams, "Idea of Equality" in *Problems of the Self,* 230 ff.

these two questions and also not violate other moral intuitions (assuming now, for the sake of argument, that there are other intuitions we would also like to preserve).

There is a striking paucity of actual philosophical work dedicated to this set of related questions, and occasionally—very occasionally—attention is drawn to this lacuna. For instance, in a rare book of uncompromising candor, Waldron observed a little over a decade ago that

> although there is plenty of work on equality, there is precious little in the modern literature on the background idea that we humans are, fundamentally, one another's equals… [The principal proponents have] said next to nothing about the nature and grounding of the principle of equal respect…. Among those who make use of some very basic principle of human equality, virtually no one has devoted much energy … to the task of outlining what the refutation of any serious philosophical denial of basic equality would have to involve.[21]

In the intervening period, mainstream academic philosophy has not made good on this deficit, by resolving this question concerning the property in terms of which human beings are relevantly equal. Instead, the question seems hardly even to register as a question. More recently, in one the major organs of North Atlantic, analytic, political philosophy, Cartes notes that "the task of identifying the property has been strangely neglected by contemporary egalitarians."[22] From the point of view pursued in this chapter, this finding is not surprising. It is, in fact, importantly true that this is the case.

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[21] Waldron, *God, Locke, and Equality,* 2-3.
[22] Carter, "Respect and the Basis of Equality," 539. This is a remarkable article, particularly in its critical aspect. I cannot, however, follow him in his positive reconstruction. Though finding Rawls' account (which I discuss later) not quite sufficient, albeit on the right track, Carter grounds his own argument on behalf of equality in an appeal to a "substantive moral attitude" he calls "opacity respect," which asks us, in the name of "*evaluative abstinence,*" to adopt an evaluative perspective that remains external to the person being evaluated—a practice whose moral justification rests upon "respect for human dignity." (Also, he ends up basically recapitulates the Rawlsian logic he otherwise justly criticizes by insisting that we cannot actually treat all agents as "wholly opaque," for we must be assured that they do, after all, meet some "minimum standard.) (550-53). However, as the author acknowledges, the propriety of this appeal to respect so understood rests importantly upon whether political liberalism as a project is "intuitively plausible" (554), which is related to the question of whether or not we are prepared, in the public sphere, to view a human being as "an agent laid bare … as an agent and no more than an agent." The author insists that a political liberal's doing this has a "respect-based," as opposed to an "equality-based," motivation, and thus does not presuppose the truth of what it seeks to show (556-59). That this last argument is successful is unclear.

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So, in what sense are human beings equal, then? In what relevant respect—relevant, say, in the sense that it can be said to bear normative significance? At least in pre-political terms, their equality consists not at all in their aesthetic appeal; their physical dimensions; their health; their physical prowess; their intellectual gifts or capacity to develop their mind and personality; their impulse control; the innocence of their most basic desires; their ability to responsibly foresee the consequences of their actions and to shape behavior in accordance with this insight; their ability to give back to the world into which they were born; their preparedness to express sympathy or act beneficently. It's certainly none of these things. Not only can we say with a high degree of confidence that amongst our species there exists great variation on each and every one of these axes, but, in addition, we'd presumably like to be able to explain our intuition that it is wrong to systematically liquidate *en masse* the mentally handicapped, severely deformed, and/or those who, even as early as childhood, exhibit identifiable predispositions toward antisocial or violent behavior, and these notions above help us not at all in explaining this intuition.

It is of course true, by definition, that all human beings are equal *as* human beings, but it's far from clear where this elementary and perfectly tautological recognition gets us in establishing normative significance or relevance. Inegalitarians (or those who are not perfect egalitarians) are not confused about this definitional matter—or so we may very plausibly assume. They have not committed a purely cognitive or intellectual error.

The biological makeup of human beings, moreover, is not equal per se, but relatively equivalent, in that the observable differences amongst human beings can be reduced to variations within 0.1% of the species' genomic makeup. Multiply that number by what, in many other contexts, may seem insignificant (a mere factor of 10) and we've succeeded in describing our variation from *pan troglodytes;* and it is only the fact of extinction which prevents us from

sequencing the historically known, intermediary species. Though certainly not devoid of interest, these physicalist-scientistic notions ultimately do very little normative work when stated in these bald terms.

Those of a certain naturalistically-minded temper are sometimes inclined to conceive human equality as consisting in the fact that humans are equally capable of exercising power over one another, which, in the limit case, means that they are equally capable of killing one another.[23] Yet, it is difficult to understand why any of this should prove relevant for a normatively useful concept of human equality that has any politically-actionable and desirable consequences; or, put another way, why this fact would elicit anything like respect or due regard rather than fear and therewith the impulse to mitigate the consequences of this fact, which—it seems almost unnecessary to say—is not necessarily or even likely to consist in the desire to treat or respect others as equals. Muammar al-Gaddafi surrounded himself with a cadre of deadly but fiercely loyal guards at all times, day and night, not because he doubted this fact, but because he had a deep, rich, and profound understanding of it.

The classical utilitarian's approach of grounding equality in the equal ability to suffer is similarly unproductive.[24] Not only is its conceptual efficacy parasitic upon a moral sentiment (sympathy) whose boundaries are well enough known to be disappointingly narrow in circumscription, but it also cannot explain what meaningfully distinguishes a human being from a dolphin or even a tadpole or termite. As such, it does not do justice to our standard intuition about how we should relate to various living organisms. To fail to make some rather dramatic qualitative differentiation here—as do some contemporary, animal activists—would violate the

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[23] Hobbes, *Leviathan,* ch. 13, pp. 86-87; Hart, *Concept of Law,* 195.
[24] Bentham, *Introduction to the Principles of Morals and Legislation* in *Works,* 1:143.

(still widely shared) moral intuition that can be best illustrated through two paradigmatic thought-experimental examples: While it would be perfectly conceivable for a nation to go to war to protect any chance ethnic group targeted for extermination, it would be morally absurd and even reprehensible to do the same thing in order to protect any chance animal species from near certain extinction. Similarly, while it is appropriate to have a democratic debate about whether or not any chance citizen has a moral right (that imposes a duty upon fellow citizens) to have any life-threatening illness treated by means of the most advanced medicine available at a given time *completely irrespective of cost,* to have that same debate about our dogs, cats, cows, pigs, and goats would border on ludicrous and would invite justified laughter.

Next, to say that human beings are equal in that they are equally deserving of respect is similarly unsatisfactory, so long as stated merely in these terms. For this response is either evasive about *what* precisely is being respected, and/or why it is that this *what* is deserving of respect; or, it is forced to make a number of highly abstruse claims about equal capacities in moral agency (freedom, responsibility, etc.) that are either empirically questionable or entirely vague, without, in the end, explaining why this substrate is the relevant or salient one that should/could suffice to generate respect.

Some may want to define the attribute, in terms of which equality obtains, as a range property indexed to a threshold limit.[25] This is perfectly understandable, given that it seems to allow for considerable empirical variation. Still, this quasi-solution does not actually resolve the problem. Were one to set out to explicitly articulate such a threshold level (accompanied, let us assume, by a defined range of "normal" human functioning), this would necessarily invite the criticism that the threshold and/or the range of normal human functioning had been set at such a level *expressly*

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[25] Cf., Waldron, *God, Locke, and Equality,* 76 ff.; Carter, "Respect," 548 ff.

*in order to* yield a maximal grouping of biological human beings, which would suggest that the threshold's limit was itself governed by some yet further, unacknowledged principle. This unacknowledged principle, the critic will reasonable suppose, would be functionally indistinguishable from the idea of basic human equality.

Finally and perhaps more common is for an author either to simply lay down or to assume a train of stipulations about this matter of fundamental significance, hoping that the reader will obediently nod his head without pausing to think why. The crass description shows, I hope, that this approach is not intellectually satisfying, because completely unreflective. (In a subsequent excursus, we shall have a chance to critically examine Jürgen Habermas' response, which attempts to ground this claim in the philosophy of language.)

Ultimately, human beings are equal *only* in terms of a non-natural attribute, which the modern tradition of moral philosophy calls "dignity." (However, the name we ascribe to this attribute is, for present purposes, not terribly significant. Our deciding to call this non-natural attribute *x* would not significantly affect the argument.)

It is important that this attribute be non-natural, for only such an attribute could provide the relevant kind of support that would establish equality *in the abstract,* that is, a sort of equality which makes no reference to observable, physical or neurophysical attributes; life choices; patterns of belief; etc. This is the sort of equality perfectly suited as a supporting idea for the moral point of view. Being non-natural, this attribute cannot be observed, and because it cannot be observed, it cannot be falsified, thus establishing a sound basis for equality in the abstract. This—its invocation of a non-natural property—is an important part of the sheer brilliance of the egalitarian discourse of dignity.

There probably exists no other sound principle today upon which universal, human egalitarianism could be defended. Anyone proposing another basis or attribute must do so in full awareness of what they may possibly lose in the reformulation. We are at pains to say in what respect human beings are equal if we do not advert to this notion, or one very much like it. For this reason, the idea of human dignity plays an absolutely essential role in almost any philosophically self-conscious, late modern account of liberal democracy or the liberal world order; and if it isn't explicit, it is usually implicit, in one way or another, ready to be uncovered by the archaeologist of ideas. For these reasons, anyone committed to the project of liberal democracy cannot afford to avoid being deeply concerned about its ultimate status.[26] As we shall see shortly, Rawls recognizes as much, despite the fact that the actual term, dignity, appears only infrequently in his writings.

But here our regnant mode of understanding offers us very little enlightenment. Natural science knows absolutely nothing of human dignity. Dignity cannot be measured or even located on a cartesian plane. As soon as a natural scientist begins to speak of human dignity, he instantly ceases being a natural scientist, and suddenly transforms himself into a public intellectual, for this topic lies outside of his specialist competence, strictly speaking. A defense of the idea of human dignity could not be published in *Nature*—except by accident.

Already by the late nineteenth century, the notion of universal human dignity had become entirely questionable under the impact of modern science. Nietzsche is entirely representative when he declares that "alas, the belief in [human] dignity, uniqueness, and irreplaceability in the rank ordering of being is lost. Man has become an animal."[27] These words ring like prophecy. In

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[26] For a survey of some of the most recent literature, see Goodhart, "Recent Works on Dignity and Human Rights."

[27] Nietzsche, *Genealogy of Morals* in KGW, 6.2:422/*On the Genealogy of Morals,* 3.25, p. 155, translation modified. From the eyes of this radical aristocrat whose moral intuitions were better suited for the shores of Troy, things look

the second half of the twentieth century, the leading figure of the behaviorist revolution was not at all mistaken, but only more forthright than his peers, when he declared that the notion of human dignity was not a part of the "scientific conception."[28] Today, among other places, we run up against this very same stubborn question mark whenever bioethics discourse attempts to explain what it is that medical professionals must protect and why it is that it *must* be protected. Why can't I sell my kidney … or even my heart? It is mine, after all. What does it mean to say that some specific, universally shared attribute of human being is inviolable? And why in the world would we believe this to be the case? From the perspective of pure human reason viewed from the angle of naturalism, there is nothing at all intuitive about it.

Dignity is a vestigial relic of our past, for which we increasingly have difficulty accounting. Properly understood, human dignity is a "metaphysical" category, at least in the (somewhat transfigured) etymological sense that it is somehow *after* nature (and also *outside of* history).[29] In order to forestall distracting objections about the usage of terms, I add here that for the purposes of this discussion, "metaphysical" need only mean "non-natural." It probably also means a whole lot more than this, but it is not necessary here to be overly specific in this regard for the purposes of this present discussion.

The central question becomes then: why do human beings have this attribute called dignity? We don't, as a general rule, accord the same status to any other slowly decomposing

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very different. "Every human being, with the entirety of his activity, has dignity only insofar as he is, consciously or unconsciously, the tool of genius, from which the ethical consequence to extrapolate forthwith is that 'human being in itself' … possesses neither dignity, nor rights, nor duties. Only as a completely determined being serving [these] unconscious ends can a human being justify his existence." *Der griechische Staat* in KGW, 3.2:270.

[28] Skinner, *Beyond Freedom and Dignity,* 61.

[29] Cf., Williams, "Idea of Equality" in *Problems of the Self,* 235-39, 247, who, though acknowledging the force of this observation with respect to neo-Kantianism, nevertheless seeks to outline a concept of respect "from a human point of view," but then concedes that he has offered only "vague and inconclusive considerations … rather hazy and very general notions." Then, he asks us to engage in a thought experiment concerning human, genetic engineering, the upshot of which is that we might conceivably, at least in this limit case, consider persons as "pure subjects or bearers of predicates."

conglomerate of motile hydrocarbons. Why do humans have this attribute of dignity, and not, say, dogs, cats, cockroaches, or the Ebola virus? Viewed in a different way, a human being could be *equally well* described as slowly decaying organic matter; or as an animate object for sexual gratification; or as a self-moving tool for building a pyramid in which to house the sarcophagi of recently deceased god-kings; or as an inexpensively replicable, fleshy machine useful for assembling Nike sneakers or Abercrombie & Fitch hoodies; or as a farm for harvesting vital organs; or as a barrier with which to block lethal projectiles in a Chow Yun Fat action flick gunfight; or even as food. The rejection of these anthropologic descriptions certainly does not rest upon superior, scientific, epistemic insight. When viewed exclusively from that perspective, an unwillingness to admit such descriptions can be explained only as a stubbornly persistent failure of imagination. Yet, I suspect, the common reader would cringe at most of these descriptions But why? Certainly not out of a hardnosed empiricism. These descriptions may seem fanciful—and they are. And yet I can think of no apodictically compelling reason why these—or any other suitably general characterization, for that matter—might not suffice as a description of the salient, constitutive feature of some chance individual's personhood. That no liberal politics could arise from any of these descriptions is not, strictly speaking, an argument in favor of one definition over another.

It is sometimes thought that there is no issue here; that, for whatever historically convenient reason, we all embrace and recognize these norms today, and to attempt to look under the covers consists of a dash of political naïveté sprinkled with an equal part of philosophical immaturity. By now, we should know better than to ask such fruitless questions. This view is expressed quite succinctly by a famous and pregnant remark—related by Jacques Maritain—that emerged from one of the UNESCO national commissions tasked with synthesizing expert scholarly opinion for

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the purpose of drafting the Universal Declaration of Human Rights. "'Yes … we agree about the rights *but on condition that no one asks us why.*'"[30]

The trouble is that this depiction is demonstrably false and basically impossible to sustain if we actually take the real panoply of views seriously. No one sensible disputes the fact that powerful forces are currently aligned to promote—however selectively—human rights and equal human dignity within their own communities and abroad. What this bald statement of fact misses is that shared practices, in which only an ever dwindling portion of self-reflective participants actually believe, rarely last for long, and that no idea can purport to be of universal validity when it is a demonstrable fact that the idea has no resonance at all for statistically significant portions of the world's population. This answer will no longer do—if it ever did.

The very concept of universal human dignity and basic human rights are, of course, deeply contested, and have been since the very beginning when the notion became politically concrete. Some of the tradition's greatest minds have remained deeply skeptical, each for their own varied and distinctive reasons. Bentham, for instance, famously declared the very idea "nonsense upon stilts."[31] To Burke, the notion seemed a "monstrous fiction."[32] In the last century, Rorty argued that the existence of human rights for all humans as such "has never been backed up by an argument based on neutral premises, and it never will be." At base, human rights are only productive fictions and we should leave them be. "The question whether human beings really have [human] rights … is not worth raising."[33] MacIntyre goes one step further in the same

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[30] Maritain "Introduction" in UNESCO, *Human Rights,* 1.
[31] Bentham, *Anarchical Fallacies* in *Works,* 2:501.
[32] Burke, *Reflections on the Revolution in France* in *Selected Works,* 2:126, cf., 102, 154.
[33] Rorty, "Human Rights," 116, 125 et passim.

direction, asserting that "there are no such rights, and belief in them is one with belief in witches and unicorns."[34]

In no way is this contestation confined to the sphere of academia and *belles-lettres*. Within the international sphere, there simply does not exist, as some hopefuls maintain, a "worldwide background consensus" on this, nor on many other matters.[35] Those who think the act of numerous countries signing a treaty is sufficient to establish a consensus put too much stock in pieces of paper. For confirmation, one need only consult the US-China-Russia love triangle to see the way in which this contestation plays itself out in the present day in actual, real world politics. Large segments of the ruling class in at least two of the largest countries in the world today (Russia, China) consider human rights—and other conceptual elements central to Western, liberal-democratic, constitutional governance—to be not much more than crude instruments of Western imperialism.[36] Without even speaking with them, we're usually inclined to question their sincerity, but it's far from clear that this analysis captures the whole story. Any theory committed to the fact of pluralism can't possibly ignore this stubborn fact.

The implicit controversy extends beyond the confines of the ruling classes of powerful countries to the on the ground practices of actual, contemporary communities. The requirements of dignity are understood not only in various ways by various cultures and peoples, but even sometimes in diametrically opposed fashion. Here, let one example suffice. In our time with boots on the ground in Afghanistan, more of the world, beyond the narrow confines of scholars of the Middle East and specialist anthropologists, have become increasingly familiar with some of the

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[34] MacIntyre, *After Virtue,* 69.
[35] Habermas, "A Political Constitution for the Pluralist World Society" in BNR, 343. Cf., Joas, *Sacredness of the Person,* 174 ff.
[36] See, e.g., Buckley, "China Takes Aim"; Buckley et al., "Maoists in China"; Baker, "U.S.-Russian Ties Still Fall Short."

customs of a select portion of Afghani and Pakistani tribal groups. Among other things, we have discovered with some mixture of shock and curiosity that in some parts of Afghanistan, if a woman is forcibly raped by a man other than her husband, this is seen as an affront to the dignity and honor of the family and the girl herself—a disgrace that can be discharged *only* by the murder of the rape victim.[37]

Understandably shocked, we, as outsiders, might simply protest—and rather vainly so—that these particular Afghanis "misunderstand" honor and dignity. Whether or not that is true is, however, completely immaterial. The basic fact remains that this is the way in which their world is configured for them, conditioning thereby their own first person experience of what they understand dignity to entail.[38] If we so wish, we can also dismiss these people as uncivilized or "unreasonable" barbarians, but then we run the risk of impugning the claim that we are actually sensitive to the fact of pluralism, for respect for the fact of pluralism and a claim to embody worldview neutrality strains credulity when made by anyone whose political philosophical construction systematically consigns numerically significant sub-cultures to the purgatory of "unreasonableness." The dilemma is serious and not to be taken lightly.

Perhaps it is the case that certain populations, for whom it is not already self-evident, can, in Rawls' language, "be persuaded to … accept" the principle of universal human dignity. But perhaps not. Moreover, if these populations accept it on merely prudential grounds, namely for certain enumerated situations in which they can imagine how they might benefit concretely, then

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[37] See Rubin, "Rape Case, in Public"; "Afghan Rape Case."
[38] One might object that here we are talking about "honor" and not "dignity." But dividing these two notions is only a sociological definition. A classic statement separating the two is Berger, "On the Obsolescence of the Concept of Honor."

it stands to reason that the principle can be overridden in other circumstances where the benefit is unclear or the demands very great, in which case, they don't actually accept the principle at all.

## 3.3 The Historical Origins of the Discourse of Dignity

Appeals either to self-evidence, a naturalistic substrate, or to an already existing consensus ultimately provide inadequate support for the notion of universal human dignity, so we find ourselves faced again with what is now the central question: why and in what way does it make sense to describe a human being as a bearer of a non-natural, metaphysical attribute called "dignity?"

The Christian theological tradition has an answer to this perplexing question. This answer has a long and complicated history, which is bound up with the narrative of creation in the Hebrew Bible, coupled with Platonic and Stoic themes, that are integrated into early Church theology by major patristic figures. The same basic structure recurs at various pivotal junctures in Western intellectual history. Though I quite expect that this claim will be vigorously contested in some quarters, it is the case, I submit, that this narrative retains much of its effective force even up to the present day, though admittedly in a deeply transmogrified form, which would be just barely recognizable to the tradition that generated it.[39] Why we should even care about the Christian theological tradition's answer to this question I delay to a later section. It is, I agree, not obviously the case that we should.

According to the creation story in Genesis, man is created *ad imaginem dei,* that is, in the image of God.[40] Referencing this earlier narration of divine creation, the author of the Psalms

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[39] As a supplement to existing knowledge, I found the following scholarship particularly helpful: Cancik, "'Dignity of Man'"; McGinn, "Human Person as Image of God"; Starck, "Religious and Philosophical Background"; Lebech, "What is Human Dignity?"; de Blignières, "Dignité de l'homme image de Dieu"; Joas, *Sacredness of the Person;* Vögele, *Menschenwürde zwischen Recht und Theologie.*

[40] Gen. 1.26-27, cf., 5.1, 9.6. Cf., Jas. 3.9; 1 Cor. 11.7; Eph. 4.24.

adds the following comment: "You have made [human beings] a little lower than the angels, and crowned them with glory and honor."[41] In the view of historical biblical criticism, the fact that this metaphor is applied to *all* of humanity represents, in effect, a "democratization" of imagery from ancient near east, royal theology by the sons of Abraham.[42]

The narrative in the Hebrew Bible remains silent, however, regarding the next natural question: in respect of what anthropologic quality were men fashioned in the image of God? The precise answer is supplied at a much later point by Graeco-Roman philosophy, whose influence upon the development of Christian theology is generally uncontested. In its own creation mythology, the Platonic tradition contends that man, as a created being, is embodied reason, and that this reason represents the divine element within him.[43] Later Stoic philosophic theology incorporates some of these Platonic elements, and provides a vocabulary that was to prove especially influential for later periods. According to Cicero, man is given reason by the God that created him.[44] By nature, human behavior is directed rightfully and primarily by the commands of this embodied human reason.[45] As a universal, shared attribute, this human reason is what elevates him above all other creatures and thereby establishes the essential "dignity of man."[46] As he defines it, dignity is "someone's deserved authority that is worthy of cultivation, honor, and respect."[47]

These myriad themes undergo further refinement within Christian scripture. Read allegorically, the famous opening verse of John about the divine *logos* represents only a creative synthesis of

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[41] Ps. 8.5, NRSV. Cf., Heb. 2.6-8.
[42] Per Lorberbaum, "Blood and the Image of God," 55.
[43] Plato, *Timaeus,* 90a2-b1 et passim.
[44] Cicero, *De Legibus,* 1.7.22-23.
[45] Cicero, *De Officiis,* 1.36.132, cf., 2.5.18.
[46] Cicero, *De Officiis,* 1.30.105-107, cf., 1.28.97.
[47] Cicero, *De Inventione,* 2.55.166.

the above-mentioned Platonic and Stoic themes.[48] Furthermore, the force of the image of God metaphor is deeply strengthened by the Christian account of incarnation. God himself deigned to become man.[49] This would have been unthinkable had there not been some sort of underlying ontologic continuity between God and man. Moreover, the democratizing anthropology implicit within the Hebrew bible's narration of creation became later even more explicit in the Gospel of Christ, in particular when Paul writes that "there is no longer Jew or Greek, there is no longer slave or free, there is no longer male and female; for all of you are one in Christ Jesus."[50] With these words, the Abrahamic faith lost any pretensions of salvational particularity, becoming something prospectively universal, open to all, regardless of birth or other accidents (ethnicity, class, etc.).[51]

Already at least by the fifth century these disparate traditions had solidified into one syncretistic formation within Augustine's theology. There we read that it is the "spark" of reason within man that makes him divine and that this is the characteristic in virtue of which man is said to be created in the image of God. This spark, moreover, is the basis of his elevated dignity and honor—that thing or attribute which distinguishes him qualitatively from all other living creatures.[52]

This same basic theme is recapitulated even more forcefully in the thirteenth century in Thomas of Aquinas' writings. On his view, both "human dignity" and man's intellectual, rational

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[48] Jn. 1.1-14.
[49] Jn. 1.15. Cf., Mt. 1.18-25; Lk. 2.1-7.
[50] Gal. 3.28, NRSV. Cf., Acts 10.34-43; Mt. 28.19.
[51] The theology of election is a complicated question, to be sure, but not one I can address here.
[52] Augustine, *City of God,* 11.16, 22.24, cf., 13.24; *De Genesi ad litteram liber imperfectum,* 16.55, 16.59-60; *De Genesi ad litteram libri duodecim,* 3.20.30-32, 3.22.34, 6.12.21-22; *De Trinitate,* 12.11.16, 12.4.6, 12.8.11; *Confessions,* 13.32.47. De Gen. ad Litt., 6.12.21 and De Trin., 12.11.16 prefer the term *honor* to *dignitas,* but these are conceptually interrelated terms.

nature both derive ultimately from the fact that he was created in the image of God.[53] He even goes so far as to define a person as a "substance distinguished by the quality pertaining to dignity."[54]

This tradition stretches yet further, from the close of the medieval period well into the heights of early modernity.

Quattrocento Renaissance humanism represents one of the major peaks of this development, for it is there that great minds first devoted their full attention to composing paeans to the dignity of man. The watershed event is Giovanni Pico della Mirandola's famous "Oration on the Dignity of Man." In effect, this text functions an exhortation to "emulate the dignity and glory" of divine beings: the angels.[55] Though it's less clear in the famous *oratio,* Pico outlines the *source* of this human dignity in his less frequently read hybrid commentary on Christian and pagan creation narratives. There he explains that "man was created by God in his own image so that he might be preeminent" among all the created beings. Accordingly, "man [was] instituted by nature so that his reason might dominate." In this peculiar quality consists the "original dignity" given by God to mankind.[56]

By the seventeenth century and still following the general outlines of this tradition, Samuel von Pufendorf would suggest that the "the dignity of man" derives from the "Light of Understanding" provided by the soul that had been designed for him "by the all-wise Creator." It is this attribute that elevates him "above all the other parts of the animal world."[57]

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[53] Aquinas, *Summa Theologiae,* II-II q. 64 a. 2 ad 3, II-II q. 175 a. 1 ad 2, III q. 4 a. 1 ad 2 et passim.
[54] Aquinas, *Summa Theologiae,* I q. 29 a. 3 ad 2, 1 q. 40 a. 3 arg. 1.
[55] Pico della Mirandolla, *Oratio de hominis dignitate* in Garin, ed., *De hominis dignitate…,* 110.
[56] Pico della Mirandolla, *Heptaplus: De septiformi sex dierum Geneseos Enarratione* in Garin, ed., *De hominis dignitate…,* 4.6, p. 284.
[57] Pufendorf, *Of the Law of Nature and Nations,* 2.1.5, p. 95, adjusted for modern orthography.

About the same time, and with considerably greater effect, John Locke would argue that man (and woman) were made equally in the image of God and were furnished thereby with relatively equivalent intellectual capacities, and that they should be considered as remaining in this divinely arranged state of equality "unless the Lord and Master of them all, should by any manifest Declaration of his Will set one above another, and confer on him by an evident and clear appointment an undoubted Right to Dominion and Sovereignty." This, and nothing else besides, is what Locke means when he speaks of natural equality.[58]

As we enter more recognizably modern terrain, the theological background (partially) recedes from view, but the same basic, parallel *structure* remains operative.

In the eighteenth century, Kant codifies a philosophically influential form of this train of thought, which, at least at first glance, appears somehow secular in character. "Man," writes Kant, "has within himself a certain dignity, which elevates him above all creatures; and it is his duty to affirm this human dignity in his own person."[59] Man's innate capacity for rational autonomy is, he argues, the "ground of the dignity of human nature," in the name of which humanity becomes an "*end in itself.*" As a bearer of dignity, humanity possesses "an unconditional, incomparable worth," and the only appropriate posture toward this attribute of incomparable worth is "*respect*" on the part of other persons. Human dignity is "infinitely above all price, with which is cannot be brought into comparison or competition at all without, as it were, assaulting its *holiness.*"[60]

Kant's view here is, however, not, as one prominent reader would have it, a pure "translation" of the "content of [a] biblical concept" into an autonomous formulation, completely unmoored

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[58] Locke, *Two Treatises,* 1.30, pp. 161-62, 1.40, pp. 168-69 (*imago dei*); 1.67, p. 190; 2.4-5, pp. 269-70, cf., 2.54, p. 304 (natural equality), cf., 2.54, p. 304. For commentators especially sensitive to this dimension of Locke's thought, see Waldron, *God, Locke, and Equality;* Dunn, *Political Thought of John Locke.*
[59] Kant, *Über Pädagogik* in GS, 9:488.
[60] Kant, *Groundwork of the Metaphysics of Morals* in PP, Ak, 4:434-36, some emphasis added.

from its theological heritage.[61] Dignity's status as a plausible, central axiom is guaranteed solely by means of his readership's shared convictions. Kant does not explain why human beings possess this attribute called dignity, which is to say that he does not explain why we should treat human beings as ends, rather than as means. He does not explain why Hobbes—a scientistic outlier in our narrative here—is wrong to insist that dignity signifies nothing more than "the publique worth of a man, which is the Value set on him by the Common-wealth."[62] From this critical perspective, the most natural answer—namely, that this does not respect man's innate dignity—would simply beg the question.

Even here, the theological background has not yet receded fully from view. In truth, Kant's entire moral theory is only ever fully intelligible when read against the background of his *theological* anthropology. A basic presupposition of his moral theory is the radical disjunction and even antagonism between duty and inclination, between virtue and passion. And yet nothing about this depiction is necessarily self-evident. By way of illustration, I draw attention here to the Aristotelian tradition, with which Kantianism contrasts starkly. Of course the ancient world was well acquainted with the phenomenon upon which Kant's moral teaching rests: the divided will. Even if he lacked this terminology for it, this general phenomenon is the starting point for Platonic psychology, which Aristotle follows, with some modifications.[63] To these men, the Kantian schema never seems to have occurred. Within Aristotle's philosophical anthropology, for instance, man is conceived as *orektikos nous* or *orexis dianoētikē,* that is, as the complementary and cooperative fusion of desire and of reason.[64] As such, virtue consists in the development and

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[61] Habermas, "The Boundary between Faith and Knowledge" in BNR, 110.

[62] Hobbes, *Leviathan,* ch. 10, p. 63.

[63] Plato, *Republic,* IV 439d4 ff.; Aristotle, *Politics,* 1.5 1254b4-9, 7.14 1333a16-30; *Nicomachean Ethics,* 1.13 1102a26 ff., cf., 5.11 1138b5-13.

[64] Aristotle, *Nicomachean Ethics,* 6.2 1139b4-5.

the refinement of the passions.[65] At base, this requires of us that we learn to desire the right things.[66]

So, how to explain Kant's radical separation of these two things (desire and duty), which, at least intuitively, are not in permanent opposition—at least not for all human beings? What makes the phenomenon of the divided will something of universal significance, rather than simply an interesting case study for psychiatrists and therapists?

This is where sin and man's fallen nature enter. Paul and Augustine supply the missing pieces With Paul, the idea of universal, human sin enters.[67] With lasting impact, this idea of original sin is codified more formally by Augustine.[68] With his memorable phrase, he declares that "all men are a mass of sin."[69] With this addition, the phenomenon of the divided will takes on an entirely different color, becoming something of paradigmatic significance. Paul writes of himself: "I know that in me … dwelleth no good thing: for to will is present with me; but how to perform that which is good I find not. For the good that I would I do not; but the evil which I would not, that I do."[70] The explanation he gives elsewhere for this is the idea of the divided will. "The flesh lusteth against the Spirit, and the Spirit against the flesh: and these are contrary the one to the other: so that ye cannot do the things that ye would."[71] Some three centuries later, reflecting upon his own life, Augustine reaches a similar conclusion. "When I willed or did not will something, I

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[65] Aristotle, *Nicomachean Ethics,* 2.1 1103a14-b25, 2.3 110bb3-5a16.

[66] Aristotle, *Nicomachean Ethics,* 2.3 1104b11-05a10.

[67] Rm. 5.12, cf., 8.3. Cf., 1 Cor. 15.22; 1 Jn. 1.8.

[68] Augustine, *City of God,* Bks. 13-14 et passim. There is some dispute as to whether the *vetus latina* or Jerome's *vulgata* may have misled Augustine in reading Romans 5.12. The Greek original reads "sin entered the world through one man … and in this way death passed through all men, *in as much as* [ἐφ' ᾧ] all sinned," for which the Latin translates "through one man … *in whom* [*in quo*] all sinned [*per unum hominem … in quo omnes peccaverunt*]. The Latin translation more strongly suggests, than does the Greek, that subsequent men somehow sinned through Adam. For further background, see Kelly, *Early Christian Doctrines,* 354. However, in light of the numerous passages Augustine can and does adduce, the issue seems less problematic.

[69] Augustine, *De diversis Quaestionibus ad Simplicianum libri duo,* 1.2.16 et passim.

[70] Rm. 7.18-19, KJV.

[71] Gal. 5.17, KJV.

was utterly certain that none other than myself was willing or not willing… I saw that when I acted against my wishes, I was passive rather than active; and this condition I judged to be … a punishment."[72] The most vivid illustration of this phenomenon in his autobiographical writings is his recounting of the pear tree incident: As a youth, he and friends routinely stole fruits, knowing full well that what they did was wrong and, moreover, that they didn't even need the fruit. What motivated him, he recalls retrospectively, was that some part of him experienced love for the sin itself.[73] Seen in this way, human psychology is a story of internal struggle; and the self, a site of internecine combat. True freedom exists only for he who is liberated from the inborn bondage of sin.[74]

Kant follows in the footsteps of this later tradition. On his view, "radical evil" does indeed exist within the nature of man.[75] Sin is so all-pervasive that our inclinations simply cannot be trusted. The only hope for mankind is slavish obedience to that divine spark within him, his reason, and the will, which is shaped by it. Man is capable of rational self-legislation, but sin constantly thwarts his best intentions. He is "misled by his self-seeking animal inclinations into exempting himself from the law where he can." "Nothing straight can be constructed from such warped wood as that which man is made of." "Man is," Kant writes, "*an animal who needs a master ...* to break his self-will and force him to obey a universally valid will."[76] In the twentieth century, it has sometimes been maintained that Kant's moral philosophy represents the eruption of Stoic paganism within the horizon of modernity. This characterization is, however, only partially on point. It is true that Kant does draw attention to the Stoic background to the notion of

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[72] Augustine, *Confessions,* 7.3.5, trans. Chadwick.
[73] Augustine, *Confessions,* 2.4.9-2.9.17. Cf., *City of God,* 13.5.
[74] Augustine, *City of God,* 14.11. For the later Augustine, this is accomplished only through the gift of grace, which is completely unmerited (13.5, 14.1).
[75] Kant, *Religion within the Boundaries of Mere Reason* in RRT, Ak, 6:18 ff. Cf., *Perpetual Peace* in PW, 124.
[76] Kant, "Idea for a Universal History with a Cosmopolitan Purpose" in PW, 46.

human dignity.[77] However this may be, this line of reflection does not exhaust the genealogical logic of his moral philosophy. For, as Kant recounts, it is the specific superiority of "the Christian doctrine" over Stoicism that it recognizes that the laws of morality are so infinitely austere and uncompromising that they cannot possibly be satisfied in this life without divine aid. For this reason, the Christian doctrine holds out hope that a final reconciliation between nature and moral duty can be obtained in the "kingdom of God."[78] Read in this way, with all of the various considerations in play, Kant's moral theory represents a variant on what is sometimes called the "hyper-Augustianian" tradition.[79]

Seen in this light, even the idea of autonomy takes on a different hue. It is true that in some of his moods, Kant presents his teaching on autonomy as one that does not require "the idea of another being above him."[80] Still, in other moods, another image presents itself. For Kant, man's relationship to God and his status as created being remain significant, coloring the way in which even autonomy is to be understood. The substantive aspects of religion are derived from revelation and tradition, and are, as such, matters for experience. For this reason, the specific content of our duties to God cannot be determined purely in terms of universal, moral laws given *a priori* by pure reason. However, morality considered from the formal aspect does provide a vantage point through which man's relationship to God can be clarified, and this formal clarification yields the added benefit of an explanation that strengthens our resolve to do the duties we have, i.e., those duties that are derived from lawgiving reason. Reconceptualizing duty

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[77] Kant, *Religion innerhalb der Grenzen der bloßen Vernunft* in GS, 6:57-58 and n.
[78] Kant, *Kritik der praktischen Vernunft* in GS, 5:127-29 and n.
[79] Taylor, *Sources,* 246, 327, 332, 413, 443 et passim, cf., 83.
[80] Kant, *Religion innerhalb der Grenzen der bloßen Vernunft* in GS, 6:3.

in this way, as arising from divine command, enables us to clarify for ourselves the obligation under which we stand.

> The formal element of all religion … belongs to the philosophy of morals, as only the relationship of reason to the idea of God is expressed thereby…. The ground upon which all human duties ought to be thought on the formal level (their relation to a divine will given a priori) is … subjective-logical. We cannot make obligation clear to ourselves without, at the same time, thinking of the will of another (of which universal, lawgiving reason is only the spokesperson), i.e., God.… This duty … [is] a subjective [one] for the strengthening of the moral drive within our own lawgiving reason.[81]

A pure, duty-oriented religion of morality would be one which understood its consummation to consist in "the heart's disposition to observe all human duties as divine commands … as originally written upon the heart."[82] Within the Kantian framework, rational autonomy is ordinarily said to be the ground of our dignity, but in truth, we are as much subjects as lords, as much created beings as self-makers. In some sense we give the law to ourselves but in a yet deeper sense it is *given to us*. Thus, man's autonomy is to be distinguished sharply from self-given, "arbitrary choice," for this characterization misses the aura of sacrality associated with our duties, especially when we view ourselves, as indeed we should, as created beings. Refusing to recognize our subjection to duty is akin to apostasy.

> Although we are lawgiving members of a imagined kingdom of morals, made possible through freedom [and] presented to us for respect, [we are] at the same time subjects, [and] not the leader of [this kingdom], and *to misjudge our lower status as created beings and to deny, from self-conceit, the standing of the holy law is already an apostasy from it in terms of spirit, even though the letter of it might be fulfilled.*[83]

Even in this great light of the German Enlightenment, human dignity has not yet been decoupled from the Christian theological narrative, within which it is most at home. It is not exactly the

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[81] Kant, *Metaphysik der Sitten* in GS, 6:487-88.
[82] Kant, *Religion innerhalb der Grenzen der bloßen Vernunft* in GS, 6:84.
[83] Kant, *Kritik der praktischen Vernunft* in GS, 5:82-83, emphasis added.

case, then, as one prominent reader would have it, that "with his concept of autonomy … [Kant] destroys the traditional image of men as children of God."[84]

It is only here in the late eighteenth century that this teaching on universal, equal human dignity becomes a true, political force. At this point, the authors of the American Declaration of Independence could announce with confidence that human equality was a "self-evident" truth and, in the very same breath, invoke the narrative of creation.[85] Completely non-ironically, pre-eminent sociologists and historians refer to this document as sacred "scripture."[86] More than a decade later, a similarly famous, French revolutionary declaration would include among the very first of "the *sacred* … rights of man" the claim that "men are born … free and equal."[87]

By the nineteenth century, as the theological background began even more resolutely to fade from view, the sacred character of dignity and the Christian background to this notion had not yet been forgotten by historically-sensitive philosophers and social theorists. For instance, to a discerning mind like Hegel, it was clear that there existed a particularly intimate and inseparable connections between the yearning of this Kantian category of dignity and the more basic historical development of Christianity.

> One must know … that in … [ancient] philosophy one has before oneself a definite state of the development of thought…. That man is free in and for himself according to his substance—neither Plato, nor Aristotle, nor Cicero knew about that…. With the Christian principle, the individual, personal spirit [becomes] for the first time essentially [something] of infinite, absolute value…. In the Christian religion, the teaching emerged that before God all men are free … [and] equal before God…. These provisions render [this] freedom independent of birth, social class, education, etc.[88]

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[84] Habermas, "Faith and Knowledge" in FHN, 110.
[85] Declaration of Independence, Preamble.
[86] E.g., Bellah, "Civil Religion in America," 9; Maier, *American Scripture.*
[87] Déclaration des Droits de l'Homme et du Citoyen de 1789, Preamble and Art. 1, emphasis added.
[88] Hegel, *Vorlesungen über die Geschichte der Philosophie I* in Werke, 18:68-69, cf., 13, 127-28. Cf., *Enzyklopädie II* in Werke, § 247 Z, p. 9:24; *Enzyklopädie III* in Werke, § 482 A, pp. 10:301-02; *Vorlesungen über die Philosophie der Religion II* in Werke, 17:45; *Vorlesungen über die Geschichte der Philosophie II* in Werke, 19:406-07.

Man gains this august character by means of his divinely-inflected created status. "Above all, man is exalted in the entirety of creation. He is the knowing, perceiving, [and] *thinking* being. He is … the *image of God*."[89] That God deigned to become man in the form of the Christ is further testimony to this truth.[90] It is his reason, his status as a thinking being, that elevates him above all of the other creatures.[91]

The great founding figure in the sociology of religion, Émile Durkheim, would offer an expansive definition of religion and aim to integrate the new understanding of modern, individualized, equal human dignity within it. Famously, he defines a religion formally as "a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them."[92] He folds the new teaching on universal human dignity into this understanding of religion. The following is his stirring depiction of the modern religion of man as it had developed within eighteenth-century liberal theory and Kant's ethical philosophy, in particular:

> This ideal [is] … marked with a religious character. The human person … is considered as sacred, in what one might call the ritual sense of the word. It has something of that transcendental majesty which the churches of all times have given to their Gods. It is conceived as being invested with that mysterious property which creates an empty space around holy objects…. It is exactly this feature that induces the respect of which it is the object…. The individual is here placed on the level of sacrosanct objects…. There is no possible compromise with a principle which is thus put above and beyond all temporal interests. There is no reason of State which can excuse an outrage against the person.[93]

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[89] Hegel, *Vorlesungen über die Philosophie der Religion II* in Werke, 17:74.
[90] Hegel, *Philosophie der Geschichte* in Werke, 12:403-04; *Vorlesungen über die Philosophie der Religion II* in Werke, 17:204, 273-75; *Vorlesungen über die Geschichte der Philosophie II* in Werke, 19:525; *Philosophische Enzyklopädie für die Oberklasse* in Werke, 4:67 ff.
[91] Hegel, *Grundlinien der Philosophie des Rechts* in Werke, § 4, Z, p. 7:46; *Philosophie der Geschichte* in Werke, 12:557.
[92] Durkheim, *Elementary Forms,* 44, emphasis removed.
[93] Durkheim, "Individualism and the Intellectuals" in *Durkheim on Religion,* 61-62.

Inscribed upon the human person is "something of the divine … a characteristic which renders it sacred and inviolable to others." "This religion of humanity," which sacralizes the "idea of the human person," is the "religion of today." In large, advanced industrial societies, division and differences arise and social unity can no longer plausibly be predicated upon any attribute other than abstract generality. Given these newly developing divisions and the consequent loss of much else that is socially-binding, the sacralization of the human person and its system of human dignity come to represent "the only system of beliefs which can ensure the moral unity" of modern societies. "There remains nothing that men may love and honour in common, apart from man himself." This is "the sole idea that survives, immutable and impersonal, above the changing tides." Despite all modern upheavals, Durkheim insists that it is "a singular error" to understand this ethic, this religion of man, as "antagonistic to Christian morality," for in point of fact, he claims, "it is derived from it."[94]

In the present day, this notion of human dignity remains a powerful, almost indispensable, category of contemporary political thought, whose traces can be discerned all over the political fabric of the twentieth century.

At its most successful, the public rhetoric of the civil rights movement appeals precisely to this equal dignity of human beings. For instance, in his famous, 1963 March on Washington speech, Martin Luther King, Jr. would castigate white America for having "defaulted on th[e] promissory note" embodied within the Declaration's Preamble, "instead of honoring this sacred obligation." "We can never be satisfied," he declares, "so long as our children are … robbed of their

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[94] Durkheim, "Individualism and the Intellectuals" in *Durkheim on Religion,* 66-68. The notion of a "religion of humanity" derives from Comte, *Système de politique positive,* 1:360-62.

*dignity.*"[95] In his other writings, the background to King's notion of dignity is revealed yet more transparently. He is in lock step with the theological tradition on dignity, as outlined in the narrative above.

> There must be a recognition of the sacredness of human personality. Deeply rooted in our political and religious heritage is the conviction that every man is an heir to a legacy of dignity and worth. Our Hebraic-Christian tradition refers to this inherent dignity of man in the Biblical term *the image of God.* This innate worth referred to in the phrase the image of God is universally shared in equal portions by all men.… Every human being has etched in his personality the indelible stamp of the Creator…. Man is not a thing…. He must be dealt with … as a person sacred in himself…. To do otherwise is to … desecrate what he is. So long as the Negro … is seen as anything less than a person of sacred worth, the image of God is abused in him…. Human worth lies in relatedness to God. An individual has value because he has value to God.[96]

In the twentieth century, numerous European constitutions arose from the ashes of the two great world wars. Many of these formally sanctified human dignity, treating the concept as one of its fundamental principles. Of these constitutions, the German one is only the most famous. Its very first sentence declares without reservation or qualification that "human dignity is inviolable. It is the duty of all governmental power to respect and protect it."[97] In both the charters for the United Nations and for the European Union, similar language appears prominently within the respective preambles. The first reads: "We the peoples of the United Nations [are] determined … to reaffirm faith … in the dignity and worth of the human person."[98] The second: "The [European] Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.[99]

This, of course, is merely a sketch of the long history of the discourse of dignity. To be sure, it was no straight path. Still, in abstracting from the presumably countless aberrations and counter-

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[95] King, "I Have a Dream" in *Testament of Hope,* 217-18, emphasis added.
[96] King, "Ethical Demands of Integration" in *Testament of Hope,* 118-19, 122.
[97] Grundgesetz für die Bundesrepublik Deutschland, Art. 1.1.
[98] Charter of the United Nations, Preamble.
[99] Charter of Fundamental Rights of the European Union, Preamble.

narratives that permeate the fabric of all human history, it is, nevertheless, possible to narrate this almost unbroken line of thought.

The significance of this tradition consists largely in its singularly clear, demonstrated commitment to the non-natural, metaphysical status of the human attribute called "dignity"—an attribute commonly associated with man's created nature, and in terms of which all humans are said to be equal to one another. Dignity's former situatedness within a narrative of creation stands out as especially significant. Although the general idea has by now lost much of its self-transparent appeal for much of the nation's intellectual class, if we view the question from the intellectual-historical vantage point; take seriously the myriad contemporary challenges faced by the notion past, present, and future; and allow ourselves to appreciate fully the concept's underlying unintelligibility within natural scientific discourse—we might become less certain that the idea can do without some similarly metaphysical worldview. If not the original one, then perhaps something else *structurally* similar.

## 3.4 Political Liberalism's Relationship to the Discourse of Dignity

However surprising the claim may seem at first or second glance, Rawls himself stands solidly within this tradition outlined above. The crucial link is his conception of moral personality, mentioned only very briefly, above, in the discussion of political liberalism's structural concepts.

In his important discussion of "the basis of equality" in *Theory,* his reflections begin first by identifying the characteristic in virtue of which human beings are distinguished from other animals—a move typical of the tradition I've outlined above. On Rawls' view, human beings are equal to one another only as "moral persons," which is to say that they are all self-legislating beings, capable not only of possessing, pursuing, and revising a self-given conception of the good (i.e., of being "rational"), but also of possessing and acting upon a cultivated "sense of justice,"

that is, the desire and capacity to behave in accordance with "fair terms of cooperation" provided that others do so as well (i.e., of being "reasonable"). These two ideas or "powers" elaborate the extensive meaning of "the *full* conception of the person." On this view, "moral personality" and its component parts represent "the fundamental aspect of the self," which "reveals what the person is."

The goal in articulating an operative conception of the person is to "idealize and simplify." This entails, among other things, that well known empirical "contingencies" have no substantive influence upon the conception. Questions concerning, for instance, mental illness, disabilities, disorders, or anything that would put a person outside of the "normal range" must be "put aside." Even within the normal range, persons are equal not in the sense of basic identity with respect to the relevant aspects, but rather in the sense of meeting some threshold limit. We can say that their moral powers meet this "requisite" or "essential minimum" either by "assumption" or by "stipulation."

The idea of moral personhood is integral to Rawls' overall account, for its allows him "to single out the kind of beings to whom the principles chosen apply," and it serves as the "necessary and sufficient condition" for entitlement to equal treatment and respect irrespective of all accidents, contingencies, or considerations of net aggregate utility. Still, in *Theory,* he is forthright in his acknowledgement that "none of this is literally argument," in as much as his discussion of the basis of equality does not proceed by way of deductions from clear and evident premises.

Perhaps symptomatically, there is no extended discussion, let alone defense, of this notion of human equality in *Political Liberalism.* Instead, he simply refers his reader back to *Theory,* a text written more than two decades prior. For the most part, the account of moral personality is

formally identical across the two major works. The only truly significant difference consists in his express willingness to aver, in 1971, that the very idea of "the moral worth of persons"—the basis of this more elemental notion of person-indexed equality—itself rests upon "a more comprehensive account of the good," whereas some two decades later, he would contend that the very same idea is strictly political, in the sense that it does not "belong" to any one particular, comprehensive worldview, but instead follows as a consequence from the idea of society as a "fair system of cooperation"—an idea which is itself simply "implicit" within both "the tradition of democratic thought" and "the public political culture of a democratic society." In the later writings, he will maintain that although this conception of moral personality is "not to be mistaken for … a moral ideal" in the strict sense of that term, it is also not "morally neutral" and is, in fact, "in some sense liberal."[100]

Lecture III of *Political Liberalism* expresses the desire to ground this conception of the person in a meta-ethical view he calls "political constructivism." However, that discussion is somewhat opaque, and there exists good evidence to suppose that Rawls wished either to abandon the idea of political constructivism altogether, or, at the very least, to *heavily* revise it in the work he did

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[100] Rawls, TJ, 397, 504-12 (§ 77), esp. 504-06, 509 and 575, 563, cf., 19, 120; PL, 15, 18-20 and nn. 20-21, 79-81 (II:6.3), 108-09, 178, 183, 272 n. 10, 300-06 and n. 21, 370, cf., 29-35 (I:5), 52, 103-04, 279-80 and n. 16, 367-68. Cf., "Idea of Public Reason Revisited" in PL, 481-82; LP, 91-92. Both "Kantian Conception of Equality" and "Kantian Constructivism" in CP, 254-66 and 303-58 add nothing novel that is relevant to the discussion. Rawls believes (incorrectly, in my view) that this sort of equality refers to a "natural" attribute in contrast to a "metaphysical" one or to purely "procedural" rules (TJ, 453, 507-12). When Rawls speaks of moral worth in the context of distributive justice, claiming there that moral worth is not a concept anterior to the original position, and as such is not a first principle with respect to which distributive shares are to be apportioned, he must be understood to be speaking of a different sense of moral worth, namely moral worth in terms of desert or exemplary virtue, and not in terms of equal moral personhood (TJ, 312-13). Rawls also speaks of the natural duty of mutual respect as something chosen *in* the original position (TJ, 337-38). But according to the view advanced here, this claim is mistaken, inasmuch as mutual respect, as a moral principle, is actually constitutive of the original position. This admission is very nearly intimated elsewhere (585-86, emphasis added: "the original position … does not include this idea, *not explicitly anyway*).

not live to complete.[101] For this reason, I deem it quite safe and reasonable to pass over the idea here.

Viewed from the perspective of naturalism, it is perfectly apparent that everything Rawls has to say about moral personality is true only by stipulation, assumption, and/or definition. His account does not hinge on whether or not all chance human beings are equally capable of pursuing and revising their own determinate conceptions of the good and of acting with a sense of justice and with a view to fair terms of cooperation (in Rawls' specific sense of those terms). Nor does his account need or even set out to defend some articulable threshold that all chance human beings could be said to meet and then to demonstrate that all chance human beings do in fact meet this threshold. To suppose that any of this had been Rawls' intention would be sorely to miss the force of his argument. The idea of equal moral personality is, by design, not the sort of claim that is meant to be analyzed and evaluated through the lens of naturalism. This strengthens the impression that this conception of human personality is best understood as a sort of moral postulate, which, on my view, functions as a loose proxy for a non-natural attribute, which the tradition, at least, has called "dignity."

This idea of moral personhood—the attribute in terms of which humans are said to be equal— is, in effect, shorthand for the type of being Kant describes in his ethical writings: the created, yet simultaneously autonomous, rational being who, by virtue of these various qualities, is a bearer of dignity and an end in himself. This conception of personhood functions as a conceptual proxy for

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[101] Rawls, PL, 89-129 (III), esp. 94 ff. In 1995, Rawls, "Reply to Habermas" in PL, 380 alludes to the idea of political constructivism, but only in response to criticism. The idea plays no role at all in "Idea of Public Reason Revisited" in PL, 440 ff. from 1997. A letter of July 14, 1998 to his publisher [reprinted in PL, 438-39] expresse a desire to revise the relevant Lecture in *Political Liberalism*. In 1999, the idea is not even mentioned and one note in LP, 86 n. 33 declares the relevant Lecture "misleading." (This is all the more striking given that the idea appears throughout his 1993 essay on which the monograph, *Law of Peoples,* was based: "Law of Peoples" in CP, 529-64.) There is no discussion of the idea in Rawls, JF from 2001.

the more abstruse claim about human beings as bearers of a non-natural property called dignity, which, as a property, is shared equally across the species, admitting of no meaningfully relevant gradations of such an extent that it would throw one below the requisite threshold level. The notion of moral personality is the linchpin connecting the political liberal project to the discourse of dignity. Rawls himself effectively confirms this interpretation when, in an aside, he equates the idea of "dignity" with the satisfaction of "the conditions of moral personality."[102] In other respects too, Rawls' project revolves fundamentally around the idea of human dignity. Rawls' *Theory,* remember, is at its core an extended critique of utilitarianism. Ultimately, his principal objection to utilitarianism is that it does not "take seriously the distinction between persons," and for this reason, it does not "regard persons as ends in themselves."[103]

To his most astute readers, much of this has been perfectly evident all along, and especially to those who are less thorough-going in their insistence that a just modern politics be entirely freestanding in character.

For instance, Dworkin's gloss on Rawls' "most basic assumption" is spot on. "Justice as fairness," he writes, "rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess … simply as human beings."[104] "Anyone," he elaborates elsewhere, "who professes to take rights seriously ... must accept … [either] the vague but powerful idea of human dignity … [or] the more familiar idea of political equality…. Anyone who claims that citizens have rights must accept ideas very close to these."[105] In the final analysis, these two ideas—equality and dignity—are not actually distinct at all, but instead they

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[102] Rawls, TJ, 329.
[103] Rawls, TJ, 27 et passim, 181.
[104] Dworkin, *Taking Rights Seriously,* 182.
[105] Dworkin, *Taking Rights Seriously,* 198-99, cf., 203, 205.

interpenetrate.[106] However counterintuitive it may appear given liberalism's obvious latinate etymology, equality understood along these lines is "the nerve of liberalism … 'its' central principle." This is its "constitutive political morality."[107]

Similarly, Larmore maintains that, although Rawls himself neglects to articulate the moral source on which he is clearly drawing, the idea of equal human dignity (and the respect for persons this source generates) constitute the moral basis or core of political liberalism. Respect for persons is itself only a "minimal morality" that is "largely neutral with regard to ideals of the good," or, at the very least, it is "*compatible* with a very great variety of ideals of the good life." This belief is a part of our historical inheritance, and it requires no elaborate justification. From this perspective, those who dispute this principle do not deserve a rejoinder from political liberals. On the contrary, the political liberal should simply commit himself to keeping the prerogatives of political power away from such persons.[108]

In the last half-century or so, *this* view of the person has widely come to be identified with the idea of liberalism as such. For instance, Macedo calls this view of the person liberalism's "moral lodestar."[109] Similarly, both Waldron and Quong simply declare it "*the* liberal view" of human nature.[110]

Like Hegel before him, Rawls too, as a young man, flirted with theology. In light of the above analysis, one should hardly be surprised to discover further evidence supportive of my claim in

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[106] Dworkin, "Liberalism" in *Matter of Principle,* 191.
[107] Dworkin, "Liberalism" in *Matter of Principle,* 183, 186.
[108] Larmore, "Respect for Persons," 68, 70-71 and n. 13, 73, 76; *Patterns,* 59-68, esp. 61, 66 and 125. Cf., "Moral Basis of Political Liberalism."
[109] Macedo, *Liberal Virtues,* 78.
[110] Waldron, "Theoretical Foundations of Liberalism" in *Liberal Rights,* 37, emphasis added; Quong, *Liberalism,* 2, emphasis added.

Rawls' early theological work, i.e., his posthumously published senior thesis from 1942.[111] It is

particularly of note that what I have, in an earlier section, called political liberalism's most

fundamental, first-order concept (equal moral personhood) corresponds with perfect *structural*

consistency to a related idea in his theological writings. Within political liberalism, recall, the

moral postulate of equal personhood is offered without argument, mentioning only that it is

implicit within our culture. In the theological writings, the structurally analogous idea is given, let

us say, a somewhat "thicker" description.

In invoking Rawls' early theological work, the intention is not at all to downplay the very real

and profound moral and spiritual transformations that Rawls underwent before publishing his first

monograph on justice, nor to overlook the fact that Rawls never intended to have these documents

published, nor is it to suggest that Rawls was a closet theist; and his philosophy, deceptive

window-dressing. As is by now perhaps sufficiently well known, Rawls lost his faith—his

youthfully exuberant and strikingly profound Episcopalian faith—to the problem of theodicy. All

of this took place during his time as a G.I. in the Philippines in 1944 or 1945, which, it almost

goes without saying, was some decades before he published his most important works in political

philosophy.[112] The idea here, then, is only to draw attention to powerful *structural* parallels

between the theistic framework and his later political writings, in the belief that doing so provides

further (albeit only partial and weak) confirmation that there do exist important *structural*

parallels (detected quite independently) between the later political writings and what I have called

the discourse of dignity. No more than this is claimed here. Though there can be no dispositive

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[111] For further background, see Gregory, "Before the Original Position"; Reidy, "Rawls's Religion"; Adams,
"Theological Ethics of the Young Rawls"; Cohen et al., "John Rawls"; Weithman, Review.
[112] Rawls, "On my Religion" in BI, 261-63.

proof in such things, it is my hope that these structural parallels are nevertheless sufficiently suggestive.

Preliminarily, we do well to note that the name, Immanuel Kant, appears in these writings no more than twice, mentioned only perfunctorily. His first mention relates only to Kant's aesthetic theory, and the second invocation serves largely to distinguish Rawls' own condemnation of capitalist accumulation (as prideful and self-preening sin) from "Marxist propaganda."[113] In fact, in a way perhaps not uncommon for English speaking intellectuals during the intrabellum period of the 1940's, Rawls appears to go so far as to denounce all of the most prominent movements of German modernity (idealism, romanticism) as sad vehicles for the expression of "man's cardinal sin."[114] In these writings, the Königsberger philosopher plays no significant role, and to the extent that he appears at all, his moral philosophy can hardly be identified as the motivating, normative framework for the expressed view. There is something far deeper at work.

For the young Rawls, the narrative of creation is absolutely vital. The world is fundamentally good, and it is good because God created it. It is a gift, and a bounteous one at that. This much we know from scripture.[115] From the doctrine of creation, which is known to us through divine revelation, we can infer two things: first, that man is radically and inseparably dependent upon God, and second, that everything in the world is an undeserved, uncaused, and unmerited gift of God's grace.[116] The act of creation imparts to the world its distinctively special quality. "The universe is a community of Creator and created." It this fact that gives the cosmos its "intimate and personal quality."[117]

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[113] Rawls, BI, 181, 195.
[114] Rawls, BI, 199, cf., 217.
[115] Rawls, BI, 137-38, 143.
[116] Rawls, BI, 242.
[117] Rawls, BI, 108.

A particularly distinctive attribute of the created universe is the existence within it of "persons," with personhood understood here as a spiritual attribute which stands somehow above, and is irreducible to, man's mere biological nature and variable set of mental states. This attribute of personhood represents what is truly distinctive about man, in contrast to all other created things. In its spiritual dimension, the universe is a community of such persons who bear testimony to the glory of God. It is with respect to this aspect of personhood that man stands in a peculiar relationship with God. Being equally so related to God, man is importantly related to all other persons, no matter how distantly related or unknown to one another.[118] That man has personality, in this specific sense, arises from the fact that he was created *ad imaginem dei,* in the image of God, and so bears, in his person, the likeness of God. The *imago dei* certifies "the reflection in man of God Himself," and it establishes man's "distinctiveness" from all of God's other earthly creatures. It is expressly by virtue of this attribute that he participates in the spiritual order and communes with other persons. It is because he is created in the image of God that man, as a person, is a responsible agent, capable of answering to God's loving call and capable of joining into communal fellowship with all other men. It is in this sense that "the image of God provides the basis for man's moral being."[119] Personality so understood constitutes "the inner essence of man's being." All other modern views of the ultimate character of human personality are "based on superficial anthropologies," unconscious, as they are, of the fundamentally spiritual character of man. Man is a person "at the very root of his being," and his spiritual aspect is the "ineffable distinctiveness of personal consciousness."[120] The term, "dignity," does not occur in Rawls' theological writings, but his conception of personhood—an attribute ascribed to man

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[118] Rawls, BI, 111-12, 116, cf., 204-06, 215.
[119] Rawls, BI, 113, 121-22, 192-93, cf., 202-09.
[120] Rawls, BI, 215-20.

without differentiation, by virtue of his having been created in the image of God—functions as dignity's conceptual surrogate.

Man's shared personality, exercised with relation to God and in avoidance of sin sin, is the basis of universal brotherhood. To imagine that any one man, as a person, is "distinct and superior" to another is a manifest lie born of sinful pride. "Closed groups" are constructed around this vanity, but this idea is one that Christianity resolutely rejects through its own doctrine of the "universal Fatherhood of God"—a God of all who shows no partiality and who selects no chosen people.[121] Man is always a part of some "visible human community" in which he finds himself, but viewed from the aspect of "God who is the Sovereign of the Universe," this visible community is only a subset of the overarching "community of all persons."[122] The doctrine of the Trinity provides further testimony to the equality of all men. The triune character of the Godhead and the community of co-equality established between the three persons—Father, Son, Spirit— that are held together by love is but a model for the community of human persons, persons who, as bearers of the likeness of God, are co-equal with one another.[123]

Here, let me repeat: I do not say that the content of Rawls' account of moral personality in the early theological writings and in his much later political philosophy are the same in all relevant respects. In fact, I actively deny it. I say only that the *structure* of the idea is the same or at least very similar; that the structure further strengthens the impression that with the idea of equal personality, we are speaking about something non-natural in character; and, moreover, that in light of these structural similarities and other textual evidence in his political philosophy, it is

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[121] Rawls, BI, 195-97.
[122] Rawls, BI, 214.
[123] Rawls, BI, 206-07.

appropriate to relate the idea of equal moral personhood to what I have called the discourse of dignity. Here, I claim no more than this.

The most important point to be recognized at this juncture is that dignity—the non-natural attribute upon which basic human equality is premised—does important philosophical work of fundamental significance in Rawls' political liberalism. As I pointed out in an earlier section, this idea of basic human equality (or equal moral personality) is the central thought within the set of what I have called political liberalism's structural concepts, i.e., those concepts that serve as the scaffolding of the political liberal thought-world, and without which, political liberalism would become unrecognizable. All of this important normative work is accomplished through these structural concepts, the most important of which is Rawls' notion of equal moral personhood.

There is great truth, then, to Habermas' incisive criticism that in Rawls' project, much of the most controversial justificatory work is smuggled in by way of Rawls' conception of personhood.[124] This critique is the exact opposite, however, of the usual and by now traditional philosophical anthropological objection that Rawls' concept of the person is somehow too "thin."[125] On the contrary, the conception is quite thick, and it is quite thick across all of his writings, though perhaps thick in different ways at different times. It is not an objection, however, to say that this conception of personhood is quite thick, at least not in itself. In fact, it may well be

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[124] Habermas, "Reconciliation through the Public Use of Reason" and "'Reasonable' versus 'True'" in IO, 59, 61, 73 and 82, 96; "Remarks on Discourse Ethics" in JA, 28 ff. The response of Rawls, "Reply to Habermas" in PL, 380 to this criticism is not really a response. He writes simply, "I deny these things," and devotes but one sentence to recapitulating his insistence on its strictly "political" character.

[125] Sandel, *Liberalism and the Limits of Justice,* 94. Another good reason for thinking that Sandel is (at least partly) mistaken is that as early as 1982, Rawls, "Social Unity and Primary Goods" in CP, 382-84 et passim expressly rejects the idea of thin personhood (what Rawls called "bare persons") in his criticism of Kenneth Arrow's neo-utilitarian view (co-ordinal utilitarianism), on the grounds that it did not take seriously the distinctive, binding importance of the ends of individuals, treating them instead as all functionally interchangeable, because fully commensurable along a single metric of evaluation. Among other things, neo-utilitarianism is objectionable, because it does not regard the self "as having any antecedent moral structure." Another reason for thinking Sandel mistaken in this regard is simply to read Rawls' early theological works. Rawls, BI, esp. 127-28, 199.

important that this conception be thick in this way. All that is being said here is that its thickness challenges the conception's pretensions to being "political," in Rawls' sense of that term, or, as I have glossed it: worldview neutral. Its thickness is importantly tradition-constituted, and, as I shall argue shortly, not fully intelligible outside of this framework. Nothing about the metaphor of the overlapping consensus alters this claim in any way, for, recall, the overlapping consensus is itself importantly shaped and constrained *already* by the fundamental structural concept that is basic, human equality.

## 3.5 The Significance of an Historically-Inflected Insight

But still, why should we care? Why does the history of a concept matter at all?

Admittedly, history has only limited explanatory value in philosophical discussions, and it must be used carefully. It is far from self-evident that the history of an idea or a movement has a necessary relationship to its contemporary meaning or significance. It is, for instance, sometimes pointed out that leading Abolitionists and Civil Rights figures were committed Christians, and that they understood this to be an important part not only of their own identity, but even of the argument they pressed upon society. Sometimes, it is even thought that this historical fact problematizes any political liberal or worldview neutral conception of political order, on the grounds that it does not admit this type of speech or way of reasoning as fully permissible within the public space; or, to the extent that it does so, it does so as an exception to a general rule, that is, an exception which the rule, as a regulative idea, cannot fully explain.[126]

It is, however, not clear that arguments of this sort are quite as damning as they are sometimes taken to be. While accurate historically, this observation is certainly not decisive, at least not

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[126] A more sophisticated version of this argument, where the accent is placed upon "grave moral questions" (including the Lincoln-Douglas debates and the early nineteenth-century Abolitionists) can be found in Sandel, "A Response to Rawls' Political Liberalism" in *Liberalism and the Limits of Justice,* 196-202, esp. 201-02. Rawls, "Idea of Public Reason Revisited" in PL, 484 responds directly by invoking the wide view of public reason.

without further refinement. This observation, taken on its own, is ultimately quite evasive about whether or not a similar historical transformation could have taken place under any other conditions. This objection does not seriously consider the possibility that religious discourse as deployed by reformers could possibly be interpreted as dispensable rhetorical cover or as something whose meaning has, or could have, been effectively supplanted. This, recall from the previous chapter, is the actual force of Rawls' "wide view" of public reason. This critical charge ultimately fails to explain why secular *re*-interpretation of actual historical transformation does violence to the phenomenon such that we can no longer even understand ourselves today in terms that make sense. Maybe political liberals must torturously distort history to make a good deal of the historical, liberal tradition fit their model, but how or why is this relevant for us today?

Further clarification is needed, then.

The claim I am making here is emphatically *not* that some syncretistic constellation of ideas called "Christianity" equals or results in universal human dignity, or that the development of the Christian people was some necessary, steady march of progress towards the universal recognition of human dignity. Such a claim is assuredly implausible simply for the fact that much of the history of that tradition flies manifestly in the face of such an alleged *telos* (e.g., the Inquisition, the sixteenth- and seventeenth-century Wars of Religion), and that it is perhaps not terribly difficult to marshal other features of the Christian faith and scriptural tradition that conflict squarely with this notion of universalized, equal human dignity. My claim is much more modest: that two thousand years of Christianity deposited moral artifacts in the background of human consciousness, that these moral artifacts underwent a steady path of development and conceptual refinement eventually furnishing resources upon which would-be reformers could draw, that these moral artifacts possessed a metaphysical (i.e., non-natural) quality, that the presence of these

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artifacts lent their use in public rhetoric plausible (rather than simply absurd) to their intended audience, and—this is the important part—that our culture's dominant mode of understanding and knowledge generation (i.e., natural science) seems to have precious little space for the idea, which suggests that it must be supported by another (perhaps atavistic) manner of reasoning or stock of moral intuitions unsupported by the predominant, contemporary mode of reasoning. It is an interesting question why the notion of universal human dignity became politically concrete beginning only in the eighteenth century, or why widespread interest erupted in the twentieth century in a way that it had not before over its entire history.[127] But for the more modest claim I am making here, it is not necessary to have compelling, ready made answers to these questions.

Significant here is the theologically suffused genealogy of universal human dignity coupled with the fact of its alien and awkward status within natural scientific discourse (which, in our culture, is the predominant mode of understanding). It is the conjunction of these two facts that explains why I am unperturbed by the so-called "genetic fallacy"—the analytic philosopher's favorite device for excusing his disinterest in history. If today we happened to have a satisfying, non-metaphysical account of human dignity, then perhaps we might safely ignore this history. Unfortunately, this protasis is counterfactual. The concept of dignity has a clearly metaphysical character during its history, and it remains nearly unintelligible within non-atavistic, contemporary modes of understanding, which suggests that this concept has not been successfully placed on new footing.

The upshot of this argument would be that many of us may still believe in occult qualities, though our recognition of this is systematically occluded through repetition and familiarity. Should this be true not only of our culture broadly speaking, but also of Rawls in particular, this

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[127] *Pace* Joas, *Sacredness of the Person,* 4-10, 23-24, cf., 143, 158-70.

would not only give the lie to the claim that political liberalism is "political" in its governing sense of that term (i.e., innocent of "metaphysics"), but it would also raise yet further questions. That many of us currently *happen to* believe in—or at least give lip service to—the notion can hardly satisfy anyone who is committed to an account of political legitimacy sensitive to the demands of long-term stability *and* also to the fact of pluralism.

The liberal principle of legitimacy is the late twentieth century's war cry against revealed religion's interfering with politics, but the principle, as formulated, eats away at important premises presupposed by the self-same principle. This is part of the great truth of Böckenförde's famous claim that "*the liberal, secularized state lives upon presuppositions that it cannot itself guarantee.*"[128] One certainly does not need to be a believer in Christian revelation to acknowledge the possible force of this claim.

Lest there be any confusion, I most emphatically am not suggesting here a recovery of, or return to, political Christianity—if such a thing ever existed. Equally distant from my intention is the vindication of the beauty and goodness of Christianity properly understood. Nor is this a call to gather hands and celebrate that mongrel concept called "Judeo-Christianity." Nor has it been my indirect plan to impugn the value of some faith tradition outside this constellation.

All that is being debated here is the claim that "political" conceptions of justice can be completely innocent of "metaphysics" or other vital elements of "comprehensive" identity. I mean this not in the sense which political liberalism can readily allow, by saying, for instance, that citizens are fully permitted to have whatever worldview doctrinal reasons they want for affirming an overlapping consensus, and that it simply doesn't even matter what reasons they give themselves for supporting a reasonable political conception of justice, whether these reasons

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[128] Böckenförde, "Rise of the State as a Process of Secularization" in *State, Society, and Liberty,* 45.

be metaphysical, non-natural, or what have you. Instead, I mean this in the sense that all of political liberalism's *structural* concepts don't even get off the ground without inviting controversial, non-natural, "metaphysical" concepts and ideas to the table. This is what I meant when I insisted on the importance, in an earlier section, that the normative force of political liberalism's *structural* concepts are felt *prior* to the formation of an overlapping consensus. What I am saying is that Rawls' basic concepts don't even make sense as plausible ideas unless this idea of the person is warranted, unless it makes sense to say, in the abstract, that human persons all meet some threshold condition of basic equality that generates a normatively significant sentiment of respect. Nothing about this idea is, however, apodictically self-evident, and this is especially so if we insist upon viewing the matter with the lenses provided by naturalism.

The tradition's way of expressing this moral axiom of basic human equality had to do with the idea of "dignity," a thickly normative, non-natural and thus, in a limited sense, metaphysical, attribute, in terms of which human beings, conceived abstractly, can plausibly be said to be equal in a normatively significant sense. There are textual reasons to think that Rawls associates this idea of dignity with his conception of personhood, but even if he did not, he would still need something like it, that is, something functionally similar to it. Without it, his basic, structural concepts become strange curiosities, but hardly anything by which one could plausibly agree to orient and regulate his or her own life. This is true, for instance, of the original position, the conception of society as a fair system of social cooperation, the idea of the reasonable, public reason, and many other basic structural concepts besides—anything that presupposes that the moral point of view is *the* point of view from which to render judgments about rightness. These principles demand that we respect the persons as a person, that we be fair to persons and not conceptions of the good. This is an exceedingly demanding standard—one which is far easier to

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pronounce than actually to follow. I do not say that to live by such an ideal is impossible for *homines sapientes.* That I simply do not know. I do, however, say that these basic structural concepts are unwarranted, unlikely to motivate anyone, and appear inadmissible unless one discards the constraints imposed by worldview neutrality, which is to say, unless one discards the liberal principle of legitimacy which supposes that principles of justice and other regulative moral ideas can be of the kind that can be justified to all persons qua persons, insofar as they make use of their common faculty of reason. At the very least, if we use just a little bit of imagination, we cannot say that these fundamental, moral axioms can be *justified* to all persons qua persons. And note: we cannot say "to all *reasonable* persons," because the idea of reasonableness—one of what I have called Rawls' *structural* concepts—doesn't even get off the ground without a certain set of non-natural, metaphysical assumptions.

I have selected the concept of dignity here for in-depth analysis, because it is, I believe, the central metaphysical, moral postulate of the contemporary, high liberal self-understanding. The argument and reconstructed historical narrative above are only a case study of what I take to be a much broader phenomenon, but substantiating this more ambitious, latter claim would probably require at least another monograph.

## 3.6 The Romantic Moment in Contemporary Liberal Thought: A Tactical Retreat into Particularism

The political liberal project is certainly not without a response to the challenge posed by the metaphysically controversial character of the entire discourse of dignity. It does not need to square the circle by attempting to naturalize what is non-naturalizable. Instead, it manages the situation through a cultivated and highly sophisticated strategy of evasion. One of political liberalism's most distinctive features is, after all, its self-consciously strong association with a

distinctive tradition of moral and political enquiry, namely, the on-going and ever developing

tradition of liberal democracy and the culturethat supports it. If my historical account has

accomplished anything at all, it has at least shown that this discourse of dignity is solidly a part of

the tradition of enquiry within which Rawls seeks to situate himself. In effect, the political liberal

project takes itself to avoid this dilemma by means of a tactical retreat into a particularist account.

Hereafter, I will describe this intellectual move as its "romantic moment."[129] This style of

thought, I believe, increasingly characterizes much of contemporary high liberal theory, broadly

speaking. However, as we shall see in subsequent sections, this ostensible solution to a very real

dilemma is not without its own serious, attendant costs, which the political liberal project has

good reason to find equally unacceptable or no less problematic.

The political liberal project's romantic moment suggests that commonly articulated critiques

are misplaced. I'll mention just two, prominent examples. Rawls is frequently taken to task for

professing a pernicious universalistic ethic that illicitly papers over actual human difference.[130]

Another complaint, frequently repeated, is that Rawls abstracts from our historically-situated

shared understandings, rendering this meaning-giving framework wholly opaque to us, and

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[129] Despite the famous and quite understandable contention of Lovejoy, *Essays in the History of Ideas,* 232 that "the word 'romantic' has come to mean so many things that, by itself, it means nothing," I use the term, "romanticism," here in a very loose sense to characterize an Enlightenment-critical, intellectual movement, which, among other things, viewed meaning and normativity not as something discovered by means of some rational procedure conducted by a fully self-transparent, autonomous agent, but rather as almost a peculiar kind of expressive making, whose general outline could be perceived in the distinctive character of a people, nation, and/or culture as represented in its ongoing collective practices and historical traditions, to which a person belongs, in some deeper sense of that word, and by which he is (partially) constituted as the being that he is. This sense of the term can be found in, e.g., Berlin, *Against the Current,* 349, cf., 18-19; Beiser, *Enlightenment, Revolution, and Romanticism,* 17, 221-222; Taylor, *Hegel,* 18-28 et passim; Rorty, *Philosophical Papers,* vol. 4; Larmore, *Patterns,* 91-130, esp. 92-107; *Romantic Legacy,* 33 ff. (Berlin's work is almost always the common source; and Johann Gottfried Herder, the Romantic figure most relevant for social and political theory). Quite apart from his famous statement and numerous equivocations, even Lovejoy, "Meaning of Romanticism for the Historian of Ideas," 275 ff. shares this sense of the term. Justifying this usage of the term and systematically relating it to the many other concerns typically identified as "romantic" (aesthetic, musical, literary, linguistic, political, philosophical) is a task far outside the scope of this present study.
[130] E.g., Young, *Justice,* 4, 101 ff.; Honig, PT, 126-61, cf., 195 ff.; Connolly, WNS, 70 ff.; Mouffe, *Democratic Paradox,* 92, cf., 63.

thereby forestalling the possibility of meaningful agreement.[131] These two diffuse parties both object to the purportedly decontextualized universalistic register of the argument, but each for different reasons. In effect, one sees too much cultural imperialistically-imposed particularity, and the other sees not quite enough. But these dual criticisms simply miss the target, because, for all intents and purposes, this aim had already been effectively discarded.

The criticisms are understandable, for some of Rawls' earlier formulations certainly did much to invite them. As has already been noted in the prior chapter, Rawls' *Theory* gave the impression that it offered a universal theory of society appropriate for all peoples, times, and places, presenting itself as, for example, part and parcel of the "theory of rational choice." The ideal of the theory was to be "a kind of moral geometry," which would proceed in "strictly deductive" fashion.[132] In the closing lines of the *Theory,* Rawls invites his reader to stand outside of history, outside of time, and outside of society in order to arrive at a point of view to which each and sundry can agree. He contends that the original position

> enables us to be impartial ... to see our place in society from the perspective of this position is to see it *sub specie aeternitatis:* it is to regard the human situation not only from all social but also from all temporal points of view.... It is a certain form of thought and feeling that rational persons can adopt within the world.... Rational persons can ... bring together into one scheme all individual perspectives and arrive together at regulative principles that can be affirmed by everyone ... each from his own standpoint[133]

The aim is to provide politics with an "Archimedean point," from which the basic structure of society might be judged.[134] If all citizens come to share the very same sense of justice, and

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[131] E.g., MacIntyre, *Whose Justice,* 3, 337; Sandel, *Democracy's Discontent,* 12, 291; *Liberalism and its Critics,* 9-10; Walzer, *Spheres,* xiv, 19, 284, 311-13; *Interpretation and Social Criticism.*
[132] Rawls, TJ, 121.
[133] Rawls, TJ, 587.
[134] Rawls, TJ, 584, cf., 260-63, 520.

consensual unanimity prevails, then we can describe that society as being "homogenous" in an approbative sense of that term.[135]

Rawls' later work, however, retreats from this view, correcting the impression given by *Theory*. I must emphasize the word "impression," because, as I will argue, much of this was already implicit in that earlier account, so the transformation must be seen as a shift in emphasis or re-alignment.

This fundamental realignment began but nine years after the publication of *Theory,* with Rawls' Dewey Lectures given at Columbia. However, it did not receive its mature statement until the 1993 publication of *Political Liberalism.* Put most succinctly, Rawls came to expressly maintain that a theory of justice must always "start from within a certain political tradition."[136] What this means, in the concrete, Rawls enunciates as early as 1980. Principles of justice can neither be selected nor justified in the abstract, but are, instead, dependent for their intelligibility, suitability, and justifiability upon a supportive intellectual historical tradition, in particular, the constellation of liberal democratic ideas that arose and have been under constant development since the late eighteenth century. The task of political philosophy, on this view, is to use this tradition—*our* tradition—embedded or implicit within political practice, institutions, and a collective way of life as a reservoir of shared understandings, in order to give voice to the material drawn from this trough, shaping it into a coherent whole which all relevant persons party to this tradition can, upon reflection, agree.

> We are not trying to find a conception of justice suitable for all societies regardless of their particular social or historical circumstances.... The aim of political philosophy, when it presents itself in the public culture of a democratic society, is to articulate and to make explicit those shared notions and principles thought to be already latent in common sense; or, as it often the case, if common sense is

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[135] Rawls, TJ, 263.
[136] Rawls, "Justice as Fairness: Political not Metaphysical" in CP, 390; PL, 14.

hesitant and uncertain, and doesn't know what to think, to propose to it certain conceptions and principles congenial to its most essential convictions and historical traditions.... What justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us. We can find no better basic charter for our social world... Apart from the procedure of constructing the principles of justice, there are no moral facts.[137]

Rawls now "presupposes that the fundamental ideas of justice as fairness are present in the public culture, or at least implicit in the history of its main institutions and the traditions of their interpretation," and that this "shared fund of implicitly recognized basic ideas and principles" would constitute what we might regard as "the educated common sense of citizens generally."[138] Political conceptions of justice should be "congruent with [the] most essential convictions" of the liberal democratic tradition.[139] The actual "content" of a theory of justice is, then, "the family of liberal political conceptions of justice."[140] The idea of a view from nowhere is wholly illusory. Every point of view "must always be from somewhere," for "there is no such thing as the point of view of practical reason as such."[141] Political liberalism has no intention of laying out "universal first principles."[142] Political liberalism always has a particular "audience."[143] Thus, we no longer say that this is or that conception of justice is most reasonable *as such,* but instead that it is "most reasonable *for us*."[144]

These formulations are certainly striking, but it's not as though he fashioned them out of whole cloth, as an *ad hoc* sort of response to debilitating criticism. On the contrary, it was implicit all along, even in the earlier writing. Though admittedly in some tension with the rational choice

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[137] Rawls, "Kantian Constructivism" in CP, 305-07, emphasis added.
[138] Rawls, PL, 8, 13-14, 78, cf., 150-51, 192.
[139] Rawls, PL, 312, cf., 369.
[140] Rawls, "Idea of Public Reason Revisited" in PL, 453.
[141] Rawls, PL, 116.
[142] Rawls, LP, 85.
[143] Rawls, "Reply to Habermas" in PL, 384.
[144] Rawls, PL, 28; "Kantian Constructivism" in CP, 307, 340, 356, cf., 348.

aspirations of the original theory, this element of bedrock tradition-constituted historicity was always there in some form.

Despite the impression given by his regrettable choice of initially presenting *Theory* as a theory of rational choice, even in this work, Rawls occasionally foregrounds the importance of human sociality, construing it as a form of historically-conditioned intersubjectivity; though admittedly, this feature has prominence mainly only in the final chapter of the third and final part of the monograph. Section 79 of *Theory* is especially clear in this regard.

> Even the concepts that we use to describe our plans and situation, and even to give voice to our personal wants and purposes, often *presuppose a social setting* as well as *a system of belief and thought* that are the outcome of *the collective efforts of a long tradition.* These facts are certainly not trivial… Our predecessors in achieving certain things leave it up to us to pursue them further; their accomplishments *affect our choice of endeavors and define a wider background against which our aims can be understood.* To say that *man is a historical being* is to say that the realizations of the powers of human individuals living at any one time takes the cooperation of many generations … over a long period of time. It also implies that this cooperation is *guided at any moment by an understanding of what has been done in the past as it is interpreted by social tradition.*[145]

Still, it's not yet fully manifest what actual normative work this more holistic and sociologically plausible conception of society does in the entire work—not yet clear, that is, till we reconsider one of Rawls' central ideas: reflective equilibrium (an important topic whose systematic discussion we have delayed until now).

It is with the idea of reflective equilibrium that historically-conditioned intersubjectivity enters Rawls' argument in a significant way, and its full normative force is apparent even in the early works. Though faint echoes of the idea can be detected in an essay from 1951, reflective equilibrium did not receive its definitive statement until 1971.[146] Reflective equilibrium is a two-

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[145] Rawls, TJ, 522-25, cf., 563-64 (from § 85). Contrast, however, with pp. 473-76, 516.
[146] Rawls, "Outline of a Decision Procedure for Ethics" in CP, 1-19.

stage process by means of which a normative decision procedure is developed, from which principles of justice can be derived.

The first stage consists of describing this ethical decision procedure. This initial description must rest upon "generally shared and preferably weak" premises, which are "widely accepted." Embodied in the decision procedure, these premises "impose significant bounds on acceptable principles of justice," but, in doing so, these regulative premises must themselves be "natural and plausible" and "reasonable and generally acceptable." These regulative constraints are non-arbitrary, because we admit only those regulative, procedure-constitutive principles that "we are ready upon due consideration to recognize as reasonable."

The second stage of reflective equilibrium consists of our testing the quality of the results yielded by the decision procedure. In justifying the principles of justice, we will have recourse to the "ethos of a democratic society." As members of a democratic society, we possess certain "convictions" that function as the "provisional fixed points which we presume any conception of justice must fit." These points of reference deserve the status of provisional fixity, because we believe that they have withstood critical scrutiny and they have an "impartial" character. For this reason, it is important that any decision procedure yield results whose normative character gels with the "judgments ... we now make intuitively and in which we have the greatest confidence"; or, where our convictions are unclear or our present judgments somehow "in doubt," the results must be of such a sort that "we can affirm on reflection." In effect, a decision procedure is acceptable only so long as it can "accommodate our firmest convictions." The principles of justice the procedure yields must either "match our considered convictions ... or extend them in an acceptable way."

Working back and forth between the first and the second stage, our goal is to produce a decision procedure that yields a determinate set of principles of justice, and if not, we can either reformulate the decision procedure or we can supplement or revise what we had originally taken to be our considered judgments. Eventually, we arrive at a "favored interpretation" of the decision procedure. Ultimately, "its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view."

Within the horizon of reflective equilibrium, moral principles as such are ultimately "contingent," in the sense that they are neither "self-evident" nor "necessarily true" but are instead simply "chosen" by means of a decision procedure. As for the moral principles that are constitutive of the decision procedure itself, these are best understood "as reasonable stipulations to be assessed eventually by the whole theory to which they belong."

Reflective equilibrium is the point at which intuitionism enters the theory of justice, if only in piecemeal form. "Any conception of justice," he writes, "will have to rely on intuition to some degree… The dependence on intuition cannot be eliminated entirely." The goal, however, is to narrow this down as much as possible so that we "reduce the direct appeal to our considered judgments."

To the objection that it is inadmissible to invoke so-called fixed points of considered judgment, using these then as regulative principles against which the principles of justice must be checked—because it is historically demonstrable that no such fixed points exists—Rawls responds that this objection rests upon a fundamental misunderstanding of the nature of moral philosophy. Moral philosophy is an activity that is always addressed to a peculiar audience made up both of those with whom we disagree and ourselves, and it is called into action whenever we face a moral quandary that requires elucidation or when we are uncertain about what to do. Within such a

narrowly circumscribed group, taken as an audience, identifying fixed points of considered

judgment is a comparatively easier task. With this in mind, it is perfectly natural for a moral

philosophy to rest upon a more primordial, underlying "consensus" supported by this determinate

audience's considered judgments, which themselves, in turn, draw (selectively) upon the tradition

of moral philosophy hitherto. This is simply the nature of justification in moral philosophy. Seen

from this vantage point, the aim of moral philosophy is simply to "extend" this more primordial

consensus by means of conceptual clarification and philosophical argumentation.[147]

The same basic conception of reflective equilibrium carries forward into the later work.

Beginning some four years after its definitive statement, Rawls returns to the theme of reflective

equilibrium, formalizing a distinction between "wide" and "narrow" reflective equilibrium—a

distinction which was already "implicit" in the earlier account. A wide reflective equilibrium, in

contrast to a narrow one, is one in which the person engaging in the procedure has stepped

outside himself, principally by considering the full force of the leading contemporary and

historical conceptions of moral and political philosophy and weighing his own convictions

against them.[148] In *Political Liberalism,* and related writings, the account of reflective equilibrium

is otherwise relevantly similar to its inaugural presentation.[149]

The fundamental importance Rawls placed on his conception of reflective equilibrium can be

gleaned from a striking set of passages from his later *Law of Peoples*. There, Rawls is expressly

clear that some of his basic structural concepts, such as the idea of the reasonable, are in no way,

shape, or form to be understood as things that are "deduced" from a conception of practical

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[147] Rawls, TJ, 18-21, 41, 318-19, 577-87, cf., 48-53, 120-22, cf., also, 13-14, 243-44, 250, 332, 432-34, 446-47, 451-52, 520-21 et passim.
[148] Rawls, "Independence of Moral Theory" in CP, 288-91, 301; text and "Reply to Habermas" in PL, 8 n. 8 and 384 n. 16. Cf., "Kantian Constructivism" in CP, 321, 325, 354, 356.
[149] Rawls, text and "Reply to Habermas" in PL, xlviii, 8-9 and n. 8, 28, 95-97, 124 and 381, 384-85 and n. 16, 399, cf., 45-46, 72, 153, 242 n. 31. Cf., "Fairness to Goodness" in CP, 270.

reason. Even further, he acknowledges forthrightly the necessarily inescapable degree of circularity involved in claims about, for instance, reasonableness. There is no meta-concept of reasonableness that specifies the meaning of the idea of the reasonable. To pose the question is silly and to look for one is futile. "Political liberalism," he writes, "offers no way of proving that [its] specification [of the idea of the reasonable] is itself reasonable. But none is needed.... It is often thought that the task of philosophy is to uncover a form of argument that will always prove convincing against all other arguments. There is, however, no such argument." Instead, these structural concepts find their basis in reflective equilibrium. With philosphical arguments of this type, it is a matter simply of laying out our considered judgments, developing principles of right from them, determining how all of it "hangs together," and waiting to see whether the result can "be affirmed by us on due reflection."[150]

Having highlighted the romantic moment in the political liberal project, and drawn attention to its strong, underlying continuity with centrally important themes from the earlier writings, we can now, I hope, put to rest the old charge that academic high liberalism is necessarily either excessively atomistic, misleadingly other-worldly, somehow disembodied, out of touch with the influence of society on the formation of subjecthood, or completely unaware of its own parochial situatedness. In truth, it does none of these things. In support of a point very much like this one, Rawls draws attention to some of Kymlicka's writings, declaring them "on the whole satisfactory" from his point of view, noting, however, that they may possibly give voice to an ethical, in contrast to strictly political, liberalism.[151] In general, I think Rawls is right to do this.

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[150] Rawls, LP, 86-88 and nn. 32-33, 123, cf., 67.
[151] Rawls, PL, 27 n. 29.

Kymlicka's reflections on liberal culture are, on my view, a perfectly natural extension of Rawls' line of thinking, and Kymlicka is quite correct, I believe, to present them in this light.

Particularly germane here is Kymlicka's concept of a "societal culture" (or what he had earlier called a "cultural structure")—a loose term he uses to characterize the common practices and institutions, shared traditions, narratives, and conventions, handed down from generation to generation through language and history, and which serve as the preeminent distinguishing attributes of those human units to which we commonly refer as nations or peoples. A societal culture imparts "a strong sense of identity" of the sort generally sufficient to generate an affective commitment to solidarity. Nothing about liberalism, suitably qualified, requires its conception of freedom to be cosmopolitan in character or completely unbounded or to have an only insubstantial tie to a particular and determinate context of meaning. On the contrary, our attachments to our own liberal culture may indeed be quite strong. Liberalism supposes that we are able—and it is good that we are able—to step back from one given way of life in order to evaluate it, but saying this in no way implies that we create ourselves out of nothing, completely *de novo.* On the contrary, the very practice of freedom itself is dependent upon, and preconditioned by, the available societal culture. A societal culture enables freedom insofar as it defines the range of choices available to its members, imparts meaning and significance to those choices, and provides the lens through which we come to identify those choices as valuable. Our culture gives us a wide, but nevertheless finite, spectrum of meaningful options from which we may select. Having access to a societal culture so described is very likely a deep seated human need.[152]

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[152] Kymlicka, *Multicultural Citizenship,* 75-106 (ch. 5), esp. 76, 77-80, 83, 90, 93, 105-06, cf., 7-8; *Liberalism, Community, and Culture,* 162-81 (ch. 8), esp. 164-65, 170, 175, cf., 75, 78-81.

To invoke another author, Yael Tamir, whom Rawls also cites approvingly, it is perfectly natural to speak of "liberal nationalism." Nothing, in principle, prevents a liberal from "recognis[ing] that culture and membership are communal features, whose worth can be fully enjoyed only together with others making similar choices." Liberals of this type are comfortable celebrating the particularity of their own culture and the embeddedness of citizens within it, without entirely giving up on ideas such as personal freedom and human rights.[153] It's a tricky balance, to be sure, but awkwardly striking this balance does justice to our experience as liberal citizens.

Only if Rawls badly misunderstands both himself and his intellectual allies and if political liberalism's romantic moment doesn't ultimately amount to much—would it be inappropriate to attribute similar sorts of ideas to the aims of political liberalism broadly speaking. In fact, on Rawls' view—as expressed in his later *Law of Peoples*—it is indeed quite important that citizens develop "common sympathies" and shared attachments, which, though usually based upon common language, history, and political culture, may conceivably find some further, alternative source. Citizens may, and even should, take pride in their histories and achievements. All this is an important part of what it means to be a "people." Nothing about political liberalism prevents its citizens from exhibiting a "*proper patriotism*" in this specific sense of the term.[154]

Liberalism is not, in principle, incompatible with the idea of particularist, national-cultural commitments and attachments. As a matter of sheer intellectual history, post-war liberalism has become, on the whole, quite leery of the idea, the idea having achieved the status of *bête noire* in light of the experiences of Japan, Germany, Italy, and Russia during the first half of the twentieth

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[153] Tamir, *Liberal Nationalism,* 8, 79; Rawls, PL, lviii n. 37; LP, 25 n. 20.
[154] Rawls, LP, 23-25 and n 17, 44, 61-62, cf., 111-12.

century. But as for conceptual incompatibility—there doesn't seem to be one. Mill, for one, saw

no basic conflict between freedom and a strong sense of national solidarity. In fact, he would go

so far as to argue that one of the "essential condition[s] of stability in political society is a strong

and active principle of nationality … a feeling of common interest among those who live under

the same government, and are contained within the same natural or historical boundaries … that

they set a value on their connexion; feel that they are one people, that their lot is cast together"[155]

For a free people, this is especially important. Ties of common sympathy smooth the way for

fully voluntary, cooperative ventures. If they are too divided at this level, representative

government will crumble.

> A portion of mankind may be said to constitute a Nationality, if they are united among themselves by common sympathies, which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be a government by themselves….When a people are ripe for free institutions, there is a still more vital consideration…. Among a people without fellow-feeling … the united public opinion, necessary to the working of representative government, cannot exist.[156]

## 3.7 The Costs of the Romantic Moment (1): Wherefore Liberal Democracy? (The Rorty Problem)

As we have seen, Rawls anchors the provisional fixed points of considered judgment in a

distinctive tradition of moral enquiry associated with liberal democratic constitutionalism and the

fund of moral intuitions implicit within the public culture supportive of it. This is what I've called

its romantic moment. This romantic moment allows political liberalism to avoid explaining, in

non-naturalistic terms acceptable to all persons of sufficient intellect, why and in what respect

humans are equal, in a degree relevant and sufficient for generating respect. Whether the fixed

points of considered judgment that orient reflective equilibrium can be justified to any chance

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[155] Mill, "Coleridge" in *Collected Works,* 10:134-35. The later editions read "cohesion among the members of the same community or state" for "nationality."
[156] Mill, *Considerations on Representative Government* in *Collected Works,* 19:546-47.

population by means of a reasoned account is simply not the sort of question to which political liberalism directs its thematic attention. Pursuant to its method of avoidance, political liberalism can simply invoke a fund of ideas purportedly implicit within democratic culture. These ideas it does not *need* to *justify,* strictly speaking. In doing so, it implicitly displaces the charges that the political liberal project is either ahistorically universalistic or that it ignores the constitutive power of the social world.

The gains are clear, but what are the costs?

Political liberalism's romantic moment enables it to invoke a tradition-given content, which it need not justify in the strict sense of that term. To some degree, this seems tantamount to suggesting that the fundamental axioms that structure and constrain a just liberal constitutional democracy are to be understood as little more than a shared moral language that late modern, advanced industrial nations just happen to hold at the present juncture—little more than a set of contingent facts that very easily could have been otherwise. Presumably this is not the conclusion Rawls intended that the reader draw, but it is completely clear why someone might have reached this conclusion. Political liberalism's romantic moment does much to invite it. One such influential reading views this transformation in Rawls' thinking as a "thoroughly historicist and antiuniversalist" turn.[157] Rorty contends that ultimately what Rawls is attempting to do is "to systematize the principles and intuitions typical of American liberals."[158] On this view, Rawls' political liberalism would then cash out as being not much more than "a historico-sociological description of the way we live now."[159]

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[157] Rorty, "Priority of Democracy to Philosophy" in *Philosophical Papers,* 1:180.
[158] Rorty, "Priority of Democracy to Philosophy" in *Philosophical Papers,* 1:189.
[159] Rorty, "Priority of Democracy to Philosophy" in *Philosophical Papers,* 1:185.

Following Rorty's lead, we are left with the provisional conclusion that the contingent fact of a fortuitous tradition of liberal democratic constitutionality and corresponding patterns of socialization appear to shoulder an enormous amount of the explanatory burden within the political liberal constellation of ideas. At least at the level of authorial intentionality, this reading is certainly wrong as an interpretation of Rawls, but it is *importantly* wrong, which is to say that its being wrong reveals something important about Rawls' project.

Despite their numerous differences, a comparison of Rawls' political liberal project with Rorty's liberal vision is instructive, for the comparison helps us to isolate the meaning and direction of the political liberal project, and thereby, to see better the dilemmas it faces.

In his own political work, Rorty champions the vision of the "'liberal ironist.'" Such a liberal citizen is both "historicist and nominalist," and he possesses the hardiness and emotional wherewithal to stare into the abyss and "face up to the contingency of his ... own most central beliefs." Hyper-sensitized to the historical contingencies that went into the formation of contemporary, collective identities, Rorty leaves nothing sacred in his disenchanted world. He encourages us instead to attempt to arrive at that "point where we no longer worship *anything,* where we treat *nothing* as a quasi divinity, where we treat *everything* ... as a product of time and chance."[160]

Rorty's political thoughtworld is thoroughgoingly antifoundationalist— or at least sees itself in this light. As such, Rorty's liberal society does not strive for a terribly elaborate moral consensus or a broadly substantive shared political culture to undergird contemporary societies, beyond a heroically thin consensus on the "standard 'bourgeois freedoms,'" which grant to the individual a

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[160] Rorty, *Contingency,* xv, 22.

"chance at self-creation."[161] In the Rortyan universe, there are no things of ultimate significance or of absolute value. There are no ends in themselves. In fact, to speak of an "'end in itself'" is only to refer to a "project," which the liberal ironist simply "cannot imagine defending on the basis of noncircular argument."[162]

Rorty's vision of decent society is what he calls a "redescription" of liberal culture made necessary by the demise of Enlightenment rationalism. This redescription of liberalism, however, has absolutely no pretensions to defend itself against its enemies, i.e., those who find liberalism repugnant and seek its overthrow. We simply need to "giv[e] up the idea that liberalism could be justified."[163] "There is," he writes, "no standpoint outside the particular historically conditioned and temporary vocabulary we are presently using from which to judge this vocabulary."[164] In the current historical moment, it is no longer possible, nor is it even necessary, to give intellectualist grounds or arguments for one's attachment to one's own way of life. To him, the "idea that liberal societies are bound together by philosophical beliefs" is positively "ludicrous."[165] "The most philosophy can hope to do is summarize our culturally influenced intuitions about the right thing to do in various situations."[166]

Of course, there are still hopelessly naïve intellectuals in our culture who demand something more solid, but—Rorty hopes—they are a dying breed. The best one can do with them is not to engage them at all, but to ignore them or to mock them. Philosophy does not progress through yet subtler refinement of our patterns of argumentation, nor through the discovery of purportedly

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[161] Rorty, *Contingency,* 84-85.
[162] Rorty, *Contingency,* 64 n. 24.
[163] Rorty, *Contingency,* 44-45, 53.
[164] Rorty, *Contingency,* 48.
[165] Rorty, *Contingency,* 86.
[166] Rorty, "Human Rights," 117.

final, ahistorical vocabularies. Instead, when confronted with these challenges that lead only to dead ends, one must simply "change the subject."[167]

Ultimately, there is no non-circular answer to the question: Why are we liberals? We simply *are.* Full stop. A citizen in Rorty's liberal society "would feel no … need to answer the question '*Why* are you a liberal?' … for she was not raised to play the language game in which one asks and gets justifications for that sort of belief."[168] Such questions are "hopeless." He who expects something more from our public creed is "still, in his heart, a theologian or a metaphysician," whose "'deep and incurable metaphysical need'" drives him to "believe in an order beyond time and change." This "'moral[y] and political[y] immatur[e]'" intellectual has not yet realized that our world is both post-religious and post-metaphysical.[169] Beliefs and convictions can still "regulate action" and one might even consider them "*worth dying for,*" even when we see them as "caused" by nothing "deeper" than the fortuitous concatenation of contingent, historical forces.[170]

On this view, the citizen's attachment to his type of society is treated as being, at base, a merely contingent, historical fact, which—again, on this view—in no way diminishes the affective experience of these ties. A mixture of social inertia, affectivity, and the absence of widespread disquiet are the sorts of things that carry the citizen further along the path his or her forebears had trodden. The idea, however, of actually justifying our political beliefs in an intellectually satisfying way is the stuff of bedtime stories and for civics classes taught to wide-eyed prepubescents. Faced with a renewed demand for legitimation or revolution, this type of

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[167] Rorty, *Consequences,* xiv, xxxi.
[168] Rorty, *Contingency,* 87.
[169] Rorty, *Contingency,* xv-xvi, 46.
[170] Rorty, *Contingency,* 189, emphasis added.

liberal can only stutter or shrug. This is, in rough outline, "postmodernist bourgeois liberalism."[171] On Rorty's view, this is all we have left. Everything else is just hand waving.

There is, however, absolutely no reason to think that the political liberal project entertains anything at all like these thoughts. There is, in fact, much evidence to the contrary. When push comes to shove, political liberalism *wants* to say that its political values are "objective."[172] It *wants* to claim a legitimate stability for itself that reaches a bit deeper than a claim about the fortuitous concatenation of historical contingency and other such accidents. It *wants* a conception of legitimate stability that rests upon something far sturdier than a claim about the arrangement of "historical circumstances … for the time being." It does *not want* to be "contingent on circumstances remaining such as not to upset the fortunate convergence of interests."[173] It *wants* to say that the principles of constitutional democracy are "very great values and not easily overridden and the ideals they express are not to be lightly abandoned," and that these principles are "worth defending."[174] It *wants* to say these things not of this or that nation, during this or that decade, but simply and without qualification. It *wants* to say that a just political order "does not … depend on historically accidental or established delusions, or other mistaken beliefs," thereby assuring its freedom from ideology and false consciousness.[175] It *wants* something like world-transcending validity. It wants to articulate a set of values that have a hold on us quite irrespective of nationality, geography, location, and temporality. It *wants* to reject "the moral emptiness of … nihilism," in order to affirm the truth that "just and decent civilized societies … all depend *absolutely* on making significant moral and political distinctions *in all situations* … principles and

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[171] Rorty, "Postmodernist Bourgeois Liberalism" in *Collected Papers,* 1:197-202.
[172] Rawls, PL, 110-25 (III:5-7). Cf., "Kantian Constructivism" in CP, 340-41.
[173] Rawls, PL, xl-xli, 147.
[174] Rawls, PL, 39, 218.
[175] Rawls, PL, 68-69 and n. 21.

restraints that *always apply to us fully*."[176] In his later *Law of Peoples,* Rawls will simply state outright that it is his belief that the liberal democratic way of life and culture are "good in themselves" and "superior" to other types of societies.[177]

And if being strictly political isn't enough under certain demographic conditions, then political liberalism will shift in accordance. To those, for instance, who say *extra ecclesiam nulla salus* and seek to use state power to save others out of neighborly love, it is quite impossible for our political liberal behavior not to at least *imply* the falsity of this belief. It is part of the nature of liberalism to remove certain items from the political agenda, and it is not expected that we should debate those who disagree about the political importance of "such fundamental matters" as the basic rights and liberties identified by the liberal tradition. "In affirming a political conception of justice," writes Rawls, "we may eventually have to assert at least certain aspects of our own comprehensive … doctrine…. We may have no alternative but … to maintain the kind of thing we had hoped to avoid."[178]

Rawls does not *want* to accept Rorty's conclusions. That much is clear. The fundamental question is how he, to what extent he, and/or whether he successfully distinguishes himself from Rorty. Political liberalism's very obvious strength is that it permits one to avoid justifying basic moral axioms. Among other things, it calls these its provisional fixed points of considered judgment and treats them as artifacts implicit within the liberal democratic tradition of thought and the type of culture it generates. Moreover, because these moral postulates constitute the fundamental, structural concepts with which Rawls works, these same, fundamental moral axioms can't themselves be justified, strictly speaking, by, for instance, invoking the original position, the

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[176] Rawls, "50 Years after Hiroshima" in CP, 572, emphasis added (~ LP, 103).
[177] Rawls, LP, 61-62, cf., 111, cf., however, 47-48, 122.
[178] Rawls, PL, 138, 152, 155, 157, cf., 4, 154. Cf., TJ, 215-16.

idea of the reasonable, the conception of society as a fair system of social cooperation, a conception of the person, or any such related conception. Instead, their ultimate justification, from which they derive their warrant to regulate and constrain life plans and worldviews, consists, in the final analysis, in this sincere appeal to a tradition into which many of us have been socialized to some degree or another.

Yet, if Rawls is sincerely to distinguish himself from Rorty, he will need to explain, in a truly plausible fashion, how or why the *emergence* of this tradition of moral enquiry was good, necessary, legitimate, providential, rational, reasonable, etc. etc. Failing that, he will be forced to say that beyond the contingent fact that it now happens to stand silently in the background, there is not much more to be said for or against this tradition of moral enquiry, at least not much more in terms of philosophical justification. This is Rorty's position, but we have good reason to doubt that it is true of Rawls. Hereafter, I will call this dilemma the "Rorty problem."

Rawls seems to be genuinely aware of the dilemma, though it is an open question whether his response is adequate to the task. Three possible, political liberal responses to the Rorty problem stand out in particular: (1) first is Rawls' hypothetical narrative concerning the emergence of just institutions; (2) second is his attempt to legitimize the non-political arguments made by ethical liberals of the past; and (3) third, he suggests that one must start somewhere, and *our* tradition is as good a place as any. None of these three responses unambiguously succeed in dispelling the Rorty problem.

We might take Rawls' first possible response to the Rorty problem to consist in his thematically related discussion about the emergence of just institutions (a topic reserved for

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nonideal theory).[179] Though the discussion in *Political Liberalism* (IV.6-7) might very easily not receive the attention it deserves, and one might leaf through it quickly, the sheer frequency of inter-textual references to it is a testament to its importance.[180] Political liberalism's moral psychology presupposes that it is possible to develop regulative, action-motivating desires based upon what one considers to be right or good (ideals, to use Rawls' sometimes preferred term). We learn to become so constituted and oriented towards these ideals through our environment, which subtly shapes us. We are "educated to that ideal by the public culture and its historical traditions of interpretation." So far, so good. But in a comment that is more revealing than Rawls had intended, and which is buried in a half page long footnote, he writes: "How these conceptions and ideals enter into the public culture itself and often stay there … is a long and different story."[181]

When he does finally return to this story, he basically recapitulates a line of argumentation familiar from Kant's historical writings. Rawls hypothesizes that "historical events and contingencies" may have led to the acceptance of liberal principles of justice, but first only "as a mere modus vivendi" and only in order to avoid "endless and destructive civil strife." Though it is far less clear in the main text, the Introduction written for the paperback edition confirms that he has the Wars of Religion in mind. Given that liberal principles were, by hypothesis, first adopted merely as stopgap measures, he describes this acceptance as "reluctant" "acquiescence" in contrast to heartfelt affirmation. Initially, at least, the question concerning the right, the good, the fair, or the reasonable seem not ever to have arisen for these individuals.

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[179] Rawls, PL, 17-18. If anything, this is an oblique response to the charge in Habermas, BFN, 58 ff., that Rawls exhibits a peculiar blindness to questions concerning the genesis of just institutions and legal orders. The charge is denied directly in Rawls, "Reply to Habermas" in PL, 418 n. 64.

[180] E.g., Rawls, text and "Reply to Habermas" in PL, xlvi, lv-lvi, 65, 86 and n. 34, 208, 219 and n. 15 and 389, 422 n. 68. The reference is IV.6-7.

[181] Rawls, PL, 8 5-86 and n. 33.

"Slowly over time," citizens learned to appreciate these stopgap measures, which led them to affirm these stopgap measures as principles of justice worthy of deeper affirmation, such that if a conflict were later to arise between liberal principles of justice and their own worldviews, citizens would sooner revise their own worldviews than abandon these originally stopgap modus vivendi measures that seem, for them, to have somehow solidified into principles of justice. This development would bring into existence a "constitutional consensus"—a type of consensus that is neither deep nor wide, but which is to some degree principled, particularly when seen in contrast with a mere modus vivendi arrangement. A constitutional consensus lays out only a set of procedural political principles anchored in a constitution.

But how plausibly to explain this slide from acquiescence to affirmation? Rawls acknowledges that custom, tradition, and the desire "to conform to what is expected and normally done" may have played some role in this process, but, in truth, he really wants to explain the change without invoking these extra-rational, more sociologically-accented elements. In this attempt, Rawls first appeals to his conception of a "reasonable moral psychology" (discussed in the previous chapter). Recall, for the moment, that to have a reasonable moral psychology by definition entails, among other things, that one possesses "a basic desire to be able to justify our actions to others on grounds they could not reasonably reject." If this reasonable moral psychology is to be taken as a strictly psychological claim—as the name, at least, would suggest—what this reasonable moral psychology says, in effect, is that human beings have a basic desire to follow the liberal principle of legitimacy. However, as an empirical claim about human psychological makeup, this is probably quite incorrect of adult men and women taken at random. It is probably only true—if ever true at all—if we qualify by adding "justify … to others, *whom we respect as our equals,*" but it is not self-evident that we respect all other chance human beings as our equals, and

invoking this idea is doubly dubious in attempting to explain the emergence of a principled tradition of liberal thought out of a mere modus vivendi arrangement.

What Rawls needs to be able to explain is how it is that stopgap measures, adopted for purely strategic purposes, could possibly transform into principles of justice, right, or fairness of the sort that are unlikely to be abandoned after the truly extreme conditions that demanded the stopgap measure in the first place no longer obtain. The idea of a reasonable moral psychology doesn't close the gap in historical explanation, or to the extent that it does, it is forced to make questionable, and very possibly flatly false, assumptions about the nature of the human psyche.

In the second stage of his hypothetical historical reconstruction—within which he attempts to explain how a strictly political overlapping consensus might plausibly arise later—Rawls supposes that circumstances would inevitably force those subject to a constitutional consensus to deepen the nature of the principles of justice in such a way that they could become acceptable to persons qua persons. They would do this, he contends, because it is "rational" to abstract from one's own comprehensive worldview and to appeal to deepened principles of justice, if only in order to form majority coalitions with others who do not share the same worldview as we do.[182]

This last claim, however, would be true only if there exists no one, single (partial or complete) comprehensive worldview in this hypothesized, historical society to which a majority of citizens already subscribed and upon which it might prove possible to establish a politics that did not regularly resort to violence. This presumption, however, is historically and sociologically

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[182] Rawls, PL, xxxviii-xxxix, 148-49, 158-86 (IV.6-7), esp. 158-65 and n. 25, 168. Rawls has highly revised the corresponding account in the essay from which Lecture IV is drawn. See "Idea of an Overlapping Consensus" in CP, 440-46. Cf., LP, 44-45, 112-13. For Kant's conceptually similar presentation, see "Idea for a Universal History" in PW, 41 ff.

dubious. If this presumption were true, then the classically liberal concern about majority tyranny would only be so much words.

The historical narrative doesn't succeed in unambiguously showing the necessity or goodness of liberal constitutional principles becoming fixed points of considered judgment. It's hard to imagine how any strictly political explanation possibly could. At best, the historical narrative has explained how some of the basic liberties (freedom of conscience) were, in an age of extreme strife, adopted as a modus vivendi stopgap, but it has not succeeded in explaining the transformation of these stopgap measures into the highly demanding principles of the sort many of us might freely recognize today.

Another possible avenue for justifying the fixed points of considered judgment given by our traditional liberal democratic heritage is also closed to political liberalism. So long as it wishes to remain true to its own framework and historical insights, political liberalism's explanation cannot invoke the actual arguments offered by historical liberal intellectuals, at least not on their own terms. Instead, political liberalism must treat these arguments as either epiphenomenal, because the original adoption of liberal principles was simply a modus vivendi stopgap advanced in the face of bloodshed; as oppressive, because non-political in character; as hopelessly inadequate, because no longer convincing; or—and this last one is the path it chooses—as strange exceptions to a general rule, which the general rule itself either cannot explain or to the extent it tries to do so, draws discomfiting scrutiny to its status as a general rule.

Along these general lines, Rawls' second possible response to the Rorty problem arises in his discussion of the idea of public reason. There, Rawls does allow that historical figures can be seen as having legitimately invoked comprehensive worldviews to promote their own programs of reform. However, he does so, qualified, at two points in his career, with differing critical

stipulations. As we saw in the previous chapter, political actos can legitimately invoke their comprehensive worldview in public debate only if (a) it serves the cause of bringing into existence the conditions that favor political liberalism or (b) they are able to explain their invocation in terms translatable into types of reasons recognized as valid for the public forum by political liberalism.[183] Ultimately, what justifies and sanctifies historical behavior is its tendency to promote the cause of political liberalism or its capacity to be re-described, retrospectively, in language and concepts familiar to political liberalism.

But this isn't an answer to the Rorty problem. The legitimacy of historical events (arguments made by historical non-political liberals) are *assessed* in terms of a later intellectual complex (political liberalism), but this later intellectual complex that was yielded by these historical events is itself *justified* by an appeal to a tradition of moral enquiry (as per the romantic moment), whose very meaning and content is given by these same historical events, whose own legitimacy—I repeat—is to be assessed in light of a later intellectual complex … *ad infinitum.* Here, an ever-revolving circle appears to form.

His last and final apparent response can be gleaned from Rawls' stipulations concerning the original position, which, recall, is used to generate a freestanding, political conception of justice during the first stage of exposition. Rawls is all along careful to be very clear about just what it is that the original position can be said to accomplish. It can show only that a conception of justice, viewed from the moral point of view, is superior to an enumerated list of determinate, alternative conceptions of justice, say, intuitionism, utilitarianism, and perfectionism. This entails that argument is always relative to the enumerated list of conceptions of justice known to the tradition. This, in itself, is not, per se, a defect. Still, what this does mean is that the argument rests upon a

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[183] Rawls, text and "Idea of Public Reason Revisited" in PL, 247-54 (VI:8), esp. 251 and n. 41 and 462 ff.

"historical consensus about what so far seem to be the more reasonable and practicable moral conceptions," according, that is, to "the tradition of moral philosophy."[184] In a parenthetical aside in *Political Liberalism,* Rawls acknowledges that the decision procedure of the original position, which begins with a list of competing conceptions of justice, simply assumes that this set includes sensible options. Some assumptions must be made, and why not this one? "We take as given a short list of conceptions of justice found in the tradition of moral philosophy…. Of course [the decision procedure] presupposes the reasonableness of the tradition of moral philosophy; but where else can we start?"[185]

But, as an answer, this seems even less satisfying than the first two, at least if viewed as a possible response to the Rorty problem. This answer is only a signal that one wishes to throw one's hands up in exasperation.

The political liberal project avoids justifying its grounding moral axioms by what I have called its romantic moment, i.e., its appealing to a determinate and circumscribed tradition of moral enquiry. There is no problem with that so far as it goes. Still, if we wanted to know if there is anything to be said on behalf of that tradition of moral enquiry itself, political liberalism's most likely responses don't seem quite up to the challenge. It is tempting, then, to conclude that the goodness of political liberal principles and virtues are simply presupposed. In fact, it's hard to see how such a conclusion could be avoided.

Political liberalism's romantic moment has its obvious strengths, but the costs are significant. In particular, it has difficulty dealing with what I have called the Rorty problem, namely, the conclusion that while liberal culture may be appropriately viewed as our fortuitous and cherished

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[184] Rawls, TJ, 581; PL, 292-94.
[185] Rawls, PL, 259.

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bequest, actually justifying the principles, ideals, and common practices that comprise this bequest is an impossible task. Political liberalism gives every indication that it does not *want* to accept this conclusion, but the resources with which it might do so are not readily forthcoming. With good reason, political liberalism's trouble in dealing with this problem leads one to conclude that the value of liberal culture is simply presupposed.

To simply assume that one's own way of life is fundamentally privileged above countless other choices seems perfectly harmless and really quite natural, as far as assumptions go. Still, we should be perfectly clear that this is neither a response to the Rorty problem, nor is it consistent with worldview neutrality.

## 3.8 The Costs of the Romantic Moment (2): Intra-Traditional Conflict and the Liberal Principle of Legitimacy

Whether or not liberal democratic culture can or should be justified beyond what Rorty has given us, and in what sense this enterprise would even make sense, are questions we can leave to the side for the moment. It seems unlikely that we can succeed in this task if we are to limit ourselves to an analysis that is strictly political. Moreover, if we are to be perfectly forthright with ourselves, we are not entitled to foreclose the possibility that this may prove ultimately to be an insoluble task, even without the qualifications imposed by political liberalism. However this may be, a yet deeper quandary than the Rorty problem arises if we take a merely internal view of the issue. Leaving these matters to the side, two further questions rise to the fore: (a) first, what should we make of conflict *within* a tradition, and ultimately (b) how does this romantic moment interface with the liberal principle of legitimacy?

The political liberal project relies upon some purportedly shared, yet implicit background of meaning—something to which all persons *within* that culture do, or can upon reflection, assent.

Quite understandably, some contend that this solution falls flat on its face, seeing as it is the case that the interpretation of every tradition that is in any way robust is almost always highly conflictual, and the moral premises, principles, intuitions invoked by the reconstructive historian are, more often than not, only ever imperfectly shared or manifested in the traditions, institutions, and self-understandings of this or that historically-specifiable culture or people.[186] This general observation is one of the principal points of departure for the discourse of difference, and we will explore this challenge to the political liberal project in Part II.

Admittedly, this possibility is not something Rawls has overlooked or failed to consider. Indeed, Rawls does acknowledge that our "public political culture may be of two minds at a very deep level," and this may explain the persistence of "enduring controversy" between contending views. In fact, this notion of intra-traditional controversy and conflict are recurring themes in his writings. It is precisely the existence of such "profound and long-lasting controversies" and "deep political conflicts … in the democratic tradition" that call for the practical task of political philosophy. If there were no controversy of this sort, then political philosophy, broadly understood, would very likely soon discover that it lacked a *raison d'être*.[187] Resolving this conflict requires—or so it would seem—that we have recourse to some higher order operation or principle, which can rise above the fray. This explains the enormous appeal of all proceduralist understandings of right, of which Rawls' original position is only the most famous example. The metaphor of the overlapping consensus conjoined to the liberal principle of legitimacy attempts to save the appeal of this formulation, without running afoul of human plurality and the conditions

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[186] Connolly, WNS, 64 ff.; Spragens, *Reasons and Democracy,* 6 ff.; Bloom, "Justice: John Rawls versus the Tradition of Political Philosophy" in *Giants,* 318, 326, 334

[187] Rawls, "Justice as Fairness: Political not Metaphysical" in CP, 392-93; PL, 9, 44-46, cf., liii-lv, lviii, 4-5, 22, 35, 118, 151-55, 227, 240, 338-39, 368-69. Also TJ, 580; "Kantian Conception of Equality" and "Social Unity and Primary Goods" in CP, 255-56, 325-27, 355-56, 358 and 381-82; "Idea of Public Reason Revisited" in PL, 479-81, 484-88.

this seems to impose upon a responsible account of freedom. But it is itself a question whether this is possible, while still maintaining the type of worldview neutrality implied by the liberal principle of legitimacy.

It may well be that the conflict within the family of liberal democratic traditions is such that our living together under a single, authoritative framework will always generate profound resentment on the part of this or that party at this or that moment of time. Personally, I doubt that things are quite so bad as all that, but certainly this tragic possibility cannot be ruled out *a priori*. But it must be borne in mind that Rawls perfectly well understands the conditional character of his construct. As mentioned at the close of the previous chapter, Rawls sought to show not that a political liberal overlapping consensus would necessarily be possible, but only to explain at the highest level of abstraction and generally *how* and *in what sense* it *could* be possible.

However this may be, the conflict within our tradition is not simply a conflict between siblings within the family of liberal democratic conceptions of political order, nor so simply one between this or that fashionable moral philosophy from the last several centuries. For there is a long simmering conflict between a thorough-going naturalism and, quite literally, everything else, and there can be no doubt at all that this thorough-going naturalism has a greater claim to worldview neutrality than does political liberalism. At the very least, it can plausibly purport to being *less* metaphysically-inflected than can political liberalism. Quite apart from any of the other legitimate doubts we may have had about the political liberal project, it is when we foreground *this* intra-traditional conflict that the desire to articulate a purportedly free-standing, postmetaphysical, worldview neutral conception of political order begins to appear in an increasingly questionable light.

A highly demanding conception of human equality is basic to the political liberal project. In fact, I'd go so far as to say that this highly demanding conception of human equality is contemporary high liberalism's lodestar. While there is certainly warrant for this conception of human equality within the tradition of Western thought and even more strongly within liberal democratic political thought, it is not universally embraced in its most exacting form, and because it sits rather uncomfortably within the increasingly thoroughgoing naturalist worldview—which, as I've emphasized, is our dominant mode of understanding, and a more likely candidate for worldview neutrality—this highly demanding conception of human equality will always have difficulty claiming worldview neutral status for itself. An appeal to a particular tradition of thought in support of basic axioms may prove helpful here, and this recognition (political liberalism's romantic moment) is to be applauded, but once the liberal principle of legitimacy is applied to it, we can no longer be perfectly confident that universal, basic human equality emerges unsinged. With respect to those who do not recognize it in its most uncompromising form, this highly demanding conception of equality cannot be defended by shrilly decrying opponents as "unreasonable" persons, for this has the perverse effect of not only casting aspersions on the good name of reason, but also of hardening hearts and closing ears. It may be that this uncompromising and wholly demanding form of equality will not win out in the on-going and future conflicts within our culture. There is certainly no way to know this in advance. But the narrative framework proposed by the political liberal project—because its liberal principle of legitimacy is not thick enough to persuasively sustain so exacting a principle—seems ill-equipped even to promote a desirable outcome. Also, and perhaps this is more important, it deflects attention from the real sources of disagreement between persons within our culture.

One thing at least seems clear enough. Political liberalism's romantic moment may succeed in insulating it from justifying controversial moral premises that seem, at least to my view, metaphysical in character. However that may be, this tactical retreat into particularism suggests that the liberal principle of legitimacy as formulated is unsound. Recall that this principle states that political power is exercised appropriately only so long as its motivating ideals and principles could be endorsed by all free and equal citizens by means of their shared faculty of human reason, which, as I've glossed it, is synonymous with the aspiration for reasonable worldview neutrality. And yet the very strength of the romantic moment in the political liberal project consists in its suggestion that reason must be supplemented by the content of a tradition for it even to get off the ground, which is to say that it does not need to be, and very possibly cannot be, justified as such to all persons qua persons. But this, however, is precisely what the plain sense reading of the liberal principle of legitimacy appears to require. Stated so baldly, it should, I hope, be clear that the romantic moment and the liberal principle of legitimacy cannot both be maintained. One or the other must go.

Exaggerating only slightly for the purpose of effect, there's a considerable danger of high liberal theory becoming just an evening parlor game played by calm, dispassionate, and cultured Ivy League-educated gentlemen, in which points are awarded to whosoever can best organize the moral intuitions of the North American, white, upper middle class, rank ordering their various commitments into a coherent, philosophic system; and lasting fame is given to whomever can not only best articulate the moral intuitions of Lyndon Johnson's Great Society, but also explain why a public life guided preeminently by faith or unswerving commitment to the truth of this or that

substantive moral proposition is possibly unreasonable and perhaps even sinisterly intolerant. This parlor game would be completely innocuous and fully worthy of wide participation were it not the case that it provides our nation's intellectual class with an excuse to overlook or prematurely dismiss a large portion of people in this nominally democratic country who have no interest in this parlor game, and actively resent them for playing it and not inviting them to the table on terms they can accept. If stability is really what we want, and not just a simulacrum thereof, then what we need is a public philosophy whose own principles and construction do not generate profound resentment and a continuing sense of disenfranchisement, for which contemporary conditions of pluralism and polarization provide ample testimony.

We need something that reaches *deeper;* or if not deeper, than something a bit more self-aware, but this requires a shift in the basic parameters of the conversation: for starters, the rejection of the liberal principle of legitimacy as articulated by contemporary, high liberal theory, for the core of that principle has been under assault intellectually and sociologically for far too long to sustain itself with plausibility.

One cannot demonstrate dispositively that this need is real. At best, one can confront the most serious expositors of various alternative views, to determine whether, and/or to what extent, they are successful. This is what I have attempted to do. Admittedly, this imparts an irrevocably conditional character to the discussion above. I do not pretend to offer that "something deeper" here, but this is presumably what we need, if we are to have real and lasting, liberal democratic stability. This, then, is a hopeful—if perhaps slightly naïve—call for that something deeper.

In subsequent chapters, we shall see two intellectually respectable traditions of critiquing liberalism, drawn both from the far left and right, and both of which are deeply sensitive to the

fact of pluralism. I call these two the "discourse of difference" and the "reactionary politics of meaning," and their thought worlds revolve around the writings of Michel Foucault and Carl Schmitt, respectively. The discourse of difference ridicules the political liberal project for its continual failure to meet its universalist aspirations, and these frustrated aspirations are desublimated and redirected into social processes of disciplinary normalization that undermine the practice of real democracy understood as a practice of egalitarian freedom. But, from my view, this critique fails to hit home, because the political liberal project has effectively *already* given up on these aspirations, despite the fact that some uncomfortable remnants of that original view remain awkwardly juxtaposed with its own particularist account of itself. Moreover, the discourse of difference ultimately fails to give a cogent account of its own motivational sources. Sharing the discourse of difference's penchant for analyzing liminal political events, Carl Schmitt paves a nevertheless quite different path. He castigates the liberal tradition for its continual effort to find neutral ground upon which a stable polity could be erected and its general unwillingness to recognize the way in which every political culture possesses its own distinctive and distinguishing center of gravity that furnishes a basis for political unity. Still, the darkness of his view can be lost on no one, and it is quite unclear that he ever succeeded in surmounting the empty, purely formalistic legal theory to whose criticism he had dedicated his professional career. Though we are by no means obligated to accept the conclusions or contentions of these two competing schools, their highly influential critiques positively shatter our own self-confidence in the unproblematic status of the purportedly weak and widely held, post-metaphysical presumptions upon which the political liberal project draws.

However, before turning to these two intellectual traditions, we must tarry a bit longer, re-examining one particularly prominent exemplar of postmetaphysical liberalism: Jürgen

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Habermas. His writings give the impression of having eluded the types of dilemmas to which the political liberal project succumbs, but, ultimately—as I will argue—they repeat the same basic logic.

## 4. Excursus: Habermas, Worldview Neutrality, and God—A Continuation of Political Liberalism by other Means

Of contemporary, liberal political philosophers, Jürgen Habermas is surely the most prominent to defend the core, animating aspiration of Rawls' political liberalism, namely, the liberal principle of legitimacy and the aspiration for worldview neutrality that this principle expresses, although he attempts to use other means to do so.

It is well known that the two men exchanged critical words with one another in the mid-1990's, which, on the face of it, might militate against grouping them so closely together, as I do here. In the end, they both traded functionally equivalent accusations. Rawls views Habermas' political thought as a form of "comprehensive" as opposed to "political" liberalism, whereas Habermas treats Rawls' thought as "substantive" in contrast to "procedural."[1] Seen, however, from the perspective taken here, they are both correct and incorrect, neither more or less than the other. The important point, however, is that both views aspire to be "political" in Rawls' specific sense of that term, inasmuch as they both make claims to present liberal democracy in a somehow postmetaphysical and freestanding fashion. Perhaps, in the end, the most significant difference between them is their disagreement as to whether or not the category of "truth" has relevance in terms of justifying a strictly political conception of justice.

It would be an unforgivable mistake, here, to ignore Habermas' contributions to this debate about the nature and justification for this type of liberal theory after metaphysics. Not only has Habermas lived longer and thus has had a chance to reflect at greater depth on the thoroughly changed, twenty first-century intellectual landscape; not only has his immersion in the tradition of sociological inquiry given his normative reflections a degree of concreteness often lacking in

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[1] Rawls, "Reply to Habermas" in PL, 373, 376 ff. et passim; Habermas, BFN, 59, 64 et passim.

North Atlantic high liberal theory; not only has he, owing to peculiarities of the German constitutional tradition, had greater opportunity to reflect upon a central theme in my critical reflections—but he (quite correctly) understands himself to be reaching a bit deeper than Rawls in terms of justifying the central axioms of his project. As such, Habermas attempts to offer something more fundamental than just a "*lucky* convergence of reasonable worldviews" which just so happen to "*felicitous*[*ly*] overlap"—a move which effectively demotes consensus to a mere "social fact."[2] In all likelihood this valiant effort should be interpreted in light of Habermas' laudably wide-ranging reading habits, which have enabled him to cultivate a familiarity with critical objections far beyond those ever even considered by Rawls.

At least in terms of conceptions of legitimacy, Rawls and Habermas differ not at all. Viewed from this perspective, their other, otherwise significant differences melt away. Echoing the unchanged, basic substance of Rawlsian patterns of thought, Habermas contends that "all coercively enforceable political decisions must be *formulated* and be *justifiable* in a language that is equally intelligible to all citizens," and that this is an essential condition of state legitimacy.[3] In effect, this is Rawls' liberal principle of legitimacy. Like Rawlsian political liberalism, state neutrality does not in any way entail some fairy tale conception of neutrality of effect, but, rather more simply, the effort to disaggregate a background form of life or worldview from the basic institutions and daily operations of the state.[4] Redemption of this conception of legitimacy, as we shall see, runs into a similar set of difficulties observed already in the case of the Rawlsian political liberal project.

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[2] Habermas, "'Reasonable' versus 'True'" in IO, 78, 83-84, emphasis added, cf., 92 ff. Cf., "Reconciliation through the Public Use of Reason" in IO, 50, 62-63; "Remarks on Discourse Ethics" in JA, 25-30. Cf., however, BFN, 59 ff.
[3] Habermas, "Religion in the Public Sphere" in BNR, 134. Cf., BFN, 110, 135, 161, 458 et passim.
[4] Habermas, "Multiculturalism and the Liberal State," 851-52; "Nation, the Rule of Law, and Democracy" and "Struggles for Recognition" in IO, 144 and 217-18, 220, 225, 227-29; "Equal Treatment of Cultures" in BNR, 282-83, 286, 290, 303, 305-07, 309-10.

In what follows, I lay out, in very brief form, Habermas' orientation towards modernity—an account in which the accent falls heavily upon the idea of disenchantment and postmetaphysics (at least up through the 1990's). I draw out the consequences for political, legal, and constitutional theory that Habermas infers from this modern condition (§ 4.1).

In the next two sections, I critically examine the two notions that provide support for the promise of procedural neutrality: discourse ethics and deliberative democracy. First, I sketch the outlines of his discourse ethics. Noting the way in which the procedure of discourse ethics gives functional embodiment to the idea of universal human dignity, I raise some very brief critical objections (§ 4.2). Next, I lay out the differences and similarities between his conception of deliberative democracy and discourse ethics, focusing on the problems that arise from translating a purely abstract, regulative idea into the realm of concrete politics. I also note some of Habermas' characteristic responses to the matter (§ 4.3).

In the next two sections, I take my point of departure from Habermas' claim that he gives more weight to the idea of democracy than does Rawls. These sections aim broadly to call into question that claim. First, I critically examine his conception of popular sovereignty and democratic legitimacy, suggesting that his view sits rather uncomfortably between hard-nosed realism and radical democratic sentiment, unable to truly satisfy either party (§ 4.4). Next, I question the success of Habermas' co-originality thesis—another important point on which his putative differences with Rawls turns (§ 4.5).

Having sketched, in a very brief way, the roots of Habermas' political thought, we can now turn to the main theme: the *background* of his politics. The first relevant idea here is Habermas' notion of constitutional patriotism, which is itself a stark rejection of all traditional conceptions of nationalism. Here the idea of a people is replaced by the idea of procedure and abstract rights

(§ 4.6). The next relevant idea here is Habermas' notion of the lifeworld, that is, the fund of implicit taken-for-granteds that backgrounds all social interaction and whose presence is vital in explaining the possibility of practical reason, discourse, and democratic politics. In his hands, this idea of the lifeworld has a distinctively rational and liberal democratic inflection built into it. This idea, especially as it is brought to bear on politics, leads, nevertheless, in a very different direction than the idea of constitutional patriotism. The idea recapitulates what I called, in the previous chapter, the "romantic moment" in contemporary liberal thought (§ 4.7). The overriding importance Habermas does and *must* attribute to the lifeworld represents an implicit challenge to the idea of procedural neutrality and raises a number of difficult if not insoluble dilemmas (§ 4.8).

In the final two sections, I take up a palpable shift in Habermas' thought: his clear disavowal, beginning in the twenty-first century, of thoroughgoing secularism. This shift is significant, largely for the light it sheds on the relationship between purportedly postmetaphysical varieties of liberal democratic theory and what I have, in the previous chapter, called the discourse of dignity. It is at this point that the convergence between Habermas and Rawlsian political liberalism becomes clearest, as Habermas works to extend the latter's project (§ 4.9). More so than Rawls ever did, Habermas has become acutely sensitive to the importance of the tradition I have named the discourse of dignity, and he is especially sensitive to the latent conflict between this tradition and naturalism broadly understood. What may seem to follow as a necessary consequence of this recognition would be the abandonment of any pretensions to worldview neutrality. Although Habermas does not accept this conclusion in his own voice, all of the likely strategies he deploys in order to avoid the conclusion are deeply problematic (§ 4.10).

I conclude then that, despite their differences, Habermas and Rawlsian political liberalism find themselves confronted by the same sort of dilemma.

## 4.1 The Meaning of Modernity: The Disenchanted, Postmetaphysical Age

In the 1970 and 1980's, with fainter echoes even into the 1990's, Habermas welcomed Weberian disenchantment with open arms as an accomplished fact. After God has died, the only thing left standing is the intuitive orientation to universalistic egalitarianism, with the notion of transcendence rearticulated in a fundamentally immanent fashion. Faced by the challenge of natural science, philosophy must take the place of Christianity.

> Lately there has taken place a significant shift giving a radical this-worldly interpretation to the message of salvation…. God has come to signify little more than a structure of communication which compels the participants to rise above … contingency…. These trends characterize a development in which what is left of universal religions is but the core of universalistic moral systems…. Christianity … was the last system of ideas which provided a unifying interpretation acknowledged by more or less all the members of the community. However, once it was confronted with the rival claims of science and profane morality, Christianity could no longer satisfy this demand. Here, then, philosophy must step in its place.[5]

This historical transformation necessitated a new and distinctive orientation towards normativity and authoritative points of social reference. Communication becomes the fundamental substrate of society. "The authority of the holy," he writes, "is gradually replaced by the authority of the achieved consensus."[6] The (atavistic) religious worldviews that still remain amongst us "must take up the fallibilistic presuppositions of secularized thought."[7] Habermas' magnum opus in political theory is premised upon "a completely secularized politics," for which "no plausible alternatives exist."[8] Almost concomitantly, he heralded the resolute arrival of the age of

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[5] Habermas, "On Social Identity," 94-95. An almost identical sentiment is expressed in "Kulturkritik der Neokonservativen" in KPS, 5:52. (Strangely, the relevant paragraph has been excised from the English translation published four years later in NC, 43. It is preserved, however, in the earliest translation from 1983: "Neoconservative Cultural Criticism," 87.)

[6] Habermas, TCA, 2:77, more generally: 77-111.

[7] Habermas, BFN, 551 n. 39.

[8] Habermas, BFN, xlii, 443, cf., 26.

"postmetaphysical thinking," placing great hopes in intersubjective, yet purely "procedural rationality."[9]

The themes of secularizing modernization and postmetaphics converge to impart a distinctive hue to his political thought. In the modern, postmetaphysical age, politics and legitimacy are "radically this-worldly."[10] Legitimate, modern constitutional democracies must eschew all reference to religious and metaphysical forms of argumentation.[11] If it is not to lose its own footing, philosophy must practice a cultivated "methodological atheism."[12]

The implications of this postmetaphysical approach to politics are far-ranging. If it is not to be paternalistic, liberal democratic theory must not "prejudge" any substantive controversy.[13] Under conditions of modernity, positive law can no longer derive its legitimacy from "higher" or sacred law. Any such conceptualization of a "suprapositive" or "metasocial" order is little more than a relic from pre-modern modes of reasoning, which we have, in the interim, simply outgrown.[14] Not even basic human rights are to be conceptualized as a higher law to which we are subject. To think of these as "extrinsic constraints" foisted upon a population, "above the heads of citizens, as it were," is tantamount to "paternalism."[15] With this claim, Habermas takes himself to depart strongly from Rawls.[16] When actually existing constitutions speak of rights as being somehow

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[9] Habermas, "A Return to Metaphysics?" in PMT, 34-37.

[10] Habermas, "Popular Sovereignty as Procedure" in BFN, 467 et passim.

[11] Habermas, BFN, 27, 33, 98, 132, 146, 343, 448; LM, 241, 270. Cf., "Cognitive Content of Morality" in IO, 7 ff.; "Remarks on Discourse Ethics" in JA, 70; "Internal Relation between Law and Democracy" in IO, 255-56; "Remarks on Legitimation through Human Rights" in PC, 115.

[12] Habermas, "Transcendence from Within" in RR, 74-77, cf., 68.

[13] Habermas, "'Reasonable' versus 'True'" in IO, 95.

[14] Habermas, "European Nation-State" and "Internal Relation between Law and Democracy" in IO, 111 and 254; text and "Citizenship and National Identity" in BFN, 26, 33, 71, 106, 199, 457 and 468; LM, 267-68; "Remarks on Legitimation through Human Rights" in PC, 115.

[15] Habermas, "Reconciliation through the Public Use of Reason" and "Internal Relation between Law and Democracy" in IO, 69 and 259-60; "Remarks on Legitimation through Human Rights" in PC, 117; "Equal Treatment of Cultures" in BNR, 275; BFN, 454

[16] Habermas, "Reconciliation through the Public Use of Reason" in IO, 50-51, 69 ff.

natural, innate, inalienable, imprescriptible, or inviolable, so as to suggest that they somehow stand above democratic procedure as moral norms that are not subject to revision, this is just a "rhetorical proviso."[17] "Rights are a social construction that one must not hypostatize into facts."[18]

Still, postmetaphysical disenchantment does not collapse into historicist-contextualist conventionalism; nor does it license the thoroughgoing, hard boiled naturalism of the sociological objectivating gaze. Habermas still holds out hope for speaking about the specifically unconditional obliging character of norms, and thus for articulating some basis upon which normative validity might rest. In this way, postmetaphysical thought in a Habermasian register aims to "recover the meaning of the unconditional without recourse to God or an Absolute."[19] This move requires that we attempt to capture a sense for what it would mean to achieve something like "transcendence from within."[20]

From this point of view, we can and must draw a hard and fast line of differentiation between *quaestio facti* and *quaestio juris.* There exists an unqualified and absolute distinction between valid norms (with universal moral validity) and norms that are merely recognized (within a particular, ethical community). It is indeed a "fundamental intuition" that there exists a hard separation between a norm that is merely de facto recognized and one that it is actually worthy of being recognized.[21] Such a moral norm is categorically distinct both from both custom and from behavior exacted under force of threatened sanction.[22] In the political realm, this distinction

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[17] Habermas, "Kant's Idea of Perpetual Peace" in IO, 189-90.
[18] Habermas, BFN, 226.
[19] Habermas, "To Seek to Salvage an Unconditional Meaning" in JA, 146.
[20] Habermas, "Cognitive Content of Morality" in IO, 7; "Transcendence from Within" in RR, 80, 91; "Boundary between Faith and Knowledge" in BNR, 228, 242; BFN, 14. Cf., also, "Morality, Society, and Ethics" in JA, 165.
[21] Habermas, "Discourse Ethics" in MCCA, 61, 72-73; "Rightness versus Truth" in TJ, 243-45, 247, 257-58, 318 n. 32.
[22] Habermas, BFN, 20.

cashes out as a contrast between normatively-imbued legitimacy and the merely de facto "belief in legitimacy" as measured by the apparent stability of a given political order—dual categories mistakenly conflated by Weberian social science.[23] Redeeming this distinction in a postmetaphysical age, and thus navigating a path between the tension-ridden spheres of facticity and validity, is the task to which the bulk of Habermasian political theory is devoted.

The task is enormous and daunting within the modern, postmetaphysical age, requiring something on the order of a rebirth that self-consciously cuts ties with both father and mother. "Modernity can … no longer borrow the criteria by which it takes its orientation from the models supplied by another epoch; *it has to create its normativity out of itself.*"[24]

This chapter will examine whether and to what extent this rebirth is successful.

## 4.2 The Promise of Procedural Neutrality (1): Discourse Ethics

In things political, Habermas' political thought begins (and ends) with a theory of democracy. His theorization of democratic discourse rests upon his much-lauded theory of "communicative action" and "discourse ethics." The bulk of this work emerged first in the 1980's.

One of the most significant steps beyond Rawls' vision is Habermas' insistent claim that human society cannot simply be analyzed from the third person objectivating perspective, but that in order to truly *understand* human phenomena, one must also approach the study of society from the first person performative perspective of an actual participant. Human society can only truly be understood as though from within.[25] For Habermas, this genuinely important insight translates into a moral theory that is ineluctably discourse-oriented. Normatively-oriented discursive argumentation absolutely must proceed from the participant's perspective, because, on Habermas'

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[23] Habermas, BFN, 290, 319, 363, cf., 29 ff., 36-37, cf., however, 155; Weber, "Politics as a Vocation" in FMW, 78.
[24] Habermas, PDM, 7.
[25] E.g., Habermas, "Reconstruction and Interpretation" in MCCA, 21-32.

view, there simply are no other "external or preceding criteria" available in a postmetaphysical age.[26] Discourse, on this view, is dialogical and never monological. It is not some Rawlsian thought experiment that could be conducted by interchangeable persons. Actual discussion must take place if validity claims are sincerely to be redeemed.[27] The philosopher's task in all this is only to clarify the procedural conditions under which deliberation is capable of imparting democratic legitimacy. When he himself enters the public sphere, he has no special or elevated status. He speaks as just another citizen among many.[28] Thus, any theory of justice, no matter how sophisticated or compelling, counts only as one voice within the bustle of democratic debate: "just one contribution … among many."[29] The motivation for this participatory formulation of normative justification is abundantly clear and seemingly intuitive. Real discursive argumentation amongst all parties concerned is perhaps the surest prophylactic against one party simply prescribing for another by fiat what is good for them, in clear contravention of what is actually good for them.[30]

But here we are not speaking about conversation of just any sort. Instead, we are talking about discourse, which is itself a very "exacting form of communication."[31] As a normative theory, discourse ethics revolves around the "principle of universalization" (U), which functions as a heuristic "rule of argumentation" for speech partners oriented towards mutual understanding: "For a norm to be valid, the consequences of and side effects of its general observance for the

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[26] Habermas, LM, 244. Cf., BFN, 69, 149, 178 et passim; "Remarks on Discourse Ethics" in JA, 24.
[27] Habermas, "Discourse Ethics" in MCCA, 57, 66, 68, 94. Cf., "Remarks on Discourse Ethics" in JA, 48 ff.; "Reconciliation through the Public Use of Reason" in IO, 57-58; "Employments of Practical Reason" in JA, 15-16. Rawls, "Reply to Habermas" 383-84 and n. 14 takes great umbrage to this charge, but, as should perhaps have been clear from the previous two chapters, my sympathies lie with Habermas in this debate—which is *not* to say that I believe Habermas himself escapes from the dilemma he identifies in Rawls' work.
[28] Habermas, "Morality, Society, and Ethics" in JA, 175-76; "Reconciliation through the Public Use of Reason" and "'Reasonable' versus 'True'" in IO, 72 and 96-97; BFN, 60.
[29] Habermas, "Moral Consciousness" in MCCA, 122.
[30] Habermas, "Discourse Ethics" in MCCA, 67, 71.
[31] Habermas, "Moral Consciousness" in MCCA, 132.

satisfaction of each person's particular interests must be acceptable to all." From this principle is derived the "discourse principle" (D), which specifies more concretely that discourse ethics consists ultimately in the practice of actual discursive participants testing normative validity claims against the metric of the universalization principle.[32]

As a rule of argumentation, the universalization principle establishes "general symmetry conditions" between dialogic partners, and this conjures into existence an "ideal speech situation."[33] This situation can be interpreted as "a communicative *structure* purified of all substantive elements."[34] Strictly speaking, this situation refers to what one might describe as a "'worldless' realm."[35] Apart, of course, from the stipulations that describe the situation's enabling conditions, this ideal speech situation is free of all compulsion, force, or violence, save for the compulsion of the "unforced force of the better argument"—a memorable image that recurs with some frequency throughout Habermas' writings.[36] Situated therein, participants in discourse have nothing left to them but to assent to "the authority of the better argument."[37] If all discourse participants are sincere, if they "bracket all motives save that of a cooperative search for truth," and if they persist in discussion "long enough," the conclusion they reach will "count" as a "rational consensus."[38] This type of discourse conducted under ideal conditions is sufficient to

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[32] Habermas, "Morality and Ethical Life" in MCCA, 197. Cf., "Discourse Ethics" and "Moral Consciousness" in MCCA, 65-66, 93 and 120-21; BFN, 107; "Remarks on Discourse Ethics" in JA, 32, 50; "Cognitive Content of Morality" in IO, 34, 41-42; "Architectonics of Discursive Differentiation" in BNR, 80-81, 88-89.

[33] Habermas, "Wahrheitstheorien" in PT, esp. 2:259-69; TCA, 1:22 ff., esp. 25, cf., 42, 2:149-50; "Discourse Ethics" and "Moral Consciousness" in MCCA, 88 and 189 n. 12; BFN, 228, 322-23; "Remarks on Discourse Ethics" in JA, 56-57; "Hermeneutic Claim to Universality," 267; "Rightness versus Truth" in TJ, 251; "Reflections on the Linguistic Foundation of Sociology" in PSI, 97 ff.; "Reply to my Critics," 235, 255, 272.

[34] Habermas, BFN, 228. Cf., "Moral Consciousness" in MCCA, 122.

[35] Habermas, "Rightness versus Truth" in TJ, 271. Cf., BFN, 283, cf., however, 21.

[36] Habermas, BFN, 103, 306, 541 n. 58, cf., 24; "Reflections on the Linguistic Foundation of Sociology" in PSI, 95, 98; "Moral Consciousness" in MCCA, 160; "Remarks on Discourse Ethics" and "Morality, Society, and Ethics" in JA, 23, cf., 47 and 163; "Cognitive Content of Morality" in IO, 37.

[37] Habermas, TCA, 2:145, cf., 150.

[38] Habermas, "Reflections on the Linguistic Foundation of Sociology" in PSI, 98-100.

impart "unconditional" validity to moral norms, allowing them to transcend the situatedness of the *hic et nunc*.[39] The discourse ethical conceptualization of the ideal speech situation's give and take of argument abstracts even from the affective dimension of the human condition, at least in as much as it aims to translate all affective content into articulable argumentation. Within the discourse ethical, cognitivist model of norm justification, even "feelings" themselves are assimilated into propositional statements that can then take their place within the structure of rational argument and thus can be tested for validity.[40]

The theoretical significance of the ideal speech situation is not to be underestimated, treated as some quaint feature of Habermas' thought that he may have outgrown, or which may be safely placed on the periphery, or as a feature of his thought that could be safely excised.[41] Far from it, for on Habermas' own account, it is *only* the meaningful possibility of the ideal speech situation as a regulative ideal that ensures that human reason is not context- or tradition-constituted all the way down. The ideal speech situation rescues the promise of the German Enlightenment by enabling us to distinguish compulsion free dialogue oriented to the truth from a false consciousness that has developed under the conditions of systematically distorted communication. In this manner, the ideal speech situation represents the sufficient condition for context-transcending ideology-critique.[42]

Importantly for our purposes, the rules governing discourse within the ideal speech situation are the precise point at which the idea of human dignity enters. Habermas is perfectly aware that

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[39] Habermas, "Rightness versus Truth" in TJ, 270 et passim; BFN, 15.
[40] Habermas, "Rightness versus Truth" in TJ, 241-42.
[41] E.g., Heath, "Rebooting," 830, 861 nn. 1-2 *ad* Habermas, "Morality, Society, and Ethics" in JA, 163-64; "Rightness versus Truth" in TJ, 251-52 argues that Habermas later rejects the ideal speech situation. This seems far from clear, especially seeing as in 2009, he chose to reprint the 1973 essay in which the concept was first introduced. See Habermas, "Wahrheitstheorien" in PT, 2:208-69.
[42] Habermas, "Hermeneutic Claim to Universality," 266-70.

procedure is always normatively charged. In this sense, it seems correct to acknowledge that "the rules of discourse themselves have a normative quality."[43] Here form oozes substance. Discourse ethics is very clearly and self-consciously oriented around "a morality of equal respect."[44] In its very structure, discourse theory necessarily presupposes that a human being is, qua human being, a bearer of human dignity, in terms of which he is equal to all others and thereby deserving of unqualified respect. Absent this supposition, these rules of argumentation that orient discourse ethics would be completely unwarranted and the procedural construct rejected out of hand.

As a procedural neutralist, however, Habermas insists that the concept of human dignity and its legal correlate (human rights) are neutral with respect to morality, are not ineluctably tied to the background knowledge of any particular lifeworld context, and are not dependent upon metaphysical premises of any variety.[45] Almost two centuries after Tocqueville declared democracy a *fait accompli,* Habermas' view of discourse seems like an attractive, nay even intuitive, starting point.[46] Still, it, has not become, for this reason, self-evident or uncontroversial as such. We still need an answer that goes a bit deeper than simply asserting that today we live in the democratic age. To the extent that he aims to provide an answer, Habermas takes one step beyond Rawls.

So, how does one go about justifying this essential premise of human dignity postmetaphysically, such that it would make sense that discourse procedure and/or human rights ought to protect this anthropologic attribute that is shared equally by all human persons? Some

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[43] Habermas, "Discourse Ethics" in MCCA, 71, cf., 93. Cf., "Remarks on Discourse Ethics" in JA, 31, 77; "Reconciliation through the Public Use of Reason" in IO, 51, 59, 67-68; "Rightness versus Truth" in TJ, 271; BFN, 4, 266.

[44] Habermas, "Cognitive Content of Morality" in IO, 39.

[45] Habermas, BFN, 107; "Remarks on Discourse Ethics" in JA, 84; "'Reasonable' versus 'True'" in IO, 98; "Architectonics of Discursive Differentiation" in BNR, 85.

[46] Tocqueville, *Democracy,* Bk. 1 Intro, p. 13.

two decades ago, Habermas' preferred approach consisted simply of spelling out the corollaries of his discourse theory and applying it to politics. The idea that discourse be essentially oriented around the norm of egalitarian inclusivity and impartiality—and thus, by implication, to treat human beings as bearers of dignity—is, Habermas contends, rooted in the very structure of argumentation itself. For this it is even possible to offer "weak" "transcendental-pragmatic justification" that takes its point of departure from the unavoidable pragmatic presuppositions of argumentative dialogue. The rules of argumentation latent within the pragmatic-performative structure of language correspond to what "every speaker knows intuitively."[47] The extrapolated structures of argumentative speech as such provide discourse ethics with "a reference point" for orienting universal claims. In this way, discourse ethics aims, self-consciously, to give an intersubjective rendering of the functional-structural equivalent to Cartesian philosophy of consciousness' "certain and unshakeable" Archimedean point furnished by the *ego cogito*.[48] This entire line of thought represents discourse ethics' "fundamental assumption."[49]

Much of Habermas' political thought revolves in important ways around the idea of basic rights, justifying them, and making sense of their relationship to other liberal principles. Building on his moral theory, Habermas would, in his political works, treat the contention that persons possess basic human rights as a simple matter of drawing out the implications of the theory of discourse ethics.[50] On this discourse theoretic view, democracy and liberalism are "co-original." They are co-original not as a matter of history, but rather by way of a sort of conceptual necessity.

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[47] Habermas, "Reconstruction and Interpretation" and "Discourse Ethics" in MCCA, 31-32 and 76-77; "Remarks on Discourse Ethics" in JA, 56, cf., 66-67.
[48] Habermas, "Discourse Ethics" in MCCA, 80-81, 84-85; Descartes, *Meditationes* and *Principia philosophiae* in *Oeuvres,* 7:24 and 8:8. Cf., *Discours de la méthode* in ibid., 33.
[49] Habermas, "Employments of Practical Reason" in JA, 1.
[50] E.g., Habermas, BFN, 107, 119 ff., 206-07; "Three Normative Models of Democracy" and "Internal Relation between Law and Democracy" in IO, 246, 248 and 259-61; "Remarks on Legitimation through Human Rights" in PC, 116; "Constitutional Democracy" in TT, 120, 124-27; "Religion in the Public Sphere" in BNR, 121.

They bear each an "internal relation" to one another. Human rights and popular sovereignty are simply two sides of the very same coin.[51] Basic rights constitute the essential framework within which liberal democratic constitutional politics unfolds. These are fundamental, even foundational. "As constitutional norms, human rights enjoy a certain privilege, which is manifested in part by the fact that they are constitutive for the legal order as a whole and to this extent determine a framework within which normal legislation must be conducted.… Basic rights enjoy a privileged status … within the ensemble of constitutional norms."[52] Basic rights themselves are ultimately important not for their "content" per se but rather for their "structure." They are never to be conceptualized as extra-political moral facts.[53]

Despite their fundamental importance, it is absolutely essential to Habermas' self-presentation that the constitutional parameters of deliberation not be experienced by real citizens as something "imposed" from above. Instead, the shape and form of discourse must be something to which the citizen experiences an internal, rather than enforced, relationship. "Moral commands must be internally *related* to the life-plans and lifestyles of affected persons in a way they can grasp for themselves."[54] Putative experts "cannot use their professional authority to impose one view … on the rest of us. The public of citizens must itself find such a view convincing."[55] "Agreement cannot be imposed.… Something that *patently* owes its existence to external pressure cannot even be *considered* an agreement."[56] Moral discourse "must function autonomously. It must be independent of the external pressure of an existing recognized legitimate order, *no matter how*

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[51] See esp. Habermas, BFN, 84, 103-31, 449-57 et passim; "Internal Relation between Law and Democracy" in IO, 253-64; "Constitutional Democracy" in TT, 113-28.
[52] Habermas, "Kant's Idea of Perpetual Peace" in IO, 190. Cf., BFN, 247-48.
[53] Habermas, "Kant's Idea of Perpetual Peace" in IO, 191-92.
[54] Habermas, "'Reasonable' versus 'True'" in IO, 100, cf., however, 93-96. Cf., however, "Rightness versus Truth" in TJ, 261, 271.
[55] Habermas, BFN, 395.
[56] Habermas, "Moral Consciousness" in MCCA, 134. Cf., "Reply to my Critics," 264.

*small that pressure may be.*"[57] "However gentle it may be, the force of normative claims will be experienced by actors as externally imposed coercion, unless they make it their own as moral force, that is, unless they convert this force into their own motivations."[58]

Assuming for the moment—perhaps counter-factually—that academic discourse does not consist of *merely* strategic action and that the academic public sphere is not *so* power-suffused that meaningful communication has become altogether impossible, the sheer fact that discourse ethics has not yet found anything even approaching universal acceptance some three decades after its scholarly introduction suggests, however weakly, that perhaps what Habermas takes to be implicit within the pragmatic-performative structure of language does not submit to such clear and unambiguous analytic excavation.

This admittedly weak suspicion receives further, more substantive support from a selection of apposite critical observations. Sidestepping the by now tired debate about how precisely to articulate the pragmatic-performative structure of language and its consequent implications for moral theory, one can at least insist that even were Habermas' efforts to have proven successful (a very strong presumption to be sure), certain obstacles would nevertheless remain. First, it does not follow that the pragmatic-performative structure of *language* necessarily governs human *action* as such (i.e., action outside of argumentative discourse). The argument linking language to action to the required degree could succeed only on the basis of otherwise unjustified, non-self-evident assumptions at one of two or both of the following levels: (a) at the sociological level, one would need to assume that *either* all *or* most of the relevant and centrally significant social-integrative action performed by members of a community *either* can *or* should be described as

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[57] Habermas, "Moral Consciousness" in MCCA, 183, emphasis added.
[58] Habermas, BFN, 67, cf., 274 (quoting Frank Michelman).

pure and undifferentiated "communicative action," in Habermas' very specific sense of that term; and/or (b) at the political-institutional level, one would need to assume that discursive-deliberative democratic legitimacy was the only valid form of legitimacy. Interpreted in different ways with variable emphasis placed upon this or that element, these assumptions lie somewhere along the spectrum ranging from controversial, to dubious, to strictly false, or they trade in *petitio principii.*

Secondly, the purported structure of language cannot itself justify an unconditional obligation normatively operative for all concrete communities to transcend their substantive ethical particularity. Recognition of the purported structure of language does not, in and of itself, motivate a normatively binding change in perspective. The admission of some additional principle or narrative is required. (In Habermas' case, this is a genealogical narrative about the process of modernization and the unequivocal, irrevocable, and necessary moral, religious, ontological, and social transformations it is said to have entailed.)

Thirdly, it is by no means outside of the realm of possibility that the type of consensus at which discoursing parties arrive is one in which they consensually agree that their differences cannot, for the time being, be resolved by means of further argumentative discourse. The relevant parties, in effect, might agree to disagree, if only to kick the can down the road—a practice with which we are all experientially familiar.

It is of some note that each of these three objection Habermas himself grudgingly concedes at various points in his intellectual career.[59]

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[59] Habermas, "Discourse Ethics" in MCCA, 85-86, cf., 101-02; "Cognitive Content of Morality" in IO, 40, 45; "Morality, Society, and Ethics" in JA, 158; "Architectonics of Discursive Differentiation" in BNR, 83, 87, 95; "Rightness Versus Truth" in TJ, 248-49, 273-74. On the concept of communicative action, see esp. TCA, 1:94 ff., 305 ff., 397 ff.; "Reflections on the Linguistic Foundation" in PSI, 11 ff.

For these and other reasons, and despite his occasional and completely misleading talk of transcendental justification, Habermas is all along quite clear that he has given up altogether on the idea of "ultimate justification" for the basic axioms structuring discourse ethics. "Conclusive arguments are not readily available." Instead, however, of dwelling upon the ultimate meaning of such a concession, he, in the face of critical challenge, retreats into an argumentative strategy teetering on the precipice of *ad hominem*. Convicting all recalcitrant counter-enlightenment intellectuals of bad faith, he castigates them for ideologically suppressing their own access to intuitions he suspects that they possess insofar as they are socialized human adults. Only by means of suicide or "serious mental illness" can they escape the pull that their own socialization exerts upon them.[60]

But to the radical skeptic of deep conviction to whom Habermas sometimes addresses himself, this response quite naturally fails to carry conviction—as Habermas himself understands, if sometimes only implicitly. Regarding the pragmatic-performative presuppositions of language, Habermas can be permitted to have the last word: "All this," he writes, "is by no means uncontroversial."[61]

## 4.3 The Promise of Procedural Neutrality (2): Deliberative Democracy

Against the background of the discourse ethics project, Habermas began in the 1990's to develop what he called a "proceduralist conception of deliberative politics."[62]

It must be borne in mind, however, that his theory of democracy is not simply "an *unmediated* application of discourse ethics," for, among other things, the political sphere requires that our

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[60] Habermas, "Reconstruction and Interpretation" and "Discourse Ethics" in MCCA, 32, 36 and 44, 77, 82, 96-100. Cf., "Remarks on Discourse Ethics" in JA, 22, 76-84; "Architectonics of Discursive Differentiation" in BNR, 97; "Rightness versus Truth" in TJ, 274; "Moral Consciousness" in MCCA, 118, 163; "Reply to my Critics," 238 ff.
[61] Habermas, "Reply to my Critics," 256.
[62] Habermas, "Three Normative Models of Democracy" in IO, 246. Cf., BFN, 288, 302 ff.

ethical self-reflection be supplemented, in certain cases, by categories of instrumental-purposive rationality, e.g., expedience, efficiency, consequence, compromise, stability, regularity, predictability, compliance, enforcement—principles that are not, properly speaking, part of the moral point of view.[63] Further, law differs from morality in that the former exhibits a distinctively "formal" quality absent in the latter.[64] It is not the case then that politics is "legitimate *solely* through [its] compatibility with moral principles."[65]

Still, the same basic outline familiar from discourse ethics remains, inasmuch as legal-political processes and institutions interact with discourse theory's discourse principle by means of "a legally structured deliberative praxis" that "instantiate[s] the discourse principle."[66] For this reason, legislative politics must be "in harmony" with, "compatible" with, and certainly must not "contradict" the moral point of view best exemplified in argumentative discourse. This is the viewpoint that ought to have "*priority.*"[67] Thus, in certain limit cases—for instance, in constitutional principles—politics comes even to "*resemble* moral discourse."[68]

As a structure tied, *ex hypothesi,* to the moral point of view, political order cannot be something particularist in character. The norms that motivate its construction must not be the peculiar possession of a historically concrete and identifiable group. There is no set of "suprapositive" moral norms hovering above the law. Of course, the law is not morally neutral, strictly speaking, for norms and the law interpenetrate and remain pervious to one another. However this may be, the law *can* be procedurally neutral by effacing commitment to any

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[63] Habermas, BFN, 157-58 ff., cf., 230 ff., 322, 283 ff.
[64] Habermas, "Kant's Idea of Perpetual Peace" in IO, 201.
[65] Habermas, "On the Internal Relation between Law and Democracy" in IO, 257, emphasis added.
[66] Habermas, BFN, 127, 151, cf., 121, 414, 437. Cf., "Internal Relation between Law and Democracy" in IO, 260.
[67] Habermas, "Kant's Idea of Perpetual Peace" and "Struggles for Recognition" and "Three Normative Models of Democracy" and "Internal Relation between Law and Democracy" in IO, 199 and 227 and 245 and 257; "Architectonics of Discursive Differentiation" and "Equal Treatment of Cultures" in BNR, 90 and 280; BFN, 282.
[68] Habermas, "'Reasonable' versus 'True'" in IO, 87

specific, substantive *ethical* content, orienting itself, instead, around a procedure capable of justifying such normative content. It is this procedurality that guarantees law's autonomy from ethics.[69] Valid moral claims can possess a categorical force if and only if they satisfy conditions of impartiality, which is to say, if and only if these claims transcend the perspective of a concrete and particular collectivity situated and identifiable with spatio-chronological specificity, orienting themselves instead to an idealized "unlimited communication community." Running normative claims through such a "universalization test" would ensure that they are not inextricably premised upon "the intuitions of a particular culture or epoch," and success in this venture is precisely what it means to avoid the so-called "ethnocentric fallacy."[70] Particular normative contents situated within a specific, historical, cultural context are a completely inappropriate basis for legitimate law in modern societies, because they fail the test of impartiality, which is the most significant legal desideratum for a pluralistic society.[71]

Repeatedly, it is acknowledged that the universalizable ideal speech situation represents a "counterfactual" "methodological fiction" or "idealizing, limit conception" within human life, and especially so within the realm of politics.[72] Still, this set of dialogic conditions remains deliberative democracy's "regulative" ideal, whose realization is frustrated only by the "empirical" conditions of on-the-ground politics in contemporary, parliamentary systems.[73] At least from a normative point of view, it doesn't really matter if anyone *in concreto* is motivated to

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[69] Habermas, LM, 227, 246-47, 264, 279, cf., 269.

[70] Habermas, BFN, 161-62, 165; "Morality and Ethical Life" in MCCA, 197; "Remarks on Discourse Ethics" in JA, 52-53, cf., 24; "Employments of Practical Reason" in JA, 12-13.

[71] Habermas, LM, 241.

[72] Habermas, BFN, 9, 322-23, 326, 458, 462; "Reflections on the Linguistic Foundation of Sociology" in PSI, 99, 102; "Morality and Ethical Life" in MCCA, 198; "Remarks on Discourse Ethics" and "Morality, Society, and Ethics" in JA, 55 and 165; TCA, 2:149-50.

[73] Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," 83; Habermas, BFN, 362, cf., 373; "Discourse Ethics" in MCCA, 92; "Remarks on Discourse Ethics" and "Morality, Society, and Ethics" in JA, 51, 55 and 164-65.

act in accordance with the conclusions of human reason as enacted in the give and take of discourse. Habermas ruefully acknowledges that "good reasons" advanced in discourse possess only a "weak motivational force." This, however, is immaterial and completely beside the point, because "validity … does not depend on whether the directives are actually adopted and followed."[74] It is only "weakness of will" or inveterate prejudice that stand in the way of doing what we all agree—after sufficient deliberation—to be right, and the palpable cost of categorical duty-transgressive behavior is feelings of guilt and pangs of bad conscience.[75]

Admittedly, the turn to the moral point of view and the purported gain in rationality "has its price": the atrophy of "motivational anchoring" that inevitably results from the moral point of view's conscientious abstraction from actually existing "empirical motives." To meet this problem, moral discursive analysis "has to make up for the loss of concrete ethical life." The "resulting gap," "discrepancy," or "chasm" which has opened up between moral-rational insight and motivation needs to be "*supplemented* by something else."[76] But to the distinctively modern problems of moral cynicism, skepticism, apathy, withdrawal, anomie, or slumber as they are experienced from the first-person perspective, a postmetaphysical philosophy has nothing substantive to offer and thus must leave the dilemma "unanswered." In the final analysis, these are problems for cultural socialization, the study of which is the stuff of sociological and pedagogical research, but these are not problems for moral philosophy as such, whose primary task, after Kant, consists in determining how best to conceptualize the obliging force of moral

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[74] Habermas, BFN, 163-64, cf., 5, 113-14, 147. Cf., "Reflections on the Linguistic Foundation of Sociology" in PSI, 94; "Discourse Ethics" and "Morality and Ethical Life" in MCCA, 108-09 and 207 ff.; "Employments of Practical Reason" and "Remarks on Discourse Ethics" in JA, 10, 14 and 41, 75; "Transcendence from Within" in RR, 81. Cf., however, "Rightness versus Truth" in TJ, 272.

[75] Habermas, "Employments of Practical Reason" and "Remarks on Discourse Ethics" in JA, 14 and 33-34, 80, cf., 87; BFN, 116, 325-26; "Cognitive Content of Morality" in IO, 35. Cf., "Rightness versus Truth" in TJ, 269.

[76] Habermas, "Moral Consciousness" in MCCA, 178-84, emphasis added, cf., 187-88; "Lawrence Kohlberg" in JA, 127.

norms and how these norms themselves can be justified. These two issues arise on fundamentally distinct levels of analysis, and the question of motivation is always conceptually posterior to norm justification. To confuse the two operations amounts only to inexcusably muddled or sloppy thinking.[77]

But how can counterfactual presuppositions purportedly encoded within the pragmatic-performative attitude of those participating in discourse possibly ever serve as a sufficient basis for reproducing society, especially in light of discourse theory's own uncertainty about the connection between rational insight and actual motivation? This is very obviously an important question. This is the precise juncture at which coercive law steps in. Coercive law corrects for the "motivational deficit" at the heart of a discourse theoretic conception of political order, in that it "*supplements*" the "weak motivating force of good reasons," and thereby "*offset*[s] the weaknesses of a morality that exists primarily as knowledge." It must always be open to the citizen to remain within the confines of legally sanctioned behavior out of the "nonenforcable motive" of "respect for the law" as such. However, for the recalcitrant citizen who exhibits "deviant behavior," the law will step in as the enforcer, leaving the man who does not see his will reflected in the general will to calculate prudentially the consequences of his deviance, and, in those limit cases in which he calculates incorrectly, to have legally-imposed sanctions brought against him. Unlike other types of coercion, however, this type can be justified moral-

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[77] Habermas, "Remarks on Discourse Ethics" and "Lawrence Kohlberg" and "Morality, Society, and Ethics" in JA, 75, 79 and 127-28 and 160-61, cf., 172-73; "Transcendence from Within" in RR, 81; "Cognitive Content of Morality" in IO, 14; "Morality and Ethical Life" in MCCA, 206; "Moral Consciousness" in MCCA, 179-81. Cf., BFN, 113-14; "Boundary between Faith and Knowledge" in BNR, 239.

discursively, because implicit in every agreement reached within discourse, there is a reasonable expectation that rational insight will meet with general observance.[78]

## 4.4 Legitimacy Between Populism and Parliamentarism: Democratic Sovereignty and the Public Sphere

If anything at all, Habermas understands his differences with Rawls to coincide with their purportedly differing views concerning the idea of democracy and popular sovereignty. For this reason, it's perfectly natural to take a critical look at Habermas' conception of popular sovereignty and democratic legitimacy in order to determine independently the actual extent of their differences; or, relatedly, the extent to which Habermasian democratic theory matches Habermas' view of actual institutional practices.

Legitimacy is one of the most important categories of political thought, if not the most important. It signifies a given political order's "*worthiness to be recognized*" as right and just. It is the basic substrate for "social-integrative preservation of a normatively determined social identity."[79] Only with the concept of legitimacy, can one speak meaningfully of "*lasting* social acceptance" and of "loyalty."[80] The theory of discourse, across its many revisions and variations, is the beating heart of Habermas' political thought. Outside of its ambit, it is impossible to speak about modern legitimacy. State legitimacy does not draw upon any supra-democratic source.

Habermasian constitutional theory sits upon the foundation provided by his proceduralist, deliberative democratic theory. In the final analysis, it is this procedurally organized discourse that yields legitimacy for the purposes of political practice and institutions. Deliberative

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[78] Habermas, BFN, 31, 113-16, cf., 7-8, 79-80, 326; "Cognitive Content of Morality" in IO, 35, cf., 274 n. 51. Cf., LM, 245; "Internal Relation between Law and Democracy" in IO, 257; "Remarks on Discourse Ethics" and "Morality, Society, and Ethics" in JA, 87-88 and 155; "Architectonics of Discursive Differentiation" in BNR, 90-91.
[79] Habermas, "Legitimation Problems in the Modern State" in CES, 178, 182-83.
[80] Habermas, "Discourse Ethics" in MCCA, 62.

democratic procedure "bears the entire burden of legitimation." Society ultimately rests upon "the basis of a discursively achieved agreement." Deliberative democratic practice possesses this legitimating force only because citizens expect its results to be invested with "the presumption of rational acceptability," or, at the very least, to have a "*more or less* reasonable" quality "in the long run." This is the only postmetaphysical source of legitimacy that remains for us moderns.[81] For this reason, procedurally correct democratic outcomes enjoy "a presumption of legitimacy."[82] Moreover, deliberative democratic procedure represents the sufficient condition for securing "the common good" of all citizens.[83]

All matters of basic political and institutional legitimacy are here pinned upon the practice of democracy. Still, the internal character of democratic legitimacy must be further specified. What does Habermasian democracy look like for real flesh and blood human beings? As we shall see presently, Habermasian democracy is neither a theory of classically liberal parliamentarism, nor is it a form of democratic populism with strong participatory implications. Caught between these two worlds, it ultimately does not satisfy the stipulations of either.

Despite earlier mentioned stipulations to the contrary, it's not entirely clear that the Habermasian formulation of deliberative democratic legitimacy concerns itself, per se, with the description of living, breathing men and women engaged in egalitarian practices of discourse, which exhibit clear and discernible, direct ties to concrete legislative policy, or whether it is merely a regulative ideal.

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[81] Habermas, BFN, 151, 301, 304, 448-50, some emphasis added, cf., 83, 135, 146, 299, 320; "Religion in the Public Sphere" in BNR, 134. Cf., LM, 230, 241 ff., 278.
[82] Habermas, BFN, 127.
[83] Habermas, BFN, 84, 130, cf., 296; "Constitutional Democracy" in TT, 128.

In contemporary, constitutional democracies, all of the real and politically relevant decisions are made, for the most part, within the parliamentary complex, not, per se, by the people themselves, as one might have thought given the democratic constitutional state's discourse theoretical legitimating basis. On Habermas' view, this is so only "for technical reasons."[84] Still, our taking this fact seriously yields what amounts to "the more realistic view" of democracy under modern conditions.[85] For this reason, Habermasian democratic theory invokes the "*parliamentary principle,*" suitably regulated by discourse ethical axioms.[86]

However this may be, Habermas is forthright enough to acknowledge that actual parliamentary practice now, and for the foreseeable future, deviates, and will likely deviate, from the type of discursive, procedural democracy, which his theory requires and which, on his account, imparts a rational core to politics.[87]

With this in the background, we are forced to conclude that deliberative democratic theory in the Habermasian vein is not at all a call for the institutional reform of existing parliamentary practice. But this is not some oversight on Habermas' part. Instead, Habermas appears to pin his great hopes on the "public sphere"—the theme of his 1962 *Habilitationsschrift.*[88] In the interim, this feature of Habermas' democratic thought has become even more pronounced. This is especially apparent in three of his later, significant discussions of the topic, i.e., in his essay in

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[84] Habermas, BFN, 182.
[85] Habermas, "Three Normative Models of Democracy" in IO, 250. Cf., "Further Reflections on the Public Sphere," 452.
[86] Habermas, BFN, 170-72.
[87] Habermas, BFN, 182-83, 231-32, 326, 340, 356, 359; LM, 248-49. Cf., "Political Communication in Media Society" in EFP, 160-61.
[88] Habermas, STPS. See also "Public Sphere."

which he returns to the theme three decades later, in his magnum opus in political theory, and in his most recent work on the subject.[89]

This theorization of democratic legitimacy, which accords a centrally important role to the public sphere, has necessarily profound implications for conceptualizing popular sovereignty. Within Habermasian democratic theory, the role of the *dēmos* is far less consequential than is the role of members of parliament, in that to the *dēmos* is relegated only the considerably less impressive task of formulating issues and problems within a public sphere, which is itself saturated to the core with a mass media driven by its own peculiar imperatives. That this democratic legitimating move is made at all is owing to the hope that this hypostatized public sphere will indirectly shape the terms of public discourse, thereby steering, albeit indirectly, the democratic state.[90]

With the framework supplied by this self-described "*structuralist approach*" to democratic theory, popular sovereignty is transmogrified. It becomes "desubstantialized." "An *overly concrete reading*" of democratic sovereignty has been abandoned. Even to speak of a "network of associations" or a "'body' of the people" is simply "too concrete."[91] Within the democratic constitutional state there does not exist, per se, a sovereign in the standard sense of that term.[92] (It almost goes without saying that Habermasian democratic theory also represents the complete opposite of the intuition underlying both Madisonian and Jeffersonian democracy, namely, that it

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[89] Habermas, "Further Reflections on the Public Sphere," 451 ff.; BFN, 182-86, 274-75, 441-42; "Political Communication in Media Society" in EFP, 139, 146, 155-56, 159-62, 164, 167.
[90] Habermas, BFN, ch. 8, pp. 329-87.
[91] Habermas, text and "Popular Sovereignty as Procedure" in BFN, 185-86 and 475, 486, cf., 169 ff. Cf., "Three Normative Models of Democracy" in IO, 251; "Political Constitution" in BNR, 315 ff.; "Further Reflections on the Public Sphere," 451-52.
[92] Habermas, BFN, 136.

is only in virtue of the high quality of the authoritative, legislative body where the actual decisions are made that democracy can be legitimated.[93])

And yet, if it weren't bad enough that Habermasian democratic theory does not seriously propose a model of democracy for actual parliaments as they are lived and experienced today and for the foreseeable future, it begins to seem like the public sphere also does not live up to the expectations we might have had for argumentative discourse of the sort that is prospectively capable, by hypothesis, of imparting democratic legitimacy.

It appears to fail, first of all, in terms of egalitarian, inclusionary practices of discourse—even on Habermas' own acknowledgment. This becomes clear first in his magnum opus in political theory, *Between Facts and Norms,* followed by echoes in his most recent work on the subject. Habermas is under no illusions that the public sphere is a domain of egalitarian reciprocity or symmetry, nor does he even believe it to be terribly inclusive.

> The structures of the public sphere reflect unavoidable asymmetries.... The success of public communication is not intrinsically measured by the requirement of inclusion but by the formal criteria governing how a qualified public opinion comes about.... As soon as the public space has expanded beyond the context of simple interactions, a differentiation sets in among organizers, speakers, and hearers.... The *actors' roles* ... are, of course, furnished with unequal opportunities for exerting influence.[94]

In fact, "a direct widening of the formal opportunities for participation and involvement in decision making" is not, under all circumstances, to be understood as an unqualified normative gain.[95] Seen from this light, we can understand why institutional recommendations for "expanded citizen participation" beyond participation in the public sphere consume no more than one page in his 631-page tome addressing legal and political theory. Their placement in the final five pages of

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[93] Madison et al., *Federalist,* no. 10, p. 46; Jefferson in *Writings,* to John Adams, October 28, 1813, pp. 1305-06.
[94] Habermas, BFN, 362-64, cf., 115, 316, 325. Cf., "Political Communication in Media Society" in EFP, 166-67, 171 ff.
[95] Habermas, "Further Reflections on the Public Sphere," 451.

the original text gives them the appearance of an afterthought.[96] With this in the background, Habermas' frequently repeated claimed affinity for the project of "radical democracy" launched in the 1960's begins to seem more than a little bit misleading.[97]

Secondly, other no less significant structural problems have become particularly acute in late modern democratic politics, thwarting yet further the ideal typical depiction of democratic legitimacy. Habermas himself is far from sanguine about modern party infrastructure, recognizing the deeply pernicious influence of increasingly stronger party organizations on the democratic political process. These "paraconstitutional … independent power cartel[s]" progressively threaten to subvert democratic legitimacy by drawing together the classically separated governmental powers into one integrated, purposive unit; by pulling the real decisions of politics out of arenas of public deliberation and into the backrooms for secretive bargaining; and by deploying increasingly sophisticated public relations arms, whose sole purpose is the systematic manipulation of the terms of debate taking place within the broader, democratic public sphere— the pool from which these parties "extract mass loyalty."[98] Also troubling—to Habermas as to now countless others—is the contemporary and increasing trend of indecisive and dysfunctional parliaments defaulting on their legislative duties, which forces the very same real issues, which they neglect to treat, to reemerge within the sphere of the judiciary, which shortcircuits the democratic legitimacy these matters might otherwise have had.[99]

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[96] Habermas, BFN, 442.
[97] E.g., Habermas, text and "Popular Sovereignty as Procedure" in BFN, xlii-xliii, 136, 252, 373 and 471, cf., 277; "Reconciliation through the Public Use of Reason" and "Three Normative Models of Democracy" in IO, 69 and 244; "Equal Treatment of Cultures" in BNR, 275; "Lawrence Kohlberg" in JA, 114; "Further Reflections on the Public Sphere," 432, 439, 444.
[98] Habermas, BFN, 434, 442-43.
[99] Habermas, BFN, 439.

Thirdly, it is by no means obvious that a media society like the one we inhabit today is up to the task of providing a meaningfully Habermasian medium for communication. As late as 1992, as his foray into political theory truly began in earnest, Habermas still considered this to be an open question requiring further empirical research.[100] After having entered the twenty-first century, Habermas' once rosy assessment of the role of the public sphere has wilted—at least along the edges. By now, he has begun to awaken yet more palpably to the possibility that the public sphere has become more, not less, distorted as a result of the public sphere's increased saturation by new communication technologies. The quality of public discussion in the United States leading up to March 2003 is standing testimony to this sad reality. "A public sphere dominated by the electronic mass media," writes Habermas, "is as much an instrument of manipulation and indoctrination ... as of information."[101] Sobering words, to be sure. Moreover, within the past decade, it has become increasingly clear, at least to some observers, that the newest technological media of communication and the general dynamics of traditional media have encouraged, rather than hindered, so-called "group polarization."[102] Thus, in his most recent writings re-assessing the democratically legitimating role of the public sphere in a technological media society, driven by the functional imperatives of party organization, Habermas is very careful to qualify his remarks by limiting them to "*favorable conditions.*"[103] He leaves completely unanswered whether he is speaking about Germany, the United States, or rather some future, hypothetical society that is yet to come—the messianic *démocratie à venir,* perhaps? Habermas does not say. With an image as striking as it is ultimately deflationary, he describes the process

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[100] Habermas, "Further Reflections on the Public Sphere," 455, 457.
[101] Habermas, "Does the Constiutionalization of International Law still have a Chance?" in DW, 145.
[102] Sunstein, *Republic.com 2.0,* 60 ff.
[103] Habermas, "Political Communication in Media Society" in EFP, 167.

that takes place at the juncture between the public sphere and actual political institutions with the analogy of "fish[ing] the reasonable elements of opinion formation out of the murky streams."[104]

Lastly, Habermas repeatedly acknowledges that advancing reformist policies very often requires the sensational protest activity of social movements in order even to get certain topics on to the agenda of the public sphere—activity which is very clearly not the communicative action of discourse theory in the strictest sense of those terms.[105] To be sure, efforts have been made by select deliberative democratic theorists to expand the Habermasian model by including rhetorical moments and even protest activity within legitimate types of discourse in the name of building a "communicative democracy" oriented towards "inclusive political communication."[106] Still, we should be clear that any expansion beyond strict, argumentative discourse is a questionable move for Habermasian democratic theory, inasmuch as it upends so much of the discourse theoretic foundation that, as we have seen above, is meant to do so much vital normative work within the Habermasian theory of democracy. With this type of reformulation, democratic legitimacy, stylized as presumptive rationality pitched at the level of discourse, thereby recedes from view. At the very least, such an expansion—an expansion implicitly authorized by Habermas' own admissions—suggests that perhaps we are not, after all, dealing with anything quite like the unforced force of the better argument in the type of reformist, critical theoretical politics with which Habermas manifestly sympathizes. (This basic observation, as we shall observe later in Part II, animates a good deal of the discourse of difference's counter-Enlightenment polemic against the relationship of reason to democratic self-governance.)

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[104] Habermas, "Political Communication in Media Society" in EFP, 160, cf., 159, 161, 165-67.
[105] Habermas, BFN, 381, cf., 77; "Struggles for Recognition" in IO, 208; "Employments of Practical Reason" and "Morality, Society, and Ethics" in JA, 14-15 and 168; "Architectonics of Discursive Differentiation" in BNR, 82; "Reply to my Critics," 253.
[106] E.g., Young, *Inclusion,* 40, 48, 53, 59, 64 ff.

It is precisely at the point of convergence between these several, critical reflections that one becomes considerably less certain that Habermasian democratic theory is quite as concretely egalitarian or dialogical as had been initially stipulated and repeatedly re-affirmed. With the demanding criteria supplied by Habermasian democratic theory, it's no longer pellucidly clear where exactly the actual, dialogical act of democratic legitimation is taking place today in modern, mass democracies.

On the one side, the hardnosed realist, otherwise sympathetic to liberal democratic institutions, cannot help but scoff at the enormous normative weight with which a seemingly impotent, completely amorphous, and often disinterested public sphere is saddled, coupled with the almost complete neglect of the real source of action: parliament. On the other side, profound disappointment sets in for the radical democrat who had hoped to revive a more substantively democratic politics that could lift us out of our present day morass.

Still, perhaps there are meaningful differences between Habermas' and Rawls' conceptualizations of democratic self-governance. The most likely source would be his famous claim about the internal relation between democracy and liberty, i.e., the co-originality thesis, briefly mentioned above. This theme is the subject of the next section.

## 4.5 The Co-Originality Thesis and its Problems

As we have seen, Habermas' conception of political legitimacy is of a democratic variety, with the accent placed upon the presumption of rationality implicit therein, so long as procedural democracy is understood correctly. The recognition of the possibility that this formulation of legitimacy might conflict with his other (*quite different*) formulation of democratic legitimacy ("*self-determination*") is forcefully occluded by his controversial thesis, introduced earlier, concerning the co-originality of popular sovereignty and the rule of law and human rights, of

liberalism and democracy, of reason and will.[107] This fundamental misrecognition is put most succinctly in the title of one of his essays: "Popular Sovereignty *as* Procedure."[108] Popular sovereignty cannot legitimate procedure if it is *simultaneously* cast *as* procedure. Procedure clearly cannot legitimate itself. Here we are dealing with a very possible contradiction in terms, and not just a "tension" or a "*dialectic.*"[109]

Pushed to its furthest limits, the ultimate question is whether it is conceptually intelligible to deny that a polity—whose legitimacy rests ultimately in the continual practices of democratic self-determination—in effect, gives "*carte blanche*" to democratic citizenry, *without,* at the same time, elevating some principle or idea, whatever it may be, above democratic self-determination.[110] For Rawls, this idea would be justice or the idea of basic rights and liberties. Habermas gives the impression that he has avoided this matter by way of his co-originality thesis, but this appearance is sound only so far as the co-originality thesis is sound. Potential problems emerge, however, for the co-originality thesis, at two fundamental levels: (a) day-to-day politics, and (b) the legitimacy of the founding.

As for day to day politics, Habermas' solution to the co-originality problem is deceptively simple: "Consensus and majority rule are compatible *only if* the latter has an internal relation to the search for truth."[111] But because politics ultimately requires a decision, and discourse theory is premised upon an indefinite time horizon, every concrete decision yielded by political deliberation is only an "interim result" that is "in principle resumable." Majoritarianism can

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[107] Habermas, BFN, 449, emphasis added.

[108] Habermas, "Popular Sovereignty as Procedure" in BFN, 463, emphasis added.

[109] Habermas, "Popular Sovereignty as Procedure" in BFN, 470, 472, 477.

[110] Habermas, "Equal Treatment of Cultures" in BNR, 274.

[111] Habermas, "Popular Sovereignty as Procedure" in BFN, 475, emphasis added. Cf., "Morality, Society, and Ethics" in JA, 159.

maintain its internal connection only on the premise that procedurally correct decisions be viewed as "a caesura in *an ongoing discussion.*"[112] Only then does the tension between popular sovereignty and human rights dissolve. On the basis of this conceptual construct rests Habermas' confidence that he can heal that rift between *voluntas* and *ratio,* between will and reason—a rift which had been recognized as basic for the entire tradition of Western philosophical anthropology spanning from Augustine to Kant.[113] Discourse "creates room for ridding the will … of heterogenous determinations."[114]

But the truth will have its revenge. Concrete political problems and Habermas' view of these problems suggest that matters are not quite as they seem. Despite all his talk of procedurally correct democratic outcomes enjoying the presumption of legitimacy and rationality, Habermas, in the concrete, stops short of carrying through with the logic of his theoretical construct when he is confronted by very troubling, but nevertheless clear, contemporary realities. It is not terribly difficult to imagine procedurally correct democratic outcomes that very well could have been preceded by protracted and excruciatingly public debate, in which a democratic body might knowingly and consciously approve public policy that appears, to some eyes, either illiberal or inegalitarian. It's not terribly difficult to imagine largely because it happens on a semi-regular basis in the real world. Habermas himself mentions at least two current and topical examples, though strangely without dwelling at any length on their conceptual consequences for a theory of modern political order whose conception of legitimacy is procedurally democratic in character. First, a democratic public might decide to dismantle the welfare state compromise in light of

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[112] Habermas, BFN, 179, emphasis added.
[113] Habermas, "Remarks on Discourse Ethics" in JA, 42. Cf., "Cognitive Content of Morality" in IO, 31; "Constitutional Democracy" in TT, 115.
[114] Habermas, "Rightness versus Truth" in TJ, 270.

budgetary pressures and the decline of tax revenue. Similarly, a democratic public might exert strangely unwarranted assimilationist pressures on newly arrived immigrant or minority communities. Habermas leaves no doubt about his opinion of these very real concrete examples. From these two procedurally correct democratic moments of self-determination, Habermas withholds the imprimatur of democratic legitimacy. Procedurally neutral majoritarianism here falls radically short of expectation. At least when the judgment is rendered, we are given no explanation fully satisfying within Habermasian democratic theory for how this outcome comes to pass apart from easy, but ultimately unsatisfying, buzzwords: "neoliberalism" and "xenophobia."[115]

Invoking these buzzwords puts Habermas in a dilemma, presenting him with a total of four equally unsatisfactory options—unsatisfactory, that is, from within Habermasian democratic theory.

(1) First, he might protest this global and accelerating turn in democratic politics, speaking as a minority voice—just one voice among many—which, in all likelihood, will do very little to steer the course of events. This has the virtue of remaining consistent with his chastened understanding of the task of the political philosopher as just one voice among many within the public sphere, but it has the demerit of implicitly accepting the legitimacy of these procedurally democratic outcomes for the time being and foreseeable future.

(2) Or he might argue that these *dēmoi* misunderstand liberal democracy—a hypothetical accusation which we can address through the two examples introduced above.

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[115] Habermas, "European Nation-State" and "Nation, the Rule of Law, and Democracy" and "Struggles for Recognition" in IO, 123, 125 and 144 and 227; "Political Constitution" in BNR, 350-51.

(2.a) Ignoring for the moment the question of xenophobia, he might argue that the increasing pre-eminence of the so-called neo-liberal ideology is illegitimate inasmuch as it misunderstands the true meaning of freedom. In fact, this is precisely what he does.

> Private autonomy … *implies* a universal right of equality…. The right of each person to do as she pleases within the framework of laws is *legitimate* only under the conditions that these laws guarantee equal treatment in the sense of *substantive* legal equality…. To enforce the principle of legal freedom … it is necessary to … *create new types of rights*…. The new category of social entitles are justified … in relation to an *absolutely justified* equal distribution of individual liberties…. There is [an] expectation that … contingencies can be normatively domesticated with the deployment of administrative power, that is, through the redistributive measures of a welfare state.

On this view of liberty and within a distinctive narrative about the historical progress of law, the restrictions on personal freedom necessitated by welfare-state social justice are never to be understood as imposed "curtailments." This is not "welfare-state paternalism," because the key, operative idea here is not welfare as such, but the self-realization of (public) autonomy properly understood.[116] Social justice is not charity, nor is it an act of empathy, nor is it an effort to live up to self-given principles derived either from our own contemporary self-understanding or from our forefathers. On the contrary, social justice represents an absolutely binding duty, quite irrespective of predictive economic models premised upon empirically contestable cognitive behavioral assumptions or temporally-variable macro-economic performance. The trouble here, of course, is that, at any given time, a statistical majority at least of the American population happens to disagree with important elements of the above presentation. This, at least, is the story told by the poll data.[117]

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[116] Habermas, BFN, 400-05, 407, 418-19 et passim some emphasis added and removed, some order changed, cf., 427-28.
[117] E.g., Sorkin et al., "Many feel."

However, let us for the moment set aside the deep and difficult question of motivating lasting change in the basic outlook of citizens on a massive scale. At least within Habermas' presentation, we could be confident that it would be a gain in "truth" were this statistically significant part of the population persuaded otherwise, *only if* the central claims of discourse ethics were themselves unassailable, which is to say only if the discourse theoretic conceptualization of the universalizing moral point of view were not just an *option* but a positive *obligation.* But above we have already had reason to question this.

(2b) Turning now to the question of xenophobia, he might also argue that nothing that has the formal appearance of xenophobia—viewed structurally, i.e., in terms of results, irrespective of intentions—can ever survive true discourse theoretic debate.[118] Of course this is correct, but only truistically so. Because he requires that the basic rights that institutionally operationalize the requirements of discourse ethics within the public sphere be conceptualized as something arising organically, rather than as something imposed from above, and because he recognizes correctly that it is self-defeating to conceptualize his rules of discourse as coercive external constraints, preferring instead to treat them as features that bear an internal(ized) relationship to the citizen— he must still explain what goes wrong (again and again) in procedurally correct democratic outcomes that follow extensive public debate both within and outside of parliament. What exactly is it that stands in the way of achieving the sought after moral point of view in politics in such a way that the actual participants themselves welcome and embrace it of their own accord? Not enough discussion?

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[118] In other contexts, this is the tack he appears to take. E.g., Habermas, "Religion in the Public Sphere" in BNR, 134; "Kant's Idea of Perpetual Peace" in IO, 175.

(3) Encountering this last problem, it is also open to him to invoke basic rights in contesting the legitimacy of this or that procedurally democratic outcome.[119] Following the now classical schema, he could accord this essential task to the judicial review of a constitutional court, which becomes the "guardian" or "custodian of deliberative democracy"—a court that plays the role not, per se, of a "regent," but rather that of a "tutor."[120] However, in doing so, he will be forced, in the relevant limit cases, to treat these basic rights as somehow pre-democratic or extra-political impositions—despite his pleas to the contrary—at least, so long as he wishes to maintain any connection at all between the idea of democracy and the on the ground democracy of flesh and blood men and women. This is not to say that he would be wrong to grant such a role to the court, but only that doing so expressly violates the letter if not the spirit of the co-originality thesis, and for that reason becomes problematic within the framework Habermas supplies.

Or finally, (4) he might simply retreat into the contemplative silence of the study, either stricken by a dysphoric mood or with hope for a brighter future.

None of these four responses above are truly satisfactory, but they are the only responses available to him.

Interestingly, in his more recent work, Habermas has taken one step further. He has begun to entertain lines of thought which implicitly unravel the co-originality thesis. Invoking the experience of the twentieth-century collapse of republicanism in Weimar Germany, Habermas mentions, with apparent approval, the practices of contemporary German constitutional law, which seem very clearly to complicate, if not violate, the spirit of the co-originality thesis, e.g.,

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[119] E.g., Habermas, BFN, 180.
[120] Habermas, BFN, 263-66, 274-79, cf., 439. Some of this language of guardianship, etc. occurs in his discussion of the republican view of judicial review, but I attribute the language to him as well on the basis of two observations: (a) Habermas' sympathies with this view are unmistakable and (b) where he does differentiate himself from it at all (pp. 278 ff.), he only qualifies these sentiments, but does not abandon them.

Article 21, Section 2 of the Basic Law for the German Federal Republic: "[Political] parties that aim—as evidenced by their goals or the behavior of their supporters—to compromise or eliminate the liberal democratic basic order or to endanger the continued existence of the German Federal Republic are unconstitutional." In his own voice, Habermas injects only one set of provisos into the discussion: a liberal democratic constitutional state must grant legal recognition to all acts of civil disobedience, so long as the civilly disobedient "offer plausible reasons for their resistance by appealing to constitutional principles and employ nonviolent, i.e., symbolic means." In this way, the constitutional state distinguishes between acceptable and self-destructive forms of political tolerance. Following the nomenclature provided by some of Karl Loewenstein's English-language writings from the 1930's, Habermas dubs this practice "militant democracy." The supreme irony here is that Habermas, by invoking Loewenstein, is indirectly invoking his arch-nemesis, Carl Schmitt, whom Habermas scrupulously does not mention here. It had been Schmitt who had pioneered the original iteration of this logic during the Weimar period. Loewenstein greatly admired him up until 1933 and freely cribbed from his writings thereafter, systematically eliding all relevant citations to the scholar who had, in the interim, become *persona non grata*.[121] Schmitt's view will receive more detailed exposition in subsequent chapters (Part III). Suffice it here to say only that this basically Schmittian view is irreconcilable with the Habermasian co-originality thesis, insofar as its logic of exclusion categorically elevates standing constitutional principle above democratic self-determination. A very clear normative hierarchy is established.

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[121] Habermas, "Religious Tolerance as Pacemaker" in BNR, 254-57, cf., 270; Loewenstein, "Militant Democracy and Fundamental Rights" I-II; Grundgesetz für die Bundesrepublik Deutschland, Art. 21.2, cf., 18, 9.2. On the Loewenstein-Schmitt relationship, see Bendersky, "Carl Schmitt's Path," 10 ff. One form of this view of democracy has recently received detailed elaboration and systematic defense in Kirshner, *Theory of Militant Democracy.*

The solution to the co-originality problem in terms of democratic founding is fraught with yet graver conceptual problems, even on Habermas' own lights. As he realizes, he must respond to the cogent objection that the attempt to understand concrete cases of democratic constitutional founding as something legitimated by itself is necessarily circular, and the attempt to legitimate this founding in terms of a delineated democratic procedure demands that we explain from what more primordial democratic legitimacy this procedure derived its own legitimacy—a line of questioning that leads to an infinite regress.

His response to the dilemma consists in redescribing the liberal democratic constitution as a "future-oriented," "self-correcting learning process," in the name of which citizens are tasked to draw upon and rework the "still-untapped normative substance" of the constitution, periodically updating the recognized interpretation of the constitution, so as to accord with the changing times and to respond to newly encountered difficulties, particularly in terms of the expansion of civil rights. With retrospective judgment—Habermas asserts—all citizens eventually come to understand that the principled re-interpretation of constitutional essentials, however controversial it may have been at the time of re-interpretation, actually accords with the normative substance of the constitution as an on-going project.

The careful reader will notice, however, that Habermas has evaded the difficulty simply by reformulating the terms of the dilemma. In this view, there is no founding, strictly speaking. There is no beginning, but simply an on-going process in which unfolds a *something* that just emerged on the scene, as it were. Within this conceptual frame, the constitution is to be understood, as he puts it, as a "fallible continuation of ... [a] groundless discursive self-constitution." That there is something amiss here is signaled by Habermas' otherwise unwarranted assumption that this constitution will recognize the rights of man in the first place,

and that the actual controversies revolve *only* around the interpretation of these rights. The other difficulty with this conception is one that Habermas forthrightly acknowledges, namely, the assumption that there will be some underlying normative continuity across generations. The presumption is that future citizens will continue to see their constitution as a reflection of their own core, normative aspirations, such that it would continue to make sense for future generations to take part in this on-going process. With characteristic understatement, he dubs this a "non-trivial assumption."[122]

The difficulty in conceptualizing the founding extends yet further. In order to be legitimate, the democratic process must erupt spontaneously, from out of itself, as it were. Habermas' political thought at least nominally eschews top down approaches conducted above the heads of real, democratic citizens. As he repeatedly affirms, actual dialogue must take place amongst those affected. It is critically important, as Habermas understands, that that sort of politics that is conducted from the dialogically instantiated moral point of view not be experienced by citizens "as an alien force that does violence to their individual lives."[123] In order to achieve this feat, Habermas invokes a conception of social learning. His highly demanding sense of democratic self-determination "can be reasonably expected" of citizens, but it obviously "cannot be legally required, but only *urged* upon" the citizenry. "Under auspicious circumstances," however, the people will undergo the learning processes necessary to develop the requisite cognitive, affective, and attitudinal disposition.[124]

And yet, the suspicion lingers that, despite stipulations to the contrary, something about this process is, in fact, taking place over the heads of actual, living, breathing citizens, and that this

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[122] Habermas, "Constitutional Democracy" in TT, 121-23.
[123] Habermas, "Equal Treatment of Cultures" in BNR, 290.
[124] Habermas, "Equal Treatment of Cultures" in BNR, 275.

conception of social learning is better understood as code word for rules and regulations imposed

by a political elite, which citizens *may* initially resist, but ultimately learn to appreciate. That this

suspicion may be fundamentally sound emerges most clearly in his discussion of the project of

progressively instantiating a cosmopolitan world society. Despite its context, the basic logic, as it

pertains to his oft-invoked notion of learning processes, holds across his political thought.

> The constitutional norms and legal constructs introduced by political elites .... exercise anticipatory effects in the sense of a *self-fulfilling prophecy*. The kind of lawmaking anticipates the change in consciousness that it provokes among the addressees only in the course of its gradual implementation. The accompanying political discourses provide the medium in which the spirit of legal regulations, whose letter is initially recognized only in a declamatory manner, can be gradually internalized. ... How ... contracting parties understand their role can shift in the course of such a constructive, self-referential, and circular learning process. As collective actors ... become accustomed to forms of cooperation ... their self-understanding is transformed.[125]

From this vantage point, the present era is only "a transitional stage."[126]

As we shall see in a subsequent chapter in Part II, it is precisely these sorts of conceptual

difficulties that have led neo-Foucauldian theorists of democracy to speak of the "paradox of

politics"—which, though thematized more clearly as a problem within this discourse, does not

elude the same basic difficulty. Later in the chapter, we shall also have occasion to return to this

important Habermasian theme of learning processes.

Habermas is absolutely correct to insist that democracy's self-understanding must be one that

invokes normative considerations. Democratic self-organization is, as Rawls had rightly insisted,

something other than a mere bargain or modus vivendi. Unless this elementary truth is

recognized, legitimacy dissolves. That being said, it is quite uncertain that Habermas' account of

popular sovereignty succeeds in staking a more substantive claim to democratic legitimacy than

does Rawlsian political liberalism, or that it succeeds in treating basic rights any differently than

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[125] Habermas, "Political Constitution" in BNR, 321, cf., 343.
[126] Habermas, "Kant's Idea of Perpetual Peace" in IO, 183.

Rawls' account does. At the very least, what may have been established in the above two sections suffices to narrow the differences that purportedly separate Habermas from Rawls in their respective understandings of democracy.

For the time being, however, let us leave aside entirely whether or not this type of reconstruction of democratic legitimacy is ultimately satisfying or whether it is sufficient to distinguish itself from other views, for the *background* to democracy, rather than democracy itself, is the principal focus of the present enquiry. The preceding was strictly preparatory with the aim of bringing the roots of Habermas' thought fully into view.

## 4.6 Constitutional Patriotism: Post-national Integration

What, in concrete terms, holds a people together? What—apart from social inertia, the spontaneous order of market relationships, fortuitously overlapping patterns of interests, beliefs, and behavior, and the sheer power of the administrative state—suffices to explain the self-cohering quality of a particular "people" (assuming, for the moment, that this is still a meaningful unit of political analysis). The present age of multiculturalism and polarization has made this question simultaneously urgent and difficult to answer. Rawls' answer to this question was, as we saw, something along the lines of liberal nationalism, but Habermas rejects anything and everything that resembles such an idea.

Formulated in the popular revolutionary context of the late eighteenth century as an idea signifying little more than a community of shared history, language, culture, and mores, the concept of nationhood once supplied this answer, and still does in the minds of many. The singular achievement of this idea of the nation was the meaningful, though sometimes abstract and anonymous, political integration of massive populations of large territorial entities comprised

of what were, for all intents and purpose, complete and total strangers.[127] However, on Habermas' view, subsequent history shows that the concept is tied ineluctably to pernicious notions of homogeneity, and that schemes of integration oriented around the idea of nationality are always in danger of degenerating into an exclusionary practice, whose disastrous consequences are well known from the experiences twentieth century.[128]

There is no reason today, if there ever was, to valorize the nation. All of the territorial boundaries within which the artificial construct of national identity can first arise are themselves historically contingent relics of past battles lost and won. There is nothing at all organic or natural about the nation. The idea that hitherto atomized individuals come together in order to voluntarily give to themselves a future form of life together is nothing more than an intellectual artifact deriving from a fictionalized social contract conception. The supposed right of a nation for self-determination is a grave "theoretical mistake."[129] A model for conceptualizing socio-political integration must be found elsewhere.

On this Habermasian model, social integration for a plural society must henceforth revolve not around some supposedly shared "national-historical identity formation," but instead around a "more sober" "post-national" conception of political identity. This locus of membership-identification is what Habermas calls "constitutional patriotism." Rejected, in particular, is the pernicious particularism of nineteenth- and twentieth-century nationalism, whose true character

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[127] Habermas, "European Nation-State" in IO, 106-13.
[128] Habermas, "European Nation-State" and "Nation, the Rule of Law, and Democracy" in IO, 111, 113, 115-17 and 142, 152.
[129] Habermas, "European Nation-State" in IO, 115-16. Cf., BFN, 44. At "Nation, the Rule of Law, and Democracy" in IO, 137-41, 152 Habermas appears to partly back away from this claim, arguing that the coming together of a people is a voluntary action, for which the metaphor of the social contract is appropriate. Moreover, in defending his favored project of increasing, European integration, he does not shy away from affirming "the decisive historical experiences that undeniably unite the European peoples." Cf., "Constitutionalization of International Law and the Legitimation Problems," 453-54; "Does Europe need a Constitution" in IO, 161.

showed itself most clearly in its limit case. In its "purest form," nationalism is the "moment of mobilization for patriotic war." In the eyes of its enamored advocates, its exclusionary, potentially jingoistic character was only ever abetted by overlooking "the deep ambivalence of every tradition." In contrast to this archaic model, we do better to conceptualize citizens of modern, liberal democratic societies as those who come together out of their sheer readiness to identify with the political order as embodied in the fundamental principles of a modern, liberal democratic constitution—a constitution whose very meaning and significance are prospectively universal in character.[130] We no longer need to ask the impossible question as to whether a constitutional patriot would ever set out to kill or be killed in defense of the human group to which he happens to belong.[131] Thankfully, such queries are simply outdated. "Enlightenment morality," writes Habermas, "has done away with sacrifice."[132]

With constitutional patriotism, nationalism and all of its corollary concepts become a thing of the past, having been replaced by an embedded form of cosmopolitanism inscribed into law. The constitutionally patriotic citizen of the state and the citizen of the world are but two points on one linear continuum. Within this framework, there is no such thing as a "right to self-assertion of a privileged *cultural* form of life."[133] The notion of national self-determination is dangerously wrong-headed. On this point, Bluntschli, Wilson, and Lenin were all equally mistaken.[134] Of course, not every constitution is the same, and in this regard there are concrete variations, but these variations are always conceptualized as being confined to the interpretation of constitutional

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[130] Habermas, "Historical Consciousness and Post-Traditional Identity" in NC, 253-54, 256-57, 261-62.
[131] Cf., MacIntyre, "Is Patriotism a Virtue?," 213, 218, 226.
[132] Habermas, "Rightness versus Truth" in TJ, 273.
[133] Habermas, "Citizenship and National Identity" in BFN, 514-15.
[134] Habermas, "Nation, the Rule of Law, and Democracy" in IO, 134-35. In this respect, as in many others, Habermas is far more radical than Rawls, TJ, 378.

principles, whose underlying character is ultimately static and always the same: the protection of popular sovereignty and human rights.[135]

Distinctively modern demographic conditions render constitutional patriotic integration the only viable, remaining option. It is completely inappropriate under conditions of pluralism to conceptualize the constitution as "a concrete legal order that imposes a priori a total form of life on society as a whole."[136] Also inappropriate is the idea that a constitutional order and the type of integration it fosters emerge from out of some "prepolitical substrate" or "collective identity" arising from shared culture, history, tradition, language, ethnicity, and/or religion, or any similar such group qualities invoked with a view to showing that the people, conceived in concrete terms, meets some threshold level of homogeneity. What to one party may seem to be an adequate rendering of historical, national consciousness, to which one might have recourse in major constitutional dilemmas, will inevitably appear to another party as "ideology or sheer prejudice." Instead, constitutionally organized social integration unfolds exclusively within the intersubjectively shared context of democratic participation as such. This conceptually innovative type of social integration is the only one adequate for fostering "an abstract, legally mediated solidarity among strangers" in a world of increasing differentiation and pluralism.[137]

Of course, constitutional patriotism is not so abstract as to rule out the necessity for some form of commitment. Naturally, constitutional patriotic self-identification functions best when a people conscientiously appropriates the liberal democratic constitutional principles, making them their own, allowing them to settle into their framework of convictions and to receive a privileged place

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[135] Habermas, "European Nation-State" in IO, 118.
[136] Habermas, BFN, 263.
[137] Habermas, "Does Europe need a Constitution?" in IO, 158-59, 161; BFN, 200.

within the particularity of their own cultural-historical setting.[138] Still, at the end of the day, constitutional loyalty of a liberal variety is very obviously something that cannot be "legally enforced." Thus, it too is reliant upon a prior and uncoerced "ethical-political self-understanding" of a distinctive and concrete human grouping.[139]

With the aim of being maximally inclusive, constitutional patriotism is conceptualized as being a form of social integration thin enough that assimilation never requires any form of identity-compromising socialization. This enables the state to remain neutral towards all newcomers and subcultures. The liberal constitutional rights and principles of a concrete legal community serve as "the fixed point of reference" and "ethical substance" for constitutional patriotism, but ultimately the legal system must maintain neutrality with respect to the ethical worldviews of all cultural subgroups subject to it.[140] While all newly arrived immigrants are under obligation to give their allegiance to the abstract principles of the constitution as understood within its context of interpretation, they are by no means expected to assimilate to the way of life of the dominant culture—the contrast here being one between political versus cultural socialization.[141]

But to ask what substantively characterizes the thing to which the constitutional patriot is patriotic is, in effect, to ask the wrong question. The accent here is placed upon procedure, basic rights, and abstract principles. All other talk is strictly metaphorical, and is only ever offered with the aim of lending familiarity to an otherwise purely formal and abstract idea. Constitutional patriotic unity "ultimately rests only on the unity of a *procedure* to which all consent…. The

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[138] Habermas, "Prepolitical Foundations of the Constitutional State" in BNR, 106.
[139] Habermas, "Struggles for Recognition" in IO, 227.
[140] Habermas, "Struggles for Recognition" in IO, 225, 227.
[141] Habermas, "Multiculturalism and the Liberal State," 851, 853; "European Nation-State" and "Struggles for Recognition" in IO, 118 and 228-29.

constitution expresses a formal consensus."[142] "Abstract" procedures, universal democracy, and human rights are constitutional patriotism's "hard substance," which replaces the former commitment to "one's own forms of life and traditions."[143]

Constitutional patriotism is procedurally formalistic through and through. There is no actual substance to the constitution as Habermas understands it, apart, of course, from the completely abstract, universal principles of popular sovereignty and human rights. Within the affective disposition of constitutional patriotism, there does not exist a firm *something* to which the constitutionally patriotic citizen experiences patriotic attachment. As was already only hinted at above, a constitution, on Habermas' view, is ultimately something "*dynamic.*" It has "lost its static character. Even if the wording of norms has not changed, their interpretations are in flux." As an always "unfinished project," a constitution's fundamental meaning "poses itself *anew* for each generation."[144]

Hereafter, we shall pledge allegiance not to a flag and certainly not to a nation, but instead to a set of prospectively universal norms and abstract procedures concretized in a modern constitution. On this model, "We the People" is transformed into something like "We the Completely Interchangeable Constitutive Units of thus and such an Unspecified Temporal-Geographic Institutional Formation formerly known as the Sovereign Nation-State." Seen in this light, constitutional patriotism is the ideal typical expression of "rootless" or "deracinated"

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[142] Habermas, "Citizenship and National Identity" in BFN, 496, cf., 445. Cf., "Struggles for Recognition" in IO, 225-26.
[143] Habermas, "Historical Consciousness and Post-Traditional Identity" in NC, 261-62. Cf., however, "Prepolitical Foundations of the Constitutional State" in BNR, 106.
[144] Habermas, text and "Popular Sovereignty as Procedure" in BFN, 384 and 489, cf., 410, cf., however, 129, 444-45. Cf., LM, 246; "Struggles for Recognition" and "Internal Relation between Law and Democracy" in IO, 203 and 255; "Remarks on Legitimation through Human Rights" in PC, 115; "Constitutional Democracy" in TT, 115, 122-23.

cosmopolitanism.[145] Put another way: it is "homelessness" elevated to a legal-theoretical principle.[146]

## 4.7 Between Kant and Husserl: The (Rationalized) Lifeworld

Yet, things are not quite as they appear. It would seem as though Habermas is forced to replicate political liberalism's tactical retreat into particularism. This feature of his thought instantiates what I had, in the previous chapter, called the "romantic" moment in contemporary, liberal political thought. In Rawls' thought, this feature did important normative work by means of the idea of reflective equilibrium and the constant invocation of fixed points of considered judgment. In Habermas', this role is played by the idea of the lifeworld.

Despite Habermas' insistent claim to present a theory of constitutional democracy that is only procedural in character, a distinctive and culturally-inflected moral substance does show its face—albeit only covertly and in the abstruse language of the school of phenomenological sociology influenced by Edmund Husserl's late philosophy (or in Hegelian categories). As becomes clear especially in his sociologically accented writings on communicative action, his project does ultimately rest upon the availability of a shared world of intuitions, convictions, and moral idiom in order to function with any sort of meaningful reliability. To this thing, he gives the name the "lifeworld." The lifeworld

> appears as a reservoir of taken-for-granteds, of unshaken convictions that participants in communication draw upon in cooperative processes of interpretation…. This stock of knowledge supplies members with unproblematic, common, background convictions that are assumed to be guaranteed…. They find themselves right away in … [a] *preinterpreted* domain of what is culturally taken for granted…. The lifeworld is given to the experiencing subject as unquestionable.[147]

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[145] MacIntyre, *Whose Justice,* 388; Walzer, *Spheres,* 39.

[146] Heidegger, *Brief über den Humanismus* in GA, 9:338 ff.

[147] Habermas, TCA, 2:124-25, 2:130, cf., 2:149, 1:70 ff., 1:121 ff., and more generally, 2:119-52, cf., however, 2:133. Cf., "Reflections on the Linguistic Foundation of Sociology" in PSI, 23 ff.; "Actions, Speech Acts," esp. 64-74; BFN, 21-26, 36, 80; "Moral Consciousness" in MCCA, 135-36, 138; "Reply to my Critics," 271 et passim. Husserl, *Crisis,* 69, 76, 108, 142-43, 379 ff.

With this lifeworld background, Habermas intends to refer to Hegel's conception of *Sittlichkeit,* or ethical life, in which are embedded "*moral* intuitions of every life … not in need of clarification by the philosopher." This moral "content" is one that the discourse participant simply finds in everyday life, but which he did not create.[148] It represents a sort of "pretheoretical" knowledge.[149] This web of moral feelings and intuitions of everyday life are ones to which we find ourselves always already committed and ineluctably so, at least when we embrace all of the implications of the performative attitude of the first person perspective as it is necessarily given to us as members of society, inflected, as it is, in a particular way by the lifeworld.[150] Speaking loosely, Habermas offers several further rough synonyms for the concept of lifeworld intersubjectivity, which derived from other philosophical schools of thought, e.g., first, form of life or language game; second, tradition or *Wirkungsgeschichte;* or third, cultural background, convention.[151]

A specifically culturally-inflected, *sittliche* lifeworld is the vital background to Habermasian democratic politics. A careful, probing analysis of the discourse-theoretic logic reveals that it is to this ethically-inflected, cultural substance that Habermas characteristically appeals whenever he finds himself pushed up against the wall by the skeptical critic. Without this specifically-inflected lifeworld to fall back upon, it would be "utterly pointless" even to speak of practical reason or of discourse.[152] Were it to completely abstract from the lifeworld, discourse would be "robbed of all

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[148] Habermas, "Discourse Ethics" in MCCA, 98-200, 204.
[149] Habermas, "Remarks on Discourse Ethics" in JA, 25.
[150] Habermas, "Discourse Ethics" in MCCA, 47-50, 77.
[151] Habermas, "Philosophy as Stand-In" in MCCA, 9.
[152] Habermas, "Discourse Ethics" in MCCA, 77, 98-103.

content."[153] From time to time, then, this substantive background does much more than just poke its head out from under the covers, instead, declaring itself full throatedly.

Habermas' non-foundationalist, linguistic point of departure for justificatory discourses is premised upon its own type of particularist contextualism. "Every justification must … *proceed from* a pre-understood context or background understanding." This conceptualization entails that a notion such as "'truth'" be glossed as "'rational acceptability'" that is "'justified in our context'" and that a concept such as "'validity'" have the qualifier "'proven for us'" appended to it. There is no such thing as a "direct access to uninterpreted conditions of validity." Instead, "reasons count only against the background of context-dependent standards of rationality."[154]

Habermas' own distinctive brand of contextualism carries over very clearly into his political theory. Norm justification in politics always and necessarily unfolds against a particular background.

> In justifying legal norms, we must use the entire breadth of practical reason. However, these *further* reasons have a relative validity, one that depends on the context. A collective self-understanding can be *authentic only within the horizon of an existing form of life*…. Reasons count as valid *relative to the historical, culturally molded identity of the legal community,* and hence relative to the value orientations … of its members… Valid legal norms … are 'legitimate' in the sense that they … express *an authentic self-understanding of the legal community....* The rationally grounded political will retains a certain contingency insofar as it *rests on context-dependent reasons.*[155]

Similarly, every age possesses its own distinctive legal "paradigm," which expresses that epoch's self-understanding.[156] Deliberative politics as well always takes place against "the massive background of an intersubjectively shared lifeworld" whose premises are "not under [our] control."[157]

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[153] Habermas, "Reply to my Critics," 255, cf., 271.
[154] Habermas, "Cognitive Content of Morality" in IO, 37; BFN, 14, 36, cf., 34-35, 226-27. Cf., "Rightness versus Truth" in TJ, 262, cf., 272, 275.
[155] Habermas, BFN, 156-57, some emphasis added. Cf., "Reply to my Critics," 270.
[156] Habermas, BFN, 252-53, 388-89, 392-93 et passim.
[157] Habermas, BFN, 322, 324, cf., 14, 359.

Importantly, however, on Habermas' model, there are limits to our constructions. Humanity's relationship to reality entails a basic, underlying relatedness to "something independent of us," that is, to something "transcendent," if only in this very minimal sense of the term.[158] Nevertheless, the ethico-political norms constitutive of the citizen's political way of life are mis-described with the idiom of discovery—an idiom which is most appropriate for the experimental, natural sciences. In politics, our basic norms are always better understood as being at least "partly 'constructed.'"[159]

In response to early criticism, Habermas has repeatedly insisted that he had long ago abandoned any pretensions of describing a form of life.[160] But in point of fact, he is simply more forthright when he acknowledges that his discourse theory "is dependent upon a *form of life* that meets it halfway."[161] This form of life is one in which participants have already agreed, in effect, that there is no privileged place for tradition, convention, or pre-judgment—a set of ideas Habermas associates with modern rationalization, understood as a mass sociological phenomenon. Citizens must recognize that "no prejudice or unexamined belief will remain exempt from thematization and critique in the long run."[162] A deliberative conception of democratic legitimacy "can blossom *only* in an *already rationalized lifeworld*" that "meets it halfway."[163] "Only in a rationalized lifeworld do moral issues become independent of issues of the good life."[164] Deliberative democracy can "thrive *only* in an environment in which

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[158] Habermas, BFN, 14.

[159] Habermas, BFN, 156. Cf., "Remarks on Discourse Ethics" in JA, 26-30, 54; "Cognitive Content of Morality" in IO, 36.

[160] E.g., Habermas, "Morality, Society, and Ethics" in JA, 164; "Reflections on the Linguistic Foundation of Sociology" in PSI, 103, 179 n. 14; "Reply to my Critics," 261-63, cf., 227-28, also 250 ff.

[161] Habermas, "Morality and Ethical Life" in MCCA, 207, some emphasis added and removed. Cf., "Discourse Ethics" in ibid., 77, 109.

[162] Habermas, "Reflections on the Linguistic Foundation of Sociology" in PSI, 98-99.

[163] Habermas, BFN, 302, 358, 371, 382, emphasis added. Cf., "Popular Sovereignty as Procedure" in ibid., 487; "Discourse Ethics" in MCCA, 109; "Three Normative Models of Democracy" in IO, 252.

[164] Habermas, "Moral Consciousness" in MCCA, 178.

postconventional ideas about law and morality have already been institutionalized to a certain extent."[165] Here, the specifically modern "reflexive liquefaction of traditions" has itself already "slipped into tradition."[166] The conditions of modernity and secularization have necessitated a "shift to a postconventional level of justification," and this move requires that citizens "take a reflexive attitude toward their own respective cultural traditions."[167] "Before the reflexive gaze … the social world dissolves into so many conventions in need of justification."[168]

Not even the challenge of multicultural pluralism ultimately disturbs this democratic necessity. As social complexity and plural differentiation are on the rise, the extent to which these increasingly plural lifeworlds overlap necessarily narrows. This is the problem faced by all modern societies.[169] In response to this phenomenon of lifeworld divergence, the project of multiculturalism does require of all majority cultures that they progressively abstract from their own concrete, historical situatedness till they reach a "common denominator." Still, this common denominator embodied in their "common political culture" cannot be so dissolved and diffuse that society thereby fragments "into a multiplicity of subcultures closed off from one another." Some sort of common basis must always remain. Some identifiably "shared political culture" must be left standing.[170]

This form of life envisioned here represents a very specific articulation of the liberal democratic tradition and the culture supportive of it. This culture is the one designed to serve the specific needs of discourse theory—a theory which otherwise conceives of each specific

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[165] Habermas, "Morality and Ethical Life" in MCCA, 208 emphasis added. Cf., "Discourse Ethics" in ibid., 109; BFN, 113.
[166] Habermas, "Popular Sovereignty as Procedure" in BFN, 468.
[167] Habermas, BFN, 311-12.
[168] Habermas, "Moral Consciousness" in MCCA, 165.
[169] Habermas, BFN, 25.
[170] Habermas, "Nation, the Rule of Law, and Democracy" in IO, 146; "Religious Tolerance as Pacemaker" in BNR, 270. Cf., BFN, 282-83.

historical point within social order as just one moment of an ongoing conversation in which, at least prospectively, all and sundry across the globe could meaningfully contribute. For discourse ethics to succeed, a "liberal-egalitarian political culture," "'democratic *Sittlichkeit*,'" and the "corresponding patterns of socialization" will need to have already saturated the lifeworld, thereby serving as a purportedly minimalistic "common denominator" into which all modern citizens would already find themselves "embedded."[171]

> A public sphere that functions politically requires more than the institutional guarantees of the constitutional state; it also needs the supportive spirit of cultural traditions and patterns of socialization, of the political culture, of a populace accustomed to freedom…. A liberal political culture rooted in motives and value orientations … provides a favorable soil for spontaneous public communications[172]

Failing this, democracy will either generate pernicious "populist movements" that "blindly defend ... frozen traditions," having been "seduced" by demagogues; or the masses will, like unthinking automatons, fall into lock step with the slow, forward march of culture eviscerating, capitalist modernity.[173]

When viewed from this vantage point, Habermas is simply more forthright when he acknowledges that deliberative politics conceptualized along discourse theoretic lines can only unfold within the "horizon of a preunderstanding," and that this entails that the theory "retains a dogmatic core," if "only in a harmless sense" of the term dogmatic. "*For us,* who have developed our identity in such a form of life … [this dogmatic core] cannot be circumvented."[174] "The communicative form of life … is the only form of life available to us."[175] This way of life rests

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[171] Habermas, text and "Popular Sovereignty as Procedure" and "Citizenship and National Identity" in BFN, 130-31, 184, 317, 358, 371, 382, 437, 461 and 488 and 499-500. Cf., "'Reasonable' versus 'True'" and "Does Europe need a Constitution?" and "Kant's Idea of Perpetual Peace" and "Struggles for Recognition" and "Three Normative Models of Democracy" in IO, 97 and 160 and 177-78 and 220 and 251-52.
[172] Habermas, "Further Reflections on the Public Sphere," 453.
[173] Habermas, BFN, 371, 382.
[174] Habermas, BFN, 445-46.
[175] Habermas, "Rightness versus Truth" in TJ, 275.

upon "an existential pre-understanding" whose lifeworld structures are prospectively universal in character.[176]

The romantic retreat into the lifeworld contributes a good deal to restoring a sheen of plausibility of a proceduralist conception of deliberative democracy, but this invocation of a particularist element comes at the cost of raising other, no less serious, dilemmas.

Despite his own stated universalist aspirations, Habermas remains almost completely unperturbed by this particularist character of every necessarily specific articulation of the lifeworld he himself finds himself forced to invoke—apparently for a variety of interrelated reasons.

There is something distinctively unique about the rationalized lifeworld that Habermas' theory presupposes and the types of traditions it fosters, which, in view of this uniqueness, seems to rescue it from objections. Discourse has its own unique way of settling into tradition, but the tradition into which it settles is of a peculiar sort. The need for discourse only ever arises once norms have become problematic. However, the results of discourse can "of course … settle once again into a traditionally pregiven, secondarily habitual agreement." Thus, once the participant departs the field of discourse and enters the realm of action, the (historical) conclusions of discourse once again "regain the status of being 'naively' presupposed." In fact, that this is so is critically important, because norms that are naively presupposed and which have become "habitual" allow themselves to be sustained "without violence" even in the face of continued transgression.[177] Thus, although human understanding possesses a necessarily "pre-judgmental structure," this is, on Habermas' view, in no way fatal to the idea of tradition-transcending

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[176] Habermas, "Justice and Solidarity," 48.
[177] Habermas, "Reflections on the Linguistic Foundation of Sociology" in PSI, 100, 102, 179 n. 12. Cf., "Rightness versus Truth" in TJ, 253 ff., 274.; "Moral Consciousness" in MCCA, 138, 190 n. 22.

reflexivity, largely because the conditions of possibility for context-transcending reflexivity have themselves already been critically appropriated and taken up within the sort of tradition his theory invokes[178] Discourse ethics aims to rebuild a shared lifeworld "at a higher level" from out of "the rubble of devalued traditions." Before its ideas may develop a conventional character, however, they must first pass through the filter of justificatory discourse.[179]

Within the rationalized, Habermasian lifeworld, cultural reproduction takes place within strictly defined parameters. These parameters require that the lifeworld that makes up the background to the modern citizen's moral consciousness is "self-consciously appropriated and critically passed on."[180] However, for this cultural practice of critical and self-reflexive appropriation of tradition to have any meaning at all, it must be possible for those standing within it to genuinely say yes or no to that tradition. There must be a right of cultural exit, as it were.[181] Behavioral expectations are stabilized in the lifeworld "*noncoercively*" largely because of this feature.[182] This is possible only in those types of traditions whose self-understanding is such that tradition-formation is understood to be, in itself, a futurally-directed "expression of learning processes."[183] Cultural reproduction pictured along these lines fleshes out the meaning of the practice of "reflexive, post[-]traditional transmission of culture."[184] Culture of this type regenerates itself "spontaneously *for the most part.*"[185]

If the premises and ways of being constitutive of the lifeworld are not held dogmatically, they are, *ex hypothesi,* relatively innocuous. The type of liberal democratic group identity he

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[178] Habermas, "Hermeneutic Claim to Universality," 268-69.
[179] Habermas, "Moral Consciousness" in MCCA, 126-27.
[180] Habermas, BFN, 98.
[181] Habermas, "Multiculturalism and the Liberal State," 850; "Struggles for Recognition" in IO, 222-23.
[182] Habermas, BFN, 21.
[183] Habermas, "'Reasonable' versus 'True'" in IO, 97.
[184] Habermas, BFN, 324.
[185] Habermas, "Three Normative Models of Democracy" in IO, 252, emphasis added.

recommends is not to be understood as "an ego identity writ large," but instead simply as a "supplement" to individual identity. This "*exemplary* way of life" is one that is fully reflexive and self-critical about all features of its own "identity-shaping tradition."[186] This formulation may privilege a conception of autonomy mediated by practical reason, and to that minimal extent it is not normatively neutral or non-particularist, but by virtue of the functional role played by practical reason, it is procedurally neutral in that it does not wed itself, before the fact, to any "arbitrary constellation of values."[187] He stipulates, then, that political actors are "not simply *at the mercy* of their lifeworld," and that the sociology of the lifeworld denies neither the "contingency of given traditions" nor the "pluralism of existing subcultures." The lifeworld need not be "dogmatic" or "rigid."[188] What was once experienced in a "naive" fashion, has now become "reflexive."[189] We can now adopt a "hypothetical attitude" towards the normative content of our own respective lifeworld.[190] This allows the status of the norms orienting our lives to transition from "implicitly *certain*" to "explicitly *known*."[191]

Ultimately, Habermas finds himself caught between two worlds with one foot in Kantian moral theory and the other in Husserlian interpretive social theory. Neither one nor the other alone is able to support the entirety of the argumentative weight placed upon it, but they are both required. The trouble is that these are not just in tension with one another, but, in a certain sense, irreconcilable.[192]

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[186] Habermas, BFN, 160-61, emphasis added.
[187] Habermas, "'Reasonable' versus 'True'" in IO, 99-100.
[188] Habermas, BFN 324-25.
[189] Habermas, BFN, 390. Cf., however, "Rightness versus Truth" in TJ, 253, 274.
[190] Habermas, "Moral Consciousness" in MCCA, 126.
[191] Habermas, "Moral Consciousness" in MCCA, 138.
[192] Cf., Rorty, "Grandeur, Profundity, and Finitude" in *Philosophical Papers,* 4:83.

This fundamental indecision—this desire to straddle these two visions of analysis—produces a string of juxtaposed acknowledgements and affirmations that seem, at least on the surface, to possess a certain jarring quality. So, while a shared social world is defined as "the totality of justified interpersonal relations," this shared totality itself is said to emerge from out of "the framework of a decentered understanding of the world."[193] Thus, while "structural aspects of the good life" are indeed integrated into the theory, these aspects are to be distinguished from "the concrete totality of specific forms of life."[194] Whether these very fine distinctions hold up under scrutiny is the central question.

Drawing critical attention to the specific problems generated by Habermas' desire to straddle these two worlds will be the burden of the next section.

## 4.8 The Lifeworld's Implicit Challenge to Procedural Neutrality

Before elaborating in greater detail the conceptual problems Habermas' own romantic moment poses for his political thought, and before reviewing the adequacy of his responses to these dilemmas, two initial questions emerge. One concerns possibility (and the intelligibility of that possibility) and the other concerns desirability.

Whether this way of being in the world is actually possible—whether we really ever do meaningfully transcend the tradition in which we have been socialized and thus experience the lifeworld as supplement instead of as something constitutive—this Habermas elsewhere acknowledges to be "a strong premise that is far from trivial," noting, appropriately, that some consider this to be little more than "a specifically modern prejudice."[195] And yet without this strong premise, Habermas' triumphalist, social evolutionary narrative about the "rationalization

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[193] Habermas, "Moral Consciousness" in MCCA, 141, cf., 153.
[194] Habermas, "Morality and Ethical Life" in MCCA, 203. Cf., "Justice and Solidarity," 49.
[195] Habermas, "Remarks on Discourse Ethics" in JA, 69, 95. Cf., "Discourse Ethics" in MCCA, 104.

of the lifeworld," and therewith the arrival of wholly post-traditional, postmetaphysical ways of being in modernity, deflate into self-congratulatory Whig history without a clear and unambiguous referent.[196]

   Standing in the background of this entire discussion, if sometimes only ever implicitly, is Habermas' debate with Gadamer in the 1960's and '70's, Habermas' later critique of MacIntyre in the 1990's, as well as Habermas' countless productive yet nevertheless half-ambivalent encounters with Taylor's writings.[197] The common theme unifying these critical approaches is a philosophical claim about the nature of ethical and political knowledge, namely, the underlying contention that practical reason (*phronēsis, prudentia*), in contrast to theoretical reason, always unfolds within the horizon of a historically-specificiable, concrete, ethical life of a particular people. When dissociated from this background, moral injunctions face the ever-present risk of devolving into either conceptually sophisticated yet humorously unedifying, abstract reflection or well-intentioned but tragically non-motivating philosophical babble. The truly self-reflective subject is then left with the equally unattractive choices of either inner, psychological diremption or quietistic uncertainty. Following a German colleague, Habermas has dubbed this view "neo-Aristotelianism," and in explicit tension with the well enough known political predilections of a number of its most prominent exponents, he associates it loosely with a tendency toward political conservatism.[198]

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[196] For thematic discussions of the rationalization of the lifeworld, see Habermas, BFN, 95 ff.; TCA, 1:70 ff., 340 ff.

[197] For the so-called Gadamer-Habermas debate, see Gadamer, *Truth and Method,* esp. 265 ff., 566 ff.; *Philosophical Hermeneutics,* 3-43; "Reply to my Critics"; "Hermeneutics and Social Science," esp. 314-16; Habermas, LSS, 143-75; "Hermeneutic Claim to Universality"; "Hans-Georg Gadamer" in PPP, 189-98; "Reconstruction and Interpretation" in MCCA, 21-42; TCA, 1:130-36. On MacIntyre, see Habermas, "Remarks on Discourse Ethics" and "Morality, Society, and Ethics" in JA, 96-105 and 150.

[198] Habermas, "Lawrence Kohlberg" in JA, 113-32, esp. 116, 125; Schnädelbach, "What is Neo-Aristotelianism?"

Habermas is, of course, readily willing to admit the fact of human historicity, and the tendency of any culture's articulated normative self-understanding to exhibit a demonstrable particularity that tracks this historicity. On this point, absolutely no one can convict Habermas of naïveté. What he does not accept is that the vantage point from which moral judgment is made has any preeminently *constitutive* relationship to history.[199] From this point of view, there may be many differences between cultures and epochs in terms of the "*contents*" of their norms, but the "*form*" of moral reasoning is invariant, assuming similar levels of development.[200] At least prima facie, this pair of contentions seem to be in tension with one another, or, at the very least, how they can be reconciled is not intuitively obvious. To this dilemma of any universalistic ethics conjoined to a deep awareness of historicity, Habermas responds with two reflections that are loosely connected: (a) the first is his distinction between justification and application, and (b) the second is his distinction between morality and ethics. Ultimately, as I will argue, these distinctions are only partial half measures, rather than solutions, to the problems.

The first move responds to the challenge obliquely by distinguishing between "justificatory" procedural discourse and discourses of "application." He contends that although these two levels of human normativity must meet the very same standard of impartiality, they each refer to "a different kind of problem" and the distinction itself can be understood best in terms of a theoretical "division of labor." Justification occurs within the horizon of discourse ethics and is, as such, ahistorical and universal. Application, on the other hand, arises subsequent to the procedure of justification and deals with unanticipated conflicts or difficulties that arise in the act of implementing, or *applying,* discourse ethical norms to what are (from the perspective of

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[199] Habermas, "Remarks on Discourse Ethics" in JA, 39. Cf., "Reply to my Critics," 253-54.
[200] Habermas, "Moral Consciousness" in MCCA, 117.

discourse) unforeseeable concrete situations. This subsequent act of reflection requires a distinctive faculty that he, following a German colleague, calls "a sense of appropriateness." This sense of appropriateness is, as he describes it, a form of "hermeneutic insight" that draws upon a situated historical subject's "empirical knowledge" of how things are for the most part. With this second level of reflection, it is inevitably the case that "highly contextualist interpretations of the situation come to the fore." Applicatory reflection, coupled with this sense of appropriateness, is capable of resolving collisions between valid normative principles, by exercising a normatively valid "revisionary force" upon the application of the results of justificatory reflection to a concrete case. This second level of reflection arises out of necessity neither because of any fallibilistic proviso, nor because of inherent limitations of human cognition. Instead, it arises because of mankind's "existential provinciality" according to which there is "historical variability of the contexts of interaction themselves." Within politics and especially within the activity of the judiciary—where this metaphor of application is the most appropriate—the judgment yielded by a discourse of application is never purely arbitrary, at least insofar as it is subject to a "coherence proviso." By stipulating that the determination of how and in what way norms apply in this or that particular case must cohere with an overarching, "unified system," this coherence proviso ensures that there is always only "exactly one right solution for each case."

The conceptual significance of this frequently repeated train of reflection to Habermas' entire project should not be underplayed. Despite the truly abundant and repeated attention he has given to the topic, the basic problem has not been resolved, but only shifted terminologically. Apart, of course, from the sneaking suspicion that this principle of appropriateness, integral to the discourse of application, functions within his argument as a sort of *deus ex machina,* yet more importantly, the admission of this second level of *necessary* reflection cannot but complicate all

claims to *unconditionality* on the part of universal, ahistorical moral norms. The principal

difficulty of this approach emerges most clearly if one hones in upon Habermas' claim that even

if a universal ahistorical norm is superseded or suspended in this or that concrete case of

application, this does not impair that norm's universal, unconditional validity in any way, shape,

or form.[201]

But how can we make this paradoxical assertion fully intelligible? How can a norm be

superseded without impairing its validity, let alone its *unconditional* validity? Doesn't this in

some way suggest that there is some more primordial framework operating behind it, at least so

long as this operation is to remain legitimate? (As we shall see in Part III, this phenomenon is one

of the major points of departure of Carl Schmitt's reactionary politics of meaning.)

Habermas' second move is stipulative and definitional, aiming to lend nomenclature to the

schema above. Here he introduces a quasi-Hegelian dichotomy, whereby human normativity

bifurcates into a "moral" sphere of "norms" (universal) and an "ethical" sphere of "values"

(particularist). The latter sphere admits of characterization in terms of the language of identity

and authenticity, and thus is subject to a kind of historical variability; the former does not.[202] But

this distinction only muddies the water, insofar as it prejudges the dispute by definitional fiat.

Precisely what is under question here is whether or not the two can be hermetically sealed from

one another, and whether the former can ever truly hold its own as something free-standing and

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[201] Habermas, "Employments of Practical Reason" and "Remarks on Discourse Ethics" and "Morality, Society, and Ethics" in JA, 13-14 and 35-39 esp. 37-38 and 152-54, esp. 152, cf., 160-61, 172; "Architectonics of Discursive Differentiation" in BNR, 94-95, esp. 95; "Rightness versus Truth" in TJ, 245-46, 264, 272, cf., 258-59; BFN, 215-22, 229, 208-09, 260-61, cf., 109, 162, 172, 199 ff., 223-24, 232, 439. Usually citing Günther, *Sense of Appropriateness.* Cf., "Cognitive Content of Morality" in IO, 45-46; "Moral Consciousness" in MCCA, 179 ff.; "Lawrence Kohlberg" in JA, 120 ff.; "Justice and Solidarity," 43-44, 50-51. This line of reflection is absent in the earliest programmatic treatments, e.g., "Discourse Ethics" and "Morality and Ethical Life" in MCCA, esp. 104-05 and 206-07.
[202] E.g., Habermas, "Employments of Practical Reason" in JA, 1-17.—In Forst, *Toleration,* esp. 489 ff. this Habermasian distinction between ethics and morality is the hook on which he hangs his attempt to distinguish practices of toleration from skepticism or relativism. For a recent, critical yet sympathetic review of Forst, see Galeotti, "Toleration out of Conflicts."

autonomous—as procedural neutrality requires in order for that standard to retain its patina of conceptual intelligibility. Habermas himself occasionally appears even to allude to the difficulty, if only briefly.[203]

Next we confront a further, no less significant, question: whether this way of being in the world is desirable. The answer to that question is far from clear. In moments of striking lucidity, Habermas sometimes even draws attention to the distinctive manner in which our culture's inheritance of tradition-dissolving Western rationalism has even rendered the idea of human rights questionable in the eyes of increasingly many Western intellectuals.[204] In more recent years, the ruling and intellectual classes of the world's two most powerful and conspicuously unrepentant violators of basic human rights (Russia and China) have learned to ape this Western-generated critique. From the perspective of any politically committed cosmopolitanism, this is hardly a desirable development. Instead, the story can only be retold as tragic farce. Indeed from any number of further perspectives, the public disenchantment of human rights discourse seems to be of highly dubious value, at least in terms of the improvement of real human lives on the ground.

Having discussed the question of the possibility and desirability of living in the way discourse ethics prescribes, we may now return to the main question, concerning the more specific dilemmas faced by Habermas' own romantic moment.

The problematically ambivalent status of the lifeworld and its relationship to Habermas' constitutional and political theory rear its head if one pauses for a moment to re-examine. With background, theoretic assumptions like the ones articulated above, democratic legitimacy

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[203] Habermas, "Religious Tolerance as Pacemaker" in BNR, 262.
[204] Habermas, "Remarks on Legitimation through Human Rights" in PC, 119 ff. Cf., "Kant's Idea of Perpetual Peace" in IO, 176, 186, 188-201.

conceived in purely procedural terms seems not only sociologically sound, but also even normatively unassailable—at least for those of us who are not convinced *a priori* that liberalism is coterminous with subtle oppression or the evisceration of meaning from human life (as are the proponents of the discourse of difference and the reactionary politics of meaning, as we shall see in subsequent chapters). With its invocation of a particularly inflected lifeworld, Habermasian social theory seems premised on the usually unstated presumption that the participants *already* have all the right intuitions, and they need only discuss concrete cases at sufficient length in order to determine what is to be done.

And yet, with a set of background assumptions, stipulating a particular inflection of the lifeworld, like the ones above, it is far from clear that we are simply speaking about purportedly *neutral* procedural democratic legitimacy. The claim that constitutional patriotism is actually *post-traditional* is simultaneously called into question.

However, at least on the face of it, this provisional interpretation runs up against other difficulties. It would appear deeply problematic to suppose that Habermas intends to allow the lifeworld to do this kind of normative work within his theory, for when other groups of thinkers make functionally similar argumentative moves, Habermas does not hesitate to call this "begging the question."[205] Ultimately, what he wants to do, he says, is categorically different from appealing to "the normative power of the factual."[206] Also, on Habermas' view, the imposition of any type of culture or tradition is fundamentally illegitimate, up to and including attempts made to secure the conditions for its continued survival, so long as this practice unfolds "above the heads of its members."[207]

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[205] Habermas, "Constitutional Democracy" in TT, 118.
[206] Habermas, BFN, 2.
[207] Habermas, "Equal Treatment of Cultures" in BNR, 300-03.

And yet the interpretation that this is precisely what he is doing suggests itself with equal force. As we have seen throughout, the success of his project is premised upon, among other things, the realization of a gentle process of social evolutionary adaptation to which he frequently refers with the innocuous sounding language of "learning process," already introduced above. Here, the tacit premise seems to be that learning cannot, by definition, be coercive, despite the fact that its organization and method is, by definition, something that, at least in part, takes place over the head of those affected. For instance, he will write of how "a liberal political culture provides the soil in which the institutions of freedom put down their roots…. The practices of such a culture … provide … a suitable context for a public sphere that fosters political learning processes."[208]

That there is a problem here is evidenced by the fact that Habermas stipulates that the quality of moral learning is "*assessed*" strictly in terms of how "*inclusive*" it enables its participants to become in the ongoing project of "progressive decentering."[209] But this is completely self-referential assessment. Moral learning is only learning if it tends to favor the very specific interpretation of the liberal democratic tradition that instantiates the conditions of discourse ethics, but, once we have, among other things, rendered tenuous the connection between action and discourse, discourse ethics cannot itself explain conclusively why the attainment of conditions that favor it should be described as moral learning. To bring these conditions into existence may represent change, and some may view it favorably, but the idea of learning is a much stronger notion.

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[208] Habermas, "Kant's Idea of Perpetual Peace" in IO, 177-78.
[209] Habermas, "Rightness versus Truth" in TJ, 257, 260, 265.

From the very beginning of his forays into systematic social theory, it is clear that standing behind Habermas' concept of learning processes is the research paradigm in cognitive developmental psychology inaugurated by Jean Piaget. In support of his discourse ethics, Habermas supplements this Piagetian paradigm by the related work of other empirical researchers, in particular, that of Lawrence Kohlberg.[210] However this may be, despite the impression that may have been given by Habermas' sustained attention to it, analogies drawn from this research do not suffice to relieve the more basic difficulty I have raised.

Habermas is, of course, well aware that every characterization of developmental stages is always already theory-laden, in that it always presupposes a normative framework through which observation is interpreted. While not necessarily fatal to the value of the empirical research, this feature certainly forecloses any possibility of completely "*independent* corroboration" for a particular normative theory through such channels. At best, this approach can yield an intra-theoretically coherent picture which can serve as a productive roadmap for future research.[211]

In this regard, it is helpful to recall the status of Kohlberg's so-called Stage 6 of moral development, i.e., the *telos* towards which psychological development invariably tends (according to his hypothesis), and which corresponds roughly to the Habermasian rendering of the moral point of view. It is worth noting that this Stage 6 is *not* known experimentally, but is rather inferred from "elite," exceptional cases, e.g., Martin Luther King, Jr., supplemented interpretively by neo-Kantian theories of largely Anglo-American extraction.[212]

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[210] Habermas, TCA, 1:67 ff. Esp. Piaget, *Introduction a l'epistemologie genetique; Principles of Genetic Epistemology;* Kohlberg, *Essays on Moral Development.* It is worth noting that Rawls' account of the three stages of morality (the morality of authority, of association, and of principles) also draws upon this same Piagetian-Kohlbergian paradigm of developmental psychology. See Rawls, TJ, 459-62 and nn. 6, 8.

[211] Habermas, "Moral Consciousness" in MCCA, 117-18, cf., 168-70, 172; "Lawrence Kohlberg" in JA, 115-16. Cf., "Reply to my Critics," 258 ff.

[212] Habermas, "Moral Consciousness" in MCCA, 171-73, 192 n. 46; "Lawrence Kohlberg" in JA, 115; "Justice and Solidarity," 32; "Reply to my Critics," 260.

Problematically, however, experimental findings from critics appear to suggest that fantastically large quantities of otherwise well-adjusted and -educated actual human test subjects fall terrifically short even of the next highest Stage (5), e.g., those females who exhibit stereotypically "maternal" behavioral patterns, which, so the interpretive hypothesis goes, leads them to place kin in higher regard than, say, $x$ abstract person.[213] Naturally, this finding—presuming it is true—would further complicate not only the adequacy of this empirical research's interpretive frame. Distinguished careers in psychological research have been made almost exclusively on the basis of this observation (e.g., Carol Gilligan).[214] Yet more significantly, this critical empirical research necessarily complicates the value of the Kohlbergian-Piagetian research paradigm as a possibly uncontroversial source of support for Habermasian moral theory.

For these and other reasons—and although he will indulge in momentary equivocations—Habermas is ultimately perfectly clear that this research cannot and does not serve as some sort of "naturalistic" basis that could provide empirical confirmation of his moral theory.[215]

The field has been cleared. The Foucauldian critique emerges to nip at the heels.

Habermas' approach, as he knows well, implicitly rejects the Foucauldian contention that a culturally settled constellation of implicit knowledges and practices might wield its own distinctive type of power. On Habermas' view, settled norms—if they are *liberal* norms—are not experienced by subjects as "external compulsions," at least "so long as they at least *can* be problematized" and made the subject of discussion. "Liberal public spheres" are so constituted that their boundaries always "remain permeable in principle" to all interested parties in a free and

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[213] Habermas, "Moral Consciousness" in MCCA, 175 ff.
[214] E.g., Gilligan, *In a Different Voice.*
[215] Habermas, "Moral Consciousness" in MCCA, 173, 175, cf., however, 170; "Justice and Solidarity," 32-35. Cf., however, "Lawrence Kohlberg" in JA, 131-32.

equal manner.[216] Thus, at certain junctures in programmatic statements elaborating the discourse theoretic approach, he will insist that there is a fundamental difference between "enabling" conditions (liberal norms of discussion) and external "constraints" (other norms that might regulate political behavior).[217] But whether or not this distinction holds under pressure and whether or not liberal norms function precisely in the way that he describes are exactly the topics under dispute—so long as we take seriously, as many undoubtedly do, the Foucauldian critique of power.

Foucauldian-type objections also gain a foothold in Habermas' innocuous sounding language of moral or social evolutionary "learning processes." Occasionally Habermas will demonstrate an acute awareness of just how much his line of thought on learning processes opens his rear flank to Foucauldian counter-attack. In those occasional moments of apologetic self-defense, he is at pains to distinguish this process of "learning" from processes of "conditioning or forced adaptation." However, he does not explain how in the world this distinction could possibly be drawn, if not from some fundamentally privileged meta-normative perspective his democratic theory otherwise precludes. Habermas' account seems very clearly to presuppose an otherwise controversial narrative about modernity as a process of progressive maturation, without which the metaphor of "learning" would be entirely out of place. Thus, recognizing that he has not actually solved the problem, he declares the difficulty "most disquieting"; though ultimately he dismisses the problem, on the premise that acknowledging a "self-limitation" of a theory is worlds apart from admitting defeat. Each and every challenge to Habermas' (and Blumenberg's) understanding of

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[216] Habermas, BFN, 323-24, 374-75, cf., 128, cf., however, 67, 79, 413, 423-24. Cf., "On the Internal Relation between Law and Democracy" in IO, 259; "Religion in the Public Sphere" in BNR, 138.
[217] Habermas, BFN, 128, 323-24; "Cognitive Content of Morality" and "On the Internal Relation between Law and Democracy" in IO, 45 and 259.

modernity must be confronted academically, systematically, and on its own terms. The dispute concerning the ultimate nature of modernity simply cannot be decided in advance and in abstraction from such conversations.[218]

How far a stipulated form of life and procedural neutrality cohere remains a profound difficulty, and, to his credit, it is not one Habermas simply passes over in silence. He is not unacquainted with the force of the skeptical objection that claims of neutrality invariably mask "implicit prejudice ... in favor of an inherited background of settled convictions." His engagement with this type of problem far outstrips anything we find in Rawls' writings. Habermas' response is simply to deny its truth at the most abstract level of discourse ethics, pleading for the inescapability of neutrality. Conflicts arise and if they are not to be resolved by the sword, we shall find that we are forced into dialogue with one another, and in the face of insoluble controversy, we are obligated to "'retreat to neutral ground.'" The neutrality principle is, in this sense, "*unavoidable*." However diverse their backgrounds may happen to be and no matter what language they speak, dialogical participants are acquainted with ideas such as truth, rationality, justification, and consensus, and these supra-linguistic concepts shall provide the substrate for neutral discussion. It is perhaps symptomatic that in this thematic discussion of the neutrality of procedural neutrality, the only concrete example of human difference he pauses to mention is the different ways in which human communities might choose to codify human rights within their respective liberal democratic constitutions.[219]

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[218] E.g., Habermas, "Religion in the Public Sphere" in BNR, 138, 144-46. Citing Blumenberg, *Legitimacy.* More than a decade prior, he would dismiss this exact same line of thought as something "far-fetched." Habermas, BFN, 445.
[219] Habermas, BFN, 309-12, cf., 160 ff., 452 ff. Cf., "Discourse Ethics" and "Morality and Ethical Life" in MCCA, 76 ff. and 197 ff.; "Remarks on Discourse Ethics" and "Morality, Society, and Ethics" in JA, 69 ff., 91-105 and 156-58; "Cognitive Content of Morality" and "Struggles for Recognition" in IO, 34, 39 ff., 43 and 214; "Equal Treatment of Cultures" in BNR, 305-06.

Habermas' stipulation of a liberal political cultural lifeworld has not rescued pure procedural constitutional democracy. Not only does his stipulative move assume away what must be explained (why this culture, and not another?); not only does it illicitly assume that the world-sustaining, pre-political content, which Habermas believes to have derived from the Christian faith tradition, will inevitably prevail over the challenges posed by an increasingly thoroughgoing naturalism; not only does it fail to ask whether concrete and actually existing *dēmoi* are prepared to voluntarily live the types of political lives that intellectuals in Frankfurt, Berlin, Cambridge, and New Haven prescribe for them—but yet more importantly, procedure by itself can neither *sustain* itself nor *inspire* genuine commitment.

Habermas is clear-sighted enough to admit the permissibility of "bargaining" for those situations in which "diverse interests" are structured in such a way that no "generalizable interest" emerges that possesses a "clear priority" over all others. Bargaining is appropriate for those situations in which "social power relations cannot be neutralized in the way rational discourses presuppose."[220] But what happens when the vast majority of our day to day politics is transformed into bargaining for precisely those reasons that Habermas admits? What happens when democracy collapses into modus vivendi? What happens when democracy looks like it does today? Shall we recommend longer, deeper, more inclusive, and more heartfelt conversations? More discourse?[221]

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[220] Habermas, BFN, 165-66, cf., 167, 177 ff., 282-83. Cf., "Remarks on Discourse Ethics" in JA, 60.
[221] Some passages might indeed seem to suggest this as the remedy. E.g., Habermas, "Cognitive Content of Morality" in IO, 18-19, cf., 4.

In those situations in which the lifeworld palpably breaks down, and democratic procedure appears to stall as a result, all that Habermas has to say is that "then we need the repair work of translators, interpreters, therapists."[222] This is the sticking point. Here is the blind spot.

## 4.9 The Post-secular Turn: Habermas in the Twenty-First Century

To his great credit, by the 2000's, Habermas' view had shifted substantially. The shift was occasioned by the need to rethink the relationship of religion to the as yet incomplete project of modernity; but, for our present purposes, its *deeper significance* lies in the concomitant, albeit hesitant and partial rethinking of procedural neutrality necessitated by this reorientation. In this shift, he is motivated, at least in part, by the events of September 11, 2001, the "surprising" continued influence of religion in US politics, and other personal events—as he has publicly acknowledged.[223]

By this point, he had begun to speak of a "postsecular society"—one which recognizes that modernization, rationalization, disenchantment, and secularization have not, as one might have expected, resulted in the disappearance of traditional religious experience.[224] Figuring out what to do with this situation, and remaining open to all relevant parties—secular, religious, or what not—is just "democratic common sense," consistent with our democratic duty to remain accountable to one another.[225]

As he has struggled to find his footing in a newly changed intellectual landscape of the early twenty-first century, Habermas has, with increasing frequency, found himself invoking the

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[222] Habermas, TCA, 2:134, cf., 140, 142.
[223] Habermas, "Faith and Knowledge" in FHN, 101; AWM, 15-16; "Religion in the Public Sphere" in BNR, 114-18. Very tentative steps in this direction can be detected as early as the late 1980's. E.g., "Transcendence from Within" in RR, 67, 79.
[224] Habermas, "Faith and Knowledge" in FHN, 104. Cf., "Prepolitical Foundations of the Constitutional State" and "Religion in the Public Sphere" in BNR, 108, 111 and 139.
[225] Habermas, "Faith and Knowledge" in FHN, 105, 109; "'The Political,'" 26, cf., 32 n. 22.

metaphors, motifs, and images made famous by Rawls and which orient the latter's mature political thought, e.g., "reasonableness," the "public use of reason," "reasonable comprehensive doctrines," the "fact of pluralism," "modus vivendi," "political liberalism," "embedding," "burdens of reason."[226] However, although he will make use of the metaphor of "overlapping," Habermas does not ever endorse the idea of an "overlapping *consensus.*"[227] "Consensus" is something he defines as a conclusion that "rests on reasons that convince all parties *in the same way,*" and this contrasts sharply with "compromise," which is "accepted by … different parties each for its own *different* reasons."[228] From this point of view, Rawls' overlapping consensus is compromise, not consensus.

With this shift, Habermas has begun to demonstrate increasing signs of "an awareness of what is missing" in pure proceduralist understandings of liberal democracy. He has begun more thematically to entertain the possibility that the continual and ongoing processes of social and political integration, that the political virtues presupposed by liberal democratic self-governance, that the motivation needed to sustain civic solidarity—that all these things *might* somehow ultimately rest upon "'prepolitical' sources" of politico-cultural substance importantly antecedent to democratic procedure.[229] It may ultimately prove to be the case that "the liberal state depends

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[226] E.g., Habermas, "Faith and Knowledge" in FHN, 104, 126 n. 2, 105; AWM, 20-21; "'The Political,'" 19, 21, 23-26; "Prepolitical Foundations of the Constitutional State" "Religion in the Public Sphere" and "Boundary between Faith and Knowledge" and "Religious Tolerance as Pacemaker" and "Equal Treatment of Cultures" in BNR, 102, 111-12 and 119, 135, 139, 147 and 245 and 262 and 308; "Reconciliation through the Public Use of Reason" and "Struggles for Recognition" in IO, 59 and 224 et passim; Habermas, "Conversation about God and World" in TT, 152; "Rightness versus Truth" in TJ, 274.

[227] Habermas, "Communicative Action" in BNR, 40. Cf., text and "Citizenship and National Identity" in BFN, 551 n. 35 and 514; "Remarks on Discourse Ethics" in JA, 92-96; "Reconciliation through the Public Use of Reason" and "'Reasonable' versus 'True'" in IO, 60 ff. and 83 ff.; BFN, 60 ff.

[228] Habermas, BFN, 166, cf., 108, 339. Cf., "Morality and Ethical Life" in MCCA, 205; "'Reasonable' versus 'True'" in IO, 86.

[229] Habermas, "Reply" in AWM, 74-76; "'The Political,'" 15, 17, cf., 23; "Prepolitical Foundations of the Constitutional State" in BNR, 102, 105, 107.

in the long run on mentalities that it cannot produce from its own resources."[230] In the 1990's,

formally identical lines of thought hardly elicited further comment, hardly any recognition that

there might be a problem worth discussing here.[231] By now, this has changed in a striking way.

For my present purposes, *this* partial realignment is the most significant transformation in his

thought. Now, Habermas even holds out the prospect that religious movements and churches

might contribute to the project of "regenerat[ing] an atophried normative consciousness" that has

developed under the impact of a "modernization spinning out of control." Today, we need

something far more substantial than just a "theory of justice."[232]

This awareness of what was missing has brought the legacy of Western Christendom to the

forefront of Habermas' reflections on normative consciousness in a way that had been strikingly

absent in his earlier writings.

> Christianity has functioned for the normative self-understanding of modernity as more than a mere
> precursor or a catalyst. Egalitarian universalism ... is the direct heir to the Judaic ethic of justice and
> the Christian ethic of love. This legacy, substantially unchanged, has been the object of continual
> critical appropriation and reinterpretation. To this day, there is no alternative to it.... We continue to
> draw on the substance of this heritage. Everything else is just idle postmodern talk.[233]

The "cognitive substance" of the major world religions dating from Jaspers' so-called Axial Age

has not yet been "exhausted."[234]

As a result of these reflections, Habermas' view of philosophy has shifted dramatically,

retreating from the thoroughgoing secularism that characterized his thought as late as the 1990's.

For instance, he now suggests that "the boundaries between secular and religious reasons are

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[230] Habermas, BNR, 3.
[231] E.g., Habermas, BFN, 117.
[232] Habermas, "Boundary between Faith and Knowledge" in BNR, 240, 211, cf., 238. Cf., "Faith and Knowledge" in FHN, 109-10; "'The Political,'" 25, 27-28.
[233] Habermas, "Conversation about God and World" in TT, 150-51.
[234] Habermas, "Religion in the Public Sphere" 142.

fluid."[235] He even goes so far as to suggest that philosophy has "good reasons to be open to learning from religious traditions."[236]

Still, Habermas remains solidly within the political liberal, public reason tradition, inasmuch as some form of procedural, constraining filter is required of debate at at least one level of the democratic political process, and also in his insistence that this constraint is best understood in terms of worldview neutrality. Within the public sphere, citizens may articulate their political ambitions and concerns in whatever language comes naturally to them, whether secular or religious.[237] This concession is grounded not only in the normative concern that gag rules would unreasonably compromise the identity of citizens not able to contribute to the public sphere in purely secularist terms, but also in that the concession keeps a valuable functional relationship open between the political realm and history's greatest source of meaning creation and world-disclosure.[238] This, by itself, is a bit wider than Rawls' "wide view" of public reason (discussed in an earlier chapter), for there is no restriction here on what sorts of arguments are valid in the public sphere—at least so long as such argumentation is confined to the public sphere.

However—and this is a strong qualification—there is one proviso thrown into the lot. If religious citizens wish to have final, shaping influence upon the political agenda, the potential truth content of their religious "rhetoric" must pass through an "institutional filter" in which it is "translated" into "a universally accessible language." This is Habermas' "'institutional translation proviso,'" and it ultimately requires that religious citizens learn to exercise "reflexive

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[235] Habermas, "Faith and Knowledge" in FHN, 109.
[236] Habermas, "Prepolitical Foundations of the Constitutional State" in BNR, 109.
[237] Habermas, "'The Political,'" 25.
[238] Habermas, "Religion in the Public Sphere" in BNR, 131.

consciousness"—that they become in sync with the "'modernization' of religious consciousness" initiated by the Reformation and the Enlightenment.[239]

The priority of secular reason is ultimately preserved. Habermas' institutional translation proviso stipulates that, once democratic debate passes the threshold separating the public sphere and public institutions, "only secular reasons count."[240] Within institutional politics, secular reasons have clear, political "priority."[241] Given its structure, this proviso necessarily applies only to those serving in public office, but there it applies absolutely. In parliament, all untranslated religious rhetoric will be stricken from the public transcript of proceedings.[242] This is a good deal less wide than Rawls' "wide view" of public reason.

This demand naturally imposes clearly asymmetrical "burdens" upon citizens, insofar as it is only religious citizens, upon formally exiting the public sphere, who are asked to translate their contributions and from whom it is demanded that they not express the whole truth as they understand it.[243] Despite this obvious and possibly disconcerting asymmetry, this feature of Habermas' theory does not represent "an injustice *per se*," for a burden is also placed upon "religiously tone-deaf citizens" as well, which serves, in some respects, to "counterbalance" the asymmetry. In light, also, of the egalitarian gain made in terms of abolishing religious discrimination, it would be wholly "disproportionate" on the part of religious citizens to reject the translation proviso solely in the name of this far milder asymmetry.[244]

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[239] Habermas, "'The Political,'" 25-26; "Religion in the Public Sphere" in BNR, 134, 136.
[240] Habermas, "Religion in the Public Sphere" in BNR, 130.
[241] Habermas, "Religion in the Public Sphere" in BNR, 137, 139.
[242] Habermas, "Religion in the Public Sphere" in BNR, 128, 131.
[243] Habermas, "Prepolitical Foundations of the Constitutional State" and "Religious Tolerance as Pacemaker" and "Equal Treatment of Cultures" in BNR, 112 and 262-64 and 286-87, 309-10.
[244] Habermas, "Religious Tolerance as Pacemaker" and "Equal Treatment of Cultures" in BNR, 263 and 309-10. Sometimes he will argue, on the contrary, that this burden is not asymmetrical, but this seems oddly inconsistent with his other statements. E.g., "Religion in the Public Sphere" in BNR, 131-32, 136, 138, 143; "'The Political,'" 26.

Religious citizens must never forget the burden that is placed on their secular brethren, and the clear social-egalitarian gain that that represents. Consistent with a genuine democratic practice attuned to the virtue of reciprocity, the Habermasian view of public reason maintains that it is completely impermissible for committed secularists and rabid, died in the wool atheists to laugh at their religious brethren or to dismiss them as simple-minded, country bumpkins. They must— at least initially—take seriously the possibility that religious arguments contain some sort of translatable truth-content.[245]

The principles of equal participation and a conception of democratic legitimacy grounded in the presumption of rationality ultimately demand a certain set of "legally noncoercible political virtues" of all citizens.[246] Habermas does not shy away from acknowledging that all of this demands from each and every citizen a "quite demanding epistemic mind-set" whose "cognitive presuppositions … are far from trivial," nor from acknowledging that its demanded cognitive presuppositions and virtues are "prepolitical in origin" and cannot "be legally imposed." "The liberal state can scarcely influence [them] through the legal and administrative means at its disposal." Nevertheless, and despite the difficulties, this understanding of democratic citizenship is "the price to be paid for the neutrality of state authority toward competing worldviews."[247]

Thus, even now, and despite an effort to widen the public sphere beyond Rawls' wide view of public reason, the core of Habermas' basic project still remains, and this core tethers it to the project of political liberalism, especially to its aspiration for worldview neutrality. After all is said

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[245] Habermas, "'The Political,'" 27, 32-33 n. 22. This essay is, in part, a response to the critique by Lafont, "Religion in the Public Sphere," 249 ff., who argues that Habermas' demands of secular citizens is too high, that, in effect, it requires secular citizens to consider the merits of issues they know to be nonsense (e.g., creationism's polemic against the theory of evolution).

[246] Habermas, "Religion in the Public Sphere" in BNR, 121, cf., 135. Cf., "Religious Tolerance as Pacemaker" in BNR, 258

[247] Habermas, "'The Political,'" 26; "Religion in the Public Sphere" in BNR, 143-44.

and done, the liberal democratic constitutional state and its constitutional essentials must possess "an autonomous grounding" that is "rationally acceptable to all citizens" in the sense that it can be "justified neutrally towards worldviews." In addition, all procedurally correct democratic outcomes and the exercise of political authority must themselves remain "neutral toward the cognitive claims of competing worldviews."[248] The liberal democratic constitutional state "forfeit[s]" its own legitimacy if the formal procedural structure of the state is too "infiltrate[d]" by cultural, religious, or militantly *laïciste* substance.[249] To ask for anything "'deeper'" than what Habermasian worldview neutrality allows, he says, ultimately "amounts to obscurantism."[250]

The natural authority of pure, un-supplemented human reason remains as the abiding theme. The adequacy of procedural, postmetaphysical democratic politics to "defuse" existential conflict rests upon "the assumption of a common human reason" which can serve as the "epistemic basis" for "shared standards."[251] From the vantage point provided by natural reason, one must absolutely insist upon a "strict demarcation" between the "certainties of faith" and "knowledge" understood as "publicly criticizable validity claims."[252] All political actors "*must* accept the authority of 'natural' reason … and the basic principles of universalistic egalitarianism."[253] As in institutional, deliberative politics, the same epistemic-metaphysical asymmetry carries over into the interpretive terms with which Habermas describes citizens' worldviews, although the analysis is purportedly postsecular. On the one hand, there are the secular citizens who carry "light metaphysical baggage," and, on the other, the believers who carry "heavy metaphysical

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[248] Habermas, "'The Political,'" 24; AWM, 20-21; "Prepolitical Foundations of the Constitutional State" and "Religion in the Public Sphere" in BNR, 104, cf., 113 and 130. Cf., text and "Faith and Knowledge" in FHN, 32, 38, 40 and 105.
[249] Habermas, "Religious Tolerance as Pacemaker" in BNR, 265-66.
[250] Habermas, "'The Political,'" 24.
[251] Habermas, "Religion in the Public Sphere" in BNR, 120, 134.
[252] Habermas, "Religion in the Public Sphere" in BNR, 140, 143.
[253] Habermas, AWM, 16, emphasis added.

baggage."[254] At the end of the day, it's not clear that this is exactly the type of descriptive tack one would want to take in order to raise oneself above the "suspicion" that hiding behind his words is actually "condescending indulgence"—tolerance of a potentially "oppressive" sort.[255]

Why democratic constitutional neutrality? By what force of reason or circumstance does this principle become a necessity for us moderns? In his wisdom, Habermas certainly does not set out to argue here for the authority of natural reason self-referentially, i.e., to argue on the grounds provided by natural reason that it is superior to revealed truth. Philosophy ultimately has no pretention to "determine what is true or false in the contents of religious traditions."[256] Instead, the justificatory account for the necessity of this type of state is, in the final analysis, surprisingly prudential in character. The line of reasoning is the one already familiar from Rawls. War and violence loom dangerously upon the horizon. If natural reason cannot arbitrate our differences, and if we cannot agree upon a neutral constitutional order, then we shall be forced *nolens volens* to enact a recapitulation of the sixteenth-century, European wars of religion at the height of modernity.[257]

## 4.10 The Post-secular Age and its Implicit Challenge to Procedural Neutrality: The Case of Human Dignity

Does constitutional neutrality ultimately undercut too much? Here we return to a theme first advanced in an earlier chapter. More so than Rawls, Habermas has come to recognize the essential importance of the tradition, which I have earlier called the discourse of dignity, and his appreciation of the supportive role it plays in meaningfully liberal democratic self-governance is

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[254] Habermas, "Religious Tolerance as Pacemaker" and "Equal Treatment of Cultures" in BNR, 262-63 and 309.
[255] Habermas, "Religion in the Public Sphere" in BNR, 120.
[256] Habermas, "Prepolitical Foundations of the Constitutional State" in BNR, 109, cf., 113.
[257] Habermas, "'The Political,'" 21, 24; "Faith and Knowledge" in FHN, 104-05; "Religion in the Public Sphere" and "The Boundary between Faith and Knowledge" and "Equal Treatment of Cultures" in BNR, 120 and 240 and 306. Cf., "Cognitive Content of Morality" in IO, 39 ff.; "Morality, Society, and Ethics" in JA, 151.

on full display. Habermas is also sensitive to the simultaneously distinctive and problematic status of notions of human dignity. This emerges especially clearly in the context of his discussions of bioethics (genetic engineering, abortion, etc.). And yet, he denies the conclusion that would otherwise seem to follow, namely, the rejection of the idea of worldview neutrality. But, as we shall see, the strategies he deploys to evade this conclusion are ultimately insufficient.

Habermas demonstrates an awareness of the possible communicative incommensurability between the worldview supportive of equal, universal human dignity and that of natural science, while simultaneously exhibiting signs that he is cognizant of the attendant conceptual and political problems. He disclaims natural science's aspiration to assimilate all explanation under the rubric of scientistic analysis. This "naturalistic worldview," he derides as both "bad metaphysics" and "bad philosophy."[258] However this may be, he is fully cognizant of the accelerating tendency of contemporary citizens to interpret their own lives in the terms afforded by the powerfully compelling and influential naturalist worldview of the experimental natural sciences.[259] He is also correct to acknowledge that in certain, politically relevant controversies, there is no middle ground between scientific naturalism and Christian ontology. *Tertium non datur.* This contrast is particularly stark in bioethical debates (e.g., abortion). Thus—and here is the important point—he recognizes that debates of this type are insoluble "in terms that are neutral with respect to worldviews, that is, not prejudging, and thus acceptable for all citizens of a secular society."[260]

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[258] Habermas, "'I Myself am Part of Nature'" and "Boundary between Faith and Knowledge" in BNR, 207 and 245; "Faith and Knowledge" in FHN, 108.

[259] Habermas, "Religion in the Public Sphere" "Boundary Between Faith and Knowledge" and "Religious Tolerance as Pacemaker" in BNR, 140-41 and 239 and 265.

[260] Habermas, FHN, 31-32, cf., 42-43. Cf., BFN, 210. This is the example Sandel, "A Response to Rawls' Political Liberalism" in *Liberalism and the Limits of Justice,* 196-202 levels against political liberalism.

Habermas also straightforwardly acknowledges that the status of human beings as creatures thought to have equal dignity deserving of equal respect is highly dependent on an underlying anthropology. This view rests upon "a prior *ethical self-understanding of the species*" that is anterior to the "abstract morality of reason."[261] Moreover, he is conscious of the relationship between the account of creation in Genesis and the contemporary notion of human dignity, the role that this theological anthropology has played in sustaining the morality of human dignity, and the continued productive appropriations that philosophy has made in this realm.[262] Finally, he is aware that the unconditional requirement that we treat human dignity as something inviolable is highly demanding and under constant assault.[263]

His general awareness, however, for the issue to which I've drawn attention in my critical discussion of Rawlsian political liberalism—and all that the problem entails—appears to dissolve at important junctures. Habermas clearly understands that the notion of equal, universal, human dignity possesses a strong, inseparable relationship to the intuitive appeal of the constitutional essentials he happens to favor. However this may be, he simply doesn't appear to have taken seriously enough the possibility that this principle might actually be controversial in the deepest sense of that word, i.e., not acceptable to all persons *qua* persons. Instead, he deploys several strategies to artfully evade the issue. We have already had an opportunity, above, to discuss discourse ethics' controversial claim about the pragmatic-performative structure of dialogue, so

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[261] Habermas, FHN, 29, 39-40. Cf., "Remarks on Discourse Ethics" in JA, 59.
[262] Habermas, text and "Faith and Knowledge" in FHN, 40 and 109, 114-15; "Prepolitical Foundations of the Constitutional State" and "Religion in the Public Sphere" and "Religious Tolerance as Pacemaker" and "Equal Treatment of Cultures" in BNR, 102, 106, 110 and 131, 142 and 253-54, 261-62 and 305; "'The Political,'" 27; "Conversation about God and World" in TT, 149-51, 155, 160, 162, 164. Cf., "Cognitive Content of Morality" in IO, 7 ff.; BFN, 291; "Transcendence from Within" in RR, 68, 80-81; "Rightness versus Truth" in TJ, 262; "Actions, Speech Acts," 71.
[263] Habermas, "'The Political,'" 23.

there is no need to address that here. Here we will survey the remaining, likely candidates for argumentative strategies.

At times, Habermas will simply stipulate that which needs to be explained, specifying, for instance, that the type of society he has in mind is one that is "founded on mutual respect for persons."[264] Under these stipulated conditions, he will attempt to re-describe human dignity in order to drive a wedge between his and the Christian theologico-metaphysical view. Thus, he writes that "'human dignity' … is not a property … that one might 'possess' by nature; it rather indicates the kind of 'inviolability' which comes to have a significance only in interpersonal relations of mutual respect, in the egalitarian dealings among persons."[265] Here, he is able to mis-describe human dignity, because he assumes the presence of conditions that make its status as a moral axiom completely superfluous, namely, "interpersonal relations of mutual respect," etc. Why those conditions appeal at all on the intuitive level for citizens wedded to postmetaphysical, procedural neutrality is, however, precisely what needs to be explained.

His other method of avoiding the issue consists of describing the presupposition of equal, universal human dignity (and its constitutional-procedural analogue [maximal, participatory inclusion]) as involving assumptions that are only "minimal," "weak," "thin," "modest," or even "innocuous" in character, with the unstated presumption, perhaps, that what appears minimal, weak, or modest to Habermas and his readership somehow bleeds into the realm of postmetaphysical neutrality.[266] Similarly unpromising as mode of basic justification is his claim that the basic principle is itself either "not disputed" or is presupposed by all other modern

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[264] Habermas, "Remarks on Discourse Ethics" in JA, 47, cf., 45-46.
[265] Habermas, FHN, 33, cf., 37.
[266] Habermas, FHN, 40; "On the Architectonics of Discursive Differentiation" and "Prepolitical Foundations of the Constitutional State" in BNR, 83, 87 and 103-04; "'Reasonable' versus 'True'" in IO, 89.

cognitivist theories of ethics.[267] But here, the reader would like to know why a moral claim at home and undisputed within a particular culture or philosophical tradition of enquiry—which he himself has done a good deal to shape—should be considered to be neutral.

At other points, he seems eager to question much of what is taken for granted, even what may have been taken for granted by the academic establishment. Even the relevant "criteria of equal treatment," he maintains, are themselves "essentially contestable." Standing in the background of this claim is his desire to provide ammunition for feminist and queer theory critiques of contemporary society: the debate about whether or not women and homosexuals are treated equally *in the relevant respect* is itself a question for the democratic arena. Concrete, contemporary cases of palpable, but often well-intentioned disrespect, of the sort which infringes upon essential human dignity, teach us that defining the essential respects of human dignity cannot safely be left to regulations, administration officials, judges, or even to elected officials. From this more reflexive point of reference, even the most "elementary layers of a society's cultural self-understanding" come to be perceived as essentially contestable and thus as something that is legitimately "open to public discussion" by all relevant members of the public. But, at the same time, he assumes that these criteria of equal treatment are essentially contestable only *within* legally institutionalized democratic discourse. "The system of rights only spells out what those who participate in the self-organization of a community of free and equal citizens *must always already implicitly presuppose.*"[268]

Borrowing from the toolbox of neo-Foucauldian critique, Habermas has articulated a genuinely meaningful insight, but neither he—nor the discourse of difference—has carried it through to the

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[267] Habermas, BFN, 115; "Discourse Ethics" in MCCA, 63, cf., 72.
[268] Habermas, BFN, 414-15, 418, 420-21, 425-26, emphasis added.

very end. They have stopped at the guard rails of a deep and yawning cavern, not pausing long enough to gaze deep within it. Here Habermas has simply assumed away the basic problem. This is true insofar as discourse ethics itself functionally presupposes that there is some abiding criterial aspect—which is itself *not* essentially contestable—in terms of which the equalitarian outline of discourse ethics itself may remain unobjectionable from the first person perspective, i.e., something *functionally* equivalent to the traditional notion of universal human dignity. This core is importantly insulated from essential contestability. Why?

At other junctures, Habermas assumes a more empirical-descriptive tack. Sometimes, he would simply enlist "the basic facts" of anthropology, arguing that morality is "a safety device" designed to protect against the "specific vulnerability of the human species." For this reason, there is included in "every morality" the idea of "equality of respect," which, if it is to mean anything at all as a safety device, "must emphasize the inviolability of the individual by postulating equal respect for the dignity of each individual."[269] Quite apart from the fact that such an appeal to the historical record is highly questionable because overly sanguine and selective in its review of facts, it also contradicts what Habermas has to say elsewhere about the "anthropological data."[270] Still, the historical record need not completely detract from the overall strategy of this type of argument: the attempt to follow, without mentioning, the path pioneered by Hobbes. Habermas rejects the *summum bonum,* but orients his political thought around a *summum malum.* Political philosophy must proceed negatively, taking its bearing from the idea of a "damaged life," instead of affirming an already elaborated conception of "the good life."[271] Of

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[269] Habermas, "Morality and Ethical Life" in MCCA, 199-201. Cf., "Remarks on Discourse Ethics" in JA, 39-40, 66-67, 108-09; "Cognitive Content of Morality" in IO, 30, 40; "Remarks on Legitimation through Human Rights" in PC, 126; "Rightness versus Truth" in TJ, 268-69; "Justice and Solidarity," 46-47.
[270] Habermas, "Discourse Ethics" in MCCA, 78.
[271] Habermas, "Morality and Ethical Life" in MCCA, 205. Cf., Hobbes, *Leviathan,* ch. 11, pp. 69-70 with ch. 13, p. 89, ch. 14, p. 99.

course, as Habermas acknowledges elsewhere, this sort of Hobbesian approach is completely

incapable of generating the kind of *unconditional* obligatory force needed to support a genuine

ethic of human dignity and egalitarian respect. Instrumental rationality, even an instrumental

rationality oriented around the fear of the shared danger of oblivion, is simply not up to the task

of articulating any sort of univeralistic, egalitarian ethic of human dignity that holds

*unconditionally.*[272]

Sometimes he holds out the hope that the Western world, along with its ethical intuitions, will

be able, some day, to present itself to others who do not yet buy into all of its premises "in a

credible way."[273] At times, he supplements this prognostication with his observation of a growing

consensus around the idea of human rights and the value of democracy.[274] Yet further, he

sometimes even goes so far as to suggest that "we can take it for granted that these basic rights

are accepted as valid worldwide," declaring that any form of present day skepticism lacks

philosophical cogency.[275] In his more sober moments, however, he cannot help but acknowledge

how distant the realization of this goal of universal acceptance of human rights really is.[276]

No one sensible can deny the possibility that this could come to pass—that the most central

moral intuitions of Western liberal modernity could so saturate the consciousness of all or most

inhabitants of the world, that the thought that it could be, and even once was, otherwise becomes

either unthought or completely uninteresting to all relevant parties. Whether or not such a great

hope will some day succeed cannot be known a priori, and acknowledging the problem is already

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[272] Habermas, "Cognitive Content of Morality" and "'Reasonable' versus 'True'" in IO, 15 and 80.
[273] Habermas, "Faith and Knowledge" in FHN, 114.
[274] Habermas, "Remarks on Discourse Ethics" in JA, 91; "Political Constitution" in BNR, 343.
[275] Habermas, "Does the Constitutionalization of International Law still have a Chance?" in DW, 174, 193, cf.,
however, 144, 170 ff. Cf., "Constitutionalization of International Law and the Legitimation Problems," 451-52;
"Political Constitution" in BNR, 344.
[276] Habermas, "Remarks on Legitimation through Human Rights" in PC, 118-19. Cf., "Constitutionalization of
International Law and the Legitimation Problems," 452-53; "Kant's Idea of Perpetual Peace" in IO, 183-86.

a step in the direction of acknowledging the actually problematic status of allegedly neutral constitutional procedures and principles. Viewed from one set of eyes, success in this project would constitute moral progress; from another, intellectual-imperial colonialism; and from yet another, the triumph of smooth vanilla sameness. With this comment, I do not mean to prejudge the interpretive issue, but only to state the facts. This remark leads into Habermas' last strategy.

Finally, and sometimes out of his exhaustion in battling the skeptical counter-Enlightenment, and in the face of vocalized dissent from foreign governments, Habermas will simply declare human rights to be little more than a productive "construct" and just leave it at that. Seen from this point of reference, this construct "neither requires, nor is capable of, a retrospective justification."[277] They're just there, doing their productive work, and we should be glad for it.

The heart of the issue consists in resolving just what precisely it means to say, and what precisely is entailed by saying that the "religious sources" upon which the modern, liberal democratic constitutional state first developed "have long since become secularized."[278] As a factual matter, this may very well be correct. Personally, I doubt it not at all. So much, so good.

But the more serious questions that arise next are the following: (a) whether what it is with which we've replaced the historical account of human dignity provides the same support and explanatory force as the now-secularized theological notion; (b) whether this new notion remains intelligible within our culture's dominant mode of understanding (i.e., natural science), thus raising serious questions about its allegedly postmetaphysical status; and (c) whether this new notion actually admits of worldview neutral description and support, in the sense that it has

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[277] Habermas, "Remarks on Legitimation through Human Rights" in PC, 121-22.
[278] Habermas, FHN, 108, cf., 109-10.

intellectually self-evidentiary purchase for persons qua possessors of natural human reason? I, for one, am skeptical that the answer is obviously yes to any of the three questions.

Habermas' preferred constitutional essentials can be "justified neutrally towards worldviews" *only* if we severely restrict our imagination, ignore the entire history of mankind, dismiss statistically significant populations of the current world as "unreasonable" barbarians, and maintain not only that the fruits of our historical development have now obtained an unassailable status but also that the march of progress ensures that even these intransigently "unreasonable" barbarians will some day or another converge upon our own deepest held beliefs, and we must only wait for this to happen. We can of course maintain all of these premises. Nothing prevents our doing so. However, we must be clear that this is what we are doing and accept the consequences that follow from this recognition, namely, the resolute rejection of any pretense to ahistorical, acultural, postmetaphysical worldview neutrality. The stability and prospective success of the Habermasian formulation of legitimacy is premised either upon a prior, and more fundamental agreement or upon some form of (gentle or aggressive) ideological assimilation for any and all deviants and outliers. This is fine, as far as it goes, but we should be clear that this is not postmetaphysical worldview neutrality. One almost certainly has to be a being of a certain sort with a certain type of history and a certain type of upbringing for the claim of universal, equal human dignity to have any hope at all of self-evidentiary intellectual purchase or authoritative, axiomatic status. Today, there is perhaps *almost* universal agreement on this idea of equal, universal human dignity amongst Rawls' and Habermas' readership, most political actors in the countries where their sympathetic readership lives at least pay lip service to it, and collectively this loose group commands the most impressive economic and military power currently at the disposal of mankind. Still, honesty compels us to admit that happenstantial

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convergence on a particular idea amongst a circumscribed population (however large) is not at all the same thing as uncontroversially neutral agreement about basic principles. In certain sociologically defined populations, this phenomenon of happenstantial convergence might give the *simulacrum* of postmetaphysical neutrality to those standing within it, but a simulacrum is what it will always remain.

Despite their admitted differences, Habermas' continuation of political liberalism by other means falls into the same basic set of problems as the original Rawlsian variant.

## II. The "Insurrection of Subjugated Knowledges": Michel Foucault and the Discourse of Difference

## 5. Disciplinary Normalization and Cultural Revolution: Power and Genealogical Critique

Another prominent strand of contemporary thought, which I call here the *discourse of difference*, stands along side the political liberal project.[1] Almost contemporaneous with one another, the political liberal project and the discourse of difference are nevertheless in a posture of mutual antagonism with respect to each other. The discourse of difference arrives late in liberalism's history, but, in some ways, it is intelligible only within that history. If, as I contend, one prominent strand within the liberal tradition can accurately be described as the aspiration for worldview neutrality, then it is precisely to this stand of the liberal tradition that the discourse of difference reacts. The discourse of difference goes yet one step further beyond the aspiration for neutrality, though in a slightly different direction—towards affirming, or rather towards providing enlarged space within contemporary societies for, an increased swath of diverse and plural ways of life. The discourse of difference does not aspire to neutrality in the way of the liberal thinker, but instead, asks us to affirm, to celebrate, and/or to provide expanded space within contemporary societies for the types of difference that the liberal aspiration for neutrality had been meant to protect.

Though it goes generally unacknowledged, the starting point for the discourse of difference is a classically liberal one: The vision that differing men and women might be able to pursue their own conception of the good freely, without restriction, and in whatever idiosyncratic way they

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[1] I've borrowed this expression, "discourse of difference," from Elshtain, *Democracy on Trial,* 73.

see fit, whatever that might entail.[2] As Mill puts it: "The only freedom which deserves the name, is that of pursuing our own good in our own way."[3] Above all else, this is the (sometimes hidden) moral commitment of the discourse of difference. It is this to which the aspiration for neutrality addresses itself, but, from the point of view of the discourse of difference, the general strategies, epistemic and institutional, of the political liberal project are nevertheless indicted as monstrous failures.

I do not mean to say that the discourse of difference has all of its genealogical origins in the tradition of liberalism. That is certainly not correct; and the mutual antagonism of the two schools is sufficient evidence that a chasm does indeed separate them, despite certain distinctive similarities in moral outlook. Instead, what I mean to say is that a peculiar yet powerful understanding of liberalism abets the discourse of difference, and thus, without explicitly invoking it, the discourse of difference is able to find in the moral resources of classical liberalism, narrowly conceived, some *partial* claim to legitimacy and warrant for the reader's attention.

The aspiration for neutrality paves the way for a discourse of difference that, though not itself a form of liberalism, is nevertheless parasitic upon a strand of liberalism's aspiration for neutrality and the provision of space for ways of living of diverse human beings each seeking their own good in their own way. The aim is neutrality amongst, and non-discrimination against, the multifarious ways of living envisioned by plural citizens. What the discourse of difference claims is that the liberalism of neutrality is not and cannot be neutral among competing visions of

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[2] Cf., Spragens, "Between Bigotry and Nihilism," 204-7. Spragens, *Civic Liberalism,* 79-105 (ch. 4) treats a similar group of thinkers under the label of the "liberalism of difference," though my ideal type is far more circumscribed, and I do not see them as liberals, broadly speaking, notwithstanding the fact that, e.g., Connolly self-identifies (sometimes) as a "liberal." E.g., Connolly, ID, 80, 83, 91, 93-94, 213; WNS, 10; EP, xxviii; P, 155; Connolly et al., "Interview with William Connolly: Interview Questions from Samuel Chambers," 325-27.
[3] Mill, *On Liberty* in *Collected Works,* 18:226.

human life; that the aspiration to neutrality embodied within the political liberal project actually carries within itself tacit, normalizing pressures that covertly work to shape individuals in unjustified, illicit, or sometimes insidious ways; and that all of these pressures operate beneath the threshold of articulate debate, discussion, and generally go unrecognized by those who pay attention only to the official and public, progressive rhetoric. A just regime, therefore, must be one that does not shy away from promoting and affirming diverse and plural ways of living and being in the world, or at least from providing a political forum or space more sensitive to, and accessible by, these diverse and plural voices.

What I am here calling the discourse of difference is *not* shorthand for "identity politics"—a term which was always far too protean and diffuse to treat as a singular school of thought.[4] Instead, this ideal type that I'm constructing refers to those thinkers, writing primarily in the English language or addressed to that audience, who draw especially heavily upon Foucault, a left-democratized reading of Nietzsche read largely through the lens of Foucault, selectively

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[4] Thus, I largely, but not completely, exclude from consideration someone like Iris Marion Young, who is less of a conceptual purist, though she certainly shares some affinities with the group. When it serves her purposes, she freely cites from Foucault and others within the canon of the discourse of difference. E.g., Young, *Justice,* 32, 41, 96, 98 ff., 125, 209, 229-30. However, she is self-consciously not at all preoccupied with "metatheoretical" or "epistemological questions" that "abstract from the social issues" (8). This reveals itself in her argument. Her commitment to "Enlightenment" ideals of "equal moral worth of all persons" as persons is full throated (156-57, 159). Thus, she writes of "universalistic values" and presumes the possibility of articulating a minimalist image of human nature and of the good life which is nevertheless "abstract enough" that it "will not devalue or exclude any particular culture or way of life" (36-37, cf., 105). Though Habermas does not escape without some criticism, she nevertheless freely draws upon his communicative ethics as a democratic "ground" (92-93, cf., 106, 117-18). The resulting fundamental ambivalence spills forth on the page. On the one hand, she asserts "positive ideals and principles" by drawing on the "normative possibilities unrealized but felt in a particular given social reality." These have, for her, the character of "assumptions," but they are unproblematic assumptions because many today are "sympathetic enough" with them (6-7, 14, cf., 66, 226, 241, 256-57, 258). However, when she criticizes others or other ideas (e.g., the "privileged," the "myth of merit," neo-republican and communitarian-inclined thinkers), she derides the attempt to universalize "situated assumptions and commitments," she expressly challenges what she calls "widely held principle[s] of justice in our society," and ultimately, she even questions whether it is actually possible for a community actually even to "share … common values"—counter-claims which would seem to call into question her own normative, argumentative strategy (115, 200, 227). Young's ultimately ambivalent posture towards the discourse of difference cannot be better summarized than in her judgment of Connolly's work: "fascinating in its theses and style but also frustrating in its rambling, abstractness and ultimately, lack of political recommendations." Young, Review of Identity/Difference, 511. Cf., the acrimonious response in Connolly, "Identifying the Difference," esp. 130 and n. 1.

appropriated ideas and tropes from Heidegger, and also more broadly upon the loose "post-structuralist"/-"modernist" canon.[5] Above all, however, what unites these thinkers is a shared temper and concern with difference, the conviction that former narratives of unity, coherence, commonality, etc. paper over and conceal the truth about the diverse lives that real peoples actually live and in this way do "violence" to those human lives, which fail to fit neatly into the rubric of late modern or industrial, bourgeois society. This problem is especially acute in late modern societies, due to demographic conditions in most modern states resulting from globalized immigration patterns.

Especially prominent in the discourse of difference, is what I'd like to call here the spirit, ethos, sensibility, or morality of non-judgmentalism.[6] It is related to, but stronger than, liberalism's anti-paternalistic temper. Though most of these thinkers would not express themselves in these terms, this ethos is fundamental to the discourse of difference, and it is understood to be a basic requirement of a responsible politics for late modern societies.

For the purposes of the present study, the discourse of difference is significant not only for its general prominence within the discipline and its large role in shaping at least a part of the general sensibility of that same discipline, but also in that its own political vision represents the most serious, contemporary challenge to the idea of a guiding cultural horizon to politics. The discourse of difference, at its best, acknowledges that there exists a relatively, albeit imperfectly,

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[5] On this "canon," see Lilla, "Politics of Jacques Derrida." As parts of this canon, Lilla identifies French "poststructuralists" (e.g., Jean Baudrillard, Gilles Deleuze, Jacques Derrida, Michel Foucault, Julia Kristeva, Jean-François Lyotard) and early generation Frankfurt School thinkers (e.g., Theodor Adorno, Walter Benjamin, Max Horkheimer, Herbert Marcuse). Precisely because this is a canon that does not have firm institutional authority standing behind it, it is a loose canon, whose borders are porous and ever changing. Foucault wishes, however, to distance himself from "postmodernism" and "poststructuralism." Foucault, "Structuralism and Post-Structuralism" in EW, 2:447-48. On numerous occasions, Foucault also distanced himself from "structuralism." See Foucault, "Foreword to the English Edition" in MC, xix; "Truth and Power" in FR, 53-54; "Structuralism and Post-Structuralism" in EW, 2:437. Cf., however, Foucault, AS, 15.

[6] The expression, "morality of non judgmentalism," is borrowed from Spragens, "Between Bigotry and Nihilism," 204, cf., 210.

shared, semi-authoritative background "unthought" within whose general outlines and frontiers most political actors operate, though most of the time unwittingly or not fully self-consciously—and, in fact, as we shall see, this is the most important meaning of Foucalt's concept of "power." Yet, the discourse of difference recoils from this idea, for it sees in it great danger. Were I, however, to show that the very success of the discourse of difference were itself, in important ways, parasitic upon an often unacknowledged, sometimes reluctantly acknowledged, or problematically affirmed guiding horizon of a distinctive kind, this would represent no small contribution to defusing a good deal of the schoool's critical challenge. Though the discourse of difference is correct to insist on the constitutive importance of something like power, the posture towards this school appears to recommend is a good deal less plausible.

In what follows, I will introduce Foucault as the central personage in the discourse of difference and discuss the manner in which I will approach his body of work (§ 5.1). The interpretive exposition of Foucault's thought world is in service of the critique that is to come later—a critique which strives dutifully to remain faithful to the thought of this deep and important thinker.

   This is followed by a brief discussion of what Foucault does and does not inherit from Nietzsche, in order to begin to lay out the general outline of Foucault's thought. Though there is much that Foucault's own Nietzscheanism simply passes over and casts aside in Nietzsche's body of work, I argue that Foucault is in fact an authentic Nietzschean, but of a particular kind. He is, I contend, the great left-Nietzschean of the twentieth century. This discussion, moreover, prepares us to understand the Nietzscheanism of the discourse of difference, and, in addition, the terms under which the confrontation with Carl Schmitt will take place (in a later chapter) (§ 5.2).

The analysis of the essential and core features of Foucault's thought begins in earnest with a discussion of his enigmatic and mysterious sociological-metaphysical category of "power," which is essential for understanding his conception of knowledge in the following section. Particularly significant in this regard are the "productive" and omnipresent aspects, which Foucault ascribes to power, and particularly so in his conscientious decision to distance himself from a conception of power, which views power as something pernicious, potentially or actually (the "repression hypothesis"). Though Foucault wishes often to describe power as something "relational," "material," "concrete," and sometimes even "empirical," it becomes clear that power's deeper significance for him consists in its ability to serve at the conceptual level as an explanatory place holder, which fills the void opened by the reported demise of the meaning-giving subject and thus also of a conception of history as driven by human agency (§ 5.3).

Thereafter, I begin to outline Foucault's sociology, or metaphysics, of knowledge. Human knowledge is not something *read* from the world, but rather something *done* to the world. Human knowledges and rationalities (in the plural) exist only within the bounds of a historically-determinate and particular discourse or regime of truth, behind which stands a particular articulation of a relation of power, which produced it. This discourse or regime of truth functions as the power-constituted historical unthought, which serves as the background to the thought of those human beings, which inhabit that given epoch. The discourse or regime of truth of one society is parallel to that of another. They are not in a relationship of inferiority or superiority to one another (§ 5.4).

The parallel, non-hierarchical position of contending regimes of truth or discourses would seem to imply that there are no compelling grounds upon which we might distinguish, prefer, or affirm a given regime of truth, discourse, or society to another, and thus in the name of which one

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might resist, struggle, or subvert the present. That being said, a critical stance is implied quite strongly by Foucault's work, which would seem to suggest the contrary: that at some level there is—in fact or at least potentially—a singular or particular range of discourses or regimes of truth to be affirmed by the Foucauldian project. Foucault's research and the following it has inspired, moreover, are both unintelligible unless we take cognizance of this element. Foucault's critical, evaluating stance, the political-ethical sensibility animating it, and his deeply problematic attempt to wrestle with his own commitment to this sensibility in its concrete instantiation—are clearest in three moments of Foucault's body of work: in his analysis of the crisis of modernity ("disciplinary normalization"), in which he sees the pernicious introduction of arbitrary, power-infused moralizing, under the façade of pseudo-scientific nomenclature (§ 5.5); in his conception of critical historiography ("genealogy"), which is designed as a response to the crisis of modernity, in that it attempts to demonstrate the deeply contingent character of all social form and thus to challenge disciplinary normalization as a tactic pursued in late industrial societies (§ 5.6); and in his discussion of the "specific" intellectual, who is purportedly able to stand back from the messy business of affirming a particular discourse or regime of truth, because his analytical efforts are only ever undertaken in the service of local struggles waged by *other* people who themselves are already committed to particular, local projects and who themselves somehow already know what is to be done without the patriarchal guidance of the intellectual (§ 5.7).

In the subsequent chapter, we will confront the conceptual difficulties of the Foucauldian approach as outlined here.

## 5.1 Michel Foucault: The Man and His Work

With generally few exceptions, every movement, school, or collective persuasion—whether united by a doctrine or creed or by a shared sensibility or ethos—has its origins either in a

singular thinker or in an assemblage of like-minded intellectuals, who have articulated the movement's general sensibility, the important set of problems which need to be addressed, and the language and theoretical outlines in and within which subsequent conversation will be held. Today, the figure who looms the largest in the contemporary discourse of difference is the late Michel Foucault. The thought world especially of the middle to later part of his career gives intellectual expression to the theoretical imaginary that animates the research agenda of the discourse of difference. It is, moreover, no exaggeration to say that no other single intellectual figure of the twentieth century has had a more decisive influence than Foucault on the academy today, or is, at least within the humanities and the social sciences of the English-speaking world, more often cited.[7]

When one reads Foucault, it is thrilling and exhilarating. It is clear that an "event," so to speak, is taking place—despite Foucault's overly humble and repeated efforts to deemphasize his originality or significance.[8] It is indeed manifest in reading him that Foucault was, as he puts it, one "enamoured of libraries," and for a scholar, this can never be read as a term of derision.[9] Not just erudition and scholarship, but probing curiosity and a keen, active, and creative intellect are readily apparent upon even the most superficial read. Moreover, no other thinker today presents as thoroughgoing a challenge to liberal constitutional order as does Foucault—a challenge that is both compelling and glistening with learning. One cannot read Foucault with the serious intent to understand him and emerge on the other end unscathed and without having been in some way changed. Simply put: Foucault's celebrity was justly earned. Whether, at the end of the day, we

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[7] See "Most Cited Authors of Books in the Humanities, 2007." The study is not clear whether the "humanities" include History, Philosophy, Political Theory, Sociology, Cultural Anthropology, etc.
[8] E.g., Foucault, "Truth and Power" in FR, 57. Cf., OD, 76.
[9] See Foucault, "Two Lectures," in PK, 79. Cf., "Nietzsche, Genealogy, History" in FR, 77.

agree or disagree with him on this or that point, Foucault is surely to be counted among the most significant intellectuals of the late twentieth century.

That being said, after outlining the most important features of the Foucauldian thought world and sensibility, I wish also to draw attention to problematic features of his thought—problems, which I take to lie at the very core. I draw attention to these problems not to make a pedantic point, but because it is precisely these problems that the discourse of difference inherits and to which they must respond. We can't begin to develop an appreciation for how and how successfully they may have responded to these problems, without first understanding the problems themselves.

First, however, some provisional remarks about reading (and interpreting) Foucault.

It should be borne in mind that every discussion of Foucault as a thinker with a semi-unified body of work confronts some problems, and not simply for the reason that his work appears to have undergone major shifts during his lifetime, but also because it's not clear that Foucault himself thought of his own work as presenting a "method" of enquiry or that there is even a unified body of thought or a "'single' Foucault."[10] Surely, Foucault has himself disavowed the claim that his work presents a "methodology" per se or a unified theory, or that he even aspired to such a thing. In a 1969 work, he tauntingly declared: "Do not ask who I am and do not ask me to remain the same: leave it to our bureaucrats and our police to see that our papers are in order." Later, in 1974, he presented his work as a "*tool-box*" upon which his readers might draw.[11]

That being said, it's nevertheless possible to speak of his general outlook and the trajectory of his thought, though we are reluctant to call it a "system" or anything of that nature. The following

[10] See Hoy, "Introduction" in *Foucault,* 2-3.
[11] See Foucault, "Subject and Power" in EW, 3:326; AS, 16-17; "Prisons et asiles dans le mécanisme du pouvoir" in DE, 1:1391. Cf., Foucault and Deleuze, "Intellectuals and Power" in LCP, 208.

account—inadequate to the complexity and richness of Foucault's thought, but sufficient for the present purposes—will privilege Foucault's work which began in the early 1970's, after he began his work at the Collège de France. This is the work which appears to have received the most attention in the English speaking world and thus it serves as the germ for the neo-Foucauldian research agenda. The central thematic treated here will be the one announced especially by the publication of *Discipline and Punish* (1975) and its analysis of the crisis of modernity: disciplinary normalization. Material produced prior to 1975 will be discussed only to the extent that it represents elements retained by Foucault in his later writings. These interpretive decisions can be supported perhaps only by a judgment about the whole—irreducible to explicit, axiomatic rules—whose very "proof" or adequacy consists only in the overlapping and enmeshed consideration of fidelity to the texts and the meaningful coherence of the overall picture presented. For the most part, moreover, I will eschew the very common practice of developmental and periodizing accounts of his thought, while still remaining cognizant of the fact that (sometimes substantial) drift does at least appear to have occurred in his thought over the course of his career and even towards its end.[12]

Discussions of Foucault often make use of lecture materials from the Collège de France, of the essays, and also of the numerous interviews he gave during his lifetime. Perhaps, however, one

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[12] Foucault himself identifies 1975-76 as representing a decisive shift in his thought, and he indicates that there are also great thematic and philosophic changes between volume 1 and volumes 2-3 of the *History of Sexuality.* See Foucault, "Return of Morality" in FL, 465, 470-71. In focusing on Foucault's "later" work, I also follow to a large extent Dreyfus and Rabinow's argument that Foucault's earlier, quasi-structuralist, "archaeological" attempt to conceptualize discourse as rule-governed and autonomous had not yet freed itself of the "anthropological doubles" of the transcendental/empirical and the cogito/unthought—a dualism, which has, on Foucault's view, called into question the adequacy of the idea of man as both subject and condition of knowledge and as an object of knowledge within the "human sciences." For this reason, "archaeology" was a "methodological failure," and shifts in Foucault's work represent his awareness of these difficulties. The turn then from "archaeology" to the privileging of "genealogy" represents the "inversion of the priority of theory to that of practice." I do not, however, share their confidence in the ultimate success of Foucault's later work, and what they call his "interpretive analytics," to get satisfactorily "beyond hermeneutics and structuralism." See Dreyfus and Rabinow, *Michel Foucault,* xxv, 1, 16-17, 31, 43, 57, 78-79, 83-85, 91-94, 98, 102-04, 118, 22, 124-25, 133, 161, 183, 202, cf., 206, 255-56, 264.

should not read some of these interviews (or the lectures) quite as critically as his published essays and monographs, precisely for the reasons for which some of his interpreters warn, namely, that some of them "lack the precision and supporting scholarship," or that his remarks there were "often incautious."[13]

However, Foucault did consent to the publication of most I draw on here; one may presume that he had, or could have had, access to the galley proofs before the texts went to press; and finally, and most importantly, a thinker who does not believe that interviews accurately convey his thoughts to the reading public is a thinker, who does *not* consent to give interviews. Through his deeds, we can see that Foucault did not hold such a view, as evidenced by the dizzying number of interviews he did in fact agree to give.

Moreover, some of his ideas and critical interests are articulated nowhere more clearly and articulately than in these lectures and especially in the interviews, presumably because it is there that the unarticulated dimensions latent within his published monographs are finally brought out and clarified. For this reason alone, it would be a supreme mistake to ignore the formulations found in the lectures and interviews.

So, in summary, despite Foucault's clear penchant for sensationalist and hyperbolic rhetorical formulations, the following account of his thought will take seriously those words and ideas he himself or his amanuenses put to paper. If one remains cognizant of the attendant problems and dangers, one may with all propriety make critical use of the lectures, essays, and interviews in the task of reconstructing the contours of Foucault's thought.

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[13] See Dreyfus and Rabinow in Foucault, "On the Genealogy of Ethics" in FR, 340 n; Hoy, "Introduction" in *Foucault,* 13. Cf., however, Gordin, "Preface" in Foucault, PK, x.

But first, to understand Foucault and thus the discourse of difference, we must first have a sense for what Foucault inherits, sometimes undigested and sometimes in modified form, from Nietzsche, and thereby what the discourse of difference also takes from him to various degrees.

## 5.2 Left-Nietzscheanism

It is today a truism to say that Foucault is a Nietzschean of sorts, and in a deep way, this is correct. It is a point, moreover, which Foucault himself acknowledges in various ways during his career.[14] Certainly no argument is required to make that point.

Looking carefully at truisms is, however, important, because sometimes we have forgotten what did and what did not make them truisms to begin with. Although Foucault never wrote a manifesto, "What I owe to Nietzsche," it's relatively clear what he does in fact owe to him. Recounting in brief detail these elements helps us to begin to appreciate the basic contours of Foucault's thought, and thus it also prepares us to understand what it is that the discourse of difference inherits from Nietzsche (by way of Foucault), and also what it is that they neglect or cast aside. These elements I present in summary form.

The elements, which Foucault and the discourse of difference, inherit from Nietzsche are his claim that God is dead and the non-foundationalist stance this is taken to imply; his project of reinstating the "innocence of becoming" and thus his ostensibly this-worldly, anti-metaphysical immanence; his cosmology or ontology of Hericlitian flux and becoming, which he claims we often fail to recognize because the structure of human language seems to suggest that there is more ontologic order to the cosmos than in fact actually obtains; his "perspectivism" and

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[14] Foucault's most sustained, scholarly confrontation with Nietzsche occurs in "Nietzsche, Genealogy, History" in FR, 76-100. See also Foucault, "Return of Morality" in FL, 471; "Truth, Power, Self" in TS, 13; "Nietzsche, Freud, Marx" in EW, 2:272-73, 275-78; "Interview with Michel Foucault" in EW, 3:246-49, 253, 256; "Truth and Power" in FR, 75; "Prison Talk" in PK, 53-54; "Structuralism and Post-Structuralism" in EW, 2:438-39, 445-47, 457; MC, 382-85.

concomitant skepticism about the universality of reason and thus the possibility of multiple, parallel rationalities (in the plural); his conception of philosophy and theoretical enquiry as analogous somehow to the genre of autobiography and thus a reflection of ourselves, our passions, and drives at a given historical moment; his deeply antipositivistic conviction that all "science" rests upon an elaborate system of "metaphysical faith"; his conception of value and morality as constructed, and something under which we place ourselves; his analysis of the place that *ressentiment* has in the Western, Christian moral tradition and thus the basic conceit that morality is rhetorical tool under which lurks any number of extra-moral (and sometimes "morally" dubious) motives with which we deceive ourselves and others; the basic idea that the moral languages that various cultures speak are fundamentally incommensurable with one another; his celebration of the classical Greek competition [*agōn*]; his notion that interpretation, especially of the literary sort, is always a creative activity; his apparent method of inquiry in the *Genealogy of Morals,* which, after Foucault, has been called simply "genealogy"; his proto-Freudian understanding of identity as the usually unstable hegemony of one internal drive or affect over another without any self-evident rank order between these drives beyond those that are imposed upon them; his hyper-romantic aestheticism of the self (i.e., the effort to treat the self as a work of art); and more generally, his rejection of the entire tradition of philosophy that came before him.[15]

[15] E.g., Nietzsche, *Gay Science,* § 125, p. 181; *Zarathustra* in *Portable Nietzsche,* Prologue, § 2, p. 124 (death of god); *Twilight of the Idols* in KGW, 6.3:90-91/*Portable Nietzsche,* "The Four Great Errors," § 7-8, pp. 500-01 (innocence of becoming); *Zarathustra* in KGW, 6.1:248/*Portable Nietzsche,* "On Old and New Tablets," § 8 p. 313; *Human, All Too Human,* "Wanderer and his Shadow," § 11, p. 306, *Uses and Disadvantages of History* in *Untimely Meditations,* § 9, p. 112 (flux and language); *Genealogy,* 3.12, p. 119, *Will to Power,* § 481, p. 267, § 567, pp. 305-06, "On Truth and Lie in an Extra-Moral Sense" in *Portable Nietzsche,* pp. 46-47, *Beyond Good and Evil,* Preface, p. 2 (perspectivism); *Beyond Good and Evil,* § 6, p. 13; *Human, All Too Human,* § 513, p. 182 (philosophy as autobiography); *Genealogy,* 3.24, p. 152 (antipositivism); *Gay Science,* § 335, pp. 265-66; *Zarathustra,* "On the New Idol," p. 160, "On Old and New Tablets," § 2, p. 308, § 26, pp. 324-25, § 29, p. 326, *Beyond Good and Evil,* § 108, p. 85, § 211, pp. 135-36; *Twilight of the Idols* in *Portable Nietzsche,* "Morality as Anti-Nature," § 5, p. 490 (value-thinking); *Genealogy,* 1.10-16, pp. 36-54 (*ressentiment*); *Zarathustra* in KGW, 6.1:57/*Portable Nietzsche,* "On the New Idol," p. 161 (moral

What this reading of Nietzsche almost always passes over or casts aside is Nietzsche's "aristocratic radicalism," a phrase that the Danish scholar, Georg Brandes, had attributed to Nietzsche in their epistolary correspondence, and which Nietzsche quite readily assumed thereafter, calling the epithet the "most clever thing he had hitherto read" about himself.[16] Nietzsche's aristocratic radicalism and his general political and ethical worldview includes, among other things, his open and unmitigated contempt for all forms of egalitarianism (e.g., democracy, liberalism, socialism, and "equal rights") and what he believed to be their leveling or flattening tendencies; his fear that the future, flattened world might be populated by a specific type of being, the "last man," who prizes bourgeois self-comfort and "pitiable contentment" above all else; his explicit denial of the universal dignity of man; his antipathy for the working classes and his celebration of mastery and slavery; his sneering disdain for liberal, representative institutions in parliamentary systems; his apparent misogyny; his teaching on the overman; his call for "great politics" and his celebration of war and *violent* strife; and more generally, his semi-heroic, voluntaristic individualism.[17]

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incommensurability); "Homer's Contest" in Ansell-Pearson*,* ed., *On the Genealogy of Morality,* esp. pp. 177-79 (agonism); *Will to Power,* § 767, p. 403 (interpretation as creative); *Genealogy* (genealogy); *Beyond Good and Evil,* § 19, p. 26-27, *Will to Power,* § 481, p. 267 (identity); *Birth of Tragedy,* § 24, p. 141, cf., "Attempt at Self Criticism," § 5, p. 22; *Gay Science* in KGW, 5.2:210/*Gay Science,* § 290, pp. 232-33 (self-aestheticism). On the pitfalls of citing from the *Nachlass* as assembled in the form of the *Will to Power,* see Magnus, "Use and Abuse of the Will to Power." Cf., however, Heidegger, *Nietzsche,* 3:13.

[16] Nietzsche, *Briefwechsel: Kritische Gesamtausgabe,* Nietzsche to Georg Brandes, December 2, 1887, no. 960, p. 3.5:206.

[17] E.g., Nietzsche, *Twilight of the Idols* in *Portable Nietzsche,* "Skirmishes of an Untimely Man," §§ 38-39, pp. 541-44; *Antichrist* in *Portable Nietzsche,* § 57, p. 647, *Beyond Good and Evil,* §§ 202-03, pp. 115-17, § 212, pp. 138-39, § 242, p. 176, § 257, p. 201 (anti-egalitarianism); *Zarathustra* in *Portable Nietzsche,* Prologue, esp. § 5, p. 129-30, cf., § 3, 124-26 (last man); "Greek State" in Ansell-Pearson*,* ed., *On the Genealogy of Morality,* p. 172-73 (dignity of man); "Greek State" in Ansell-Pearson, ed., *On the Genealogy of Morality,* pp. 166-67; *Beyond Good and Evil,* §§ 257-58, pp. 201-02 (slavery); *Gay Science,* § 174, p. 202 (anti-parliamentarism); *Beyond Good and Evil,* § 239, pp. 167-70; *Zarathustra* in *Portable Nietzsche,* "On the Friend," p. 169, "On Little Old and Young Women," p. 178-79, *Will to Power,* § 864, p. 460 (misogyny); *Zarathustra,* Prologue, § 3, p. 124 et passim (overman); *Beyond Good and Evil,* § 208, p. 131, "Greek State" in Ansell-Pearson*,* ed., *On the Genealogy of Morality,* pp. 171-72, cf., *Twilight of the Idols* in *Portable Nietzsche,* §§ 3-4, p. 508, *Human, all too Human,* "Glance at the State," § 481, pp. 177-78, "Assorted Opinions and Maxims," § 315, p. 284, *Beyond Good and Evil,* § 241, p. 175, § 254, p. 194, *Zarathustra* in *Portable Nietzsche,* "On War and Warriors," p. 159 (great politics).—For an excellent and evenhanded account of Nietzsche's actual political views, see Detwiler, *Nietzsche*. See also Gillespie, "Search for Immediacy"; "Nietzsche and the

On Nietzsche's considered view, the salvation of the modern age consists only in discovering or breeding that man who is hardened and has an uncompromising sense for rank and order in human life and yet is at the same time a spiritual creator and legislator of the highest order, whose vision will endure and penetrate the hearts and minds of countless future generations with a force as gentle as it is nimble. This man, Nietzsche calls, somewhat enigmatically, the "Roman Caesar with the soul of Christ."[18] Nietzsche is in this sense not an anti-authoritarian. Instead, he seeks an authority of a specific type, though one distinct in kind from those types that have preceded it in human history. Here, I leave to the side the more inscrutable themes (or "doctrines"?) of *amor fati* and the eternal recurrence of the same in Nietzsche's thought.[19]

Clearly, Foucault and his descendants are all thinkers of the left. Whatever might be said of Nietzsche, it's completely certain that he decidedly and emphatically was not. At least at first glance then, this would seem to suggest that Nietzsche would make for a rather odd travelling companion. In the final analysis, this fact has entailed then that the reception of Nietzsche by those influenced by Foucault (or by Deleuze or Bataille) has almost invariably required interesting, interpretive gymnastics and extreme feats of (sometimes self-conscious) bowdlerizing.[20] This bowdlerizing usually proceeds on the premise that Nietzsche's "thinking far outstrip[s]" many of his own conclusions on politics and other topics, and that the appropriate task then for Nietzsche studies is to "think *with* Nietzsche *beyond* Nietzsche."[21] In response, I

Premodernist Critique," esp. 541-43, 553 n. 2; Berkowitz, *Nietzsche,* esp. ix-x, xii, 5, 10-12, 14-15; Abbey and Appel, "Domesticating Nietzsche." Cf., Warren, "Reply to Ruth Abbey."

[18] See Nietzsche, KGW, 7.2:289/*Will to Power,* § 983, p. 513, translation modified. Cf., *Genealogy,* 1.24, p. 96.

[19] For further explorations of those themes, see Löwith, *Nietzsche's Philosophy.*

[20] For self-conscious bowdlerizing, see Connolly, ID, 10, 186, 190, 197, and generally 184-92, cf., 82-83; WNS, 16, 52, 56, 145, 201-02 nn. 18-20; EP, 25 ff., 206 n. 21; PTM, 137-75 (ch. 5); FT, 150, 168-69, 174-78, 217 n. 3; P, 181 n. 13; "Twilight of the Idols," 131-32; "Response: Realizing Agonistic Respect," 510; TPD, xv; Brown, PH, 121, 126-37. For less self-conscious bowdlerizing, see Honig, PT, 42-75 (ch. 3), esp. 6, 9, 64-65, 74, 229 n. 81.

[21] See Warren, "Political Readings of Nietzsche," 92, 97, emphasis added. Cf., Warren, "Reply to Ruth Abbey," 127-28. A similar debate takes place between Redhead, "Nietzsche and Liberal Democracy" and Connolly, "Reworking the Democratic Imagination."

present without comment an aphorism from Nietzsche: "The worst readers ... behave like plundering troops: they take away a few things they can use, dirty and confound the remainder, and revile the whole."[22]

Foucault, for his part, has not only denied that there is much sense in claiming that there is a "single" or a "true" Nietzscheanism of which we might speak, he has also stated quite unequivocally that fidelity to Nietzsche's thought is, for his purposes, completely irrelevant. "If commentators ... say that I am being faithful or unfaithful to Nietzsche, that is of absolutely no interest." Instead, Foucault maintains that the "only valid tribute" one might make to Nietzsche's work would be to "use it, to deform it," and to "make it groan and protest."[23]

Perhaps the widely diverging and diverse "readings" of Nietzsche should not be cause for surprise, in light of Nietzsche's pronouncement that the "will to system is a lack of integrity" and also his Zarathustra's claim that the student "repays a teacher badly if [he] always remains nothing but a pupil."[24] In the same way that it was once common to speak of left- and right-Hegelianism in the nineteenth century, I suggest here that we speak of *left-Nietzscheanism* and of Foucault as its authentic heir.[25]

## 5.3 "Power"

A discussion of the essential contours of Foucault's thought should begin with a consideration of one core concept: "power"—a sociological category with metaphysical undertones, which

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[22] Nietzsche, *Human, All Too Human* in KGW, 4.3:72/*Human, All Too Human,* "Assorted Opinions and Maxims," § 137, p. 245.

[23] See Foucault, "Structuralism and Post-Structuralism" in EW, 2:445; "Prison Talk" in PK, 53-54. Cf., "Return of Morality" in FL, 471.

[24] Nietzsche, *Twilight of the Idols* in KGW, 6.3:57/*Portable Nietzsche,* "Maxims and Arrows," in *Portable Nietzsche,* § 26, p. 470; *Zarathustra* in KGW, 6.1:97/*Portable Nietzsche,* "On the Gift-Giving Virtue," § 3, p. 190.

[25] Cf., Pippin's use of the term "'left Heideggerians.'" Pippin, "Heideggerian Postmodernism," 18. On Foucault as an authentic interpreter of central Nietzschean strands, I follow generally the judgment of MacIntyre, *Three Rival Versions,* 3. For other perspectives within the early generation, left-Nietzschean movement, see also the essays collected in Allison, ed., *New Nietzsche.*

Foucault has, almost single-handedly, elevated to its current status of eminence in present day, scholarly discourse.

At least at first, Foucault's analysis of power begins ostensibly at the material and relational level. As we shall see later, however, at the conceptual level and in terms of power's explanatory force, it has in important ways qualities which no true, thoroughgoing empiricist could recognize, thus complicating the initial impression Foucault gives us.

"Power" is the name with which Foucault refers to that thing or phenomenon which constitutes and shapes, or which is responsible for constituting and shaping, the basic outline and the unthought parameters of a given society. Power is what he calls the "complex strategical situation in a particular society."[26]

Yet, power is never in a state of resting equilibrium, and so this strategical situation of power carries along within it the prospect of struggle. As such, Foucault suggests that the appropriate metaphors for power are those of *"struggle, conflict, and war,"* and he inverts Clausewitz's infamous aphorism: "War is a mere continuation of politics by other means." For Foucault, power itself is "war continued by other means." On this schema, the configuration of any given society is determined solely by a "definite relation of forces" or rather by the "disequilibrium" of forces within that society. These relations of force were "established at a determinate, historically specifiable moment" in human history, and the configuration of that given society is perpetuated by tacitly "reinscrib[ing]" these relations of forces and power on the institutions, economic arrangements and mode of production, the language, and even the bodies of each subsequent generation. To attempt to reform or change a particular society is simply to engage in this ongoing war. Foucault correctly notes that such a conceptualization of power effectively

[26] Foucault, HS, 1:93.

displaces the legitimacy/illegitimacy binary with which early modern European political thinkers had long been preoccupied, replacing it thereby with the struggle/submission or struggle/repression binary. Foucault calls this understanding of power "Nietzsche's hypothesis" or the "domination-repression" or "war-repression" one.[27]

As perceived by the critical analyst, power is not strictly speaking a thing, palpable or otherwise that can be held or possessed. Instead, it's a relationship between things. "Nothing is fundamental…. There are only reciprocal relations." To think otherwise, Foucault claims, is to engage in thought that is "metaphysical."[28] In its relational aspect, power exists in the interstices and cracks between concrete relationships, thus forming a web, network, or matrix between subjects and institutions. We do not speak of power's qualities, but rather of its manner or modes. As such, Foucault's systematically and conscientiously privileges the "how?" over the "what?" and the "why?" When the word "power" appears, that should be understood to indicate "power relations," as opposed to a hypostatized, reified entity or substance called "power."[29] Foucault's conception of power is one he takes be decidedly non-Marxian or "economic," in that it does not treat power as a "commodity" or as something that we consciously possess as ours and which can circulate between various members of a society. Instead, power is a "relation of force" that is "exercised" and which "only exists in action."[30]

Though power has aims, it is not wielded by determinate individuals in clearly specifiable ways. Rather, individuals are in certain ways themselves wielded by power. To borrow an expression, power is not "agent-centered."[31] Instead, it permeates a society and itself "constitutes

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[27] Foucault, "Two Lectures" in PK, 90-92. He poses this first as a rhetorical question then follows out the implications. Cf., Foucault, "Truth and Power" in FR, 56, 64; HS, 1:93. Clausewitz, *Vom Kriege,* 1.1.24, p. 210.
[28] Foucault, "Space, Knowledge, and Power" in FR, 247.
[29] Foucault, "Subject and Power" in EW, 3:336, 340; "Ethics of the Concern of the Self" in EW, 1:291.
[30] Foucault, "Two Lectures" in PK, 89. Cf., "Truth and Power" in FR, 58; HS, 1:92 ff.
[31] See Connolly, ID, 95 ff. Cf., Foucault, AS, 125.

subjects." The question of who exercises power, for what reason, and with what conscious intention, desire, or decision in mind is a "labyrinthine and unanswerable question." For this reason, and as a "methodological precaution," Foucault assiduously avoids such types of analysis. Instead, power is "something which circulates" within a "net-like organisation." It is "never localised" at a distinct or specifiable point, and it is "never in anybody's hands." Subjects both "undergo" and themselves "exercis[e]" power in the same moment. Foucault's analysis, in this way, avoids treating the "individual" as either an "elementary nucleus" or as a "primitive atom."[32]

Despite its non-agentic quality, power is, however, in some senses "intentional," and it moves in a particular direction, but only in a very limited sense. Power is "exercised" with its own schemata of "aims or objectives," but it is not "subjective," because the "choice[s] or decision[s]" of particular and "individual subject[s]" are not the motive force that drives power relations. Although there is a "logic" according to which power functions, and by which its "aims" are "decipherable" or intelligible for those who wish to analyze them, the intentions, objectives, or projects of individual subjects cannot "'explain'" power per se.[33]

This non-agent centered conception of power is part and parcel with Foucault's general, lifelong anti-humanist polemic. The subject is dead, Foucault daringly declares in his first philosophical-methodological work, the *Order of Things*. "Man is an invention of recent date. And one perhaps nearing its end."[34] Later in his writings, however, it became clear that Foucault's animus was directed not against *the* concept of man as such, but rather more specifically against the conception of man as a meaning-giving subject—a view popularized within the German and French phenomenological schools and which many subsequent, early

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[32] Foucault, "Two Lectures" in PK, 97-98. Cf., however, "Subject and Power" in EW, 3:337.
[33] Foucault, HS, 1:94-95. Cf., Foucault and Deleuze, "Intellectuals and Power" in LCP, 213.
[34] Foucault, MC, 387, cf., 308, 317, 322, 366, 379, 383, 385.

twentieth-century intellectuals in those two countries saw as the outgrowth of the Cartesian-Kantian tradition and its conception of the sovereign, decontextualized *ego*.[35] What has assumed the place of the subject in the wake of his demise?

Answer: "Power."

In Foucault's lights, power should not be understood along the model of the mighty oppressor who stands above weaker subjects in a hierarchical relation. Power is not a "top-down," dyadic, relation of force. It refers neither to institutions or "mechanisms" that exact subservience or compliance from citizens nor to the subjugation or "domination" of one socio-economic group or class over another. Power does not function in this way, for it does not radiate from a "central point." Instead, power "comes from below" and constitutes what might be characterized as a "chain" or a "system."[36] Power flows through the capillaries and interstices of the social body.

Consistent with this general approach, the Foucauldian analysis of power conscientiously refuses to treat the state as the locus of power, for the state is just one actor among many within the social matrix of power. The state or its ruling elite do not possess the capacity or wherewithal to singularly "occupy the whole field of actual power relations" within a given society, and, moreover, the state's power is not itself fundamental, for its own power derives only from the power of the other nodes within the network. The power of the state is epiphenomenal. It is "superstructural" with respect to the "whole series of power networks" which constitute the real and autonomous base of that society. A revolution which topples a given regime, thus, does not

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[35] See Foucault, "Structuralism and Post-Structuralism" in EW, 2:438. Cf., "Truth and Power" in FR, 59; "Revolutionary Action" in LCP, 221-22.
[36] Foucault, HS, 1:92-94.

remove a historical people from networks of power. Instead, it merely shuffles around and reorganizes the network of power, and sometimes it fails even at that.[37]

Power is thus not top-down, it is not in the hands of the state, it is not wielded by a particular agent, it is not a commodity held by anyone in particular, but it is instead somehow relational. Foucault's major innovation, however, lies in his suggestion that "power" shapes and configures the very fabric of the world, which we inhabit, and in this move, he distances himself most dramatically from a conception of power under whose premises our tradition has operated throughout much of human history and particularly during the last several centuries. Power "operates on the field of possibilities" and thereby determines what open up for us as conceptual and material possibilities.[38] Power does not simply "repress," "abstract," "censor," "mask," "exclude," or "conceal." We must no longer think of power along these lines or in these terms, for it conceals from us the reality that, in point of fact, power itself "produces reality," which is to say that it "produces domains of objects and rituals of truth."[39] Power is the first relation of all relations, and in its operation, it produces and comes to represents the "internal conditions" which constitute the relations of economics, knowledge, sex, and all of the various spheres of human knowing and experience.[40]

This feature of power is what Foucault labels its "productive aspect." Power constitutes a "productive network" that envelops us. Power does not simply prohibit and proscribe. It does much more than just tell us "no." It scales over our bodies and minds, shaping, forming, and molding us, creating and fashioning the world that we inhabit. It is this productive aspect of

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[37] Foucault, "Truth and Power" in FR, 64.
[38] Foucault, "Subject and Power" in EW, 3:341.
[39] Foucault, SP, 194.
[40] Foucault, HS, 1:94.

power, which accounts for the efficacy of power. We are largely unaware of the extent to which power shapes our world, precisely because it forms the silent, largely unsaid, unthought, and unspoken backdrop to our lives. "What makes power hold good, what makes it accepted, is simply the fact that it …. traverses and produces things, it induces pleasure, forms knowledge, produces discourse."[41] Power has had such a profound role in shaping our consciousness, becoming thereby lodged in some part of our unconscious. For these reasons, we experience power, much of the time, with a measure of docility rather than with peevish resistance. "Power is tolerable only on condition that it mask a substantial part of itself."[42]

This productive model of power is one that Foucault places in conscious opposition to another conception of power, which dominated the minds of Western man and especially in the last several centuries. The understanding of power as something productive fundamentally negates the more widespread understanding of power as "repressive." Within Foucault's thought world, power does not, and could not repress, because there is nothing anthropologically fundamental, which it could repress or distort. Instead, it is power that shapes those things we have mistakenly taken to be fundamental. At various other points in his career, he refers to this misleading, repressive conception of power (the "repression hypothesis") by various other names, calling it also "juridical," "'juridico-discursive,'" "liberal," "Marxist," "concrete," and the "contract-oppression schema," and he also associates it most prominently with Hegel, Wilhelm Reich, Freud, "sovereignty," and market exchange.[43]

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[41] Foucault, "Truth and Power" in FR, 60-62.
[42] Foucault, HS, 1:86.
[43] Foucault, "Two Lectures" in PK, 88-92, 102; HS, 1:10 ff., 82. Cf., "Ethics of the Concern of the Self" in EW, 1:298.

Power is omnipresent; ubiquitous. "Power is everywhere."[44] Power relations are not an optional extra that stands over and above society, or something from which society could one day be freed. "A society without power relations can only be an abstraction."[45] In every society, there exist "manifold relations of power which permeate, characterise, and constitute the social body." Power operates even at the level of ideas and cognition. Each society is supported by a "discourse" of truth specific to that society and reflective of the power relations present within that society. The "truth" of each society's "discourse" is something which the inhabitants of that society have "produce[d]" and to which they are simultaneously "subjected."[46]

However this may be, although it is never possibly to step fully and completely outside of relations of power within the determinate horizon of a given society, power is not for this reason universal, complete, or absolute. It never pervades our being all the way down. Instead, "freedom" is a basic presupposition of power. The omnipresence of power does not imply "fatalism," nor does power entail determinism of the behavioralist or of any other sort. Fundamentally, power is that which "operates on the field of possibilities," and those possibilities are only intelligible *as* possibilities insofar as a *field* of possibilities happens in fact to open up before those who experience specific power relations. In this way, "freedom"—understood here as the openness of a "field of possibilities"—can be said to be an "indispensable" element in power relations. "There is no relationship of power without the means of escape or possible flight."[47] With the exception of torture, execution, slavery, and concentration camps, "resistance, disobedience, and opposition groupings" are perennial options for human beings.[48] The power of

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[44] Foucault, HS, 1:93.
[45] Foucault, "Subject and Power" in EW, 3:343.
[46] Foucault, "Two Lectures" in PK, 94, cf., 98-99.
[47] See Foucault, "Subject and Power" in EW, 3:336, 340-42, 346; "Ethics of the Concern of the Self" in EW, 1:292.
[48] Foucault, "Space, Knowledge, and Power" in *Foucault, Reader,* 245; "Subject and Power" in EW, 3:342.

resistance, however, varies by degree. Certain "econom[ies] of power," Foucault explains, can be described as being either more or "less open to … resistances."[49] The concept of "total power," however, is a chimera. Suicide is always a technique of escape—of macabre emancipation. "Death is power's limit." For this reason, Foucault simply "refuse[s]" to answer that nagging question with which he is so often posed: "'But if power is everywhere, there is no freedom." In no uncertain terms, Foucault declares that the "idea that power is a system of domination that controls everything and leaves no room for freedom cannot be attributed to [him]."[50]

That being said, almost to his death, Foucault did remain wary of the categories of "liberation" or emancipation. He maintained a profound chariness towards those visions of freedom that presuppose a "human nature," which must only be unshackled so as to blossom into full bloom.[51] Moreover, the conceptual category of "freedom" that Foucault puts forward here is not the one with which most of us are familiar. The type of "resistance," which Foucault imagines, is only a resistance that is perpetually immanent or internal to relations of power. "Resistance is never in a position of exteriority in relation to power."[52]

Foucault's conception of power thus presents us with a social theory whose basic premises are deeply at odds with the general tradition of political thought. Our intellectual inheritance has taught us to cringe slightly when we hear the word power, particularly when we think of a power that somehow shapes (or limits) the types of options that are available to us. It is important, however, to recognize that Foucault wishes to have nothing at all to do with these images of power. For him, power should not at all be understood necessarily as something pernicious.

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[49] Foucault, "Truth and Power" in FR, 61.
[50] Foucault, "Ethics of the Concern of the Self" in EW, 1:292-93; HS, 1:138. Cf., Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 2:174-77.
[51] See Foucault, "Ethics of the Concern of the Self" in EW, 1:282.
[52] Foucault, HS, 1:95. Cf., "Power and Sex" in PPC, 122-23.

Although a society cannot exist without power relations, these relations themselves are "*not something that is bad in itself.*"[53] In this regard, Foucault departs radically from both the liberal and Marxian understanding of power in particular. Within liberal, political discourse—in stark contrast to Foucault's thought world—power represents the capacity of an individual or a group to bring about a desired end, usually through the exercise (or implicit threat) of force. "Arbitrary" power was something that wa**s** greatly to be feared. In this particular tradition, it is clear that "power" sometimes can be, and often was, used perniciously. It was a force that political leaders or the "powerful" could exercise arbitrarily against a population or over determinate individuals, usually through the force or threat of arms or some other type of psychological or material harm.

On this view, political power consists, then, in the ability or capacity to actualize a determinate goal whether through force or the implicit threat of force. Weber gives voice to this understanding when he defines power as the opportunity within a social relationship to enforce one's will—even against opposition.[54] Following this understanding of power, Weber defines the state as the sovereign concentration of all legitimate (sometimes physical) political force or power, wherein it becomes clear that power in a political context translates into the use of arms should the need arise.[55] Though clearly not a liberal, Chairman Mao Zedong was making use of this understanding of power when he wrote that "political power grows out of the barrel of a gun."[56]

Within this tradition, the concentration of power in the hands of one man or a few men was something greatly to be feared, for such conditions could all too readily devolve into the "arbitrary" "abuse" of power. Within the classical liberal tradition, "arbitrary" signified an event

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[53] Foucault, "Ethics of the Concern of the Self" in EW, 1:298, emphasis added.
[54] See Weber, WG, 28/53.
[55] See Weber, "Politics as a Vocation" in FMW, 78.
[56] Mao, *Quotations from Chairman Mao,* ch. 5, no. 6, p. 61. Also known as the "Little Red Book." Cf., however, Arendt, *On Violence,* 11, 44, 51.

or state of affairs that contravened a standing body of "law," where "law" is implicitly understood, at least in its ideal case, to have been the result of "reason." To put it more accurately, "law" is understood as the result of deliberation of a select number of legislators or law-givers at a particular moment in time, whose final agreement was premised upon the use of their shared faculty of "reason," which served as the substrate in the name of which and on the basis of which agreement was possible between a group of men with their own distinctive interests, perspectives, and "partialities." When through our experience, moreover, we discover that the "reason" of those legislators has proven somehow inadequate in some way or another, we attempt to "reform" that standing body of "law." This all is what is commonly called the "rule of law," in contrast to the "rule of men." Within this discourse, "arbitrary" was a synonym for "illegitimate," and an "illegitimate" use of power was an "abuse" of power.

In all of its essential elements, the basic outline of this classical, liberal understanding of power, though not all of the vocabulary I have used here, can be found first in Locke's *Second Treatise,* and its influence has been far-reaching. This is the discourse in which the vast majority of Americans still believes.

The concentration of power is perhaps *the* quintessential, liberal fear. Power is seen as always imminently something potentially pernicious. Human beings with the nature that they have are more often than not inclined to strive for increasing levels of power and, once accrued, to abuse this power should the opportunity arise. As Hobbes had informed us in the mid-seventeenth century, the "perpetuall and restlesse desire of Power after power" was a "generall inclination of all mankind," and this striving knew no bounds except that of death.[57] Then, in the late eighteenth century, Locke argued that those who have power over their citizens, who are not, for the most

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[57] Hobbes, *Leviathan,* ch. 11, ¶ 2, p. 70.

part, bound by standing laws and to relatively circumscribed spheres and objectives, simply cannot be trusted not to abuse the power, which they have accrued.[58] When we read the famous quip from Lord Acton—that "power tends to corrupt, and absolute power corrupts absolutely"—we all understand intuitively what is meant.[59] It is this classical, liberal understanding of power with which he is working. For this reason, both the holders and the effects of power must be dispersed. This fear receives its archetypal and most familiar expression in Federalist 51 and its doctrine of the separation of powers—an institutional innovation thought necessary in order to "control the abuses of government." "The great security against a gradual concentration of ... powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachment of others."[60]

Most importantly, however, this is *not* the sort of "power" of which either Foucault or the discourse of difference are speaking. Moreover, in renouncing the liberal discourse of power and this less expansive understanding of "power," the discourse of difference must also renounce the negative, political-ethical connotations associated with "power" in the original discourse in which this term was situated. In reading Foucault, if one were to interpret "power" along the lines of "domination," "oppression," or "repression" one would have seriously misunderstood what it is that Foucault means to say with this category. Within Foucault's thought world, there is absolutely no sense at all in denouncing power as such, for power is not, in itself, something bad.[61] There remains the possibility of perhaps criticizing *specific* articulations, relations, and

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[58] See Locke, *Two Treatises,* 2.135-37, pp. 357-60, cf., 2.93, p. 328.
[59] Letter of April 5, 1887 to Bishop Mandell Creighton in Acton, *Essays on Freedom and Power,* 364.
[60] Madison et al., *Federalist* no. 51, p. 268. See also Montesquieu, *Spirit of the Laws,* 11.4, p. 155; Kant, *Perpetual Peace* in PW, 115.
[61] See Brown, SI, 22; PH, 62.

configurations of power, but as will become clear later, it's not entirely clear that Foucault has the resources even for this task.

This conception of power thus cuts against so much of the contemporary citizen's basic intuitions, and it poses a whole host of problems and dilemmas—some of which I will explore later. Yet despite these initial problems and potential misgivings, it has found a home in the contemporary academy, for its purported explanatory cash value. This "post-structuralist" account of power, which localizes agency not in the concrete individual but in something wider, has had much appeal for the analysis of contemporary, industrial societies, particularly, as we see the general paradigm put to use in Iris Marion Young's, Wendy Brown's, and William Connolly's work.

As Young elucidates, this account of power has great political-sociological attraction for those who wish to explain the persistence of what appear to be forms of oppression, despite what we take to be our contemporary humane and progressive ethos. With this conception of power, we can thus continue to talk about "oppression" without (necessarily) impugning the character of well-intentioned adults going about their daily lives. Oppression on this understanding of power is thus not the direct result of "tyrannical power" which directly and knowingly "coerces" the under-privileged, but instead is the result of "everyday practices of a well-intention liberal society" and the "often unconscious assumptions and reactions of well-meaning people" within that society. This idea that oppression and power occurs without an oppressor who intends to oppress can potentially help to explain the persistence of substantive inequality within advanced industrial societies, whose educated classes, laws, and overarching ethos is explicitly committed to an emancipatory vision. It will thereby help us to develop our understanding of how it is possible for subtle forms of oppression to persist, despite the omnipresence of well-intentioned

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agents.[62] (Such an account, however, represents a partial departure from Foucault in that it seems to understand "oppression" as often times a loose synonym for "power.")

Moreover, to talk about "power" in the abstract appears then to allow one to speak at a level of generality about social forces of deep importance, which might vary as a function both of culture and historical epoch, without the high evidentiary burden of identifying the precise, individual agents responsible for putting into force a particular relation of power or the precise, individual objects of that relation of power.[63] Thus, we can talk about evil without pointing out the specific, evil men.

This account of power as somehow structural, as opposed to localized in individual agents, also follows a general shift in academic debates today, which occasionally and for various reasons seek to locate agency in something wider than the individual. For example, Connolly calls upon us to understand responsibility not as something "agent-centered," because of the grave defects encountered in agent-centered accounts of responsibility. The misfits of our society then are not necessarily singularly responsible for their ill-fittedness in the types of societies we inhabit today. With great verve and fascination, he argues that contemporary accounts of agent-centered responsibility inevitably secularize the dispute between Augustine and Pelagius. In such a dispute, one either, on the one hand, posits some nature or anthropological supplement towards which the subject can be faithful as an authentic being, and if the subject fails to meet this norm, then he proves to be "abnormal" and thus deficient (as Connolly reads Charles Taylor), or, on the other hand, one implausibly suggests that our behavior and self-formation follows from radical "choice" out of nothing (i.e., Sartre). These two accounts are deficient, in that they are,

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[62] Young, *Justice,* 40-41, cf. 32.
[63] See Brown, SI, 166-67.

respectively, either insensitive to difference or they represent a wrongheaded account of what it means to have an "identity."[64] All of this has of course profound implications for contemporary debates about the "welfare state."

## 5.4 The Sociology and Metaphysics of Knowledge

Though the key elements were not developed chronologically in all of the same moments, Foucault's sociology of power, particularly its productive and ubiquitous aspects, slides neatly into his sociology and metaphysics of knowledge.

The world was not made for us, nor we for the world—to borrow an elegant apothegm from Bernard Williams. The "knowledge" we have of the world is not discovery but rather inscription: something which is imprinted upon it. In forming a certain discourse or realm of possibility for "knowledge," other possible knowledges are also concealed from us. For this reason, we are wont to say that our "knowledge" of the world is something we "impose" on it and thus a "violence" we do to it. In his important, Inaugural Lecture at the Collège de France, given on December 2, 1970, Foucault declares that

> we must not imagine that the world turns towards us a legible face which we would have only to decipher; the world is not the accomplice of our knowledge; there is no prediscursive providence which disposes the world in our favour. We must conceive discourse as a violence which we do to things, or in any case as a practice which we impose on them.[65]

Human consciousness of a given epoch is constituted through a "system of rules" which "in itself has no essential meaning." This however is a "violence" that human beings do to their world, and so the course of human history must be understood as a procession from one "domination" to another.[66] As human beings, the kinds of lives we lead are interpretations which we have

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[64] See Connolly, ID, 95-122 (ch. 4). This represents a profound departure from TPD, esp. 219, 233 ff., cf., however, 200 ff.

[65] Foucault, OD, 55/67.

[66] Foucault, "Nietzsche, Genealogy, History" in FR, 85-86.

ourselves imposed upon the world. There exists nothing that is "absolutely primary," because "everything is already interpretation." For this reason, our interpretation of the world is just "as much a relationship of violence" to it as it is one of "elucidation."[67]

Though power and truth are not synonymous terms, power itself produces "truth." Power and truth are inter-related, inter-dependent, and inseparable. "Truth isn't outside power." Instead, power produces truth, and it is "produced only by virtue of multiple forms of constraint." Jesus was wrong then, when he said that those who knew the truth would be set free, and contrary to the "myth" which reached its apogee in the Enlightenment, truth is not the well-deserved "reward of free spirits."[68] Instead, "truth" flows from a "system of ordered procedures" according to which statements function within a discourse and are produced, regulated, and circulated. Foucault gives the name of a "'regime' of truth" to that "systems of power" within a given discourse, which "produce[s] and sustain[s]" this complex. "Truth" is not a feature that stands above of or apart from the system of ordered procedures that constitutes truth, the regime of truth, or discourse. "Truth" cannot be "emancipat[ed]" from this system, for truth is always "already power."[69]

On Foucault's account, every society and culture generates its own peculiar authorities and complex matrices of power in which the discursive rules of "truth" are produced, and according to which, certain propositions or statements will be taken as "true" and others as "false." It is in this decisive regard that one society differs from another. They differ in terms of the varying "regime[s] of truth" to which they are subject.

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[67] Foucault, "Nietzsche, Freud, Marx" in EW, 2:275.
[68] Foucault, "Truth and Power" in FR, 72-75. Also Jn. 8.32.
[69] Foucault, "Truth and Power" in FR, 74-75. He presents all this as a "hypothesis," a "few 'propositions'" or "suggestions" as opposed to "firm assertions." Cf., Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 2:176-77.

Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.[70]

Within Foucault's epistemological vision and sociology of knowledge, "discourse" takes on a technical meaning, similar in general signification to those several other locutions he deploys elsewhere, e.g., "regime of truth," "apparatus of truth," "politics of truth," a "discursive practice" or "apparatus," a "game of truth," or what he earlier had called an "episteme," an "archive," or a "historical *a priori.*" All of these conceptual terms refer, *mutatis mutandis,* to the historically specific background consciousness, which sets the rules according to which subjects experience and understand the world, which they happen to inhabit. It is the unthought which determines in some remarkably mysterious way what precisely can be thought.[71]

"Truth"—that category with which much previous philosophy had been preoccupied—receives its determinate shape and form only *within* a discourse or regime of truth. Truth does not stand above or external to a discourse, but rather precisely the other way around. From the first person point of view "inside of a discourse" the distinction between "true" and "false" is an intelligible and non-arbitrary one. However, from the god's eye view from the nowhere of Foucault's meta-analysis, it is revealed that this true-false binary and the "will to truth" functions in fact like a "system of exclusion," which is both "historical" and "modifiable" in its substantive specificity.[72] Discourses are "in themselves" things which are "neither true nor false."[73] With tongue firmly in

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[70] Foucault, "Truth and Power" in FR, 73.

[71] See Foucault, "Truth and Power" in FR, 73 (politics of truth, regime of truth, apparatus of truth); HS, 2:6 ff; "Ethics of the Concern of the Self" in EW, 1:281 (game of truth); HS, 2:4 (discursive practice); MC, xxii, 378, 385 et passim; AS, 126-27, 128-30, 191-92 (episteme, historical a priori, archive); "Confession of the Flesh" in PK, 196-97 (episteme, discursive apparatus). On possible differences between episteme and discourse, see Habermas, PD, 267. Cf., however, Geertz, "Stir Crazy." For an argument that Foucault does and must abandon much of the theoretical architecture of his "archaeological" period, see Dreyfus and Rabinow, *Michel Foucault,* esp. Part I, cf., however, 255-56.

[72] Foucault, OD, 54, cf., 52. Foucault modifies here with the word "perhaps." Cf., Foucault "What is Enlightenment?" in FR, 47. Cf., Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 2:182.

[73] Foucault, "Truth and Power" in FR, 60.

cheek, one commentator has referred to this as Foucault's "*transcendental historicism*," namely, the ostensibly extra-historical truth-claim that there is no truth outside of history.[74]

Standing behind every discourse is what Foucault calls a "discipline," which is responsible for regulating that discourse, for "control[ing]" the way in which discourse is produced, and for "fix[ing its] limits." A discipline is then in this sense a "bearer of a discourse." The limits of the discipline constitute the horizon within which it will be determined which sorts of propositions or assertions will be recognized as "true" and which will be recognized as "false," but in doing all this, the discipline also conceals and pushes to the side those knowledges, which exist "beyond its margins."[75] It is the case then that authority—or in Foucault's language, "power"—determines what will count as "true." It is conceptually possible to "say the true" within a void, but it is only possible to be "in the true" while one is "in obedience with the rules of a discursive 'police.'"[76]

Knowledge and power are interrelated at the most basic level. Each term presupposes, and is conditioned by, the other. "We should abandon a whole tradition that allows us to imagine that knowledge can exist only where power relationships are suspended." All this is wholly illusory, for power itself "produces" knowledge. The two terms "imply one another." To establish a relation of power is, at the same time, to "constitut[e] … a field of knowledge," and we must know also that when we encounter or operate within a field of knowledge, we are seeing the traces of those power relations, which helped to constitute it.[77] The movement in which one constitutes a realm of enquiry as a "science" is at the same time a movement which

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[74] See Habermas, PD, 252 ff.
[75] Foucault, OD, 59-61; "Two Lectures" in PK, 106. Cf., "Truth and Power" in FR, 54-55; "Subject and Power" in EW, 3:339.
[76] Foucault, OD, 37/61, translation modified.
[77] Foucault, SP, 27-28. Foucault qualifies here with the word "perhaps."

"disqualif[ies]" other "types of knowledge" and which "enthrone[s]" a determinate "theoretical-political *avant garde.*"[78]

What Foucault appears to have found attractive about this language and conceptual framework of discourse, discursive practice, regime of truth, etc. was that it enabled him to sidestep the stale debate as to whether "science" was a legitimately authoritative voice within society or whether it represented an ideological superstructure reflecting the class interests of the ruling bourgeoisie, as Marxian sociology and historiography might have it.[79] Foucault rejects then altogether the Marxian language of "ideology," for it seems to imply the existence of a determinate and specifiable "truth." A discourse may well reflect the regnant narrative of a ruling class, but it need not. It might be supportive of a particular material relation of production that favors one group over another, but the satisfaction of that criterion is not essential. Thus, it can neither be said that a discourse correctly represents nor that it misrepresents a correct ordering among human beings, whether in terms of the mode of production, rulership structure, regime type, patterns of cooperation, or any other such dimension of human, social life. A discourse is instead a bearer and articulation of a particular constellation of power, which is itself productive and constitutive of those subjects, who inhabit that particular discourse and constellation of power. In his own researches, Foucault is—he believes—not concerned to uncover a "truth," but rather with the analysis of the "production of effective instruments for the formation and accumulation of knowledge."[80]

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[78] Foucault, "Two Lectures" in PK, 85.
[79] See Foucault, HS, 2:4. Cf., "Truth and Power" in FR, 74.
[80] See Foucault, "Two Lectures" in PK, 102; "Truth and Power" in FR, 60, 74. See also Brown, SI, 142 n. 13.

Yet in side-stepping one stale debate, Foucault encountered a whole host of other problems—problems, which I contend, he never lived to solve, and, moreover, which he could not solve, while still remaining even obliquely or partially faithful to the work on which his celebrity rested.

On Foucault's account, one cannot with real epistemic warrant say that one *episteme;* one regime, politic, or apparatus of truth; or one discourse is more "true" or better than another. They are simply parallel. Still, however, somehow and somewhat paradoxically, there appears to be a place from which one may still criticize what confronts us; or, *to put it more accurately,* a critical stance and political-ethical sensibility is *implied by* and *animates* Foucault's *oeuvre*—despite his occasional reluctance to affirm it. This sensibility is clearest first in his diagnosis of the crisis of modernity as he sees it. And to this, we now turn.

## 5.5 The Meaning of Modernity: The Crisis of "Disciplinary Normalization"

According to Foucault, a new form of socialization emerged in the seventeenth and eighteenth centuries. This new species of "control," "domination," and "coercion" was one that "imposed" upon subjects a whole host of "constraints, prohibitions, and obligations." This type of discipline differed from prior forms of socialization in that the scale was on the level of the individual and was far "subtle[r]" than ever before, the object of control went beyond and deeper than merely external behavior, and the modality of control was "uninterrupted" and "constant." In effect, we would say that the control was internalized, in contrast to the grandiose and external displays of control characteristic of royal monarchy in an earlier period—whose grandiosity and spectacular, albeit macabre, character Foucault memorably highlighted in the opening pages of *Discipline and Punish,* with the execution of the regicide, Damiens, in 1757. Foucault calls this new form of control "discipline," understood as a specific "technology," "'physics,'" or "'anatomy'" of power.

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Discipline is itself a specific technique of power. It should not itself be confused with "power" as such. The object and product of this new form of power, control, and socialization is what he calls "subjected," "practiced" or "'docile'" bodies. These bodies themselves are the products of "meticulous" and "minute techniques" of power.[81]

Foucault is often credited with innovation for his conscious decision to focus not simply on the level of ideas, but also on the level of "the body."[82] However this may be, unless he subscribes to a strict, Platonic-Cartesian mind-body dualism, it's not terribly clear what precisely this ostensible innovation ultimately amounts to.

Discipline proceeds by means of a process Foucault variously calls "normalizing judgment," "normalization," and "disciplinary normalization." These three features are at the core of all disciplinary systems. The emergence upon the world stage of disciplinary normalization inaugurated a "new age" or "era." Foucault asks pensively then whether disciplinary normalization has become the "new law of modern society."[83]

With *normalization,* Foucault raises the eerie specter of a fundamental unfreedom, which is seen to be endemic within the types of societies we inhabit today. This basic idea, even when it appears in other guises and other different names (e.g., "cultural imperialism"), has resonated with a large number of contemporary intellectuals and especially so with the group I am calling the proponents of the discourse of difference.[84] Its high, theoretical articulation in Foucault's work animates much of the discourse of difference's research agenda.

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[81] See Foucault, SP, 3-6, 136-39, 194, 215; "Politics and Ethics" in FR, 380.
[82] E.g., Dreyfus and Rabinow, *Michel Foucault,* xxvi.
[83] Foucault, SP, 170, 184, 177, 296.
[84] E.g., Young, *Justice,* 58-61.

Disciplinary normalization is something far darker and more ominous than mere, self-willed conformism. It reaches somehow a deeper level of the human psyche and body. Normalizing judgment is a form of socialization, which projects a "rule" against which individuals might be judged or an "optimum" to which they should aspire. Individuals themselves are then constituted and differentiated through the very activity of normalizing judgment. Normalization "measures" and "hierarchizes" individuals according to their success in achieving conformity with the projected standard (the "Norm"), and it defines an "external frontier" (i.e., "abnormal[ity]") which serves as the difference in terms of which all other difference can be known and constituted. Somewhat paradoxically, normalization proceeds by means of two moments, which on the surface seem in conflict with one another. It both "imposes homogeneity" and it "individualizes," in the sense that agents are treated as "individuals," so that it can be known to what extent they deviate from the whole and thereby frustrate homogeneity and their ultimate integration into the general, social fabric. Thus, we are not born individuals, but rather we become individuals through a specific historical process and configuration of power. Disciplinary normalization individualizes; or, to use Foucault's somewhat jarring formulation, discipline "'makes' individuals."[85]

Behind disciplinary normalization, Foucault sees lurking the urge and instinct of Western man to moralize, where moralization is understood along broadly Nietzschean lines as an act of power irreducible to principles, which are not themselves ineluctably arbitrary. It is precisely this feature of disciplinary normalization, which appears most to rankle Foucault. The history of the West is plagued by a pernicious, moral dichotomy, which sometimes masquerades under technical-sounding labels. It takes the keen eye of the critical historian to see things for what they truly are.

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[85] Foucault, SP, 182-84, 170, cf., 194.

According to this "fundamental duality of Western consciousness," we rank, hierarchize, and categorize human beings and human practices. In a previous era, we spoke unapologetically and unselfconsciously of "good" and "evil" in order to separate the good, decent, and worthy men from the chaff and riff-raff whom we despised out of a visceral sense of revulsion. Today, our vocabulary is far more subtle, but, Foucault suggests, no less pernicious. Instead, we speak today of "normal" and "abnormal," and there terms have simply become proxy or surrogates for that linguistic and cultural operation our ancestors performed through the language of "good" and "evil." "When a judgment cannot be framed in terms of good and evil," writes Foucault, "it is stated in terms of normal and abnormal."[86]

Consistent with the overarching theme of *Discipline and Punish,* discipline and normalization are presented as hallmarks of the modern penal system. Again and again, however, he also returns to the school and educational institutions more broadly as paradigmatic examples of society's principle loci for normalization, including as well the military, the factory, the family, the courts, and, of course, psychiatric institutions, which had been the focus of his earlier research.[87]

As is well known, the archetype of modern, disciplinary normalization, can be seen conceptually in Jeremy Bentham's plan for prison reform, which he called the "panopticon." In the panopticon, Foucault saw a peculiar "mechanism of power reduced to its ideal form." Though never fully actualized, this plan envisioned a circular arrangement for the design of future prisons. Cleverly, this circular architecture would ensure that prisoners would be constantly under scrutiny by an observer located in a central tower, or, more importantly, they would at least experience their subjection and scrutiny as unflaggingly constant, because they simply would not be in a

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[86] Foucault, "Revolutionary Action" in LCP, 230.
[87] E.g., Foucault, SP, 184, 186, 215-16, 296; "Truth and Power" in FR, 67.

position to know whether they were at any given moment being surveilled. The prisoner does not and cannot see either his supervisor or his fellow inmates in neighboring cells, but through a simple but ingenious set of one-directional venetian blinds mounted on the central tower and by means of other architectural stratagems, the supervisor could potentially at any given moment observe any inmate without the inmate's knowledge of this surveillance taking place. This inspires in the inmate population a heightened sense that they are perpetually under watch as separate and discreet individuals, thus instilling in the inmate a docile sort of obedience, though a constant, manifest, and awe-inspiring show of force is not at all necessary for the success of discipline's domesticating operation. In this way, the prisoner or inmate "inscribes in himself" a "power relation" by this brilliantly simple "technology of power" and thus "becomes the principle of his own subjection." The "mechanisms of observation" enable the observer to "penetrate into men's behavior," exerting there a "constant pressure." Through this particular technique of power, domination becomes *auto*-domination. Throughout the whole process, we learn to internalize patterns of behavior and discipline ourselves.[88]

Foucault studies the prison system not principally because he wishes to reform the prison system in order that it might better conform with the worth and dignity of human beings, but because it is in the prison system that one sees the operation of power in unadulterated, stark, naked clarity.[89] In his research, the prison system is simply metonymy for modern society. For this reason, Foucault expands the scope of the implications of his genealogical study yet further beyond the prison system, closing *Discipline and Punish* by suggesting that the historical study of the penal system, and in particular, the analysis of their techniques of discipline, can provide a

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[88] See Foucault, SP, 200-09, also fig. 3-6, pp. 169 ff.
[89] Foucault and Deleuze, "Intellectuals and Power" in LCP, 209-10.

"historical background to various studies of the power of normalization and the formation of knowledge *in modern society.*"[90] Critique of the prison system in modern society can teach us something about modern society *tout court.* Scholars and critics have raised doubts about the "empirical" accuracy of Foucault's account of the salient moments in the modern period, in order to draw attention to important lacunae in his narrative of the modern onslaught of disciplinary normalization, but we shall leave these considerations aside for the moment.[91]

On Foucault's account, society more and more comes to assume the "carceral," disciplinary, normalizing character of the modern prison. In addition, it is the increasingly carceral character of *society* that in fact legitimates in the eyes of citizens the ever intensifying carceral character of *the prison system.* In this, we as citizens systematically, willfully, and continually overlook the glaring fact that the prison system is notoriously ineffective in rehabilitating criminals or curtailing recidivism. If it's unclear that imprisonment palpably improves our communities, the drive to imprison must have another source. Because our society comes ever more to resemble a prison, our citizens are psychologically disposed to countenance and even to recommend the radicalization of disciplinary procedures within the prisons. The disciplinary, normalizing logic seen in the prison system then filters outward. The application of the carceral techniques of the modern prison system on society writ large brings about the advent of a type of society Foucault variously calls the "carceral archipelago," the "carceral city," and "panoptic society."[92] This, in Foucault's eyes, is our current reality.

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[90] Foucault, SP, 308, emphasis added.
[91] E.g., Habermas notes in his "empirical critique" of Foucault that Foucault deals largely with French sources—as Foucault himself acknowledges—and once Foucault enters the modern period (by which Foucault means the close of the eighteenth century), he abruptly begins to ignore, among other things, the simultaneous development of the constitutional, *Rechtsstaat* and popular sovereignty, and the character of the liberalizing laws that come to govern penal institutions. See Habermas, PD, 270-71, 288-91; Foucault, SP, 309 n. 3.
[92] See Foucault, SP, 271 ff, 298, 301-03, 308.

Presently and before our eyes we bear witness to the emergence of a new configuration or relation of power wholly unprecedented in the history of human being. "Disciplinary power" arose, or was "invent[ed]" as a "new type" of power in the seventeenth and eighteenth centuries. In our age, it was perfected. At the present juncture, the rule of the "norm" and the procedures of disciplinary normalisation have become predominant, and as such, they have come to "coloniz[e]" even the juridical realm of juridical right, rules, and law, such that we can now speak of the emergence of a "*society of normalisation.*"[93]

A disciplinary society is one where the power relations existent within that society are characteristically disciplinarian. The existing web of power of the preceding historical epoch is not, per se, wholly and completely replaced by disciplinary techniques of powers. Instead, disciplinary power "infiltrates" those already existing logics of power, investing as a supplement those preexisting logics with its own and extending its reach to increasingly minute details of the general, social fabric.[94]

This is an important move by Foucault, for with this claim, he becomes entitled, or so one might believe, to speak of a partial logic animating and configuring society, which is neither fully reflected in public rhetoric or institutions, nor recognized as such or in those terms by those human beings situated within such a society. Disciplinary power colonizes without overwhelming altogether the prior relations of power, thus rendering itself generally opaque to all but those possessing the tools of the critical historian, who, by virtue of his tools and vast erudition, can speak of such matters from an elevated position of authority.

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[93] Foucault, "Two Lectures" in PK, 104-07. Cf., "Truth and Power" in FR, 66.
[94] See Foucault, SP, 216.

This entire spectacle assumes an increasingly ominous and dystopian tone when Foucault begins to speak of "bio-power" and its concomitant "bio-politics." With this language, he refers to a model of politics and an ambient political culture thought legitimate by its citizens, which increasingly seeks, not only through law but through "norms," to administer, optimize, and discipline "life" itself, and thus to treat the population as a whole and their statistical predilections and dispositions—including their biological personhood and even the very intimacy of sexual reproduction—as objects of knowledge to be categorized, scrutinized, and controlled in the service of various ends, which are more often than not, those of organized capital, its productivity, and the material terms of its continuity and self-reproduction.[95]

To correct a common confusion, however, the emergence of a disciplinary society does *not* mean that society somehow became more regularized, more obedient, more … disciplined, or that society in any literal sense begins increasingly to resemble prisons and schools, paradigms of regimented and uniform behavior. Instead, what it does mean is that a certain technique of power, that of disciplinary normalization, has been brought to bear upon society. The mark of a normalizing society is not that normalization is *total,* or that everyone is the same and that a given society approaches asymptotically a condition of near homogeneity, according to a culturally posited set of norms. Rather, a normalizing society can be recognized by the increasing number of those that society considers somehow to be delinquents. "Delinquency" itself is *produced* by the steep rise in normalization pressures.[96]

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[95] See Foucault, HS, 1:137, 139-45, 147. In published work, the notion remains underdeveloped. It is treated at greater length in the Collège de France lectures, e.g., *Security, Territory, Population; 'Society Must be Defended'; Birth of Biopolitics.* It perhaps of some significance that Derrida is reported to have said that he "didn't understand the concept of bio-power all too well." Per Thorsteinsson, Review of The Death Penalty.

[96] See Foucault, "Subject and Power" in EW, 3:339; SP, 301 et passim. See also Connolly, ID, 21, 150, 172, 188.

One of Foucault's examples is fitting here. Perhaps children, prepubescents, and teenagers, from time to time, would touch themselves and others with an orientation towards pleasure. In the pagan and pre-Christian world at least, this occasioned no felt urgency for a type of censorious prescription embodied in an elaborate science of systematic reflection and observation. But, in the eighteenth century, an entire scientific discourse began with great urgency to take shape around infantile onanism—or, as it is more commonly known in English, childhood masturbation. As the child's "sex" became an object of knowledge, the net result of this research was that it had become socially and intellectually intelligible thereafter to delineate normality from abnormality with respect to puerile, sexual pleasure. As the gestures of the child became known, through a certain body of knowledge, to be a part of his or her "sexuality," yet another category of "perversity" entered the world by means of an ostensible progress in human understanding.[97] *This* is the tragedy of the disciplinary normalizing society, which Foucault wishes to expose to the light of day, and in so doing, he would like to shake us from our unreflective, uncritical, self-contented complacence.

From today's vantage point, we are inclined to believe that things have gotten "better" for humanity on the whole and for the most part, or at least for that part of humanity that currently resides in the industrial West. We are heirs to historical currents which include, among other things, the late eighteenth-century American and French revolutions; its mantra of *liberté, egalité, fraternité;* the birth of liberal constitutionalism; the slow and ongoing democratization of former empires, monarchies, principalities, and colonies; the widening of the franchise; the increasing prominence and importance of representative legislatures that understand their legitimacy to flow from "the people"; and the Civil Rights and women's movements, which sought to put an end to

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[97] See Foucault, HS, 1:28-30, 42 104-05, 121, 153.

inegalitarian practices and institutions which were essentially and uncontroversially tied to racially and sexually ascriptive qualities of human beings. Not acquainted with Michel Foucault, the common man, when presented with this list of accomplishments, nods his head with approval and agrees that "progress" has occurred.

This is not so, retorts Foucault. Instead, the legal codes have come increasingly to embody the "norm," and for this reason, we should not allow ourselves to be "deceived" by the flurry of constitutions and the boisterous activity within the halls of representative legislatures that supposedly guarantee to us the protection of these features of our society and the rights we have been taught to prize and value during the catechism to which young minds are subjected in the public schools. Instead, this veneer of liberal legitimacy has concealed from us the inner truth about ourselves. This façade of liberal constitutionalism served only to make the bitter pill palatable, functioning as a smooth anodyne. Through it, an "essentially normalizing power" became "acceptable" to citizens of the industrial West.[98] Law and rights do not limit power, but instead serve as vehicles for the dispersion of normalizing forces throughout the social body. Disciplinary power "operate[s] …. on the underside of the law." "The 'Enlightenment,' which discovered the liberties, also invented the disciplines."[99]

It should be clear then that Foucault's whole conceptual framework involves a radical rethinking of much of the Western tradition of political thought, and especially of the liberal tradition inaugurated in early modern Europe, insofar as he blithely and somewhat cavalierly disposes of some of the important normative categories most central to that tradition—a tradition whose horizons we still nevertheless very much inhabit today. Foucault understands the

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[98] Foucault, HS, 1:144.
[99] Foucault, SP, 222-23.

legitimacy/illegitimacy binary, along with the conception of "right," to be bound up not only with the (naïve) conception of power as repressive but also with medieval to early modern conceptions of royal sovereignty. On Foucault's account, however, this conception of power derived from sovereignty has proven to be complicit in, and itself an "instrument" of, domination, and one which has sometimes "concealed [the] actual procedures of disciplinary power." One strolls down a "blind alley," then, when one appeals to the juridical-sovereignty conception of power when attempting to limit, for example, disciplinary-normalizing power. Foucault suggests instead that we need to "cut off the king's head" and to look for a conception of power that is neither disciplinarian, nor modeled after the conception of sovereignty.[100]

Thus, in his extended polemic against liberalism, Foucault searches after a conceptualization of power that requires no reference to "right" or to the legitimacy/illegitimacy binary, which would ostensibly enable him to avoid the anthropological presuppositions and pitfalls of the conception of power modeled after "sovereignty" (i.e., the liberal, "juridical" conception) and the "repression hypothesis"—both of which he sees as basically synonymous terms. This conceptualization of power as repressive is something which Foucault must reject, because it presupposes a stable subject with something like a "nature," to which society and its fundamental order might or might not be faithful—a view which conflicts with Foucault's historicized understanding of subjectivity, wherein the subject is understood as being constituted in and through history and within a particular, historical discourse.[101]

I cannot take up the question at any length here as to whether or not Foucault succeeded in doing this, namely in escaping from the power-as-repression paradigm. Clearly his work on

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[100] See Foucault, "Two Lectures" in PK, 94-96, 105, 108; HS, 1:89, cf., 97; "Truth and Power" in FR, 63. Cf., Arendt, "What is Freedom?" in *Between Past and Future,* 163.
[101] See Foucault, "Truth and Power" in FR, 59-60.

sexuality in the three published volumes of the *History of Sexuality* was at least intended to do just this with respect to sexuality, i.e., to call into question the very idea of "sexuality" as a static constant, which society represses. There, Foucault informs his reader that sexuality is a "historical construct" and thus not something which society represses à la Freud and his many spiritual descendants.[102] Elsewhere, Foucault acknowledges that his work prior to 1976 had operated tacitly with something like a repression-conceptualization of power, and that afterward he had sought to "reconsider," "modif[y]," and probably even to "abandon" it.[103] The question, then, is whether he did abandon it, as would seem to be required by his basic thought world.

Rorty, for one, doubts that Foucault does, after all is said and done, escape from this repression-paradigm—that, in fact, Foucault does at the end of the day understand socialization to be "antithetical to something deep within us."[104] If, however, this were the case, then the hallmarks of Foucault's understanding of power would have been abandoned (i.e., the idea of power as omnipresent and constitutive of the subject). I confess that I am myself sympathetic to this view. Yet if this view is correct, as I am inclined to believe, precisely what it is that socialization in fact "represses" in us remains unclear. Foucault, at least, never said what might this might be, and, far more importantly, there's really no place for it within his thought world. "Authenticity"—understood at least as fidelity to some underlying, core self—has no place at all in the thought world of Foucault.

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[102] E.g., Foucault, HS, 1:105, cf., 34, 150-51, 155; "Truth and Power" in FR, 62.

[103] Foucault, "Two Lectures" in PK, 92, cf., 108.

[104] See Rorty, *Contingency,* xiii-xiv. See Hacking, "Archaeology of Foucault," who agrees, but attributes this only to his earlier work. When it seems as though, even in his later work, Foucault must be offering an account that presumes that there is some, perhaps antedeluvian, core self that modern disciplinary power represses, his most sympthetic readers pass off these occasional lapses into a "strangely modernist narrative" as little more than an analytic "'mistake'"—a brief departure from consistency. Brown, E, 147-48 nn. 9-10 *ad* Foucault, HS, 1:31-32.

Moreover, this philosophical abandonment of authenticity, or any of its cognate concepts, can have real and concrete consequences. Despite the fact that Foucault himself expressed no interest in "gay liberation" and distanced himself from that project, Foucault has nevertheless often been seen, though far from universally, as one of the patron "saint[s]" of the LGBT movement.[105] It should be noted, however, that his anthropological framework ominously forecloses at least one important defense members of this same movement might deploy in making its case to an audience outside of their fold. Anyone in the LGBT movement who remains a self-reflective Foucauldian is not able to say: "This is who I am, this is my deep self to which I wish to be true, and to ask other of me is to do violence to my core being. Here I stand; I can do no other."[106]

There are clearly other rhetorical strategies this movement might pursue, but the real question is whether those whom this movement seeks to persuade will find any other argument or strategy other than this one to be even remotely plausible or persuasive. Whether any strategy other than the one outlined above has any hope with the broader public is surely an issue to which the activist cannot fail to give his attention, so long as he wishes to remain a democrat at the same time. One thing must be understood: it is not enough simply to contest with great vigor and to denounce vociferously, and thus to arouse the indignant passions of like-minded friends and allies. One must also be heard, and to be heard in any nominally democratic society, one must also be able to persuade.

## 5.6 *La Révolution en permanence:* "Genealogy" as Critique

Foucault addresses the critical tools of scholarship to the crisis of modernity as he understands it, and his evaluative and committed stance appears in this critical posture. The distinctive character

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[105] See Halperin, *Saint Foucault,* esp. 31.
[106] Cf., Brown, E, 127.

of Foucault's "political-ethical" sensibility manifests itself especially clearly in his reflections on the nature of the work he is performing.

Foucault has from time to time seen fit to describe the "mood" of his research as one of "happy positivism" and his work as "empirical."[107] That being said, Foucault is not an ostensibly value-free social science positivist of the sort that proliferated in the mid-twentieth century nor is he an empiricist historian. Foucault doesn't believe that such categories even exist, and neither should we.

In one of his many interviews, Foucault asserts that "philosophy today is entirely political."[108] Foucault is what one might call a *critical* theorist, but not in the sense that he has important links to the intellectual circle that surrounded the Frankfurt Institute for Social Research, but rather more importantly in the sense that his basic philosophical outlook is in perfect agreement with Marx's famous, eleventh thesis on Feuerbach: that the task of philosophy hereafter is not to "interpret" our world, but rather to "change" it.[109] If we have not understood this, then we have not understood Foucault. Those who insist that Foucault offers only "descriptions" are missing something vital.

Foucault's narratives, his epistemology, his ontological-metaphysical horizons—these are all saturated by considerations and a basic sensibility that I would call here political-ethical. We cannot even begin to understand why he has engaged in the research that he has unless we understand the political and moral backdrop to Foucault's thought. There is clearly and self-evidently a social critique implied in Foucault's work—which almost singularly accounts for the

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[107] See Foucault, OD, 73; "Subject and Power" in EW, 3:337, 339. Cf., AS, 125. For discussion and criticism, see Habermas, PD, 257, 273-74 et passim.
[108] See Foucault, "Power and Sex" in DE, 2:266/PPC, 121, translation modified.
[109] See Marx, *Theses on Feuerbach* in MEW, 3:533/MER, 145.

appeal that his work has had and the considerable following the Foucauldian research agenda has inspired. But, this social critique is of a distinctive kind, whose particular nature is not immediately apparent, but in fact underlies his entire work. While there is no specific Foucauldian public policy platform nor a precisely detailed legislative agenda, which follows of necessity from his work, a very specific political-ethical sensibility imbues his research, and this general sensibility can be missed *only* by those who presently share it and for whom the value of such a sensibility appears self-evident.[110] Though this consideration is not decisive, it is of some significance that Foucault himself acknowledges that the revolutionary atmosphere of May 1968 in Paris—though he was not himself physically present in France at the time—had a profound influence on the direction that his research would take him thereafter.[111] Foucault's analysis of the crisis of modernity, that of *disciplinary normalization,* represents the core of this political-ethical sensibility.[112] It is to this, and to similar such crises, that his research speaks.

Those who see in Foucault's thought nothing more than a quietist resignation to the status quo—on the grounds that "fatalism" and not "emancipation" is only possible in a world saturated by power relations—have surely misunderstood him.[113] *Nothing could be further from his intention.* As Foucault put it in his *Will to Knowledge:* "Where there is power, there is resistance."[114] In fact, what has been so powerfully attractive to so many scholars and politically engaged thinkers about the Foucauldian conceptual language of 'power' has been the usually tacit premise carried within it that a greater level of our contemporary social fabric could be

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[110] *Pace* Brown, PH, 118-20.
[111] See Foucault, "Truth and Power" in FR, 53, 57-58. Cf., "Power and Sex" in PPC, 119.
[112] Cf., Dreyfus and Rabinow, *Michel Foucault,* xxvi-xxvii, 139, 166, 254, 257-59.
[113] E.g., Jameson, "Postmodernism," 57.
[114] Foucault, HS, 1:95, cf., 96. Cf., "Subject and Power" in EW, 3:343.

meaningfully subjected to contestation, by virtue of the fact that power and not some type of necessity had a hand in shaping it.

Foucault's researches are designed to provide the theoretical scaffolding for the activity of critical, philosophical activism. The name given to this element of Foucault's thought is, as is by today well known, "genealogy." After 1971 and with increasing prominence thereafter, "genealogy" became the programmatic language, with which Foucault sought to characterize his general orientation to human enquiry.[115] Whether "genealogy" fully and completely displaced what Foucault had earlier in his career called "archaeology" has been the subject of much discussion, though Foucault does sometimes give the impression that he wished to preserve both of these elements.[116] This question, however, I leave to the side.

The chief aim of critical theory as deployed by Foucault is to complicate and problematize what it is that we think we know about ourselves, and thus to deflate our self-confidence in the basic propriety of our current practices. This is the essential task of philosophy today. Foucault's body of work aims to chasten reason's pretensions towards universalism, which is, on his account, *always* nothing more than an over-inflated and self-confident parochialism masquerading under the banner of necessity or neutrality. Philosophy, in the critical sense, aims then to "limit" and circumscribe the "domains of knowledge" and to problematize what it is that we think we know.[117] In our conceptions of ourselves and in the types of practices and institutions we favor, we might formerly not have seen problems, nor might we have been troubled by pangs

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[115] E.g., Foucault, "Nietzsche, Genealogy, History"; SP, 23, 29; "Truth and Power" in FR, 59; "Two Lectures" in PK, 83.

[116] On "archaeology" as a method, see Foucault, MC, xxi-xxii, 30; AS, 130-31, 135, 138-40. For an effort to relate "archaeology" and "genealogy," see Foucault, "Two Lectures" in PK, 85. Cf., Foucault, "What is Enlightenment?" in FR, 46, 50; "Structuralism and Post-Structuralism" in EW, 2:444. See also Habermas, PD, 247-48. For an argument that Foucault does and must abandon much of the theoretical architecture of his "archaeological" period, see Dreyfus and Rabinow, *Michel Foucault,* esp. Part I, cf., however, 255-56.

[117] See Foucault, "Return of Morality" in FL, 473.

of existential uncertainty. Foucault wishes to raise these problems for us. Accordingly, the political-methodological ethos Foucault uses to describe his critical work is that of "problematization."[118] Philosophy, on this view, then both "warn[s] of the dangers of power" and also "calls into question domination at every level and in every form in which it exists."[119] Foucault's work seeks to reveal the difficulties and dangers involved in answering the question "who are we?" Answering such a question is always an "abstraction" of a sort—an abstraction that papers over difference, an abstraction that cannot but "ignore who we are individually." For this reason, it is an abstraction, which we must "refus[e]."[120] Today, our object and aim should not be to "discover what we are." Instead, we should "refuse what we are" and thus refuse what power relations have made us and have "imposed" upon us.[121] In the present day, the task of philosophy is to perform the "critical work" by which one might come to grasp both the limits to, and possibility of, "think[ing] differently, instead of legitimating what is already known."[122]

Social critique on Foucault's account ought to serve as an "instrument for those who fight," as well as for "those who resist and refuse what is." His work represents then a collection of "essays in refusal."[123] One should work to unmask the violence hidden in the way in which contemporary society is structured.

> *The real political task* in a society such as ours is to criticize the workings of institutions, which appear to be both neutral and independent ... in such a manner that the political violence which has always exercised itself obscurely through them will be unmasked, so that one can fight against them.[124]

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[118] Foucault, "Polemics, Politics, and Problematizations" in FR, 384.
[119] Foucault, "Ethics of the Concern of the Self" in EW, 1:300-01. The first formulation is that of an interviewer, to which Foucault assents.
[120] See Foucault, "Subject and Power" in EW, 3:331.
[121] Foucault, "Subject and Power" in EW, 3:336. Foucault qualifies this statement with the word "maybe."
[122] Foucault, HS, 2:8-9. This is posed here as a rhetorical question.
[123] Foucault, "Questions of Method" in EW, 3:236.
[124] Foucault, "Human Nature" in CFD, 41, emphasis added.

Foucault's *oeuvre* is thus one which helps along what he calls the "*insurrection of subjugated knowledges.*" These subjugated knowledges correspond to a "whole set of knowledges," which are "disqualified as inadequate," because they are perceived as "naive knowledges," which sit at the bottom of the "hierarchy" of scientific respectability. These are the knowledges of local struggles, which "systematising thought" does its utmost to "mask," conceal, and cover up. Foucault loosely associates subjugated knowledge with *les savoirs des gens,* or "popular knowledge." Their knowledge is a "particular, local, regional knowledge," which is internally variegated, or, as Foucault puts it, "incapable of unanimity."[125] Though it would be a mistake to suggest that Foucault is advocating a revolution of the proletariat, this expression gestures, nevertheless, generally in the right direction: the revolution of the intellectual proletariat, who often are as well the proletariat simpliciter in terms of social class. In intent and in effect, this call for the insurrection of subjugated knowledges is also a call for what Proudhon, long ago, had called "*la révolution … en permanence,*" the permanent revolution.[126]

To the end of furthering the permanent insurrection of subjugated knowldges, Foucauldian genealogy crucially embodies the cooperation of, on the one hand, "erudite knowledge" (i.e., Foucault's scholarship) and, on the other hand, those "subjugated knowledges" and "local memories." This partnership is designed to bring to the light of day the "*historical knowledge of struggles,*" hitherto "confined to the margins of knowledge" by the "tyranny of globalising discourses." Genealogy thus "emancipate[s]" these "local historical knowledges" and exposes the "violence, aggression and absurdity" latent within the contemporary matrix of power.[127]

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[125] Foucault, "Two Lectures" in PK, 81-83.
[126] Proudhon, "Toast à la Révolution" in *Oeuvres Complètes,* 17:143. The idea was later, and more famously, appropriated by Marx and Engels, "Ansprache der Zentralbehörde an den Bund vom März 1850" in MEW, 7:254; Trotsky, *Permanent Revolution.*
[127] Foucault, "Two Lectures" in PK, 82-83, 85, 87.

Genealogy aims thereby to disturb and upset the current balance of knowledge within our society. It sets out to "reestablish the various systems of subjection" and the "hazardous play of dominations," which have saturated the history of our contemporary world.[128]

Genealogy is thus an "anti-science," not in the sense that it celebrates idiocy, anti-intellectualism, or ignorance, but rather in the sense that it struggles against the "power of a discourse" thought to be authoritative by virtue of its "scientific" credentials. Genealogy as an anti-science thus eschews all attempts to "hierarchise and order" bodies of knowledge or theories, with a view to a purportedly "true knowledge" or "some *arbitrary* idea of what constitutes a science and its objects." In so doing, genealogy stands up against the "centralising power" exercised by the type of "organised scientific discourse" which we encounter on a routine basis in a "society such as ours."[129]

In effect, Foucault's genealogies represent challenges to what we might call the putative "wisdom of experts," whether economists, doctors, lawyers, professors, or other types of technocrats whom we generally esteem in contemporary societies. Foucault suggests that his work, his genealogies, and the local struggles with which they occasionally align themselves, are something more than simply "anti-authority struggles" full stop, but instead, that they represent struggles against the "effects" of a type of power that legitimizes itself through a claim to "knowledge" or to a specific "competence" or "qualification" on a given matter.[130]

Foucault's general thesis is today nowhere more clear than in the recent debates, which surrounded the publication of the fifth edition of the *Diagnostic Statistical Manual* (DSM-V): the classificatory resource that health care providers, psychiatrists and psychologists, and health

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[128] Foucault, "Nietzsche, Genealogy, History" in FR, 83.
[129] Foucault, "Two Lectures" in PK, 83-84, emphasis added.
[130] See Foucault, "Subject and Power" in EW, 3:329-30.

insurance bureaucrats all consult in order to schematize mental illness and determine indirectly which medical treatments will and will not be reimbursable through health care plans. This document largely determines what sort of language and classificatory schema the present day psychiatric health-industrial complex will use in order to discuss these illnesses either with peers or with patients. More importantly from Foucault's perspective, a group of experts here literally decides who, and on what grounds and in terms of which characteristics, our society will determine whether a given human being is insane or sane, who deviates from the norm and who does not, who requires treatment and who does not. The fact that there remains considerable and seemingly insoluble disagreement among the panel of experts consulted on any number of questions (e.g., whether clinical depression is an appropriate label for bereavement in the face of the death of a loved one, or what exactly we mean by the term "autism") is nothing short of disquieting for at least that part of the population that comes into direct contact with the institution of medical psychiatry and especially with regard to these problematic, liminal cases.

In this regard, we may recall a further fact that is often brought up in these contexts. Until not too long ago, similar professional, medical councils understood "homosexuality" to be something along the lines of a mental illness, and the credentialed scientific status of those who issued these pronouncements played no small part in the stigmatization if not marginalization of gays and lesbians. While the medical establishment has, beginning in the 1970's, since abandoned this view, it's relatively clear that to this day at least a portion of the American population maintains a similar line of thought.

Though I do not wish to say here that Foucault's metaphysics of knowledge and sociology of science correctly and precisely capture the entire logic of medical psychiatry as a sociological practice, I do mean to say that these here are exactly the sorts of social phenomena that Foucault

has in mind: the production of a body of knowledge by a group of individuals, whom a given

society considers to be expert over a certain domain, and whose decisions and judgments as a

collectivity reverberate throughout society and affect the daily lives of manifold individuals by

imposing upon them an image of what it means to be a normal, healthy, happy individual. In

Foucault's analysis, this process is aided and abetted by the state and politics more broadly, to the

extent that they pay heed to this entire interlocking structure and relation of power, which

constitutes a certain body of knowledge. It is for these and similar sorts of reasons that Foucault

refers to the contemporary discipline of clinical psychiatry as a "'dubious'" science with a "low"

"epistemological profile." He seeks then to denigrate and to deflate both the self-understanding

and the presumptuous aspirations of such bodies of knowledge, specifically of the so-called

human sciences.[131]

On this schema which Foucault presents us, "theory" becomes itself a "practice," complicating

thereby an age-old Aristotelian distinction. Theory becomes an engaged practice, insofar as one

contributes to the task of struggling against the "'knowledges,'" "'discourse,'" and forms of

power that are the "most invisible and insidious" in contemporary society. Moreover, the theorist,

as engaged practitioner, does not need to guide the movement from his ethereal heights. The

problems we face today are already known by the people, by the *dēmos,* and thus one does not

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[131] Foucault, "Truth and Power" in FR, 51-52. Cf., "Ethics of the Concern of the Self" in EW, 1:296. However, Foucault has stated that his position is neither "scientistic," i.e., the "dogmatic belief in the value of scientific knowledge," nor is it the "skeptical or relativistic refusal of all verified truth." See Foucault, "Subject and Power" in EW, 3:330. This treatment of "science" more along the lines of a sociological practice than as an enquiry directed towards the generation of a body of "truths," which correspond to the world out there, has somewhat predictably raised the ire of scientistic realists. This reached a head in the 1996 "Sokal affair," in which a well credentialed professor of physics successfully published in a prominent journal of culture studies (*Social Text*) an article with left-emancipatory rhetoric supported by natural scientific and mathematical nonsense and non-sequitors. A heated debate ensued thereafter. Because Foucault is a more careful writer in that he usually restrict his comments to the social sciences and clinical psychiatry, Sokal's attention was preoccupied more by other (usually French) theorists and sociologists of knowledge. See Sokal, "Transgressing the Boundaries"; "Physicist's Experiment with Cultural Studies," 62; Sokal and Bricmonth, *Fashionable Nonsense;* Robbins, Ross, and Sokal, "Mystery Science Theater"; Fish, "Professor Sokal's Bad Joke"; Fuller et al., "Sokal Hoax: A Forum"; Dawkins, "Postmodernism Disrobed."

need to wait upon the publication of academic monographs for these problems to be known. The objective, then, is to take on those relations of power, which themselves "block, prohibit, and invalidate" the knowledges of the masses and their general sense of what is to be done. In so doing, one enables the "counter-discourse" to speak its mind. By "denouncing" and by "speaking out," the theorist as practical actor forces the "institutionalized networks of information" to pay attention and to "*listen,*" rather than just to pontificate from on high. This is the "first step" toward unwinding a particular configuration of power.[132]

In this insurrection of subjugated knowledges, the danger against which one must guard is the ever looming prospect that the formerly submerged and concealed knowledges once liberated and brought to the light of day may themselves become the colonizing unity, "totality," or "global, *totalitarian theor*[*y*]," which, according to Foucault, always inhibits meaningful and fruitful research. The question then is whether the local knowledges and counter-memories, once resurrected, and also the memory of their intellectual ostracism and suppression, will themselves become the frame through which social theory must now gaze hence forward upon the data it surveys. Will it then become the *totalizing,* interpretive theory according to which we must now analyze social phenomena *in toto?*[133]

Though Foucault was himself aware of this danger, it is nevertheless itself certainly an open question whether the Foucauldian research agenda has succeeded in avoiding this pitfall.[134] In this context, it should be remarked that Foucault openly courted followers, and that some of his later work began sometimes to take on the tone of instructing initiates on how precisely to carry on his

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[132] Foucault and Deleuze, "Intellectuals and Power" in LCP, 207-09, 214, emphasis added.
[133] See Foucault, "Two Lectures" in PK, 86, 80-81, cf., 88. Cf., "Politics and Ethics" in FR, 375-76.
[134] Cf., Habermas, PD, 281.

own research agenda.[135] Today, the richness of Foucault's thought has by now been reduced to crass bullet points outlining his "method," so that it can be reproduced by others who can't be bothered to wrestle with his prose or to think through critically the evidence he presents to support his amply controversial conception of historiography.[136]

Much of Foucault's most impressive work has the external appearance of being "history." There is, however, a question as to its adequacy *as* history, and this is a frequent theme amongst his critics, and not just from those who are professional, academic historians. History must give an account both of change and of continuity within the general motion of human history. Traditionally, human agency has played at least some role in this explanation. However, to the extent that it is not agent-centered, Foucauldian historiography appears from the vantage point of human self-understanding, intentionality, and agency to be deeply problematic. It does not appear to take human intentionality or self-understanding terribly seriously, or at least it radically bifurcates human agency from the motion of history. While it is undoubtedly true that human history is just as much a story of unintended consequences of non-clairvoyant and sometimes delusional actors as it is a story of effects consciously intended by world-historical individuals, a historiography of human beings which radically divorces itself from the self-understanding and intentionality of those human beings needs, then, to reach for some other motive engine in order to explain the motion of history. This is precisely where the explanatory force of "power" does, and indeed must, enter.[137] Power, as a concept, was needed all along in Foucault's thought, despite the fact that it was an apparently late arrival.

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[135] E.g., Foucault, "Two Lectures" in PK, 78-79; HS, 2:7; "Subject and Power" in EW, 3:342-45.
[136] See Kendall and Wickham, *Using Foucault's Methods,* 33-34. For discussion, see Stevens, "Morals of Genealogy," 578-79.
[137] Cf., Habermas, PD, 276-77; Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 2:169-71.

To take Foucault to task for practicing a bizarre or eccentric type of historiography seems, however, somehow beside the point. It is misleading, precisely because Foucault is not a "historian" per se. He aims, as he says, not to write a mere "history of the past" but rather a "history *of the present.*"[138] Instead, the historiographical narrative Foucault presents to us is an instrument or tactic of critique: a (sometimes) compelling redescription of our past that seeks to shatter, among other things, rival narratives of confidence or progress.

Foucault's work is, however, largely *historical* in the sense that it is strongly *historicist.* Foucault's "genealogy" represents the fully self-conscious tactical use of historicism.[139] What he wishes to show is that history and "historical event[s]"—and *not* truth, necessity, nature, God, progress, or what have you—saturate deeply and constitute *all* that we encounter in our day to day lives: those things which we take for granted and are sometimes even inclined to call "common sense."[140] Today, Foucault tells us, we must probe the "'contemporary limits of the necessary.'"[141] Following his friend and interpreter Paul Veyne, Foucault refers then to his work as a "nominalist critique" of historical knowledge, but one that is itself brought about by means of historical analysis.[142]

Genealogy seeks to reveal that history is not a continuous stream or progression of happenings dictated by extra-temporal or "metaphysical" forces. Instead, actual human history is radically discontinuous. It is punctuated by what Foucault calls the "event" whose peculiar characteristic is that of its "singular randomness." Foucault's narratives do of course sometimes treat certain types of continuities, e.g., sexuality as a central preoccupation of Western man, and one which takes

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[138] See Foucault, HS, 2:9; SP, 31, emphasis added.
[139] For the *locus classicus* of the contemporary, critical treatment of "historicism" in the English language, see Strauss, *Natural Right,* 12 ff.
[140] E.g., Foucault, SP, 23; "On the Genealogy of Ethics" in FR, 347.
[141] Foucault, "What is Enlightenment?" in FR, 43.
[142] Foucault, "Questions of Method" in EW, 3:238. Cf., HS, 1:93.

various forms. That being said, for the most part, Foucault's narratives of human history and human knowledge are largely marked by "discontinuity," and Foucauldian historiography *privileges* these discontinuities and ruptures. Discourses, and the practices which they underlie, shift dramatically, though not through deliberate and conscious action on the part of self-aware agents guided by reason, collective self-realization, or any other quasi-necessary force, but instead through a dramatic "reversal of a relationship of forces" and the "usurpation of power." In the midst of these "haphazard conflicts" of power, the "masker 'other'" makes his entrance. History understood in this way is, at least purportedly, thoroughgoingly anti-metaphysical and anti-essentialist. It is history understood without reference to *any* "constants," and especially not to a "transcendental" or extra-temporally stable "subject."[143]

To use Hegelian categories but to reverse them: history is a story of "accidents" and not of "necessities." In his documentary studies, Foucault privileges the "singularity" of the "event" over historical progressions rooted in the nature of man or other constants, in order to show that "things 'weren't as necessary as all that.'" What did in fact arise in our society could just as easily have been otherwise. In so doing, his aim is to shatter the "self-evident" character of the narratives we commonly tell ourselves about ourselves, and thereby to uncover what sort of "strategies" have been deployed in order to constitute a discourse in which certain things and not others are perceived and experienced as "self-evident, universal, and necessary."[144] The purpose of genealogy is thus to point out the "accidents … the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us." In so

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[143] Foucault, "Nietzsche, Genealogy, History" in FR, 87-89, 78; "Truth and Power" in FR, 59. On discontinuity, see AS, 12; OD, 67-69. Somewhat implausibly, Foucault, "Truth and Power" in FR, 53-54 denies that his historiography is one that privileges discontinuity. See also Connolly, "Taylor, Foucault, and Otherness," 369. Cf, however, Geertz, "Stir Crazy."
[144] Foucault, "Questions of Method" in EW, 3:226-27.

doing, we might be led to understand that neither "truth" nor "being" can account for or explain "what we know and what we are," and thus we might learn to see that our history and our present is one forged by the concatenation of accidents and happenstance.[145]

What was raised can be lowered. What was made can be unmade. What is built can be destroyed. *This* is the motivating insight of genealogical history, and in it can be found at least the germs of Foucault's political-ethical sensibility. In diagnosing the present, we should not simply and self-contentedly describe "what we are." Instead, the lesson of genealogical history is precisely that "that which is has not always been." This means that those things which appear "most evident to us" are in fact appearances that were themselves shaped by the "confluence of encounters and chances," which make up our own "precarious and fragile history." A substantive conception of reason might wish to see in its present something conforming to "necessity" or "necessary being," but genealogy can reveal that our present has a history whose "contingencies ... can be traced" and demonstrated. By giving our attention over to the eventful "fracture[s]" in our own history, we might thereby identify the possibility of "transformation," and such knowledge can "open up the space of freedom."[146] Today, the critical historian is charged with a specific task in service of this project of freedom. If he can show contingency in what had hitherto been understood to be necessity, the latitude for envisioning change in social theory grows immensely. If the metaphysical backdrop to our lives truly is empty, then we may playfully inscribe whatever we like upon our social world.

> We have to dig to dig deeply to show how things have been historically contingent, for such and such reason intelligible but not necessary. We must make the intelligible appears against a background of emptiness and deny its necessity. We must think that what exists is far from filling all possible spaces. To make a truly unavoidable challenge of the question: What can be played?[147]

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[145] Foucault, "Nietzsche, Genealogy, History" in FR, 81.
[146] Foucault, "Structuralism and Post-Structuralism" in EW, 2:449-50.
[147] Foucault, "Friendship as a Way of Life" in EW, 1:139.

The general outline of genealogy as critique as well as the political-ethical sensibility which animates it should be relatively clear from the above. More significant, however, is the following question: To what extent did Foucault succeed in his task of writing genealogical histories in the manner proposed? I close this section with a brief, critical discussion of (a) Foucault's reverse, teleological historiography, (b) Foucault's metanarrative of power and the necessity for it within his thought, and (c) those important elements which Foucault's Nietzschean historiography neglects in Nietzsche's own reflections on history.

As one particularly astute, early commentator has observed, though the historiographic strategy *chez Foucault* is premised upon the denial of metanarrative of progress and all such similar stories, Foucault's own narratives end up, nevertheless, reading something like the inversion of progress, as, in fact, a narrative of regress or decadence, a "kind of Whig history in reverse—a history, in spite of itself, of The Rise of Unfreedom."[148] Instead of the triumphal optimism of Enlightenment progress à la Condorcet, we have in Foucault's writings a tragic narrative of decline and the fall of man.[149] Reverse teleology is certainly a teleology of sorts.

Moreover, despite Foucault's intention of writing narratives without reference to constants, essences, or universals, another equally astute, early commentator has observed that there remains in Foucault's thought the vestiges of at least one constant: "Power" remains the hypothesized, though largely obscure and perplexing, constant in the types of histories Foucault narrates.[150] Though Foucault would undoubtedly and most vigorously resist the following formulation: "Power" is the foundation or ground, if you will, upon which actual, human history rises and

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[148] Geertz, "Stir Crazy."
[149] Cf., Condorcet, "Sketch" in *Political Writings,* pp. 1-147.
[150] See Habermas, PD, 253-54, 256.

falls, or at least the motive force, which lies behind historical developments. Its presence in Foucault's account is altogether necessary.

In the 1980's, a prominent, French intellectual declared that we had reached an age in which "metanarratives" had lost altogether their critical, intellectual purchase and that this is what it meant to live in a "postmodern" age.[151] There is good reason, however, to doubt the ultimate veracity of this claim.

While Foucault's metanarrative does not concern itself with the steady march of reason through history à la barely disguised Protestant theodicy, nor does it concern itself with the inexorable progress towards the cooperative control of the means of production, the withering away of the state, the arrival of a humanist-technological future, and thus true human emancipation—Foucault's is a metanarrative all the same. The central term of this metanarrative is "power."

While there is great truth to the claim that Foucault is a Nietzschean of sorts, there are important elements in Nietzsche's thought, which have been shifted. Foucault has dropped, for one, Nietzsche's unabashed, semi-heroic voluntarism. *Will-to-power* becomes then, in Foucault's hands, disembodied, non-anthropomorphized *power*. There is no human will willing power, and yet power *is*.

Somewhat surprisingly, Foucault at the very end of his life in one of the last interviews he ever gave declared that "Heidegger has always been for me *the essential philosopher*," and also that

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[151] See Lyotard, *Postmodern Condition,* xxiv, 37. Habermas credits this publication with the contemporary prominence of the word "postmodernism." See Habermas, PD, xix.

his "whole philosophical development was determined by [his] reading of Heidegger."[152] This is a deeply revealing comment.

One would not be mistaken if one were to understand Foucault's conception of "power" to have a function at least *formally* similar to the one that Heidegger had ascribed to "being" in the form in which it has been dispensed or sent to a particular age. This is especially so in terms of power's conceptual and explanatory role in Foucault's historiography and of its role in the production of "subjects" and of "discourse," and also despite the fact that Foucault does, from time to time, revert to a more colloquial, even material-relational understanding of "power," which he sometimes describes as an "empirical" approach. The fact that "power" is such a common word obscures from many—though certainly not all—of Foucault's readers just how deeply uncommon is his use of this quite mysterious category.

In the final analysis, what then is this thing that Foucault, and discourse of difference following him, call "power?" It is a somewhat nebulous, non-agentive, structural, organizing principle according to which cultures are constituted in the way that they are constituted. Though it is described as something that is relational, power is, in terms of its conceptual effect and explanatory force, a hypothesized force or entity that exerts itself and yet is exerted neither by a determinate agent or group of doers, nor are its designs determined by the currents of "history." Power shapes our world, but it is not wielded by anyone in particular and it does not follow any specific projects, ends, or designs that the agents enmeshed in its relations can or could discern with clairvoyance and perspicacity or which they could recognize as corresponding in any direct

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[152] See Foucault, "Return of Morality" in DE, 2:1522/FL, 470, emphasis added. Cf., Foucault, "Truth, Power, Self" in TS, 12-13. On the influence of Heidegger on the thought of Foucault, see, e.g., Afary and Anderson, *Foucault and the Iranian Revolution,* 17 ff.; Dreyfus and Rabinow, *Michel Foucault,* et passim. Cf., however, Sluga, "Foucault's Encounter," 210-23; Habermas, PD, 239.

or indirect way to their own personal ends or designs, collective or individual. Nevertheless, the genealogical, Foucauldian historiographer can somehow describe the inner workings of power, even as he stands within it and in its midst.

Not only is God dead, not only have miracles, magic, and occult causes long ago fled the scene, but today, we are told that the subject is dead, "humanism" is thought to be bankrupt, history moves in no particular direction, progress is a fairy tale told by jejune optimists, and meaning is effervescent. "Power" is in this way an explanatory place-holder, an only dimly understood *x,* which comes to fill the analytic vacuum created by modernity's second wave of disenchantment. Why does our human, social world come to take the form that it does? Why does history move in one direction and not in another? Answer: "Power."

Foucauldian 'power' begins more and more to resemble medieval scholasticism's *deus absconditus,* or hidden god, who enacts a providential plan that unfolds before our eyes, but of whom we may not speak in precise and determinate language nor may we see, but who nevertheless organizes the very fabric of our societies and the trajectory of our histories, according to some plan or logic that ultimately defies final, human comprehension or fully articulate expression by those upon whom the force of power is enacted. Contrary to the fact that the word is quite commonplace, power's ultimate meaning eludes full articulation. Foucault's "power" is no less mysterious than Heidegger's "being" and what he calls sometimes the "unknown god."[153]

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[153] See Heidegger, "Poetically Man Dwells" in GA, 7:201/*Poetry, Language, Thought,* 221. See also Gillespie, *Theological Origins,* 33-34, 114-15, 156, 158-59, 226-27, 248, 272-273 (deus absconditus), 274, 359-60 n. 47 (political theology of poststructuralism); Meier, "What is Political Theology?," 88-89. *Pace* Dreyfus and Rabinow, *Michel Foucault,* 129, cf., 147 et passim.

Ultimately, what power itself is approaches asymptotically the ineffable. We can only gesture in its direction and begin to describe it in ethereal, abstruse, uncanny, and mysterious language. The evidence for this judgment is familiar to anyone who has read and puzzled over those thematic statements Foucault attempted to write on the topic. It is in fact altogether likely that Foucault never quite decided with ultimate finality what precisely he meant to say with this word "power." It's not that there is nothing there *there,* but rather that we have and he had such difficulty saying precisely what that something is.

Finally, there is a question which remains as to the specific Nietzschean credentials of the genealogical enterprise, and such a question is significant not because I wish to impugn Foucault's Nietzschean credentials at all, but because Foucault has dispensed with an important consideration from Nietzsche's own work, which deals more directly with the theme of history and its relation to human life.

The first programmatic, and also the most important, statement on genealogy that Foucault ever wrote took the form of an essay on Nietzsche: "Nietzsche, Genealogy, History" (1971), which was written as a contribution to the 1971 Feschrift for the famous, French scholar of Hegel, Jean Hyppolite. This text also happens to be his sole scholarly piece that addresses Nietzsche's thought in a sustained way. However, in constructing this neo-Nietzschean methodology of historical analysis, which Foucault calls "genealogy," Foucault departs radically from Nietzsche, or at least from the Nietzsche of *On the Uses and Disadvantages of History for Life,* despite the fact that Foucault cites several times from this text in elaborating his own account of genealogy.[154]

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[154] Foucault, "Nietzsche, Genealogy, History" in FR, 86, 94-97, 99 n. 51. *Pace* Habermas, PD, 249. For helpful discussions of Nietzsche's *Uses and Disadvantages of History,* see Berkowitz, *Nietzsche,* 25-43 (ch. 1); Zuckert,

It is there, in *On the Uses and Disadvantages of History,* that Nietzsche recommends precisely *against* the type of historical knowledge for which Foucault advocates, namely, histories written with the express purpose of shattering altogether the horizons within which contemporary human beings conduct their lives. This point, moreover, is seldom fully appreciated.

In *On the Uses and Disadvantages of History,* Nietzsche does indeed recommend a *certain form* of "untimely" historical knowledge, which could function critically, namely as a "counter to our time."[155] In addition, Nietzsche does make more than clear that only a "naive historian," accompanied by a suitcase stuffed full with the tools of uncritical positivism, could imagine that *all* the prejudices of his own era deserve unqualified universal approbation from either transhistorical humanity or present day man.[156] However, it should always be borne in mind that what Nietzsche advocates here is a particular *sort* of historical knowledge, and one which is practiced with "*restraint.*"[157] On Nietzsche's view, one must first have a sense for what is valuable in a human life, before one turns to history.[158]

There, he argues that, if confronted by undifferentiated Hericlitean becoming and total historical flux, without banisters or guideposts, man would undergo a disastrous sort of radical enervation and loss of self-confidence, which would be inimical to "action of any kind." Such a man would "hardly dare to raise his finger."[159] For this reason, Nietzsche suggests that bounded horizons and some element of historical forgetting are obligatory for life. "All living things require an atmosphere around them, a mysterious misty vapour." Nations and cultures too require

"Nature, History and the Self." For a critique of Foucault's et alia's use of Nietzsche's "genealogy" as though it were intended and recommended as a method, see Stevens, "On the Morals of Genealogy."

[155] Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1:243/*Untimely Meditations,* Foreword, p. 60.

[156] Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1:285/*Untimely Meditations,* § 6, p. 90-91.

[157] Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1:291/*Untimely Meditations,* § 7, p. 95.

[158] See Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1:289-90/*Untimely Meditations,* § 6, p. 94.

[159] Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1:246/*Untimely Meditations,* § 1, p. 62.

a "similar enveloping illusion."[160] Thus, life requires the "art and power of *forgetting*" which would enable man to "enclose" himself "within a bounded *horizon.*" In order to live, man must to some degree live "unhistorical[ly]" or "suprahistorical[ly]."[161] "A certain excess of history," on Nietzsche's account, "by continually shifting horizons and removing a protective atmosphere," thus has the consequence of disadvantaging "life" by enervating man.[162] So, Nietzsche states without qualification that it is a "universal law" that a "living thing can be healthy, strong and fruitful only when bounded by a horizon"—a horizon, which, though temporal, must be experienced at least to some degree as a- or extra-temporal.[163]

Though of course, on the basis of basic chronology, Nietzsche could not have had Foucault in mind when he wrote, we, standing where we do today, cannot but read his words as in some way directed at Foucault, albeit posthumously. In his critical mood, Foucault recommends precisely what Nietzsche disclaims: the "oversaturation of an age with history," which Nietzsche sees as "hostile and dangerous to life" in many ways, but perhaps chiefly in the sense that it "leads an age into a dangerous mood of irony in regard to itself and subsequently into the even more dangerous mood of cynicism."[164]

Foucault's apology for his practice of devaluing this important, early Nietzschean thesis appears to consist only in the under-argued assertion that "somewhat later … Nietzsche reconsiders this line of thought."[165] Surely *On the Uses and Disadvantages of History* is an early text of Nietzsche's, and there are periods and breaks in Nietzsche's thought.[166] That being said,

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[160] Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1: 294, 246-48/*Untimely Meditations,* § 7, p. 97, § 1, pp. 62-63.
[161] Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1:326/*Untimely Meditations,* § 10, p. 120.
[162] Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1:319*Untimely Meditations,* § 9, p. 115.
[163] Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1:247*Untimely Meditations,* § 1, p. 63.
[164] Nietzsche, *Uses and Disadvantages of History* in KGW, 3.1:275/*Untimely Meditations,* § 5, p. 83.
[165] Foucault, "Nietzsche, Genealogy, History" in FR, 97.
[166] See, e.g., Löwith, *Nietzsche's Philosophy,* 21-26 (ch. 2), esp. 22-24, 26.

the periodization of a thinker does not entail of necessity that everything from a prior period had been abrogated in the subsequent installation. Whether or not Nietzsche did abandon this insight is controversial enough that Foucault's adverting to his essay, where he outlines the principles of his left, neo-Nietzschean reconstruction of "genealogy," is not on its own sufficient to establish the point.

Foucault, however, as we have already discussed, never did in fact put himself forward as a reader of Nietzsche, whose aim was fidelity to Nietzsches' thought, and so we should not hold against him the fact that his enterprise involves repudiation of any Nietzschean insights, whether they be "early" or "late." However, Foucault's dismissal, on my account, *is* problematic in the sense that what it is that Foucault ignores or argues away in Nietzsche's thought represents at least the kernel of a genuine and important insight, to which Foucault appears not to have given much serious or sustained attention.

## 5.7 The Role of the "Intellectual"

As already discussed, within Foucault's thought world, there exists no principled, philosophic ground on the basis of which one might definitely judge the superiority or inferiority of one regime of truth or discourse to another, which might potentially compete with it. All are equally implicated within and enveloped by their own distinctive matrices of power. Yet, despite it all, the philosopher who is concerned with the present and the future is not completely and utterly condemned to silence. As we have discussed, there is clearly a committed, evaluative critique of the present implied by Foucault's research. The aim, direction, and very *raison d'être* of these studies are unintelligible unless we take cognizance of it. This is a paradox to be sure, and it is one which Foucault did in fact attempt to address.

We have already established that Foucault's thought receives its inspiration and direction from a conception of philosophy's task. Philosophy finds its fulfillment in providing the scaffolding for critical, philosophical activism. The name Foucault gives to this intellectual enquiry is "genealogy." The question then is what is the nature, scope, and justification of the critique of the present, which itself ultimately hinges on evaluative judgment that the present is something from which we need somehow to distance our self, owing to the ominous and crisis-like prevalence of disciplinary normalization. Foucault's meditations on these themes are nowhere more clear than in his discussions of the role of a particular sociological category: the "intellectual." Having been a faculty member of the French Republic's most prestigious research institution, the Collège de France, in a national culture more attentive and deferential to public intellectuals than in North America and elsewhere, Foucault was uniquely situated to have grappled in the concrete with the role of the public intellectual in society.

Foucault generally stands aloof from normative and affirming talk, approaching them only ever from the most oblique of angles. This proceeds, however, not merely, or not so simply, from an idiosyncrasy of personality, but rather and precisely from the nature of the thought world he inhabits. For these sorts of reasons, it has been remarked, and not without some merit, that there is something uniquely unattached about Foucault, a cultivated deracinated and abstemious sensibility, which perhaps distinguishes him from other, major figures in the poststructuralist "canon."[167] This, undoubtedly, has led some of his readers to conclude that he was fundamentally an apolitical or antipolitical thinker.[168]

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[167] See Rorty, "Remarks on Deconstruction and Pragmatism," 13-14, 17; Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 2:182; Walzer, "Politics of Michel Foucault," 67.
[168] E.g., Lilla, "Michel Foucault" in *Reckless Mind,* 139-58, esp. 144-45, 149-50, 158.

The parlor game of historicizing the historicist is not terribly helpful in the case of Foucault. We should not interpret him merely as a disappointed revolutionary, whose revolutionary fervor subsided in the wake of the disillusioning failures and/or vicious cruelties of Stalinism, Maoism, the Viet Cong, the Khmer Rouge, Paris 1968, and the Iranian Revolution. Instead, his thoughts on the sociological category of the intellectual follow, step by step, from the edifice that is Foucault's thought. Whether Foucault's thought, in turn, can be interpreted as the literary expression of disappointed revolutionary fervor is a topic I leave to the biographically-inclined psychoanalyst.

If not this, what then precisely is the source of Foucault's abstemiousness with regards to normative affirmation?

Today, we are living in an age that is beyond the binaries of good and evil. There really isn't an unambiguous "good side" on which to stand.[169] Beyond the local struggles that are already under way, we have no grand, normative vision, which can guide us. It would be, in addition, a mistake to depend or wait upon the "approval of the established régimes of thought" before we were to press forward.[170]

It is, moreover, somehow fundamentally dictatorial or authoritarian to seek to prescribe to others how they should lead their lives. "There is always something ludicrous in philosophical discourses when it tries, from the outside, to dictate to others, to tell them what their truth is and how to find it."[171] This reminds the reader a bit of Horkheimer and Adorno's famous claim that the "Enlightenment is totalitarian."[172]

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[169] See Foucault, "Power and Sex" in PPC, 120-21.
[170] Foucault, "Two Lectures" in PK, 81.
[171] Foucault, HS, 2:9, cf., 21. Cf., Foucault, "Return of Morality" in FL, 473.
[172] See Horkheimer and Adorno, *Dialectic of Enlightenment,* 4, cf., 2.

Thus, the intellectual's job today is not to lead and guide society, for in doing so, he cannot help but participate in, and become implicated with, the existing power structures, which are precisely the things, which must be subverted. In the very act of contemplating "another system" we unwittingly "extend our participation in the present system."[173] So the self-aware, critical intellectual should step back from the messiness of politics, or at least not prescribe solutions from on high, as Moses did the Hebrews. As Foucault puts it:

> I have absolutely no desire to play the role of a prescriber of solutions. I think that the role of the intellectual today is not to ordain, to recommend solutions, to prophesy, because in that function he can only contribute to the functioning of a particular power situation that, in my opinion, must be criticized.

This, he says, is his "political preference."[174] The Greek sage, the Hebraic prophet, and the Roman legislator are still the images which haunt our contemporary conception of the intellectual's task, but Foucault wishes no longer to inhabit these roles or to serve as prophet or as legislator.[175]

Despite it all, there is still a role for the intellectual in a society like ours, but it is one quite different from the older, more common image of the intellectual, modeled, if perhaps only unconsciously, on the philosopher of Plato's *Republic.* Foucault's vision for critique is hyper-specific and focused, and in this way, he hopes to avoid some of the difficulties associated with the now eclipsed vision of the prophesying-legislating, public intellectual. In our world, all that is settled is simultaneously "dangerous" and bursting with opportunities and the invitation to meet the challenges posed by those dangers. In a world of ever arising "new problems," Foucault

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[173] Foucault, "Revolutionary Action" in LCP, 230, cf., 231. Cf., "Interview with Michel Foucault" in EW, 3:288.
[174] Foucault, "Interview with Michel Foucault" in EW, 3:288. Cf., "Space, Knowledge, and Power" in FR, 249; "Questions of Method" in EW, 3:236.
[175] Foucault, "Power and Sex" in PPC, 124.

encourages the disposition of "*hyper- and pessimistic activism.*"[176] We must be ever vigilant, ever watchful, ever wary.

To address the problems of the rotten present, Foucault recommends what he calls the "'specific'" as opposed to the "'universal'" intellectual. The self-aware and reflective leftist intellectual is not and cannot be the "spokesman of the universal." He cannot give voice to the "consciousness/conscience of all," and he is not the "bearer of ['universal'] values" which give deep expression to the hopes and aspirations of all. He cannot present a vision of the world in which "all can recognize themselves." Rejecting the yearning for "new philosophy" or "world-view," he must confine himself instead "within specific sectors" and address himself to "real, material, everyday struggles," which might, but do not necessarily, concern the plight of the proletariat. Such a perspective affords the specific intellectual "more immediate and concrete awareness" of the struggles taking place already within our society. The pressing and "essential political problem" faced by the specific intellectual is not to critique the way that ideology drives science, to construct a "correct ideology," or to change popular "consciousness" on a wide scale. Instead, the essential political problem of the specific intellectual is to determine the "possibility of constituting a new politics of truth."[177] Problematically, however, Foucault does not specify in any detail what precisely "constituting a new politics of truth" would entail or how to go about doing so, apart from shattering the old one with a hammer and then standing back to watch and see what grows from beneath the shards of glass and rubble. Foucault's focus is not affirmation but critique.

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[176] Foucault, "On the Genealogy of Ethics" in FR, 343-44, emphasis added.
[177] Foucault, "Truth and Power" in FR, 67-74.

If it is to be successful, critique must be "specific," "partial" and local, as opposed to "global" or "radical." This is what we might today call "grassroots activism." In contrast, the global or universal intellectual posits "another vision of the world" towards which we might aspire, but today we know "from experience," that this manner of thinking has against our deepest wishes contributed and facilitated some of the "most dangerous traditions" that humanity has yet faced.[178] The intellectual is thus well advised to avoid grandiose aspirations, confining himself instead to this or that "local, specific struggle." In such a struggle, the intellectual's aim is to "detach" the good name and socially effective "power" of "truth" from the "forms of hegemony" which we encounter in that specific domain. His struggle thus takes place "at the general level of th[e] regime of truth," which he encounters within that particular, local sphere. In this way, the struggle, waged by the specific intellectual, is a conflict not over or about the truth, but rather a battle "'around truth.'"[179]

The Foucauldian, specific intellectual does not recommend or offer specific prescriptions or attempt to give us a vision of a better world in the future to come. In contrast, his value consists instead in problematizing the present and providing the analytical constructs in order to do so. Foucault takes aim at the settled. He hopes thereby to prepare the way for those who fight the good fight—for those who are already so inclined to fight the good fight. The intellectual himself can take part in struggles, but as an intellectual he has no privileged status. Though it may be the case that his analyses may have done much to undermine a particular regime of truth and thus provided much in the way of the necessary conditions for change, the specific intellectual is just one among many in the crowd. The place of the intellectual is thus decidedly different from the

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[178] Foucault, "What is Enlightenment?" in FR, 46-47.
[179] Foucault, "Truth and Power" in FR, 73-74. Cf., "Subject and Power" in EW, 3:330.

Platonic image. Through his researches, Foucault's specific intellectual paves the way for those who will fight the good fight. It is not necessary that he assign to them a particular struggle as their lot or that he endeavor to shape their consciousness or awareness. He must only prepare the conditions for the opening of the floodgates, and then the struggle will play itself out without his mediation or more direct intervention.

The intellectual might critique a given human practice or institution, but not in the name of some grand normative ideal. The intellectual after Foucault's heart is the one who takes aim at the present, who shatters "generalities," and who isolates and exposes the "weak points" and "openings" in the present, without necessarily knowing whither, wherefore, and in what direction precisely his critique is pointing, because he is doggedly fixated on "the present."[180] Foucault is simply "not interested in constructing a new schema or in validating one that already exists." Instead he aims to shatter present humanity's confident and all too comfortable self-certainty in the privileged status of their way of life, and this aim is propaedeutic to critical, social change, to be pursued at the specific and local level. He aims to "bring it about that" those already enmeshed in actually existing institutions, "'no longer know what to do'" with any great degree of confidence. In this way, various "conflicts and confrontations" can play themselves out "on the ground" and "in the real."[181]

Formerly, it was the case that the intellectual "spoke the truth" both to, and on behalf of, those who did not yet recognize it as such. This is the meaning of that Civil Rights-era injunction to "speak truth to power." It was their aim to "awaken" popular "consciousness." The "role" of the intellectual today is, however, not to speak the "truth of the collectivity" and thereby to situate

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[180] Foucault, "Power and Sex" in PPC, 124.
[181] Foucault, "Questions of Method" in EW, 3:235-37.

himself somewhat "ahead and to the side" of that collectivity. Today, the "masses" do not require such an actor, for they already know what needs doing, and they do not require the "eloquence" of the intellectual in order to do it.[182] The intellectual can "no longer" serve as an "advisor" to reform or revolutionary movements. The actual direction of these movements must be left to "those who do the fighting." In the final analysis, all the "intellectual" can do is to furnish to the reformers and revolutionaries are the "instruments of analysis." The provision of these tools of analysis is today the "essential" task of the critical historian.[183]

This focus on material, local struggle—interpreted, it would seem, without much attention given to the overall normative horizon or consciousness that animates the struggle (of both revolutionaries *and* reactionaries)—is perhaps one of Foucault's least Nietzschean moments. This orientation would appear instead to be derived from lingering traces of the sort of naïve positivism latent in the deeply anti-Hegelian, Marxian conception of class struggle as something fundamentally responsive only to empirical, material conditions, and that these empirical, material conditions are the more fundamental bases of human history, while ideas and human consciousness are something epiphenomenal and "superstructural." On this basically Marxian view, struggle and resistance arise, then, somehow empirically, in response to some underlying, material reality, and thus almost with a certain sort of assured automaticity. At the most fundamental level, then, resistance and struggle do not arise in response to a historically shaped normative consciousness or a distinctive, constellation of ideas which motivate, provide sustenance, and direction to human action.[184] This tentative analogy between Foucault and this

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[182] Foucault and Deleuze, "Intellectuals and Power" in LCP, 207-08.

[183] Foucault, "Body/Power" in PK, 62.—Evidence that the basic outlines of this Foucauldian critical/normative vision I've been outlining remains attractive for contemporary intellectuals can be seen in, e.g., the recent Hendrix, "Where Should we Expect Social Change," esp. 127-37.

[184] See Marx and Engels, *Manifesto* in MEW, 4:475/MER, § 2, p. 484; Marx, "Preface to A Critique of Political Economy" in MEW, 13:8-9/*Selected Writings,* 425; *Germany Ideology* in MEW, 3:46-47/MER, 172-73.

Marxian-material conception of struggle is appropriate, despite Foucault's frequent efforts to distance himself from the general project of Marxian social theory and also from the social role assumed by the French, Marxist intellectual.[185] The key difference here between his thought and that of the French, Marxian intellectual would be Foucault's decided emphasis on *local* struggles and his denigration of those who purport to act as "spokesm[e]n of the universal" and thus of those who aim to speak beyond the merely local and establish thereby some grand science. After that, the substantive differences end.

At the end of the day, Foucault sees a really insubstantial link between ideas and action, theory and practice. When all is said and done, the constellation of ideas to which we find ourselves drawn are not in any deep and meaningful sense related to our behavior or the types of action in which we engage in the world. In a discussion of Heidegger and his own political activities, Foucault informs us that "there is a very tenuous 'analytic' link between a philosophical conception and the concrete political attitude of someone who is appealing to it." Action is not related to ideas in the way of deduction from first principles. There is, if not, a radical disconnect between the two, then at least it can be said that they are not intimately or closely related. The "'best' theories do not constitute a very effective protection against disastrous political choices." In this regard, the philosopher's "ideas" are far less decisive than his "ethos" or his "philosophy-as-life."[186]

We should recall, in this context, that Foucault seems to have had trouble distinguishing between, on the one hand, desirable insurrections of subjugated knowledges and those that were

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[185] See Foucault, "Prison Talk" in PK, 53-54; "Truth and Power" in FR, 52-53, 58-59, 60, 67; Foucault, "Two Lectures" in PK, 80-81, 84-85, 88-89, 91, 100, 102; HS, 2:4; "Structuralism and Post-Structuralism" in EW, 2:437, 458. Cf., however, "Prison Talk" in PK, 52-53.
[186] Foucault, "Politics and Ethics" in FR, 374. Cf., "What is Enlightenment?" in FR, 50.

genuinely pernicious. During the 1978-79 Iranian Revolution, Foucault cheered for Ayatollah Khomeini and his band of militant, intolerant, Islamist, theocratic thugs as they successfully rode (and co-opted) the wave that displaced the authoritarian Shah. Foucault was, in this regard, singularly alone amongst French, leftist intellectuals in so doing, and he never returned to the theme afterwards, even after it had become increasingly clear what darkness had in fact been wrought by this *particular* insurrection of subjugated knowledge. Instead, a mist of silence enveloped his tower of ivory.[187]

There is a long tradition, beginning perhaps with Plato, of important intellectuals making political mistakes of the highest order, and we should not let the brute fact of tragically mistaken, political judgment overwhelm or decisively color our understanding of such thinkers. That being said, we should not simply forget or ignore them either. The important question to be posed here is as follows: Is there a meaningful and compelling language with which Foucault could distinguish pernicious insurrections of subjugated knowledge from those that were less so? Or is revolution as such simply exhilarating?

These and other questions we will explore in the subsequent chapter, as we attempt to make sense of the ethical-political sensibility, which clearly imbues his critical project.

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[187] See Afary and Anderson, *Foucault and the Iranian Revolution,* esp. 1-10; Nussbaum, "Professor of Parody," 43; Lilla, "Michel Foucault" in *Reckless Intellectuals,* 153-54. Cf., Honig, "What Foucault Saw."

## 6. The Elusive, Ethical-Political Sensibility of Michel Foucault

In the foregoing chapter, I have illuminated (a) the most salient features of the left-Nietzscheanism, which the discourse of difference inherits; (b) the constitutive force of Foucauldian "power," which fills out the background to a person's posture towards the world, and which also serves—at least in its more subterranean Heideggerian moments—as an explanatory place holder in light of the reported demise of the meaning-giving subject; (c.1) Foucault's sociology of knowledge, which categorically disavows relations of hierarchy between "discourses" or "regimes of truth," and (c.2) what relationship this sociology of knowledge has to "power"; and the three most prominent instances in which the critical force and political-ethical sensibility of the discourse of difference become most manifest, namely in (d) the crisis of modernity as diagnosed by Foucault (i.e., "disciplinary normalization"), (e) the response to the crisis (i.e., critical historiography or "genealogy"), and (f) the role which the "specific" intellectual might play in society (i.e., by taking part in "local struggles," all the while vigorously eschewing any patriarchal relationship to those already on the ground). The stage has thus been set for a genuine critical evaluation of the achievements of, and the difficulties faced by, the Foucauldian thought world.

In what follows, I consider critically and in full force the normative and epistemic difficulties at the core of Foucault's project. Drawing on, but extending, select critical points first articulated in abbreviated form by Charles Taylor and Jürgen Habermas, I contend that Foucault's project of unmasking is deeply problematic, insofar as the basic position appears effectively to deny the very possibility of such an activity of unmasking. More decisively, I argue that the success of his

project relies heavily on his reader's holding a series of deep, political-ethical commitments, but the type of vision he recommends is one that treats all such deep and abiding commitments as themselves deeply problematic and deserving of great suspicion, thus unsettling the commitments on which his own project relies (i.e., Foucault's "crypto-normativism") (§ 6.1).

Against those who suggest that Foucault's later ethical "turn" represents a solution to these sorts of difficulties, I argue that this apparent "turn" involves a repudiation of important elements from his immediately preceding work (§ 6.2), and, drawing on Richard Rorty, I contend that this later, ethical "turn" lacks real purchase for politics, to the extent that it lacks any meaningful space for a conception of political socialization, understood here not as a pernicious form of domination but rather more simply as the partially-heteronomous acculturation to the norms, practices, and terms of cooperation, which remains an important feature of any society (§ 6.3).

This discussion sets the stage for the types of problems the discourse of difference inherits from Foucault and thus must confront. This confrontation takes place in the subsequent chapter.

## 6.1 Foucault and our Discontents

There appear to be grave epistemic and normative difficulties at the core of Foucault's position, which I will outline here. These difficulties are, moreover, intimately related to essential features of his project, which I have already discussed above in the previous chapter. These problems seem if not to undermine Foucault's project, at least to vitiate the ultimate success of the project. Here I expand upon some of the core insights first articulated by Taylor and Habermas, but which were left by them in an inchoate and relatively underdeveloped form.[1] We begin first with the epistemic.

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[1] On the part of Habermas, this critique of Foucault represents the opening salvo of the so-called Foucault-Habermas "debate." Though he does call Habermas' communicative ethics "utopian," Foucault assiduously avoided any *direct*

In Foucault's thought world, there simply is nothing at all outside of the cave—to borrow a time-worn metaphor. The basic conceit, more often tacit than written, of Foucault's epistemological stance is that there exists no clear and perspicuous point of differentiation between warranted confidence and reactionary fundamentalism. We may believe that we are reasonable, reflective human beings in asserting some particular "truth," but in point of fact, in a world without a reassuring God, this is no more than a desperate grasp—a grasp whose desperation is directly proportional to its level of dogmatism. Claims to truth, specifically those that pertain to the shape and form of a given society, are at best misleading, and at worst, dictatorial. Truth-claims *always* cover over possible difference illicitly and arbitrarily, and the illicitness is compounded further by our failure to recognize them as such. Such claims to finality do not transcend or move beyond the particular rationalities or knowledges, which abide within a given discourse constituted by a historically specific discipline and articulation of "power." This is the epistemic view towards which the vast majority, if not all, of Foucault's later monographs, essays, lectures, and interviews point, as I have already shown. Problematically, however, this epistemic view is not up to the task of making sense of the type of theoretical activity in which Foucault was engaged.

Much of Foucault's work reads as though he is *revealing* something to us about ourselves as human beings inhabiting different types of societies, something that power generally masks or

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response to Habermas' charges, possibly because he doesn't "like" "polemics" which he believes are not oriented towards the "truth." Foucault and Habermas met at some point in Paris in 1983 on amicable terms. See Foucault, "Polemics, Politics, and Problematizations" in FR, 381-82; "Ethics of the Concern of the Self" in EW, 1:298; "Politics and Ethics" in FR, 373; Habermas, "Taking Aim at the Heart of the Present" in NC, 173-74; PD, 238-93 (chs. 9-10).—I do not wish to go so far as Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 2:167 in saying that Foucault's thought is "ultimately incoherent." Connolly, "Taylor, Foucault, and Otherness," 365, 367-69, 371-75, I believe, does indeed do much to restore the "coherence" of Foucault's thought, but it's not clear that he can respond to Taylor's most promising critiques, without fundamentally changing elements in Foucault's thought—something of which Connolly appears to be cognizant. Cf., Taylor, "Connolly, Foucault, and Truth."

covers up, and so his philosophy is, in effect, a philosophy of unmasking. The entire critical enterprise proceeds, it would seem, on the premise that if we should only understand the way in which power actually works in societies such as ours, then we will have provided the first step towards changing it. "Power," Foucault explains "is tolerable on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms.... Secrecy ... is indispensable to its operation."[2] The sense in which Foucault is a critical, philosophical activist consists in his attempt to make good on the philosophical-political vocation of unmasking.

However, the very concept of "mask" simply fails unless we have an accompanying idea of "truth," which could sustain the type of distinction the word, "mask," and its antithesis, appears to require. We cannot speak of unmasking unless we have an idea of what it would mean to live without them—i.e., what the tradition has called "truth." What is problematic, then, about the Foucauldian framework is, among other things, that it purports to show us something, to unmask, but it denies, *ab initio,* that unmasking is even possible. A view from outside of the relations of power which themselves constitute the rules of truth is a view which Foucault has decried again and again in so many different forms. That, however, is precisely what is required in order to make sense of unmasking: a conception of truth that at minimum does not see "truth" as something we impose on the world. If imposition is all there is, masks and "truths" imposed on the world cannot be *un*masked.[3] So, what would seem to be one of the principal, critical *raisons d'être* of the Foucauldian thought world—namely, its ability to unmask and thus to show that

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[2] Foucault, HS, 1:86. Cf., SP, 187.
[3] Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 2:176. Cf., Walzer, "Politics of Michel Foucault," 52.

what we take to be necessary is instead arbitrary—is simultaneously called into question and undermined by other key features of the very same Foucauldian framework.

What this word "truth" actually entails in the final analysis I do not intend here to specify. To even begin to address the question tangentially would constitute a life's work. However, I do wish to say that what Foucault proffers does not seem to be up to the task. It is, however, decidedly *not* the case that in showing something to be defective or problematic, one *must* proffer in that very same moment a well-articulated alternative or that one must put forward a well articulated "doctrine" of "truth" in order to criticize a rival conception.[4] We *can* in various circumstances know that a solution is a dead end without knowing in full and explicit detail where precisely it is that the complete and fully satisfying solution does in fact lie. Moreover, when we do take dead ends off the table, we are, in fact, moving in an appreciably positive direction, albeit step by step instead of by means of the giant leaps that, to certain types of people, are more satisfying, both aesthetically and intellectually. This is—to borrow, but alter, an expression from Foucault—effectively to resist the *blackmail of the* counter-*Enlightenment.*[5]

Perhaps more importantly, all of Foucault's written and spoken assertions *seem,* at least on the surface of things, to have the character of "truth"-claims. He at least *appears* to make claims that somehow transcend the local character of a particular and historically isolable discourse or regime of truth, whose rules for truth-assertions are determined by a historically-specifiable and -analysable relation of power. This is, in effect, what Habermas has called the "performative contradiction" at the heart of Foucault's work, i.e., the sort of contradiction that occurs when the propositional content or locutionary force of a speech act conflicts with or contradicts certain

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[4] *Pace* Connolly, "Taylor, Foucault, and Otherness," 372.
[5] See Foucault, "What is Enlightenment?" in FR, 42-43.

other presuppositions that the same speaker must hold in order to meaningfully engage in that very same speech act. Foucault's *deeds* presuppose that which in speech he wishes to deny. To put it another way, Foucault's text puts to work "reason" as an instrument in order to denigrate and trivialize the pretensions of "reason." This is indeed a powerful charge, whose force cannot be easily evaded.[6]

Indeed, it is quite true that today, we no longer know what it is that we thought we knew, that comfortable self-confidence, collective or individual, can often harbor profound illusions, whose depths are ordinarily under-explored, *especially* by those who ought most to explore them. However, to say all of this, indeed, to say any of this, to make any of these sorts of statements intelligible, we do in fact need something *like* "truth" as at least a regulative or aspirational ideal; though what this "truth" will look like at the end of the day remains as yet unclear. One of Foucault's principal defects is the rather cavalier and blithe way in which he seems to have dispensed with the problem altogether. This is the problem with which we still wrestle today. Let us, however, leave all these significant issues aside for the moment, fixing our attention instead on a far more pressing concern: the normative dimension of Foucault's thought.

Foucault is sometimes accused of being something of an anti-normativist, a neutralist, or a "relativist," but all of these charges are at least partially misleading.[7] Foucault's researches are wholly and completely unintelligible without reference to the normative horizon that animates his

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[6] See Habermas, PD, 126-27, 248, cf., 269, 276, 279, cf. also, 119 (on Adorno), 185-86 (on Adorno and Derrida), 193 (on Derrida). Cf., Putnam, *Reason, Truth, and History,* 121, 156, 159-63. Habermas, "Discourse Ethics" in MCCA, 80 ff. develops the theme of a performative contradiction at greater length. Somewhat flippantly, Connolly, ID, xv dismisses the force of the charge of "performative contradiction," because it "reflects the tacit assumption that the world conforms to a logic to be grasped through precise concepts." On the ethos of "performative consistency" in Habermas' thought, see also Jay, "Debate over the Performative Contradiction," esp. 261-62, 265-66. Cf., Connolly, WNS, 10, 43, 189-90 n. 6, 192 n. 34; P, 128. Cf., however, Connolly, FT, 112-13. It is of some note that even Derrida in his later work adopted the conceptual language of the "performative contradiction." See Derrida, *Politics of Friendship,* 118.

[7] Cf., Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 2:163 et passim. Cf., however, Connolly, "Taylor, Foucault, Otherness," 369.

work, although admittedly it is sometimes difficult to articulate or to pin down precisely how to formulate that normative horizon.

This feature of Foucault's work is what Habermas has called Foucault's "cryptonormativism," and it is a problem which is of decisive importance, if not only for Foucault's account, but even more so for the reception of Foucault in the English-speaking world. However, we should not understand *crypto*-normativism too literally, for there is nothing *hidden* about Foucault's normative commitments. He wears them on his sleeve, so to speak, even while he appears to disavow them in writing. The charge is certainly not that Foucault fails as an "objective" or "positivistic" historian, despite the fact that in some of his moods, Foucault does seem to share much with the anti-idealist temper of positivism (and Marxian historical materialism). Instead, what I wish to say is that Foucault's normative commitments can find neither a principled, philosophic basis nor are they even fully intelligible within the Foucauldian framework**.** They are hidden or pushed to the side by the Foucauldian thought world, but, at the same time, these normative commitments—for which the framework cannot account—are actually that very thing which drives the philosophic elaboration of the framework in the first place. A specific political-ethical, normative vision is, *in deed,* privileged by the Foucauldian framework, in the sense that the Foucauldian framework puts forward a social critique, but within the framework, Foucault is unable to account for why it is that this critique—or really any critique at all—should be privileged. In other words, there is, in Foucault's account, a glaring *normative deficit.* Somewhat surprisingly, this crypto-normativism is a feature Foucault shares with the value-free social sciences he otherwise wishes to critique and precisely for their alleged neutrality.[8]

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[8] See Habermas, PD, 275-76, 282-86. Cf., Connolly, ID, 183.

"Evaluative" or "normative" language does occasionally and subtly creep into Foucault's texts, betraying a sense of outrage and indignation—outrage and indignation that are very often warranted. For instance, in *Discipline and Punish,* apart from the words "coercion" and "domination," Foucault's two favorite, evaluative terms appear to be "insidious" and "shameful," although other such language appears as well. Foucault, for example, speaks of the "*insidious* militarization of the large workshops"; he refers to the "'new microphysics' of power" as obeying techniques, rules, procedures, and economies "too *shameful* to be [openly] acknowledged"; he speaks of the "*shameful* art of surveillance"; he mentions the "*insidious* extension" of "hierarchized, continuous and functional surveillance"; he describes how disciplinary power "*insidiously* objectifies those on whom it is applied"; getting more at the heart of the matter, he suggests that the "*dark* side" of the "formally egalitarian juridical framework" associated with bourgeois "parliamentary, representative" government was accompanied by the "panoptic modality of power" and "systems of micropower" (i.e., "disciplines") which are at their core "essentially *non-egalitarian and asymmetrical*"; and he calls the penal system the "*detestable* solution," which our culture appears nevertheless "unable to do without."[9]

However, apart from this occasionally evaluative language, dripping in outrage and indignation, Foucault more often than not maintains a *tone* of distance and coolness, more characteristic of the particle physicist than of the social activist or critic. Problematically, however, the efficacy of Foucault's rhetoric and selection of topics requires, and is in some way parasitic upon, a certain horizon of value and shared moral sensibility (albeit one that is imperfectly and incompletely shared). Moreover, we fail to understand how to read some of his

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[9] See Foucault, SP, 138-39, 172, 176, 220, 221-22, 232, emphasis added, cf., 191, 231-32.

most impressive works if we were to take seriously the possibility that Foucault's thought world is not motivated by deep, political-ethical, normative commitments.

To take just one example, let us consider Foucault's justly celebrated *Discipline and Punish.* The work is very clearly designed to shock readers out of a complacent acceptance of the common narrative of progress we tell ourselves about ourselves, namely that our society grows day by day freer, more just, and more humane. Instead, as Foucault argues, human autonomy in the modern epoch, suffers under increasingly internalized tactics of disciplinary normalization, and, moreover, a radical asymmetry grows between supervisor and those supervised. This can be seen particularly starkly in the historical development and "reform" of the prison system, as Foucault seeks to demonstrate. The various humanitarian, liberalizing reform movements had a sinister underbelly, for in effect, as Foucault aims to demonstrate, the logic driving the developments in penal justice, even the reforms, was "not to punish less, but to punish better"— more deeply, more widely, more universally, and with a certain necessary automaticity.[10] The entire narrative of that text, however, presupposes that some sort of egalitarian, symmetric practice of human autonomy is a thing of deep value, and relatedly, that social institutions and structures which subtly but in some deep and enduring way diminish our sphere of autonomy should be understood to be insidious.

If evidence were needed, then let us consider the following scenario. Let us now imagine a prison warden who reads the work and from it he learns how to improve his prison's own tactics of discipline and normalization. He recognizes his vocation as prison warden to be precisely the one that Foucault describes as "disciplinary normalization," and through Foucault's documentary studies, he realizes that his own current prison system is not sufficiently normalizing nor is it

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[10] Foucault, SP, 82.

sufficiently disciplinary, and he comes to believe that earlier thinkers—e.g., Bentham, of whom he had never heard before reading Foucault—had much to teach him as to how he might improve his own prison's techniques of disciplinary normalization. This same prison warden, after leaving work, returns home. Realizing that his "disobedient" son lacks "discipline"—as we commonly say in English—he returns once more to Foucault's documentary studies, reading them a second time and this time more carefully, in the hopes he might discover there and better understand thereby the procedures and techniques with which he might ever more subtly instill norms of behavior in his son, to the point where the norms themselves are so deeply internalized that surveillance and observation are no longer required. He feels that a great task is before him. In fact, he feels an extra skip in his step, as he realizes that Foucault has now provided him with a sophisticated, theoretical language with which he can refer to his practices and techniques when speaking with his friends, colleagues, and wife.

Let us suppose for a moment what Foucault does not ever say in *Discipline and Punish:* that meeting some minimum threshold of definite autonomy is a positive human good and, relatedly, that profound social asymmetries between supervisor and the one supervised are definite ills for human beings in any context, at least when these assymetries run so deeply that top-to-bottom social engineering becomes a meaningful possibility, and, moreover, these ethical concerns as elaborated are of paramount and overriding importance in social organization, and they certainly have priority over considerations of "efficiency," "order," and the profoundly human yearning for *nemetic* justice. Were we not to presuppose that such a basic and deep horizon of normative value were operative in the text, then we would be foreclosed from claiming that this hypothetical prison warden has somehow *misread* Foucault's text; that he does not "get it." However, even for those who dismiss wholly or partially the notion of *mens auctoris* or authorial intention of a work,

or who hold onto an insistent skepticism about the possibility of meaningfully identifying authorial intentions—it seems nevertheless somehow wrongheaded and baldly mistaken to imagine that it could be thought appropriate to envision that *Discipline and Punish* could or should serve as a manual or guidebook for prison wardens, without fundamentally misunderstanding the meaning of the work.[11] This is so because a horizon of meaning and value is, in fact, silently operative in the background, lurking there, operative yet unacknowledged and generally unaccounted for.

A sympathetic critic provides another, similar example. Foucault's research points in the direction of generalized resistance and subversion, but the resistance and subversion is always envisioned in advance to be of a specific kind. Problematically, however, there are almost infinitely many types of subversion, and they are not all of them equally palatable to Foucault's intended audience. Other acts of resistance and subversion include: tax evasion as a protest against the state's support of "welfare queens"; willfully ignoring anti-discrimination legislation; joining the far-right, anti-government, white supremacist militias; or in the university system, laughing down feminist comments made by fellow students or, in the dead of the night, tearing down or defacing flyers belonging to the campus LGBT association. Beyond the shadow of a doubt, all of these constitute acts of subversion and resistance. All of these acts also have grassroots, popular support in certain and sometimes even statistically significant segments of the population, and, finally, these are even in other segments of our society what one might describe as "subjugated" positions, especially amongst the educated elite of our country. And yet, we can hardly imagine that these are the insurrections of subjugated knowledges Foucault had in mind,

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[11] For the poststructuralist retreat from the *mens auctoris,* see, e.g., Barthes, "Death of the Author" in *Image Music Text,* 146-48; Derrida, *Of Grammatology,* 158; Foucault, "What is an Author?" in FR, 118-19.

nor are these the types of action he might have thought to follow from his "essays in refusal." This deeply moral problem can only be evaded, as one sympathetic critic puts it, by "tacitly assum[ing] an audience of like-minded readers who agree (sort of) about what the bad things are."[12] It is *precisely* for this reason that so much of the discourse of difference has such a deeply intramural character, being so often addressed explicitly to the left—and then only to a tiny part of what makes up the left today—with the presumption (perhaps) that getting *that* house in order would somehow solve our contemporary, political problems.[13]

So, in short, on the one hand, the rhetorical efficacy of *Discipline and Punish* presupposes that radical, human autonomy is a thing of overriding value or importance in social organization, and that profound asymmetries between observer and the one observed are pernicious in their inegalitarian implications wherever we encounter them, but, on the other hand, as any even mildly astute reader of Foucault should have learned, it is not self-evidently the case nor according to any anthropologic principle or necessity that autonomy or equality are things of universal or necessary value or that a contemporary society would *need to* or *must* value or privilege autonomy and equality as ethical-political principles of deep and overriding significance, especially in light of the myriad conflicts the occasion with other fundamental human concerns. Foucault is indeed correct that today precious little appears to us as entirely and unambiguously self-evident, or that future cultures will or even should prize the same things that we do. His work, however, presupposes in important ways a set of deep and abiding commitments, some of which are part of the tapestry of our often-times internally conflicting

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[12] See Nussbaum, "Professor of Parody," 42-43.
[13] E.g., Brown, SI, xii; PH, 14, 18-22, 117.

intellectual-historical heritage that makes up the background unthought of a big part of the contemporary civic consciousness.

Of course, the idea of a background horizon of value or moral or civic consciousness latent within a culture, which goes generally unacknowledged, is something with which Foucault is well acquainted and to which he frequently adverts.[14] It is, in fact, central to his whole project. A "discourse" or "regime of truth" constituted by "power" are the tropes with which he ordinarily describes this thing. However, the overriding significance or importance of this background horizon goes unacknowledged, or at least unaccounted for, in Foucault's *own* work.

This is, *in itself,* no great sin, for we are all of us often unaware of this background horizon and, moreover, it's not clear that all of its contours could be specified in excruciating and concrete detail even by the most attentive, careful, sensitive, introspective, or knowledgeable of thinkers. But in a writer like Foucault, this lacuna is especially problematic. His rhetorical efficacy is heavily reliant on this background horizon, and yet he simultaneously seeks to call into question the privileged status of *any* background horizon. To put it yet more starkly, the problem is that Foucault dedicates no sustained effort to give an account of the (controversial) background, horizon of value within which his work operates; explain in what ways the set of commitments embedded in this horizon relate to other, equal fundamental human concerns which certainly conflict with it; or to describe what status this horizon has within his own thoroughgoingly critical project.

Somewhat disingenuously, Foucault disavows a "political" background to his work**.** The "questions [he is] trying to ask are not determined by a preestablished political outlook and do not tend toward the realization of some definite political project." The evidence he presents for this

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[14] E.g., Foucault, HS, 2:25-26.

claim is the observation that large groups on the right and on the left in France, in Europe more broadly, and even in America denounced his work during the time that he was writing.[15] For example, Foucault indicates that among the powers that be in the world of clinical psychiatry, those on the right criticized him for his apparent anarchism (i.e., for his seeming to be "against any form of power") and those on the left referred to him as the "'last bulwark of the bourgeoisie,'" presumably for his reluctance to play the common role of the French, Marxist intellectual gesturing in the direction of a brighter future for the whole of society.[16]

In point of fact, however, Foucault's work does presuppose as an audience those with certain pre-existing, deep and abiding, political-ethical preoccupations. It *only* speaks to "those people who had already been concerned" with, for example, problems in the prison system or in psychiatric institutions. However, for those "certain people," who do not fit this cast or mold, they are "not likely to find advice or instructions in [Foucault's] books that tell them 'what is to be done.'"[17]

As is clear from even a superficial reading, Foucault's work, however, palpably points in the direction of generalized social critique, specifically of patterns of behavior and institutions that take themselves to be somehow necessary, universal, neutral, and thereby those which unself-consciously exert normalizing pressures. It is not an idle problem, however, that he is generally reluctant to engage in normative or prescriptive discussions beyond the local, circumscribed level amongst those of similar disposition, in spite of the fact that his own work is clearly animated by a deep and distinctive political-ethical sensibility. This is a problem for those matters which address details of collective self-organization, precisely because this political-ethical sensibility

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[15] Foucault, "Politics and Ethics" in FR, 375-76; "Polemics, Politics, and Problematizations" in FR, 383-84.
[16] Foucault, "Questions of Method" in EW, 3:235.
[17] Foucault, "Questions of Method" in EW, 3:235.

he embraces might not be widely shared, or at least its central, animating elements, when in conflict with other similarly important considerations, might not, in the minds of most, win out in the inevitable hierarchy of value, which is occasioned by such types of conflict. As Foucault puts it, his work concerning psychiatry and its formal institutions, e.g., *Birth of the Clinic,* "totally failed to interest those to whom [he] addressed it." Instead, these studies were "surrounded by" what Foucault calls "a prudent silence."[18] This is still the case today—or so I am told.[19] Moreover, this problem is not unimportant. Quite correctly, Foucault observes elsewhere that it's also possible that the "silence of the enemy" can signify that one was simply ignored.[20]

All of Foucault's narratives at least appear to point in particular directions, but when under duress from the possible political implications of that work, he sometimes openly disavows them, or appears to vacillate in a strikingly substantial way without much in the way of apparent explanation. I will highlight here one striking example.

A reader of *Discipline and Punish,* particularly one already invested in the prison reform movement, might be inclined to think that because Foucault's narrative there aims to show the constructed character of delinquency and criminality, that it follows then that the categories of the "criminal" and the "delinquent" are themselves constructed, that the crimes of the criminal are constructed, that juridical guilt and innocence are similarly constructed, and insofar as they are constructed and saturated with power, then they are for this reason subject to contestation.

It's clear that this is not the overarching purpose of *Discipline and Punish*. Its aim was rather to show the nature of contemporary, disciplinary society, through the lens of a genealogical

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[18] Foucault, "Truth and Power" in FR, 52. Cf., "Interview with Michel Foucault" in EW, 3:243; "Polemics, Politics, and Problematizations" in FR, 385; "Two Lectures" in PK, 86-87.

[19] See also Hacking, "Archaeology of Foucault," text and n. 2.

[20] See Foucault, "Two Lectures" in PK, 87. Cf., "Truth and Power" in FR, 71.

investigation of a point at which contemporary, disciplinary normalizing power becomes especially manifest as an ideal type. However, were a reader of *Discipline and Punish* to reach these conclusions about the problematically constructed character of criminality, he would not necessarily be a bad or wholly inattentive reader for having arrived at these conclusions. At least without further explanation, they do, in fact, at least *seem* to follow.

In fact, on at least one occasion, in 1971, before the publication of *Discipline and Punish,* Foucault even apparently endorses these conclusions. He associates himself with the "struggle against repression" at the level of the prisons, psychiatric institutions, police raids (including drug busts), and the judiciary. Then he identifies himself with one such organization, the *Groupe d'information sur les prisons* (G.I.P.), and he states quite unambiguously that their goal is not mere reform so as to improve, on humanitarian grounds, the living conditions of inmates in the carceral system (e.g., the provision of flushing toilettes), but rather, and more fundamentally, their objective is to "question the social and moral distinction between the innocent and the guilty" and thereby to "obliterate the deep division that lies between innocence and guilt."[21]

However, seven years later, in 1978, without anything in the way of explanation, Foucault disavows these conclusions, at which many of his readers had apparently arrived. At this later point, he refers to this view dismissively as a "naive, archaic ideology which makes the criminal … into the innocent victim."[22]

In effect, Foucault *can* tell us, and in many cases he has with great merit, that "what has emerged in the course of the last ten or fifteen years is a sense of the increasing vulnerability to criticism of things, institutions, practices, discourses."[23] There's great truth to all that. But what

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[21] Foucault, "Revolutionary Action" in DE, 1:1096/LCP, 223, 1:1098-99/226-27.
[22] Foucault, "Truth and Power" in DE, 2:157/EW, 3:130. Cf., "Power and Sex" in PPC, 120.
[23] Foucault, "Two Lectures" in PK, 80, cf., 102. Cf., "Subject and Power" in EW, 3:329.

Foucault—or more specifically Foucault's *oeuvre—cannot* tell us is *why* and *on what grounds* we should criticize things, or *which* things to criticize. All of those decisions and judgments would have to be extra-Foucauldian types of judgments. Problematically, Foucault's work calls into question this type of judgment. He historicizes this type of judgment into oblivion and thereby trivializes it. Assuredly, we could direct our attention to those things that captured Foucault's interest (e.g., the human or social sciences, especially when they have institutional ramifications; the complex amalgam of madness, mental illness, therapy, and psychiatry; the modern penal system; human sexuality), but he provides no intellectual resources for identifying other domains that require critique, and he actively deprives us of the means for evaluating whether or not those institutions and practices he did in fact critique ought to have been critiqued in the first place. This is *not* to say that he was incorrect in critiquing those institutions and contemporary social configurations, which he did in fact critique, but only to say that those who are not content to remain mere *epigonoi* or merely under-laborers would like to hear a principled account given relating to this question at hand.

Momentarily and as a hypothesis, let us take then the plasticity of being and social fabric a little more seriously than Foucault appears ever to have done. It is only when we have done so that the important, critical questions can even arise for us. Why should (a) *we,* his readers, care about the insurrection of subjugated knowledges and contribute to this insurrection, and why should (b) those who either feel threatened by this insurrection, or who find it otherwise unpropitious not react against it and suppress the insurrection? For every insurrection, a class exists, which stands against it, and ordinarily, this class is very powerful—with "powerful" being used in the naïve, non-Foucauldian sense. What would a better world look like, and what precisely is the force of this word *better?* Why *this* and not *that?* In effect, the question is: What

is to be done, and why?[24] But this is of course the question Foucault conscientiously refuses to answer. More importantly, he refuses to answer it not because he does not want to and merely would prefer not to, but because fidelity to his own thought meaningfully forbids such an answer.

From time to time, Foucault does wish to draw qualitative distinctions of worth between human practices, but he only ever does so under extreme duress, on topics that seem to be near and dear to his heart. For example, Foucault does wish to distinguish between Soviet gulags and the practices of "internment" practiced in Western, liberal societies.[25] The real question is, however, whether the distinctions he wishes to draw are intelligible within the framework he puts forward. Why one collective human practice or regime of truth and not another? Are there meaningful grounds or reasons we can articulate? Articulation is not here simply a "rationalist" prejudice. For those of us who take seriously the fact that we live in a democratic age, we must hold as a regulative ideal that we at least attempt to pose potentially compelling arguments to our fellow citizens when we deploy the coercive force of law.

One might respond here that Foucault writes only to a particular audience, and not to a wider audience of those who make up a polity. This may be true, in a trivial sense, of course, but it is also true in an even deeper way, which itself calls into question his real potential as a contributor to normative, political thought. Of course, every piece of writing is addressed to a *particular* audience with a certain set of commitments. The trouble with Foucault's writing is *not* that he has an audience in mind when he writes. The trouble with Foucault's writing is that his basic thought world problematizes and trivializes those commitments. For those who write about politics in a democratic age, we have to remain cognizant of the problem of persuading others who don't

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[24] Cf., Habermas, PD, 283-84; Walzer, "Politics of Michel Foucault," 61, 64, 67.
[25] Foucault, "Powers and Strategies" in PK, 134-37. Cf., "Truth and Power" in EW, 3:113.

already agree with our general outlook, or absent that, we must present arguments that at least make pretensions to reach beyond ideological partisanship when we deploy the force of law. We no longer inhabit the political culture of four to five decades ago, when, it *seemed* to some, if only for a moment, as though "the people" or the youth generation were unambiguously on the side of generally progressive and "emancipatory" causes. *That* was the environment in which Foucault wrote his most important works, but that era has long since been eclipsed.

Foucault is silent on all these sorts of questions, problems, and difficulties. This silence, however, follows not from his character or general disposition, but rather is related to the framework within which his thought circulates. Foucault *must* be silent on these questions, and he is so owing to his stubborn, yet simultaneously admirable, consistency.

## 6.2 An Ethical Turn?

It might be thought, and some scholars have indeed thought, that Foucault began to grapple with some of these very same problems rather late in his career (from approximately 1976 to 1984), shortly before his untimely death. Towards the end of his career, in the final years of his life, Foucault did begin to develop the outlines or contours of what it might mean to be an ethical or moral subject. An "ethical turn" in his thought, we might call it—a "detour" in his scholarship that took him far afield from his earlier work.[26] This judgment seems even to be supported by Foucault's very own words, which intimate that perhaps he had spent too much of his career unmasking, nay-saying, and had not attended sufficiently to yea-saying and affirmation. In an interview in 1977, Foucault states that hitherto his "attitude" had been that the essential

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[26] See Hoy, "Introduction" in *Foucault,* 14-20; Nussbaum, "Professor of Parody," 42. See also Foucault, HS, 2:7; "Ethics of the Concern of the Self" in EW, 1:281-82, cf., 288, 291; "Return of Morality" in FL, 472.. Cf., Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 183; Habermas, PD, 284.

prerogative of the critical intellectual was to "denounce and to criticize" and to allow others whose hands were dirty to "get on with their legislation and their reforms," but that in the end, this was a view to which he no longer could "subscribe" and which he found now even "a little irritating."[27]

The central questions posed by this later work are (a) whether this latter day ethical vision has any political salience, and (b) whether it represents a continuation *or* a reversal of what came before. I contend here that (a) it does not have much in the way of political salience as presented (see § 6.3, below), by virtue of the fact that it has no place for any idea of political socialization, (b) and though I will not develop the argument at considerable length here, whatever this new vision ultimately consists in, it represents a considerable reversal from the general trajectory of his earlier work.

In his final work, Foucault puts forward a conception of ethics, distinctive for its *mode d'assujettissement,* or manner of subjection/subjugation, which corresponds to the way, the mode, or the manner in which the subject or individual experiences moral obligation. It should be noted at the outset that Foucault understands the word "ethics" in what appears to be a somewhat technical and circumscribed sense. On his view, ethics concerns one's *rapport à soi,* or the "kind of relationship you ought to have with yourself."

In constructing the related ideas of a "technology" or "technique of the self" (*technē tou biou*) and "care for the self" (*epimeleia heauotu*), Foucault is especially clear that what interests him is the idea of an ethics without "normalization" or socialization, and especially one that is areligious and which eschews any pretensions of presenting to the general "population" a "pattern of

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[27] Foucault, "Confinement, Psychiatry, Prison" in DE, 2:360/PPC, 209.

behavior" to which they ought to aspire. Instead, ethical obligation follows from the "personal" or "politico-aesthetic" "choice" of the individual. Ethics in this sense has no formal relation to speak of with "any social … institutional system," whether "juridical," "authoritarian," or "disciplinary." Thus it preserves the sanctity of the "personal, private life" that liberalism bestowed upon the bourgeois citizen. Ethics, on this view, is not "imposed" upon an individual through "civil law or religious obligation." Instead, it is a "choice about existence," which the individual himself makes. "Nobody is *obliged*" to do thus and such, but instead, ethics on this view represents a conditional or hypothetical imperative of the following form: If the individual "want[s] to have a beautiful existence," then doing thus and such follows. In this way, the individual takes upon himself an "obligation," but in a manner that is fully "conscious" and whose end consists of the "beauty or glory of existence" sought by that particular individual's choice.

*Ars gratia artis. L'art pour l'art.* This conception of ethics as self-fashioning "for its own sake" involves, we are told, treating the self as an "aesthetic piece of art." "Couldn't everyone's life become a work of art?" Foucault asks. "Why should the lamp or the house be an art object, but not our life?" This conception of ethics is, in effect, what Foucault calls an "aesthetics of existence," and he associates it variously with the "Greeks," "Greek ethics," "classical Greek thought," "Classical Greek philosophy," "Stoic ethics," "Greek and Greco-Roman antiquity," and "classical ethics."

Foucault argues, moreover, that the care of the self is both "ethically" and also "ontologically prior" to the care for others. Contrary to the impression we might have had upon first glance, however, Foucault wishes vigorously to distance his view of ethics from a self-involved, self-absorbed, self-indulgent, solipsistic, narcissistic inwardness, which Foucault calls the

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"Californian cult of the self." He distances himself from this vision, however, precisely because this Californian cult of the self presupposes that there is under our alienated and inauthentic selves a "true self," which psychoanalysis can help us to uncover. As Foucault reminds us, such a presupposition of an underlying nature or core self is altogether absent from the "aesthetics of existence," which he limns.[28]

This later turn in Foucault's thought follows a broader intellectual-sociological trajectory, which several, particularly astute sociologists and academic philosophers, between the 1970's and early 1990's, identified as the radicalization of "aesthetic modernism." The major contributors to this movement, which is still with us today, sought to subsume (practical) judgment under aesthetic categories, and thus to increasingly view human beings effectively as artists of their own lives. The important question for this movement then becomes: what does the politics look like, which is the analogue of Dadaism or Surrealism?[29] But let us leave these considerations aside for the moment.

What is especially significant for the present study of Foucault's thought is that towards the end of his life, Foucault *did* appear to begin to make a bit more room for a conception of freedom in his thought. He begins to speak of freedom and other cognate terms in a more pronounced fashion, and he quite self-consciously begins to elaborate an intimate relationship between what he called "freedom" and what he called "ethics." In fact, Foucault even defines "ethics" as the

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[28] See Foucault, "On the Genealogy of Ethics" in FR, 340-45, 348, 349-50, 352-53, 355-57, 359-62, emphasis added; HS, 2:10-12, 21-24, 36-28, 30, 32; "Ethics of the Concept of the Self as a Practice of Freedom" in EW, 1:287. Foucault proposes that all "ethics" have four elements: (a) with what part of a moral subject is ethics most concerned (i.e., the *substance éthique* e.g., feelings, intention, desire, acts, pleasure, *aphrodisia*); (b) what is the *mode d'assujettissement;* (c) how do we change or alter ourselves in order to meet ethical obligation (i.e., *practique de soi, form d'ascèse, travail éthique*); and (d) what do we wish to be, what do we imitate, and to what do we aspire (i.e., *téléologie*)? See "On the Genealogy of Ethics," 352-55, 357. I've chosen here to emphasize the second element ([b]).
[29] See Habermas, "Modernity versus Postmodernity," esp. 10, 13; Bell, "Cultural Contradictions of Capitalism"; *Cultural Contradictions of Capitalism;* Pippin, *Modernism as a Philosophical Problem,* esp. xi-15.

"considered form that freedom takes when it is informed by reflection." In characteristically hinting, tantalizing prose, Foucault presents us with an understanding of freedom which seems at least potentially to have politically emancipatory implications. Foucault's vision of freedom is described here as something, which can "control" or guide the new power relations opened up by "liberation" movements and thereby reduce "domination" in a given society. On this schema, domination is understood as the condition, which obtains in a society where power relations have become sedimented, "immobiliz[ed]," non-fluid, or incapable of change by virtue of the activity of some determinate social group or individual (i.e., an oppressor).[30] We cannot step outside of power. Such a goal is illusory. What we can do, however, is attempt to assume an ethical "practice of the self" which enables us to "play" within a given matrix of power "with as little domination as possible."[31]

Many of these reflections were inspired by Foucault's approximately eight year foray into the study of classical texts from several centuries of Graeco-Roman antiquity. However, Foucault vigorously counsels us not to see the classical age that he explores in the later volumes of the *History of Sexuality* as an "alternative" per se, to which we can unproblematically return. When asked if he "admired" the Greeks, he responded with a resounding "No." The classical age does not, on Foucault's account, represent a Hesiodic "golden age," but is instead a perspective that furnishes a "certain point of view" which is "useful as a tool for analyzing" the contemporary one with a view to reforming it. The basic idea standing behind this late stage in his research is to

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[30] See Foucault, "Ethics of the Concern of the Self" in EW, 1:283-84.
[31] See Foucault, "Ethics of the Concern of the Self" in EW, 1:298. Occurs in a discussion of Habermas.

"learn to what extent the effort to think one's own history can free thought from what it silently thinks, and so enable it to think differently."[32] A return, however, is not the prescribed solution.

To his credit, Foucault candidly acknowledges that he is neither a "'historian'" of classical antiquity nor is he a classical philologist with much in the way of formal training in the study of ancient texts or the languages contained therein.[33] He also acknowledges that before he began the research for the *Use of Pleasure,* all that he had written about Graeco-Roman culture and "pagan ethics were only clichés borrowed from secondary texts."[34] Much of this is apparent. For example, although Foucault would like to discuss and draw upon Plato's writings, he also wishes to exclude—and his discussion requires excluding—from overall consideration the Plato of the *Republic* and the *Laws* when presenting the "Greek" understanding of ethics as an "aesthetics of existence."[35] This is striking, indeed. This is not to say that Plato is fully representative of Greek thought, and in fact he might perhaps better be thought of as a fundamentally, reactionary thinker.[36] Rather, what I mean to suggest is that a discussion of "Greek" thought that deprivileges what are Plato's major works is nothing short of unusual.

Similarly, on the one hand, he appears from time to time to associate his aestheticized vision of ethics with "Stoic ethics." Then in other passages he quite correctly acknowledges that the Stoics did in fact conceive of obligation as something that did not follow from personal choice, but which proceeded instead from man's status as a rational being. So, pushed into a corner, he is

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[32] Foucault, "On the Genealogy of Ethics" in FR, 343-44, 347, 349-50; HS, 2:9, cf., 7 n; "Return of Morality" in FL, 466, cf., 469-70, 473.
[33] See Foucault, HS, 2:9, 7 and n.
[34] Foucault, "On the Genealogy of Ethics" in FR, 342.
[35] See Foucault, HS, 2:30-31, cf., 49-50 et passim.
[36] See Ober, *Political Dissent.*

forced to fall back on a *deus ex machina,* suggesting that later Stoicism abandoned somehow a more primordial Stoic insight.[37]

Bearing in mind these problems and others like them, and given the extreme fluidity with which Foucault appears, in constructing his account of "ethics," to slide across several centuries in moving between discussions of the categories "Greek" and then "Greco-Roman" ethical thought, and so on and so forth, it's far more plausible to interpret his discussion as one that treats an amalgam of features to which he is favorably disposed plucked from various passages from sundry writers in classical antiquity—despite the fact that he explicitly denied that this is what he had done.[38] What Foucault offers us in these final monographs is a bricolage of loosely joined Hellenistic-Roman artifacts, a classical potpourri. The point is put aptly by a sympathetic reader, who has both classical philological training and a keen philosophical acumen:

> Foucault plunders his sources for bits of evidence that will help him make a striking collage; the result is that he makes far too few distinctions, and no single piece is seen as a part of the historical whole from which it originally came.[39]

However, in the final analysis, none of these objections are decisive, so long as we cease to maintain that what Foucault primarily is doing is *interpreting* classical antiquity, but instead that he is, in his last years, doing something else altogether. But what then is that something else that he is doing?

Consistent with a general "turn" or change in his work, Foucault, at the very end of his life gives evidence that he wished to backpedal even further from much that was central to his enterprise. Two documents from 1984 are critical here: one a posthumously published manuscript ("What is the Enlightenment?") and the other an interview published first in a Spanish journal of

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[37] See Foucault, "On the Genealogy of Ethics" in FR, 341, 354, 356-57.
[38] See Foucault, "Return of Morality" in FL, 470.
[39] Nussbaum, "Affections of the Greeks."

philosophy ("Ethics of the Concern of the Self as a Practice of Freedom"). Among other things, the former document represents almost assuredly an oblique response to Habermas.[40]

At this late date, Foucault appears to wish to revise his relationship to the "Enlightenment," suggesting that one does not need to be either "'for' or 'against'" that particular tradition. This rhetorically manipulative either/or, Foucault calls the "'blackmail'" of the Enlightenment. In addition, he suggests that truth was not simply reducible to "concealed power relations," and that there was a "kernel of rationality" in the Enlightenment tradition, which he did indeed wish to "preserve." He appears there, moreover, to write appreciatively of central elements in that Enlightenment tradition, including its conception of "autonomy" and "liberty."[41]

As outlined here, Foucault's conception of ethics towards the end of his life is entirely what one might expect to encounter had the John-Stuart Mill of *On Liberty* effaced all reference to the state; had then read Nietzsche's *Gay Science* and decided to assume some of the language and metaphors contained therein; and had chosen thereafter to present his thought on ethics as one derived from classical antiquity writ large. It would be, in effect, simultaneously foreign enough to feel a bit transgressive, and yet at the same time familiar enough to find an audience and readership.[42]

Whether at the end of the day we want to call this his late-in-life "'liberal turn'" can remain an open, yet important, question.[43] It is an important question, principally because of the fact that Foucault spent a good portion of his career denouncing, and thus distancing himself from, this or

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[40] See Habermas, "Modernity versus Postmodernity," 13, cf., 9, 11. This text is the address Habermas gave when he was awarded the Theodor W. Adorno prize in Frankfurt in 1980, and which prepared the conceptual problematic to which his later lectures in PD (lectures: 1983/1984; published: 1985) were a response.

[41] See Foucault, "What is Enlightenment?" in DE, 2:1390-1392/FR, esp. 42-44, 2:1397/50; "Ethics of the Concern of the Self" in DE, 2:1543/EW, 1:296. Cf., "Structuralism and Post-Structuralism" in DE, 4:1259/EW, 2:441

[42] It is telling that this is precisely what Connolly, EP, 206 n. 22 seems to be calling for: a fusion of Mill and Nietzsche.

[43] See Brown, SI, 15 n. 22.

that element of the liberal world order, because he sensed, quite correctly, that his teaching cut really quite deeply against liberal, common sense. It would seem to be a pretty extreme reversal if the trenchant critic of liberalism presented us at the end of his life with a normative vision of the subject which was at least formally, if not substantively, indistinguishable from the hopes and aspirations of that same tradition.

Moreover, it's not clear that the general framework of the thought which preceded it and on which his celebrity rested could sustain these types of claims. Even a conception of freedom understood as aesthetic self-creation requires something in the way of a conception of a core self, namely, of a self that is capable of aesthetic self-creation.

It is, moreover, truly unfortunate that Foucault's life was cut so tragically short, and that he did not have an opportunity to show us precisely in what consisted this "kernel of rationality" in the Enlightenment tradition, which he hoped to maintain within his own work. Clearly, however, whatever it would entail would be in deep tension with the Nietzscheanism of plural rationalities, which permeated his earlier work. What we see here, I contend, represents ultimately a dramatic, end of life *volte-face* on the part of Foucault.[44]

However, what is in fact more important is the observation that Foucault's later, ethical turn lacks real purchase for politics, or at least it lacks important elements. Perhaps, this should not surprise us, given that Foucault stated that he found far more interesting the domain of "morals"

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[44] A common defense of Foucault involves adverting to his end-of-life writings to suggest that, in fact, he did have an (intelligible) conception of the self, his project was animated by an (intelligible) conception of freedom, etc., and that his work did have an (intelligible) normative thrust to it. E.g., Connolly, EP, 103, 127, 214 n. 21. (cf., however, Connolly, "Taylor, Foucault, and Otherness," 371, cf., 373 ff. which seems to suggest that Foucault's conception of subjectivity is either non-existent or too thin.) Cf., Connolly, WNS, 153. The important question, then, is whether Foucault's end-of-life work actually coheres and is essentially continuous with the work that preceded it. In answering "no" here, I agree with, e.g., Habermas, "Taking Aim at the Heart of the Present" in NC, 176-79 and disagree with, e.g., Taylor, "Overcoming Epistemology" in *Philosophical Arguments,* 15-16.

and "ethics" than that of "politics."[45] As we shall see shortly, there isn't any real space in Foucault's thought for political-cultural socialization, and this lacuna is a significant one.

## 6.3 The Political-Ethical Lacunae: Socialization, Politics, and "Normalization"

In Foucault's lexicon, normalization appears to be, in effect, a synonym for subtle and pernicious socialization. Foucault's documentary studies, have, for the most part and on the whole, done a good job of pointing out the *subtlety* of normalizing pressures within circumscribed spheres of human life. For example, we deal with delinquency no longer through the public spectacle of execution, but instead through the ostensibly gentler and more subtle process of rehabilitation. The trouble, however, is that, on the one hand, Foucault's worldview forecloses, or at least calls into question, the possibility of even drawing substantive and qualitative distinctions between pernicious and non-pernicious forms of socialization (or disciplines). Or, if, on the other hand, he believes that all socialization and disciplines are pernicious, then he has either, very little to say about politics—for politics requires at minimum self-imposed disciplines so as to sustain collective action, and probably much more besides—or his thought can find a home only within the no-place of anarchist fantasies.[46]

Politics and socialization are related terms, and this relationship is admitted by everyone save the most ardent anarchists of the right or of the left, who each in his or her own way believe quite deeply in some hidden, invisible hand mechanism that will yield something like a spontaneous order. Political socialization, however, is scarcely distinguishable from what Foucault calls normalization. Here Rorty's critique of Foucault is instructive and, I believe, ultimately decisive

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[45] Foucault, "Politics and Ethics" in FR, 375.
[46] Cf., Taylor, "Foucault on Freedom and Truth" in *Philosophical Papers,* 2:156-57, 160, 163-65; Habermas, PD, 286-87.

with respect to the political relevance of Foucault's thought for political thought, so long as no supplements are made to it.

Although Rorty and the discourse of difference often draw on a similar set of intellectual sources, and their broad intellectual-epistemological sympathies are quite similar, they depart radically from one another on the political conclusions at which they arrive.[47] Given their similarities, the grounds Rorty gives to justify his departure from Foucault and the discourse of difference are particularly instructive.

Although, as we saw in an earlier chapter, Rorty celebrates the deep and fundamental contingency of late modernity, his liberal ironist detachment only goes so far. Here, a touch of realist sobriety enters the picture. On Rorty's view, the most extreme sort of ironism is appropriate only towards one's own (private) life, and not towards one's own society's collective way of life. Though the distinction Rorty draws here between the private and the public is perhaps somewhat artificial—and he acknowledges elsewhere the role that the public sphere has on the experience of one's private life—the grounds he gives for preserving this distinction are nevertheless instructive.[48]

A society's public philosophy cannot be ambivalent towards itself. Societies do not and cannot raise their youth to be ironic towards, or dubious about, the processes of socialization in which they are enmeshed from the time of birth. Societies that encourage that way of thought no longer remain societies, but instead become loose aggregations of atoms with wholly differing aims, projects, and desires, which conflict one with another just as often, if not more often, as they happen to coincide. Societies are held together by, among other things, a network of shared

[47] See Connolly, ID, 226 n. 11. See also Connolly et al., "Review Symposium."
[48] See Rorty, "What Can You Expect," 726.

language and aspirations, towards which they cannot be thoroughgoingly ironic or ambivalent. "What binds societies together are common vocabularies and common hopes," and one cannot be ironic, nominalist, historicist, and unattached to those, if one wishes their perpetuation to any degree.[49]

This element, or even a place for it, is simply not present in Foucault's thought as it stands. The kind of freedom for which Foucault appears to yearn is not available through political technique or reform. "The sort of autonomy," for which Foucault' seems sometimes to long, "is not the sort of thing that *could* ever be embodied in social institutions." We do not become free simply by being left alone. There is not some deeper self that springs forth just as soon as socialization ends.[50] Instead, socialization equips us for the bare possibility of freedom. Foucault does not address these topics, and cannot address them, even in his later works, because he always abstracts from the political.

As a political thinker, then, Foucault is not one that is terribly helpful; or at least, something is missing, and that that something is something significant. His value lies elsewhere. The kind of vision adumbrated in Foucault's late thought is of use only in the bedroom and in 'private,' and *only* if one is by disposition and for whatever reason inclined towards experimentation in poeticizing, aesthetics of the self. Foucault is, on this view, "invaluable in our attempt to form a private self-image, but pretty much useless when it comes to politics."[51] As a political thinker—in contrast to philosopher, historian, or private moralist—all that Foucault has to offer is "anarchist

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[49] Rorty, *Contingency,* 86.
[50] Rorty, *Contingency,* 65, some emphasis added, cf., 68. Cf., "Thugs and Theorists," 569-72.
[51] See Rorty, *Contingency,* 65, 82-83, cf., xiii-xiv, 61-68; "Thugs and Theorists," 569-72. Foucault mentions Rorty by name in Foucault, "Polemics, Politics, and Problematizations" in FR, 385. There Foucault responds to Rorty's accusation that Foucault "do[es] not appeal to any 'we,'" by saying that Foucault's object is rather to "make the future formation of a 'we' possible."

claptrap" and "self-indulgent radical chic."[52] A political culture in which citizens were ironic

about that very same political culture would cease to be a political culture altogether. Irony of the

fullest sort belongs only in the bedroom (i.e., in the private sphere). An ironist, *public* culture is

something inconceivable. "I cannot imagine a culture," writes Rorty, "which socialized its youth

in such a way as to make them continually dubious about their own process of socialization."[53]

For his resistance, *inter alia,* to the project of increasingly expanding the sphere of the

political, Rorty is sometimes accused of being an apologist for the status quo and thus of a certain

type of "postmodern conservatism."[54] This charge, however, is deeply implausible, given that

Rorty firmly self-identifies as a "social democrat."[55] When the name of conservatism as a term of

derision has come to be applied to social democrats, we know that we have entered a political

landscape wholly foreign to the one we currently inhabit.

In at least a qualified sense, Foucault is absolutely correct. That thing he calls "power" is

everywhere, and most of the time we are not even half-conscious of it. But this observation only

gets us so far. In the late eighteenth century, Rousseau had observed that "man is ... everywhere

... in chains," immediately following this observation with a question: "What can make it

legitimate?"[56] Though we may find his own solution deeply unsatisfying, there is something

importantly true about Rousseau's formulation of the problem. In his own, idiosyncratic way,

Foucault agrees at a deep level with Rousseau in the first regard, but dismisses the subsequent

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[52] Rorty, "Foucault and Epistemology," 47.
[53] Rorty, *Contingency,* 87.
[54] Connolly, "Review Symposium," 105. Cf., Bernstein, "One Step Forward," 541, 556.
[55] Rorty, "Thugs and Theorists," 565-67, 575 n. 3.
[56] Rousseau, *Social Contract,* 1.1, ¶ 1, p. 41.

question. This dismissal, moreover, is quite damaging for any social theory that has any pretensions to say anything about the way in which human beings organize their lives politically.

Though unmitigatedly hostile to liberal democratic culture and institutions, Foucault offers us little to nothing of substance in the way of consolation. Ever hostile to the present, Foucault leaves us with little more than an odd and incompatible mixture of ironic detachment and zealously committed critique.

However, the lived experience of authentic, political actors is never one of ironic detachment, but rather, at its best, an attempt to reach out for something beyond themselves. Admittedly, it is not clear what the force of this "beyond" actually signifies in this context. So, for lack of a better idiom, let us call it the "common good" understood here not as something ever fully, completely, or entirely instantiated, but instead as a largely hypothetical, and yet regulative, aspirational ideal, whose fulfillment lies ever, perhaps even perpetually, on the distant horizon. To fail, however, to take this aspiration seriously is to do real violence to the phenomena under study and the lived experience of authentic political actors.

"Legitimacy," understood not as an eighteenth-century buzz word, but as something which speaks to a deeply human, social need, finds little hope for sustenance in Foucault's politics. In classical liberalism, a generalized spirit of relative anti-authoritarianism is tied to a vision of human freedom, which is to be, at least as a regulative ideal, shared equally across an ever-expanding population of potentially autonomous subjects. In Foucault, this general vision drops out, though there is *possibly* a case to be made that something of this vision resurfaces at a very late stage, shortly before his death, though it's likely the case that this vision is deeply incongruous with what preceded it.

Despite democracy's rising prominence and importance in the modern age, Foucault is silent on questions of democratic legitimacy. As one commentator puts it, the "*demos* doesn't exist in [Foucault's] political world."[57] The absence, however, of a democratic imaginary from Foucault's thought is no surprise, given that disciplinary normalization has the very same character whether it is collectively self-imposed by a democratic popular "will," by an autocrat, or in some other, more nebulous, capillary-like, interstitial fashion.[58] Not every conception of legitimacy needs of necessity to be a liberal democratic one, but if we displace the regnant model, it is incumbent upon us to replace it with something else. This was not a task that Foucault consciously set for himself, but more importantly, this is probably not a task that Foucault could have set for himself, at least not in the terms of the work which has come down to us.

However, if we are to take democratic politics seriously, we must first confront one glaring fact: There is not even majoritarian support in our society for the type of critique in which Foucault engages nor for the especially exacting type of longing for egalitarian practices of self-determination implied by his work—if only because other cherished ideals can and do conflict with the ideals motivating Foucault's critical scholarship.

Finding Foucault's diagnosis of the crisis of modernity generally compelling, the discourse of difference scrambles to pick up the pieces he has left them. With these problems in the background, the reception of Foucault in the English-speaking world has largely proven to be a story of the political-ethicization of Foucault's work and his insights, which entails, at minimum, the attempt to put him in service of particular political causes—e.g., some democratic vision of politics or culture—and in the case of Connolly and his followers, to integrate Foucault's thought

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[57] See Walzer, "Politics of Michel Foucault," 53-55. Cf., Habermas, PD, 289. *Pace* Connolly, "Beyond Good and Evil," 379 ff.
[58] This is intimated in Foucault , SP, 207.

and diagnosis of the crisis of modernity into a position, which explicitly advocates the cultivation of a particular ethos or sensibility, which is itself recognized to be an "ethical" one.

In doing this, the discourse of difference must abandon Foucault's ironic detachment. Philosophical activism, in pursuing and recommending particular goals or policies and in recommending a new way that we as citizens ought to inhabit our world, must in the end persuade others of the superiority of its vision. Philosophical activism must be able to give a compelling account of why its vision of the future society is to be privileged above the rotten present, for in the absence of such an account (or of armed revolution), the prejudice is almost always in favor of the present and the status quo. Let us call this the phenomenon of social inertia.

The sufficient conditions, if not the grounds, for critique in the Foucauldian thought world consist chiefly and principally in the claim that all norms and practices are altogether and inescapably conventional. As a strategy, however, this is a fatally two-edged sword. On the one hand, it holds out the prospect that norms and cultural practices are alterable, because there exists nothing necessary and immutable about them. This is what so many of Foucault's readers have found so deeply liberating about his writings. On the other hand, however, in a world wholly and completely denaturalized, we can have no recourse to anything beyond. We do not stand on firm, authoritative, or privileged grounds then when we advocate on behalf of reform or social transformation. Foucault's meditations on the sociological category of the "intellectual" represents *his* own personal recognition of this deep problem, but his descendants, however, have not felt hampered by his own close-lipped reluctance. Based on the material with which they begin, however, the philosophical activism of the neo-Foucauldian discourse of difference often turns into a sometimes awkward business.

The son must reckon with the father.

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## 7. The Reception in the English-Speaking World

From the vantage point of the discourse of difference, the central crisis of late modernity is not principally that we experience increasing degrees of anomie, social fragmentation, alienation, or anything of that sort. Instead, the "intensification … of pressures for normalization" is our central socio-political problem.[1] This is the crisis that Foucault's work had so pointedly identified. Understood in a certain way, this is a crisis of freedom. The liberal tradition has hitherto failed to deliver on its promise of "experiments in living"—to use Mill's memorable phrase.[2] It failed, because it could not but fail to deliver on its promise. Liberal rhetoric, at least, supports equality and freedom, but, in actuality, it aims to fold these principles into some overarching unity of self-narrated myth, nation, common purpose, or community, which, in limit cases, frustrate these stated aspirations. In this way, liberalism is actually "divided against itself."[3] Fundamentally,

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[1] Connolly, ID, 172. Cf., EP, xxi; "Reworking the Democratic Imagination," 202. Cf., Markell, *Bound by Recognition,* 175; Honig, "Juncture Interview."—Democratic equality is, of course, a worthy goal, but the "essential virtue" of allowing space for democratic "cultural pluralism" is even higher, for it is held to be the essential precondition of the other. Connolly, EP, 80-81, cf., 84, 224 n. 9. Cf., WNS, 151, 186, 197-98 n. 25; P, 176-77 n. 29; FT, 216-17 n. 7; P, 7-9; "Pluralism, Multiculturalism," 73 n. 25.—The following account will treat William Connolly's work as the intellectual epicenter of the ideal type I call the discourse of difference. Particular emphasis will be placed on Connolly's work from the 1990's to the present day, for this is when the fundaments of the intellectual imaginary were first given clearest articulation and truly began to take its distinctive shape. The essays and book chapters reprinted in Connolly, DPPT (2008) are largely from this time frame. On this turning point in his career, see Schoolman and Campbell, "Introduction: Pluralism 'Old' and 'New'" in *New Pluralism*, 10; White, "'Critical Responsiveness,'" 73; Connolly et al., "Towards an Ethos," 168. A number of journal issues have been dedicated to his work, e.g., *Philosophy & Social Criticism* 24, no. 1 (1998); *Political Research Quarterly* 67, no. 2 (2014). An encomium to his work was recently published in *Political Theory:* Wenman, "William E. Connolly." Two edited volumes on Connolly's thought have recently appeared: Campbell and Schoolman, eds., *New Pluralism;* Finlayson, ed., *Democracy and Pluralism.* A 2010 survey of English-speaking political theory faculty identified him as the fourth most impactful theorist in the past two decades, right behind Rawls, Habermas, and Foucault, and before Strauss; and as the third scholar whose work is most likely to be influential two decades from now, after Markel, Brown, and before Honig. See Moore, "Political Theory Today," 267-68. I will also discuss other figures (principally, Wendy Brown, Stephen White, and Bonnie Honig; but others as well) within the discourse of difference when and where appropriate. Principal attention will be given to their similarities, rather than to their numerous differences. This is the only way to proceed when constructing ideal types. For reasons both of concision and of disciplinary boundaries, I do not discuss Judith Butler's work at any length here. A recent journal issue has been dedicated to Honig's work: *Contemporary Political Theory* 13, no. 2 (2014).

[2] Mill, *On Liberty* in *Collected Works,* 18:281.

[3] Connolly, WNS, 82.

then, our contemporary problem lies in the fact that we experience our identities in a wholly pernicious manner. Our idealization (or fetishization) of unity and harmony leads us to fixate upon the settlement of identities. As a result, we give in to the instinct to treat settled identities as though one in particular were deserving of hegemonic predominance. The hegemonic set of identities then exert upon society at large a normalizing pressure from which none can truly escape.

For these reasons, Connolly enjoins us to stop living our identities in the "wrong way." We should not "moralize difference," nor should we try to locate (or construct) a point of fixity and non-contingency in order to compensate for the death of God ("ontological narcissism"), nor should we call for difference to be diminished or altogether quashed in the name of assuring the dominant identity's self-confidence and reassurance ("transcendental egoism") and thus subscribe to "deep theories of identity." Instead, we should "try to open up what is closed" thus avoiding these dangerous and manifold forms of "closure."[4] Only then, as Connolly's student, Honig contends, can we become sensitive to the "remainders" daily generated by the confines of the intellectual world of liberalism that systematically routinize the "displacement" of real democratic "politics."[5]

Confronting the legacy of Foucault, later thinkers within the discourse of difference recognize and acknowledge that developing a political theory as such was not one of his central concerns, and thus that any political theory arising out of his thought necessarily will be forced to supplement it in various ways.[6] In some ways, then, the various strands of the discourse of

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[4] Connolly, ID, 30-33, 59, 116-17, 135, 154, 172, 180, 204. Cf., Connolly, EP, 88; Brown, PH, 11.
[5] See Honig, PTDP, 6, 11, 15, 128, 213 n. 1. Cf., Connolly, TPD, xiii, xvii, 213, cf., however, 12-14.
[6] E.g., Connolly, ID, 185; EP, 208 n. 28; "Taylor, Foucault, and Otherness," 371, 374; Brown, "Power after Foucault," 77-80; RA, 82-83, 94; White, SA, 57, 89-90.

difference represent departures from Foucault, but the basic Foucauldian sensibility and general analysis of the crisis of late modernity remain.

In what follows, I will first identify the discourse of difference's point of departure. Though the liberal tradition's practices of toleration claim sensitivity to the fact of pluralism within human communities, its orientation for thinkers in this tradition is only a sham sensitivity (§ 7.1). But, the lingering problems arising out of the Foucauldian thought-world still remain salient, particularly its normative deficit, which we identified in the previous chapter. Thus, we will next examine the two paradigmatic strands of the neo-Foucauldian school in North America, with particular attention given to this problem. The first strand—represented here by Wendy Brown—effectively aims to rearticulate Foucault's basically anti-normative posture. Thus, as we shall see, the first strand of the discourse of difference ultimately fails to give a cogent motivational account, which might explain why its own critical project is to be preferred over all of the many other forms of political order with which it conflicts (§ 7.2). Thereafter, I will introduce the more promising (second) strand of the discourse of difference—represented here principally by William Connolly and Stephen White. They appreciate what was lacking in the first strand: that a distinctive ethical sensibility is concretely entailed by their own critical project, and that it is imperative to come to terms with this basic feature of the project. With this move, the discourse of difference begins to the fill the normative deficit of the Foucauldian critical project, identified in the previous chapter (§ 7.3).

Motivated by this need to specify and account for the ethical entailments of their own project, this move necessitates a rejection of at least the dominant form of anti-foundationalist rhetoric

formerly common within this school, and thus a turn towards metaphysico-ontological speculation. It entails also a concomitant problematization of the dominant narrative of an ostensible sacred-secular divide within our contemporary political formations, which had provided the basis for the supposedly unproblematic public use of reason within the political liberal project. Following the Heideggerian terminology they invoke, I will call this the "ontotheological turn" within the discourse of difference, thereby drawing attention to its characteristic departure from central features of Foucault's own anti-metaphysical project (§ 7.4).

And yet, we still know very little about what weak ontotheology entails politically, apart from the literary activity of relentless critique of the present. We can obtain some insight into their answer to this question through their peculiar account of the future, democratic public sphere, which they call "agonism." Agonism is the logical termination point for the discourse of difference, even when it is not thematically discussed. On this model, politics is treated as a space for indefinite contestation, unfettered by any prior commitments. As a medium for stirring things up, the agonistic public sphere enables increased sensitivity to the claims of difference (§ 7.5). Yet, given that its characteristic and most distinctive feature is complete freedom from binding norms, procedures, regulations, or rules of order, agonism faces the peculiar danger that it may devolve into violent antagonism. Aware of this danger, thinkers in this school invariably promote "restrained" contestation—that is, contestation restrained by "deep respect" for the other as other. This is, in fact, one of the most distinctive features of the agonistic project: its "micropolitical" transformative dimension. Given the importance of this dimension, the agonistic public sphere effectively presupposes the existence of a background, agonistic, democratic culture capable of sustaining this future culture of deep respect (§ 7.6).

## 7.1. The Case Against (Mere) Liberal Toleration

This school's critical project is motivated by its peculiar sensitivity to human difference, to variety, to otherness—ultimately, to pluralism. And yet, on most contemporary accounts, the liberal tradition emerged precisely out of a very similar concern: the problem of how to integrate citizens of differing faiths under the rubric of a nation state, during that historical moment in which the unity of Western Christendom had begun to dissolve under the combined impact of Reformation, Counter-Reformation, and Radical Reformation. This, at least, is the way in which the political liberal project understands its own intellectual history.[7] In fact, since at least the 1990's, academic, high liberalism has gone so far as to explicitly acknowledge the so-called "fact of pluralism," and to organize its theory around this "fact."[8] So why, then, has the discourse of difference's critique had the power that it has had within the academy? What can accounts for its strength?

The full implications of the discourse of difference remain unclear, at least until they are examined in light of what it is that it rejects in liberalism. Only when viewed in the light of the purported inadequacies of the liberal tradition's call for toleration, do we begin to understand why it views historical and contemporary liberal reflection to be ultimately inadequate to the real conditions of pluralism and difference in late modern states. The discourse of difference raises a battle cry against the liberal public sphere and its practices of toleration, and it can only be meaningfully understood in that light.

While, liberal practices of toleration and the specific civic virtues advocated by the discourse of difference are somewhat similar in intent, their similarities end there. On Connolly's view,

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[7] Rawls, PL, xxiv et passim.
[8] Rawls, PL, 192 et passim.

they share a "family resemblance," but then only as "kissing cousins."[9] Practices of toleration are always "organized around a hegemonic center"—which is precisely that which the discourse of difference was designed to avoid.[10] In the eyes of this way of looking at things, liberal toleration harbors within it a devastating potential for condescension and an implicit hierarchical paternalism. It involves always a "sense of superiority ... on the part of those who practice it."[11]

This claim has some warrant in the liberal tradition. In Mill's famous, programmatic statement on liberty, for example, he suggests that we remain tolerant publicly, but in private that we may, and even ought to, express paternalistic disapprobation of what we take to be immoral behavior. It is not the business of politics to stop an individual from doing "with his life for his own benefit what he chooses to do with it." Nevertheless, with regard to the cultivation of "virtues," "human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter."[12] In this regard, Mill still belongs to the world of Christian charity and the edict, "hate the sin; love the sinner"—a model for mere toleration, but certainly no model for deep respect.[13]

Mill's model for liberty thus possesses clearly demarcated temporal and geographic boundaries. Liberty can be afforded, it would seem, only to nineteenth-century Englishmen, or to citizens of other nations who resembles them, but not to "backward states of society in which the race itself may be considered as in its nonage." In such backward societies, men must be "protected against their own actions." There,

> a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an
> end, perhaps otherwise unattainable. Despotism is a legitimate mode of government in dealing with

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[9] Connolly, ID, xxvi, cf., xviii, 33; WNS, 62; P, 123.
[10] Connolly, FT, 78.
[11] Connolly, P, 173 n. 10.
[12] Mill, *On Liberty* in *Collected Works,* 18:276-77.
[13] E.g., Augustine, *City of God,* 14.6.

barbarians, provided the end be their improvement.… Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. Until then, there is nothing for them but implicit obedience to an Akbar or a Charlemagne, if they are so fortunate as to find one[14]

Who are these "barbarians" fitted for "legitimate despotism?" We learn later that "the greater part of the world has, properly speaking, no history." "This is the case over the whole East," for there, "the despotism of Custom is complete."[15] Real and unfettered discussion with such men is impossible, and so these peoples require temporary, custodial care. In this way, the liberal tradition's intellectual voice of good conscience lays the groundwork for colonialism and empire.[16]

None of this tolerant paternalism is restricted exclusively to liberalism's ambivalent and sometimes deeply checkered past. The discourse of difference even finds lingering traces of this perspective in the condescending tone with which our most celebrated, contemporary liberal intellectuals speak about those who differ from common norms of behavior, whether sexual, economic, aesthetic, or otherwise. At the end of the day, high liberal theory simply doesn't know how to make sense of the "underachiever," the "oddball," the "eccentric," nor is it welcoming of the self that wishes to live a life of "promiscuity, spontaneity, experimentation" or of the one who wishes "to live in the present" rather than to "plan" one's "life as a career." As Honig puts it, "those .... who deviate from [liberal] ... norms find that their rights are protected ... but that they are (at best) disrespected." Their toleration of the other is always reluctantly "*forced*."[17] Ultimately, liberalism's strategy of toleration is "not for the other as other but for the other

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[14] Mill, *On Liberty* in *Collected Works,* 18:224.
[15] Mill, *On Liberty* in *Collected Works,* 18:272.
[16] These are the themes of Mehta, *Liberalism and Empire;* Pitts, *Turn to Empire.* Muthu, *Enlightenment against Empire,* however, finds anti-imperialistic resources in Diderot, Kant, and Herder.
[17] Honig, PTDP, 130, 151-54.

insofar as he is the same."[18] Absent deep respect, liberal theory cannot help but introduce forms of "discipline, normalization, power, and violence" into their highly "idealized account of [the private] realm."[19] Mere toleration is, thus, as Connolly puts it, but a "detour on the way to conversion" of the other.[20] As such, it is an "underdeveloped" and wholly inadequate ethos for a truly pluralistic society.[21]

Even worse than *mere* toleration, is, as Brown argues at great length, its power-suffused, productive quality. Although she is a good deal more outspoken on this point than others within this school, her thoughts expand existing arguments and reflect tacit commitments of the discourse of difference.

Although the usage of "tolerance talk" cuts across party lines today, its linguistic deployment can often seem "semiotically polyvalent" (depending on national context), and its meaning occasionally even "incoherent," the historical and present-day "uncritical embrace" of liberal tolerance talk has effectively functioned as a "kind of political discourse" which "produces and positions subjects, orchestrates meanings ..., marks bodies, and conditions political subjectivities."[22] Tolerance talk subtly legitimizes and masks the hegemony of one dominant socio-cultural class. As a power suffused discourse, tolerance talk functions, almost by default, "on behalf of hegemonic social or political powers."[23]

Toleration talk addresses itself only to marginal peoples; never to equals. During its historical genesis from the toleration of Protestant sects to Jewish emancipation, toleration talk grew increasingly distant from the world of meaningful equality. It came to function as the "mantle"

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[18] Honig, PTDP, 190.
[19] Honig, PTDP, 204.
[20] Connolly, ID, 43.
[21] Connolly, EP, xvii.
[22] Brown, RA, 3-5.
[23] Brown, RA, 10.

under which an alter-identity might find a little niche within the dominant culture.[24] In the final analysis, tolerance talk is itself premised upon "a posture of indulgence toward what one permits or licenses."[25] Toleration is little more than a strategy of "regulating aversion." Its affective posture bears comparison with the "aristocrat holding his nose in the agora."[26] Without fail, token gestures of "political inclusion" are always offered up in liberal societies, but those "inscribed" as "objects of *social* tolerance" retain indefinitely their own "marginal status" within the state and civil society. As a discourse, what tolerance talk does is actually to "propagate ... hegemonic social norms" and thereby to contain "the challenge to Protestant, white, heterosexual superordination."[27]

Despite its underlying "conceit of neutrality," "universality," and/or "impartiality," toleration talk is actually "thick with bourgeois Protestant norms." It tolerates, for example, only those whose own faiths can happily permit a Lutheran/Lockean privatization maneuver—identities whose (minor) deviations from the hegemonic social norm can remain within the privacy of home and hearth without violence to their own identity. This is to say that liberalism is only able to tolerate those who make no claim upon the political in a way that deviates from hegemonic norms. This is clear not only in the West's contemporary stance toward certain strands of Islam, but also in the history of the conditions for Jewish emancipation. In all cases, what is tolerated is only ever the individuated body that has been forcibly "converted into citizen" and "abstracted" from their faith communities. The object of toleration must first be "decorporatized" from its "community" in order first to even meet the "condition of tolerance."[28]

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[24] Brown, RA, 70-71.
[25] Brown, RA, 26, cf., 186, 203.
[26] Brown, RA, 178.
[27] Brown, RA, 207 n. 2.
[28] Brown, RA, 7, 31 ff., 50 ff., 91, 93-94 et passim.

As a practice of power, toleration talk masks the more subtle, productive elements of its own operation. Its depoliticized operations enables it to hide unavowed commitments which function under its cover. Because today its "normative" operationality has become "oblique almost to the point of invisibility," the "call for tolerance" contributes to the rampant and accelerating depoliticization of the world we inhabit, thereby sedimenting rather than mitigating our human differences.[29]

However, although toleration talk implicitly supports the norms of the dominant, cultural group, this does not mean that that group has consciously orchestrated the ruse.[30] Instead, tolerance talk represents an insidious yet unconscious strategy of disembodied, Foucauldian power, which always has its own designs that are irreducible to the aggregation of individual agent intentionality. Toleration talk "masks the role of the state in reproducing the dominance of certain groups and norms." As a strategy of power, this insidious masking operation is an important component of its success, especially during the present crisis of legitimacy, when it has finally become clear, at least to the observant, that the sense in which our representatives represent us *all* only very loosely corresponds with reality, and those who have been excluded have become increasingly "vocal" about it. Tolerance talk serves to "soften and deflect these tensions."[31] In this way, liberalism's inherent "antagonism towards alterity" and its "capacity for normalization" hide themselves along the seamy underbelly of an ostensibly neighborly virtue.[32]

As a discursive strategy, tolerance actually forestalls more meaningful socio-political change. The now "ubiquitous call for tolerance today" represents a "general retreat from the more

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[29] Brown, RA, 14-15, 88-89.
[30] Brown, RA, 212 n. 13.
[31] Brown, RA, 83-84.
[32] Brown, RA, 26.

ambitious liberal and left political agendas of the mid-twentieth century"—a retreat not only from "equality and emancipatory projects," but also from "participatory models of civic and political life." Once tolerance has become "a primary civic virtue and dominant political value," we can say with some confidence that civil society is bursting at the seams. In actual fact, these thinkers conclude, we have today a situation in which groups can "barely contain their aversions toward one another."[33]

However paradoxical it may seem, the proliferation of tolerance furnishes evidence of liberalism's imperial character. True neighborly love seems always to be out of reach. In concrete actuality, tolerance talk legitimates the practice of dividing the world into two camps: the "tolerable" and the "intolerable"—thus recapitulating Mill's logic civilized and barbarian. *Our* tolerance becomes instead *our* "badge of Western superiority." Toleration becomes one of the ostensible goals of armed nation building in Islamic nations, against whom aggression—ostensibly a form of intolerance—is legitimated by the intolerance of the attacked party. On this model, "tolerance … exists only for and among the civilized." Thus, the same liberal discourse which "claims to be respectful of all" actually finds itself "legitimating the most illiberal actions of the state." Similarly, on the domestic front, toleration talk frustrates real egalitarian, political accomplishments. The toleration of homosexuality, for example, is "advocated as an *alternative* to full legal equality." Thus is "the pursuit of substantive equality and freedom" "overtly blocked" by means of tolerance talk.[34] Through its own "dissemination" as a discourse, tolerance talk functions as one of the tools of subjection in the powerful and cunning arsenal of

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[33] Brown, RA, 87-88.
[34] Brown, RA, 7-10, 136, 226 n. 16, emphasis added, cf., 97-99, 104-05, 149 ff. Ultimately, however, Brown, op. cit., 229 n. 30 rejects the "fetishism … of marriage" in the "gay marriage campaign."

"contemporary *imperial* liberal governmentality."[35] In the end, it is but a "vehicle for citizen subjugation."[36]

Ultimately, the ever-widening proliferation of tolerance talk signals the beginning of the end— a sign of liberalism's decadent character. "Tolerance," writes Brown evocatively, "arises at the dusk of Enlightenment."[37] Toleration talk is a corrective to a manifest, historical failure. It functions as an awkward "supplement" to liberalism's numerous promises (e.g., equality, thoroughgoing secularism)—promises on which liberalism could not but fail to deliver.[38] To the observant, "late modern transnational population flows" are not just a simple "policy problem" but instead "a sign of the breakdown of th[e] logic of liberal universalism" in the face of the "challenges … posed by the eruption of subnational identities."[39]

A reactive retreat into reflection on the demands of "moral autonomy" doesn't even come close to solving the problems posed by toleration in a liberal world order, but, instead, simply evades the crucial point, for the term "moral autonomy" is little more than a stand in for liberal culture. Those whose philosophical discussions fundamentally rest upon it often fail to realize that their reflections presume what is to be shown: that this is the model of the self that *should* be promoted, or that the world *should* be made over in the image of the twenty first-century liberal elite's self-understanding of its own identity.[40]

Seen from this vantage point, the liberal rhetoric of toleration begins to look a bit more complicated. Still, this complicating narrative does not yet play perfectly into the hands of the discourse of difference, for, upon reflection, we might decide that we prefer our liberal myths to

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[35] Brown, RA, 4, 7.
[36] Brown, RA, 106
[37] Brown, RA, 90.
[38] Brown, RA, 70-71, 174.
[39] Brown, RA, 173.
[40] Brown, RA, 154 ff.

Foucauldian truth. At the very least, we would like to know why our contemporary society's partial, albeit productive, self-narrative must be shattered. However, as we saw in the previous chapter, the Foucauldian critical project is afflicted by a motivational normative deficit, which threatens to forestall any meaningful response to this dilemma. In what immediately follows, we will have an opportunity to look more carefully at the two strands of the neo-Foucauldian discourse of difference, and how they have grappled with the legacy Foucault bequeathed them.

## 7.2. Foucault's North American Legacy I: Anti-Normativism

The concern in certain parts of the discourse of difference has long been that the good names of ethics and morality have been put to use rhetorically in pursuing some of the most unsavory of ends. Historically, the language of morality has proven at the rhetorical level to have been morally indeterminate or at least underdetermined. It is a weapon that can be wielded by anyone, more often by the base and those in positions of power, and as such, can be dangerous. As Strong puts it, for example: "If one thinks in a moral structure after the death of God, one can ... justify anything. And the history of the past century (and, alas, this one) tends to confirm that."[41] Though there is a serious danger of possible overstatement, there is, of course, some truth to the claim.

Brown's work is fully representative of this strand of thought. She recapitulates much of the Foucauldian logic, at least when it touches upon the question of normativity and the moral horizons of politics. In her hands, Foucault's ambivalent normative deficit, becomes an avowed anti-normativism.

In her view, the transcendent claims that have sustained politics hitherto can no longer prop up our political lives. "We inheritors of a radically disenchanted universe" must learn to face up to

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[41] Strong, *Politics without Vision,* 137, cf., 145.

the "relative arbitrariness of political values." But this does not mean we must sink into a politics of "sheer aggression." We can still "harbor sustained purposes" in politics, but we must forever give up on "transcendent ideals." "A politics of Truth," writes Brown, "is inevitably totalitarian," for it is "quite at odds with democratic deliberation." "In our time," when "reason [has been] toppled as a god," "conviction" has also become qualitatively indistinguishable from "tenaciousness."[42] "Truth" has been "undone." Thus, "knowledge," she contends, "is always political." For this reason, "knowledge categories" possess only a "fictional quality." This is "one of the insights" of "anti-essentialist" critical theory.[43] All discourse, including her own "radical postfoundationalist feminist political discourse," is contestable, because all arguments advance "quasi-transcendental postulates" of some type. For that reason, her perspective is characterized by "necessarily partial logics and provisional truths[ and] situated knowledges."[44]

Democratic "politics," understood in a distinctive sense, is the only proper response to this (post-)modern dilemma. When properly understood, "the political" is an "autonomous" sphere, unbounded by anything above or peripheral to it. We can cleanly "differentiate" it from the economic, the social, the cultural, the natural, the domestic, the bodily, the ethnic, the emotional, the psychic, the erotic, the sexual, the poetic, the literary, and the moral.[45] In contrast to these spheres, politics is a "terrain of struggle," deeply saturated by power. Thus, those who stand within the sphere of politics cannot have recourse to "extrapolitical" or "fixed ... metaphysical referents" to guide them in the choices they must make. To imagine otherwise is to take part, albeit sometimes unwittingly, in what she calls "reactionary foundationalism."[46] Luckily,

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[42] Brown, PH, 93-94, 139, cf., 145, 155. Cf., E, 101.
[43] Brown, E, 62, 71.
[44] Brown, SI, 78-79.
[45] Brown, E, 61, 64-65, cf., 73, 75, 78. Cf., however, Connolly et al., "Interview with William Connolly, December 2006," 318.
[46] Brown, SI, 35-37, cf., 111. Cf., PH, 4.

democracy is itself structurally non-foundational. It possesses a "hollow center," for it is completely "lacking in any binding principle"—at least apart from the idea of "the perpetual sovereignty of the people" and its own democratically-enacted "practice of freedom."[47] It is only by means of a "radical democratic politics released from conviction" that we can meet the challenge of (post-)modernity.[48] But our instincts for moralizing politics often frustrate an adequate understanding and practice of democracy.

On Brown's account, we exhibit today a specific, recurring pattern. We tend to "moralize in the place of political argument." We abhor, for example, racism, sexism, and homophobia, and for these reasons we attempt to inscribe these judgments into the law as behavior that are "morally heinous" and reprehensible, and thus ones which we thereby hope to proscribe. This is a troubling development, however. Not only in doing so, must we thereby cede deliberative and adjudicative authority to judges for ostensibly neutral arbitration in the courts, but we take part in a process whose actual workings are not fully transparent to us. Moralizing in politics exhibits all of the features that Nietzsche attributed to Christian morality in the *Genealogy of Morals.* It gives expression to the profound *ressentiment* on the part of a weaker, oppressed party, who, in their battle against the strong, projected tendentiously a rhetorical image of the "the true *and* the good" by which they hoped to "shame and discredit" those who might seek to dominate them. In this way, morality became a cunning "weapon." In point of fact, however, there are no "specifically *moral* claims against domination," but only the cunning, deceptive, and strategic use of language. The moralizing view of politics falsely supposes that there is a meaningful distinction between morality/truth and power, or between philosophy and sophistry. More importantly, it fails to

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[47] Brown, PH, 127, 134-35.
[48] Brown, PH, 94.

understand the true, contestatory and "amoral" nature of politics in a late modern age.[49] "All visions of the Good," she concludes elsewhere, "consort with fundamentalism."[50]

Our failure to recognize the actual character of our language of moral judgment has perverse consequences in terms of concrete politics. It leads us to a perniciously anti-political, non-democratic, rights-based vision of political order. Moral "norms" are imposed on the world and not discovered. They are, in effect, "power-suffused" and "struggle-produced" and they always, and somewhat ominously, play an "exclusionary and regulatory function." This is because it is of the nature of moral norms to function as "trump cards," which shut down the public discussion in which we might contest vigorously about "who we are and how we ought to live."[51] In this way, political "moralism" is inherently and always a form of "anti-politics."[52] Politics should not be bounded by a stultifyingly moralistic language of rights. Although there have undoubtedly been historical moments and contexts in which the language of rights has proven emancipatory (e.g., the U.S. Civil Rights Movement, the dismantling of Apartheid in South Africa), this is not always or necessarily so. As a formalized code, the language of rights always runs the risk of "naturalizing … historically specific, unavowed social powers" and thus depoliticizing these elements of human life (e.g., bourgeois property rights, the nature of desire/sex/gender). Circumstances may arise in which these rights of man become no longer our tools but our oppressors.[53] It is in this way that Brown "moralizes against moralism"—as she says some of her seminar participants sometimes caught her doing.[54]

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[49] Brown, SI, 26-27, 44-46, 133. Cf., RA, 39-40, 126; E, 96.
[50] Brown, E, 101.
[51] Brown, SI, 47-48. This language of "trumps" derives from Dworkin, "Rights as Trumps."
[52] Brown, PH, 18 ff.
[53] See Brown, SI, 98, 113-15, 120-23, 133-34. Cf., PH, 154. However, years later, she would endorse a vision of "rights" wherein they "function to safeguard the individual against radical democratic enthusiasms." E, 59, cf., 125 ff. But this is simply the classically liberal conception.
[54] Brown, PH, ix.

Given her stridently anti-normative stance, Brown does not take herself to be a participant in the project of "'normative political theory'" or "normative moral theory." Instead, her "critical theory" is a part of the genus of "political theoretical critique"—a genre of writing which simultaneously "refuses ...historical specificity for its norms," but which also does not "attempt to leap out of history." Critique of this sort has no pretenses of putting forward a "political or even theoretical program" or "full-blown political vision," of "declaring 'what is to be done,'" of remaining bound by a "fixed set of political principles," or even of confining itself to the "political practicalities" which seem to limit what is considered politically feasible at a given historical juncture.

Critique is not, however, innocent of "normative impulses." It "cannot get off the block without affirming contestable and contingent values." In this way, it cannot disclaim being animated by a "vision of an alternative way of political life," albeit one not set out with a level of clearly defined specificity. The "relentless," "radical critic" is indeed "animated" at some remove by the "idealization of an eternally deferred elsewhere."

Ultimately, however, the genre of writing to which Brown's work belongs only receives its determinate shape and form from the very "activity of criticizing the present." This mode of critique receives theoretical support from the Foucauldian insight that "resistance" can proceed not from outside of, but rather only internal to, the configurations of power on the ground and in the concrete which the resisting agent confronts.[55] This is what we might call political philosophy

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[55] Brown, SI, 3-4; E, 15-16, 35. Elsewhere, she cites Connolly's work for support, mentioning, but not developing at length, a distinction between "righteous moralism" (which is her target) and a "contestable intellectual morality." PH, 15, 37 ff., 177 n. 16, cf., 123 In another place, she speaks of an appropriate political "ethic" which although it has no "positive content" and is certainly not "a set of guidelines for action," can nevertheless "rule out the disavowals entailed in other possible ethical stances" and thus produces in us "a caution about what may or may not be discounted in acting." E, 14-15. The crucial question is whether she can redeem any of these claims or distinctions without the move that the second strand of the neo-Foucauldian discourse of difference takes—a move which I explore in subsequent sections.

as resistance, where resistance is understood as an autonomous activity, which requires no autonomous, self-standing, justificatory, normative account. "Resistance," writes Brown, "responds to without fully meeting the normativity challenge of postmodernity." "Resistance-as-politics" is a "vital *tactic*," but it does not hold within itself a specific or articulated political "vision" that is defended as such, nor does it propose "grounds for organized collective efforts." It simply "eschews rather than revises these problematic practices," in that it does not take up the "dilemmas" associated with, *inter alia,* "justification entailed in 'affirming' political projects and norms."[56]

Resistance has a vital democratic function. However this may be, critical resistance is never total, for it has an ambivalently affirmed, positive, and supportive role to play as well. "Permanent resistance" is the only means for "sustaining democracy," for otherwise, the sovereign people run the risk of sliding into technocratic, state-run, market-manipulated anti-political decadence.[57] That being said, critique or resistance is not to be confused with "negation," "destruction," "nihilism," "rejection," "refutation," "rebuttal," nor with "dismissal," for by even criticizing anything, we are, at least for the moment in which we engage in that activity, affirming the object to be critiqued, at the very least "its power to organize and contain us" and "its right to govern us." In this way, critique is always "a reaffirmation of that which it engages." Critique is "an act of reclamation," an attempt to "take over the object for a different project than that to which it is currently tethered."[58] Critique possesses a "destructive force," and it always necessarily "de-idealizes" to some degree. However, it is not the same thing as "political destruction," although "at times, this distinction may be so fine as to be almost unsustainable."

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[56] Brown, SI, 49.
[57] Brown, PH, 137. Cf., E, 21 ff.
[58] Brown, E, 16.

Because critique is "animated by love" and by an "avowal of attachment to the object of critique," it recognizes the productive tension between civic authority and critical dialogue, which requires a very specific species of "thoughtfulness" in order to navigate it. In recognizing the "limit this avowal" entails for us, critique does not have as its ultimate aim to "excessively loosen the threads of the collectivity that sustain its inhabitants." Even when we are "interrogating" our "attachment" this does not mean necessarily that we are "disavowing" it. Conceived in this way, political critique is a form of "*productive* de-idealization."[59] On this model, the most vital task for "political opposition" today is not to "prescribe ... replacements" or even to "oppose them on moral or political grounds," but instead, just to open up a "discursive political space for their interrogation," so that we can denaturalize the "encrusted relations of the present [and] to expose as a consequence of power what is ordinarily conceived as divinely, teleologically, or naturally ordained." By "destabilizing," it "offers the possibility of resolving into another story." However, the politics that will follow are "at best indeterminate," for the critical project "doesn't tell us what is to be done, or even what is to be valued." Thus, at the end of the day, "what results from th[is] exposé" is simply "a matter of temperament" and a variety of other contingent factors.[60]

This is, however, a somewhat awkward position in which to find oneself—advocating deep critique but suggesting that what arises from that critique is ultimately a matter of one's disposition or temperament. Brown's entire account is unintelligible absent the usually tacit espousal of the normative ideals that clearly animate it. It is telling that again and again, she returns, like a refrain, to cherished notions of substantive democratic freedom, non-domination,

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[59] Brown, E, 23, 25-27, 31, 35, 140 n. 10, emphasis added. Tellingly, however, she adds that interpreting "*relentless* practices of dissent or critique" as "a form of love" is something that "must be held for another essay" (35, emphasis added). Later and even more tellingly, she writes that with the rise of "neoliberalism," the "Left is losing something it *never loved* … liberal democracy," adding later, by way of qualification, that it was "an object both loved *and* loathed"—"our ambivalent attachment to it" was a "mix of love and hostility" (53-54, 57, emphasis added).
[60] Brown, PH, 118-19, 120, 128, cf., 168.

participation, solidarity, and human emancipation, which animate the entire discourse.[61] Invoked

constantly, she neither argues for them nor explains their apparently fundamental status. Implicit

within these motivating notions is an (often tacit) rejection of those (widely held, historically

prominent, and philosophically respectable) competing conceptions of political order, with which

her own cherished notions manifestly conflict; for instance, three of the basic pillars of

(contemporary) liberalism: (a) *freedom* understood as the protection of a (private) sphere of

voluntary behavior and associations against governmental intrusion, all of which is ensured by

means of the legal codification of rights and their authoritative interpretation by a separate power

(the judiciary), where private is understood to signify those matters that are indifferent to the

public interest, as it is currently conceived, or those domains of human life in which the absence

of restriction is absolutely essential for the cultivation of moral autonomy (freedom as liberty

rights against the state); (b) *equality* understood as equal applicability of the law to the legal

subject without special exemptions based upon class, privilege, prestige, power, sex, ethnicity, or

race (formal equality/equality before the law); and (c) *democracy,* understood as the elected

appointment of proportionally representative, non-permanent, revocable actors to a legislative

body, which provides the state with a medium for mediated, collective self-determination

(parliamentary democracy). With full acknowledgment to the simplifications this might engender,

let us calls this traditional, twentieth-century liberalism, adding by way of caveat that the vast

majority of actual contemporary debates within real (as opposed to academic) politics seem to

move left and right mostly along the neo-classical to social democratic spectrum, and usually

only with modification to the specific, substantive requirements of equality. Though the ideals

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[61] E.g., Brown, SI, 4, 26, 28, 133-34, 163, 165, 169-71; PH, 12-14, 35, 37, 41, 43, 46-47, 112, 133, 135-36, 140, 173; RA, 17, 23-24, 87-88, 150, 184; E, vii, 9-10, 17, 30, 36, 37-59 (ch. 3), 64, 68-69, 72, 76, 86, 89, 91, 94, 96-97, 105, 114-15, 135.

that seem to motivate her own project conflict with these (and many other) visions of political order, she's usually unwilling to affirm her own cherished ideals unambiguously, to treat them as 'norms,' let alone as a 'moral' ones, or to give an account as to why her interpretation of what substantively democratic freedom entails should be privileged above all other things.

It is only in those relatively few moments where she discusses thematically the competing political visions instantiated in contemporary American politics, which are radically and diametrically opposed to her own, where she reveals her true intentions, and in so doing, she unravels her project. For instance, when she argues against George W. Bush's "neoliberal" project, she mentions that he enjoyed "the support of the majority of the American people," and so at this juncture, she cannot suggest—as she had before—that democracy has a hollow center and is completely lacking in any binding principle. In contrast, at this juncture, "democracy" suddenly has a number of substantive "principles," a "substance," and even a "*morality,*" which had been, under George W. Bush, "*abandoned* by large parts of the American population."[62] At this point, there emerges an underdeveloped, under-argued call for "radical democracy," which, she reminds her reader, is "something other than liberal democracy in a capitalist socioeconomic order." It's at this point that she acknowledges forthrightly that her "emancipatory vision" and its "alternative political, social, and economic vision" represent a "set of values and possibilities" that are "qualitatively different" from the values currently advocated by others in the political sphere, including those advocated by left-leaning liberals. It's at this point that she begins to speak of "the good society," as she calls upon her reader to take up an "alternative vision of the good," namely "one that rejects *homo oeconomicus* as the norm of the human."[63]

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[62] Brown, E, 49-53, 58, some emphasis added.
[63] Brown, E, 53, 55-56, 59.

My point in drawing attention to this is not to suggest that she is incorrect or that these ideals are unworthy of consideration, but simply to highlight a rare moment in which her commitments are avowed and clear, as well as the manifest conflict between her vision of political order and the regnant one today. More importantly, because she holds everything to be contingent including her own account and beliefs, and because she only very rarely, and then only perfunctorily, engages the arguments of any liberal on the right or the left, Brown does not explain how her critique might amount to anything other than visceral "revulsion against … the liberal-bourgeoisie."[64] Such a revulsion seems, at least, to follow from her above-mentioned comment about disposition. Her claims thus are likely to appeal to one who prefers non-stratified collective and individual self-determination (or human emancipation) to other human goals, such as finding the one; raising a happy and healthy family; making a living; having a satisfying career; owning a home; possessing enough disposable income so as to support occasional leisure activities outside of the house; experiencing the little pleasures, such as the innocent and unassuming grin of a child or playing fetch with a golden retriever; or enjoying Sunday Night Football in high definition with beer, buffalo wings, and brethren. These and others are the sorts of goals and aspirations that intellectuals have often derided as "bourgeois." But, at least without further argument, it's not clear that we are entitled to sneer at them. Though Brown presupposes nothing to be self-evident, her narrative's success requires that her reader share a certain set of normative commitments whose value is not open for debate.

Brown desacralizes almost everything. Her critical analysis respects no contemporary "taboo." She is willing to go so far as even to consider the possibility that an "ambiguous experience" such as "childhood sexual acts—with a sibling or an adult"—is not as self-evidently "traumatic or

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[64] This is the general charge Kristol, "Capitalism, Socialism, Nihilism," 9 laid against the "New Left" more broadly.

abusive" as the contemporary legal code appears to believe, even when the act was "coerced or unpleasant." The "shame," which is the principal harm to the child, is not "intrinsic to the experience," but is instead "retroactively imposed on the experience" by "discourse." As such, it is discourse and the law that are "constructive of the abuse."[65] Ultimately, Brown may be correct here. It's hard to know. What, however, is noteworthy is despite the extent to which her critical analysis probes all of our most deeply held and widely shared beliefs, Brown never does ask whether the bourgeois way of life may be, on the whole and for the most part, less oppressive and more livable than the presently-envisioned alternatives, whose contours she hints at but never makes clear. The rhetorical success of her critical narrative positively forbids that this question ever arise as a sincere question.

Ultimately, this question is simply uninteresting for her. She offers us what she calls a "radical democratic critique" that rejects "liberal reformism" and its "narrative of incrementalism," because it is, she contends, "no longer convincing" to thinking men and women. The "utopian imaginary" animating her critique has, however, "no certainty about its prospects or even about the means and vehicles of its realization."[66] Ultimately, she wishes to be completely "unmoored from an obligation to specific political entailments."[67]

Ultimately, Brown does not, and cannot, tell us *why* to reject the regnant vision of political order. All she can tell us is that it is neither neutral nor universal. But this only does half of the work she'd like it to do. It simply does not follow—as she seems to think it does—that recognition of the cultural particularity of all ways of life should result in a "principle of mutual

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[65] Brown, E, 148 nn. 9-10. Cf., Connolly, EP, 195, who agrees largely, but suggests that clitoridectomy goes too far.
[66] Brown, E, 114.
[67] Brown, PH, 15, cf., 44.

valuation" between any two differing parties.[68] Incommensurability and parity are radically distinct notions. Neither term implies the other. Metaphors from mathematics may help illustrate this truth (e.g., $\pi$ and $^{22}/_7$; incommensurable, yet inequal). This is an important lesson one could have learned from Nietzsche. If it should prove to be the case, as Nietzsche contends, that we cannot judge the ultimate value of another's way of life from the supreme perch of absolute knowledge, it does not follow that we should therefore withhold all judgment about it. Indeed, it is not possible to live a human life of this sort. Thus, even self-reflective beings may judge and judge harshly. This, he suggests, is a "necessary injustice."[69] Brown's preference for radical democracy is thus merely a preference. In no way does it follow from her critique.

## 7.3. Foucault's North American Legacy II: An Ethical Vision

The more promising response by members of this school to the conundrums internal to the Foucauldian thought-world consists in relinquishing entirely the anti-normative rhetoric and outlook, recognizing, in an unambiguous and overt fashion, that in fact a particular and implicit "ethical sensibility" motivates, and is entailed, by the Foucauldian critical project, and that one must come to grips with articulating and affirming this conceptual core.[70] On this view, ethical reflection is "indispensable."[71]

Here, William Connolly and Stephen White are representative. They both began their intellectual lives with commitments they loosely describe as "Left-Hegelian," "Taylorite" (Connolly) and "Habermasian" (Connolly and White). They both identify Foucault as the figure

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[68] Brown, RA, 180.
[69] Nietzsche, *Human, all too Human* in KGW, 4.2:14/*Human, All Too Human,* Preface, § 6, p. 9, 4.2:47/§ 32, p. 28.
[70] See Connolly, "Beyond Good and Evil," esp. 365, 367-68, 381 ff.; ID, 10, 72, cf., 182
[71] Connolly, EP, xxiv, cf., xviii.

who had shattered those horizons.[72] Probably owing to their earlier, intellectual commitments, Connolly and White appear to be especially sensitive to potential, critical objections to the Foucauldian sensibility and critical project, which contributes, it would seem, to their having developed a more promising response to the normative deficit of that sensibility. Their respective solutions to the dilemma posed by the general contours of Foucault's thought proceed from two realizations: (a) first, we are in danger that critical, self-reflection might undermine the conditions for sustaining and affirming what is best in our contemporary world, and (b) second, that unmasking and critique is unintelligible without attention to the background horizon and ontology by which it receives its orientation.

Human beings require social form to fill out and complete their lives. From birth, human beings are radically underdetermined, "essentially incomplete without social form." The language they inherit, institutions with which they interact, traditions they imbibe, and political space they encounter upon maturity help, among other things, to fill out the background of their lives. We need some particular identity in order to make ethical judgment and "discrimination," and for this task, some identities are, in fact, "better than others." A stable, social identity is "the ground from which ethical action proceeds."

But this social form itself is nevertheless problematic. All human forms of social life privilege some identities above others. Commonly, the dominant culture's range of regnant identities veils the ways in which the negation of certain types of difference actually operate as moments of "arbitrary conquest." In this sense, every form of social completion contains within it "subjugations and cruelties," for the application of "historically constructed" standards of identity

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[72] See Connolly, "White Noise," 27; TPD, 6; EP, 23; Connolly et al., "Towards an Ethos," 166-67; Connolly et al., "Interview with William Connolly: Interview Questions from Samuel Chambers," 321-22, 325, 327; White, "Weak Ontology," 12, cf., 13-14.

does "*violence* to those to whom it is applied." We need stable identities and social forms in order to live political and ethical lives, but, at the same time, they do violence to us. This dilemma is what Connolly calls variously calls either the "*paradox of politics*" or the "*paradox of ethicality*."

With this dilemma in mind, Connolly's political vision "works within and against the terms of the paradox, *wagering* that it is better to expose it than to suppress it." On this view, it is better to treat our momentary "standards of identity" as fictitious, "indispensable constructions" and not as "natural kinds" or as ones that are "intrinsically true."[73] Of course, not every identity can ultimately be affirmed, but every identity must be problematized. "The point," writes Connolly, "is not to deny this ambiguity but to struggle against the denials and simplifications it tends to engender."[74]

Connolly's understanding of identity vigorously rejects the disembodied, acultural ones more familiar from Kant or Sartre. He rejects, then, what Taylor and Sandel call the "punctual" or "unencumbered" self. Identity is not something voluntaristic or chosen *ex nihilo,* independent of the social world we inhabit. To be human, and thus to engage in reflection and action, is to experience a drive toward "entrenchment"—to experience an impulse to treat one's own identity as though it were a deep identity specifically fitted to one's being. Some parts of our identities have, in fact, become for us a sort of "second nature," and should therefore be understood as "entrenched contingencies." At minimum, this entails treating the presuppositions and background of one's own identity as "true" precisely in those moments in which we engage in judgment or action, when those elements "function as presuppositions in thought." Moreover, when we engage in debate with interlocutors who bring to the table other types of identity, we

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[73] Connolly, ID, xix, 12-14, 67-68, 93-94, emphasis added, cf., ix-x, 8.
[74] Connolly, ID, 160. Cf., FT, 124-26

also privilege our own identity and way of being in the world. We treat it as somehow "true." Still, despite all of this, it is necessary to put "under a critical lens" and to "excavate" the contingent character of those principles the truth of which one presupposes in moments of judgment and action. Thus, Connolly calls on us to adopt a "rhetoric" of self-problematization, which "ironizes" those presuppositions we generally hold to be true in moments of judgment or action. Fundamentally, we must learn to think of those things we consider to be "true" as being, in point of fact, just "indispensable constructions and unavoidable fictions."[75]

Even the activity of critique itself requires and presupposes that we stand within a determinate, momentarily fixed identity. Every identity, in the moment that it critiques another, alternative identity, does not offer that critique, so to speak, from nowhere. Instead, critique always proceeds from within a particular horizon with a distinctive identity and configuration, which holds a number of principles and prejudgments (ethical or otherwise) as presuppositions partially or wholly constitutive of its own identity. Moreover, we must remain to some degree within the dominant identity in order to persuade others of what it is of which we wish to persuade them. "If one transcends the domestic field of identities," one runs the risk of "losing the identity and standing needed to communicate with those one sought to inform." "Postmodern" discourse thus does not repudiate the category of truth in one grand sweep. However that may be, it also does not treat the various presuppositions of any identity as articles of a creed in which one must believe as a matter of unquestionable, unshakable faith. In the moment of judgment or action, a particular identity holds its own presuppositions to be true, even if it later "problematizes" these

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[75] Connolly, ID, 64, 118, 127, 176, 199; Taylor, *Sources,* 159 ff.; Sandel, *Liberalism and the Limits of Justice,* 87, 94, 121, 172, 175, 178, 180, 182; "Procedural Republic." Cf., Connolly, EP, 30.

very same principles. It "assumes an ironic stance towards what it is … *even when it affirms itself in its identity.*"[76]

Although his analysis aims to draw attention to the contingency of all identities in service of making us as citizens more open to difference, it's certainly not the case that *everything* goes. "Every political regime," writes Connolly, "must set limits and seek to secure them through education and discipline."[77] There is no "ordered way of life" that can "house" under one roof all "identities that might … make a claim upon it." "No order can enable everything to flower in the same garden." Echoing an important Nietzschean insight, Connolly calls this a "'necessary injustice.'"[78] The discourse of difference's injunction thus does "not entail the celebration of any and every identity." We are not called upon to celebrate *all* difference as difference. The conclusion to be drawn from all this is that *it is,* in fact, ethical to constitute *certain* types of difference as otherness, particularly those that "stifle cultivation of care." Thus, Connolly explicitly excludes from our consideration the "politics of racism or genocide" and more broadly those identities, which "must define what deviates from them as intrinsically evil (or one of its modern surrogates)." Thus, violent or Manichean identities are excluded from receiving our respect and reflective consideration, notwithstanding the fact that these identities also represent difference from the regnant identity in our culture, or at least difference from that set of identities to which most of us, in our best moments, do in fact or at least ought to aspire.[79] Connolly even concedes the possibility that some configurations of identity, personal or civic, "may fit us better than others."[80]

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[76] Connolly, ID, 44, 47, 60-61, emphasis added.
[77] Connolly, P, 40.
[78] Connolly, ID, 159-60. Cf., P, 43.
[79] Connolly, ID, 14-15, cf., 117, 179-80. Cf., FT, 216 n. 7, 223-24 n. 4; "Twilight of the Idols," 135; TPD, 205.
[80] Connolly, ID, 163.

It is for these sorts of reasons that there exist necessary "boundaries to pluralism." We must, for example, respect those "general civilizational values," including the protection of life, preservation of privacy, respect for diversity, and the amelioration of suffering, while also avoiding the "reification" of these values by treating them as "fixed criteria."[81] "'Absolute tolerance'" is not possible. In general, however, we should only "set limits to tolerance" in order "to ensure that an exclusionary ... movement does not take over an entire regime."[82] If a coup attempt should become "violent," that's when it's time to call upon the military police.[83]

In the final analysis, the discourse of difference's critical preoccupations entail a call for a particular ethical sensibility: the "care for identity and difference." "To be ethical," writes Connolly, "is often to put identity, to some degree, at risk." Though this ethos, should it prove efficacious, must be treated as a more than ephemeral points of stability for the subject, it proceeds not from a confidence about the truth of one's identity, but rather from reflection and what Connolly calls "reverence for life."[84]

This is, then, a general outline of the ethical sensibility of the discourse of difference. In proposing this ethical sensibility, Connolly adopts a particular social ontology, which he labels a "social ontology of dissonant holism." Such an ontology assumes that the mutual accommodation of collective human purposes are "*always* partial" and "incomplete," and, moreover, "likely to contain an element of subjugation and imposition." This is then a social ontology that "refuses to pretend" that some God-surrogate stands today above us humans in order to direct us to our collective salvation and mutual satisfaction.[85]

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[81] Connolly, EP, xxx, 194 et passim, cf., 93, 96, 178. Cf., P, 43.
[82] Connolly, P, 42-43.
[83] Connolly, P, 35.
[84] Connolly, ID, xix, 180, 184. Cf., White, SA, 23 et passim.
[85] Connolly, ID, 91, 162, emphasis added.

The crucial question remains, however: what is the status of this social ontology, and what, moreover, does it even mean to speak in such an abstruse and unfamiliar language?

## 7.4. The Weak Ontotheological Turn

Much of political theory of the last five or so decades has been variously preoccupied with trying to make sense of what Heidegger meant when he announced the "overcoming" and even the "end" of "metaphysics."[86] Following Rorty, one prominent manner in which these general concerns have been interpreted has been called non- or anti-foundationalism.[87] According to this view, there are no *fundamentally* privileged grounds upon which to stand when we engage in philosophical reasoning in practical judgment. The thought is largely that, in the wake of the Nietzschean pronouncement of the death of God, intellectual probity and courage require a fundamentally new orientation. We must give up those philosophical accounts aimed at "healing and unification," for these are simply "religion" in disguise, in that they attempt, covertly, to do "the work once done by god."[88] Equally, we must "abjure the attempt to divinize the self as a replacement for a divinized world."[89] Only then will we finally be "cured" of the "'moral and political immaturity'" wrought by our deceptive but "'deep metaphysical need'" for a solid rock of stability.[90] Generally speaking, Foucault took his place within this thought-world, especially when he disclaimed what he called "transcendental narcissism."[91]

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[86] See Heidegger, "On the Essence of Truth" in GA, 9:202/*Basic Writings,* 138; *Nietzsche,* vol. 2 in GA, 6.2:179/*Nietzsche,* 4:148.
[87] E.g., Rorty, *Philosophy and the Mirror of Nature,* 181, 257, 317, 326, cf., 132. Cf., *Contingency,* 44-45, 52.
[88] Rorty, *Contingency,* 68.
[89] Rorty, *Contingency,* 35.
[90] Rorty, *Contingency,* 62.
[91] Foucault, *Archaeology,* 203.

However, the more promising strand of the discourse of difference has begun to take at least a *tentative* step away from this vision. They have sensed that time has come to rethink, if not the very substance, then at least the *rhetorical* direction in which this language and conceptual armature pushes. Connolly and White have been at the forefront of this project.[92] With due regard to their differences in terminology, let us call this project the discourse of difference's "ontotheological turn." Even here, the guiding premise is fundamentally Nietzschean. "In order to think and infer," writes Nietzsche, "it is necessary to assume beings"—that is, what the pre-Socratics called *ta onta.*[93]

On this more recent, metaphysico-ontological view, the numerous and various "invocations" of "nonfoundationalism," "ontological minimalism," "antiessentialism," and conceptions of a merely political "overlapping consensus" are empty "pretenses."[94] "The drive to *be* postmetaphysical," writes Connolly, "represses too many operative assumptions of its own carriers." As a project, it "has failed both theoretically and practically."[95] These ostensibly post-metaphysical thinkers may have dispensed with foundationalism, understood as a universally valid, non-historical, epistemological project, arising in the seventeenth century, and according to which it is possible to establish certain conditions of knowledge such that the thoughts that occur within the human mind accurately represent the world out there, all of which is vouched-safe by a set of rules or by a method.[96] Nonetheless, metaphysics has returned with a vengeance. If we wish

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[92] These are, for example, the pre-eminent figures cited by Markell, *Bound by Recognition,* 195 n. 7.

[93] Nietzsche, *Will to Power,* § 517, p. 280.

[94] Connolly, EP, 5, 8, cf., 222 n. 19. Cf., WNS, 186.

[95] Connolly, WNS, 15, 184. Cf., FT, 219-20 n. 11.

[96] An especially lucid and concise discussion of the history and the stakes of the argument can be found in Taylor, "Overcoming Epistemology" in *Philosophical Arguments,* 1-19.

"to pursue the trail of affirmative possibility" we cannot avoid drawing upon "ontological assumptions."[97]

To be a committed political agent in the world or to offer a critique of existing social practices, we have to stand *somewhere*. What does this "somewhere" mean? While traditionally political theorists referred to truth or reason, these thinkers, largely for moral-political and epistemic reasons, do not wish to take part in that, and instead have developed a different response to this problem.

Though he wishes to present us with a political theory that has a place for meaningful and sustained commitments, Connolly also wishes to avoid implicating his activity of theorizing in representational or realist thought and the general paradigm that makes use of a concept, which thinkers that preceded him had called "truth." This he does by repeatedly characterizing his own position as "contestable." Or similarly, he sometimes he speaks of himself as "self-problematizing" his own presuppositions, acknowledging that he neither expects to persuade everyone nor does he think he has offered a definitive solution to a problem. He encourages, thus, a basic stance of ironic self-detachment in the midst of insoluble paradox. As we shall see, examples of this strategy abound in Connolly's work, and it dates back to his celebrated, and more general thesis about the "essential contestability" of all political "concepts" in political enquiry, especially of the social sciences.[98]

Connolly does not view his theoretical project as the "single, exclusive interpretation" of the existential questions that most concern us or a "definitive solution" to the "paradox of difference." Instead, his aim is a good deal more modest. He hopes only to "place another

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[97] Connolly, EP, 36.
[98] See Connolly, TPD, esp. 10-41. Drawing on Gallie, "Essentially Contested Concepts."

candidate onto the field of discussion," a vision and "speculation," which should simultaneously "*problematize* itself" and "confess itself to be *contestable* to the core." This is especially important to bear in mind, because it would be a mistake to seek to implement administratively, judicially, legislatively, or culturally the political and ethical recommendations and norms that Connolly puts forward. "No single set of conclusions should become … the object of legislation or fixed cultural expectation."[99] Thus, Connolly repeatedly emphasizes that his own theoretical project is contestable. Its "ontological projections" are themselves "open to *contestation.*"[100] He seeks simultaneously to "*problematize*" the "presuppositions" of his project at the very same moment in which he puts them forward.[101] By "presenting" our own "contentions as *contestable* suppositions" in this way, we enable ourselves to "think within the code of *paradox.*" This mode of thought allows us to remain "attentive to ambiguity" and thereby to "loosen the hold monotonic standards of identity have over life" in our contemporary situation.[102] This "affirmation of contestability" within his own thought imparts to it a distinctive character of "critical reflexivity." By "limiting its own self-assertion … other faiths can count for something too."[103] Anyone, moreover, who "refuses to acknowledge the contestability of his own fundaments" is a reactionary "fundamentalist."[104]

Although everyone to some degree must, in order to treat others with deep respect, learn to treat their own positions as contestable and their own identities as "contingent formations," even that way of experiencing identity is treated by Connolly as itself contestable. He does not "expect everyone" to share the view concerning the "deep contingency of things." As Connolly is well

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[99] Connolly, ID, 92, 170-71, emphasis added.
[100] Connolly, ID, 13, emphasis added.
[101] Connolly, ID, 67, emphasis added.
[102] Connolly, ID, 59-60, emphasis added.
[103] Connolly, EP, 39-40.
[104] Connolly, EP, xxviii.

aware, "many" and "perhaps most" "existential faiths" reject this claim out of hand. However this may be, for them truly to "engage in a generous ethos of engagement," all participants would need to "come to terms with the comparative *contestability* of the faith" that animates their own respective political visions. Still, although Connolly finds it "noble" when political agents treat their own faiths as "*contestable,*" and in so doing "render [themselves] a question to [themselves]," he does not command, however, that "everyone *must* hold this view" in order for the "positive ethos of engagement" to appear on the political scene.[105]

Despite the rhetoric of contestability and self-problematization, Connolly does not retreat into the political quiescence of Heraclitean flux. So, then, what is that "somewhere" from which Connolly addresses his reader?

Borrowing a turn of phrase popularized by Heidegger, though giving it his own twist, Connolly declares that he participates in the "*ontotheological* tradition," in the sense that he privileges certain ways of living and being in the world over other ways of living and being in the world, and he treats his own normative proposals as having authoritative force that humans are either disposed to follow or ought to follow. Thus, to continue the use of Heideggerian jargon, Connolly's project presupposes a distinctive answer to the "question of being."[106]

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[105] Connolly, ID, xxiii, emphasis added. Cf., EP, 202 n. 13; WNS, 154; "Twilight of the Idols," 131. In one passage, which, to my knowledge, has no parallels in any of his other writings, Connolly, P, 32, some emphasis added, suggests that "it is not necessary that you treat your faith ... to be *uncertain to you....* You merely need to come to terms ... with the extent to which it must appear profoundly *contestable to others.*" But this seems so undemanding, and thus inconsistent with the general thrust of the project, that it must be dismissed.

[106] Connolly, ID, 71, 229-30 n. 7, emphasis added. Elsewhere, Connolly invokes other, similar language, referring to, e.g., the "ontopolitical stance," the "ontological dimension," a "social ontology," "ont*a*logy," or "onto-non-theistic stance."Connolly, EP, xxv, 1-2, 36; AI, 146; "Twilight of the Idols," 135.—Heidegger, *Identität und Differenz* in GA, 11:63/*Identity and Difference,* 54 ff. understands all "metaphysics" to be what he calls "onto-theo-logy." See also Heidegger, "Einleitung zu: 'Was ist Metaphysik?'" in GA, 9:379. "Ontology" was an early seventeenth-century neologism. It underwent an eclipse during the late eighteenth century till the early twentieth century, resuscitated by Heidegger and his colleague, Nicolai Hartmann. See Krell, ed., in Heidegger, *Nietzsche,* 4:154 n. Kant first coined the term, "ontotheology," to refer to a form of transcendental theology whose concepts are wholly non-empirical. See Kant, KrV, A632/B660. For a generally helpful account of Heidegger's thought vis-à-vis the theme of ontotheology, see Thomson, "Ontotheology?"

In this way, Connolly's thought "*projects* an answer to" the paradox of difference. His thought must project a social ontology, because human thought must necessarily "invoke" a background set of ontological presuppositions in order to make sense of the world, to structure thought, and to affirm ways of being in the world above other competitor visions. "No affirmative theory can proceed without invoking ontological presumptions." Connolly offers the particular projection that he does, because history has shown other similar projections to be problematic, and because it represents a novel contribution that will help to destabilize intellectual hegemonies in the academy.[107]

As a participant in the ontotheologic tradition, Connolly renounces the regnant aspiration of secular culture—the aspiration to construct a peaceful, humane world without drawing on forces above and beyond human beings taken singularly or collectively. Secularism was always only a "compromise formation" and "historical modus vivendi" that arose out of the breakdown of the Roman "Catholic monopoly over religious belief" in the Latin West.[108] Given its prudential history, it represents a "contestable" "political settlement."[109] Certain types of believers discover upon entering the public sphere today that "some of their key convictions [have been] consigned to the 'private realm' by secular liberal neutrality. They are told to leave their bags of faith at the door when they enter the public realm, while [secular liberals] are allowed to bring several suitcases in with them."[110] This is the reason why the "religious fundamentalists are on to something" when they cry foul claiming that a "'secular liberal bias'" (Jerry Falwell) pervades high liberal intellectual thinking.[111] This public faith in secularism and the idea that there is a

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[107] Connolly, ID, 66-67, emphasis added. Cf., Connolly, AI, 149.
[108] Connolly, WNS, 4.
[109] Connolly, WNS, 36.
[110] Connolly, EP, 124.
[111] Connolly, EP, xxviii, 123 ff. Cf., WNS, 6, 22-23.

"sharp" "Kantian distinction" between reason and faith in revelation, philosophy and theology, "no longer cuts the mustard." "Only a few secularists, mostly academics, still purport to leave their existential faiths at home when they enter the public realm."[112] Today, this secularist imaginary is "coming apart at its seams."[113]

Having dismissed the aspiration of secularism, Connolly adumbrates the nontheistic "sources" on which he draws, and which "ground" his project. These sources he variously calls the "ambiguity of being," the "mysteries of being," the "fugitive abundance of being," the "*vitality* of being," the "rich *an-arche* of being," the "plurivocity of being," the "rich diversity of life" or "of being," the "strife and interdependence of identity\difference," or "the world." On Connolly's account, these sources are capable, at least prospectively, of eliciting "nonthesistic reverence," "gratitude," "attachment," "wonder," "awe," "care," and/or "modesty." They are the "most basic ethical sources" that are part of the "faith" to which he subscribes, and they function in a similar manner to the way in which "'*grace*'" has operated historically in Augustinian Christianity.[114]

The discourse of difference's ontotheology is theological, but only by analogy. Its sources and their entailments are ultimately "uncodifiable."[115] They "exceed identity but [are] not shaped like a god."[116] It is possible to experience mystico-epiphantic communion "while not necessarily

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[112] Connolly, ID, xxvii; "Radical Enlightenment," ¶ 15. Cf., "White Noise," 34; "Rethinking the Ethos," 94; WNS, 37, 92, 155, 185; P, 64. This represents a profound departure from TPD, esp. 240.

[113] Connolly, WNS, 19.

[114] Connolly, ID, xx-xxii, 77, 81, 153-57, 185, 220; "Beyond Good and Evil," 385 n. 8; EP, xxiii ff., 27-29, 31, 54-55, 154, 202 n. 13; WNS, 69, 82, 160, 193 n. 12, cf., 194 n. 15; AI, 126, 141 ff.; FT, 77, 80, 132. "Sources" is a reference to Taylor, *Sources*. There is also mention of "limit experiences" such as birth and death. EP, 33, 209 n. 30.

[115] Connolly, EP, 187. I leave aside here the very cogent objection that Connolly's sources are simply "too radically underdetermined" to do the work that Connolly would like them to. White, SA, 129 et passim.

[116] Connolly, EP, 189. It is, however, deeply questionable whether this view, or any view invoking (especially later) Heideggerian metaphors, can truly remain nontheistic in any but the most minimalistic sense. White, SA, 118, 94 n. 54 writes of "a kind of giving that has no giver behind it" and he similarly writes that "the issue of what sort of theism is in Heidegger's later work can … be held aside." Whether this is true, and whether this view is actually intelligible, is an important question I leave to the side here.

being fettered to the idea of a ... divinity."[117] In that it projects a "fundamental perspective," the discourse of difference's moral sources can even be said to be "'religious,'" at least in an analogical sense of the term.[118] These social ontologies are "projections" into an underdetermined openness, but they are projections not entirely in the sense that they are artifacts of human willfulness out of nothingness, but rather something to which we have been called. Thus, Connolly describes himself as having been "*selected* by [a] particular projection."[119]

With this ontotheological turn, Connolly, "an ironic evangelist of metaphysical atheism," aims at a "nontheistic enchantment with the world."[120] In its rejection of all forms of "'exclusive humanism,'" he hopes to recapture a sense for "mundane transcendence," understood as an "outside," corresponding not to Plato's "Being that is beyond being," but rather to "that which is *coming* into being."[121] With this peculiar brand of immanence in the background, he proclaims that his sources are "earthy all the way down."[122]

Connolly, however, understands his involvement in the ontotheological tradition to be ambivalent at best in two different ways. First, although he does "invoke" one, Connolly's own social ontology should be understood to be fundamentally contestable, for his social ontology "problematizes" its own presuppositions in the very same moment in which it is invoked. At its most fundamental level, the social ontology selected by Connolly is contestable. It is not possible to "prove or demonstrate" the adequacy of the projection without "invoking" the projection itself "as part of the proof." However, because normative thinking cannot "escape the territory of the

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[117] Connolly, P, 119-20.
[118] Connolly, WNS, 54, 65.a
[119] Connolly, ID, 66-67, emphasis added.
[120] Connolly, WNS, 159, 16.
[121] Connolly, FT, 204 n. 4, 29-30, 141, cf., 48, 168, 222 n. 27; Plato, *Republic,* VI 509b8-9. "Exclusive humanism" is a reference to Taylor, *Secular Age.*
[122] Connolly, P, 119-20.

unthought," the normative thinker, must put forward or project a "*contestable* set of presumptions," for "no interpretation of actuality" can "dispense with some such set." The best type of normative theory, however, is the one whose "perspective" has written into its very core an ever vigilant "alertness" to the "ambiguous status of the presumptions from which it proceeds."[123] Because he treats his "most basic" "existential faith" of nontheistic reverence as a "profoundly contestable faith," he can disclaim "universality" and thus actively "support" the "*pluralization* of ethical sources in public life." With his ontotheological projection, he is, in effect, only "propelling *another* source" of "ethical inspiration" "into public … life," but in a manner that does not require that "everyone … affirm it."[124] Insofar as it is a "contestable response to the mysteries of existence," Connolly's "nontheistic reverence" does not "seek to eliminate … other theistic faiths," for that would contravene the very "public ethos of deep pluralism" that he wishes to promote.[125]

Secondly, Connolly claims that his participation in the ontotheologic tradition is ambivalent, in that the social ontology he "projects" (or "invokes") in no way assumes that the world is "designed … in some fundamental way" to smoothly coalesce with human plans and projects. In this way, as Connolly puts it, he "refuses the transcendental reassurances most commonly associated with ontotheology."[126]

Largely drawing upon Connolly's original formulations and intuitions, White develops this basic position at an even higher level of systematicity and conceptual refinement. Although he gives this theoretical orientation a new name, "weak ontology," following Vattimo in that respect,

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[123] Connolly, ID, 66-67, 220, 229-30 n. 7, emphasis added.
[124] Connolly, ID, xxi, some emphasis added.
[125] Connolly, ID, xxii, 156.
[126] Connolly, ID, 66-67, 229-30 n. 7.

White retraces the path blazed by Connolly's understanding of ontotheology.[127] The distinction of "weak" from "strong" ontologies is ultimately meant to capture the normative-epistemic force of Connolly's own ontotheological qualifications (e.g., "contestable," "problematizable"). Fundamentally, what White calls "ontology," strong or weak, maps closely what it is that Connolly calls "ontotheology." With the word "ontology," White wishes to speak about the background to the convictions and motivations we carry with us both in the public sphere and when we communicate with others, engage in internal deliberation, or judge amongst the alternatives that daily confront us. In his own idiom, ontology refers to that thing which "prefigures practical insight or judgment, in the sense of providing broad cognitive and affective orientation."[128] It is the "background that sustains ... affirmative political gestures."[129] Ontological reflection concerns itself principally with the "basic figures or portrayals that animate our thought and action."[130]

The problem to which "weak ontology" is an answer is one that has haunted political theory and philosophy for some 150 years or so odd years, but it's a problem that's all too often ignored or swept away. All "fundamental conceptualizations of self, other, and world" are themselves "contestable," but we still find that we need these conceptualizations and cannot operate without them. They are "necessary or unavoidable for an adequately reflective ethical and political life."[131]

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[127] The language/notion first emerged in 1997 in White, "Weak Ontology and Liberal Political Reflection." It is likely borrowed loosely from Vattimo, *End of Modernity,* 85 ff. The notion received systematic defense in 2000 in White, *Sustaining Affirmation.* For a helpful symposium, see *Hedgehog Review* 7, no. 2 (2005). For further discussions, see Rekret, "Impasse"; Douglas, "Weak Ontology."—Connolly and White seem to be in general agreement with my seeing them as generally overlapping in this regard. See, e.g., Connolly, "White Noise," 26; FT, 220 n. 11; ID, xxxi; Back cover to White, SA; White, "'Critical Responsiveness,'" 73; SA, 106, cf., 118 n. 37.

[128] White, SA, 11.

[129] White, SA, x.

[130] White, "Weak Ontology," 17.

[131] White, SA, 8.

So, with this problematic fully in view, the task of the contemporary intellectual is no longer *simply* to unmask, oppose, critique, and deconstruct, but also to articulate, cultivate, and affirm. This amounts to a general and wholesale "shift" of the "intellectual burden" within critical, political theory.[132] This is especially so in the school of thought that calls itself anti- or non-foundationalist. These thinkers need to express their commitments, their ontologies, in a way that is "more explicit, more robust, more felicitous," in order to become "better competitors" with foundationalist positions.[133] "A strategy of nonaffirmation," writes White, "does not stand up well over time."[134]

But how to do this? White's answer is *weak* ontology.

*Weak* ontology is intelligible *only* in contradistinction with *strong* ontology. Strong ontologies are those that make definitive claims with "crystalline conviction," whose "validity is unchanging and universal" about the reality of the world or cosmos, which purport to uncover God's relationship to human beings, or which make claims about human nature and the *telos* or direction towards which they tend by nature, and that these various forms of truth-claims serve as an "external ground" or "foundation" upon which human beings can obtain a "sense of what is right." Strong ontologists characteristically betray an "underlying assumption of certainty." They see a clear and unmediated connection between ontological knowledge and the realm of ethics and politics—a "royal road," if you will, of deductive certainty between knowledge and action or judgment. Thus, strong ontologists are characterized as harboring a contestable core of truth that they treat as beyond contestation.[135]

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[132] White, SA, 8, cf., 6 n. 8.
[133] White, "Weak Ontology," 13.
[134] White, SA, 50.
[135] White, SA, 6-7 and n. 9, 9; "Weak Ontology," 17.

In contrast to a *strong* ontology, a *weak* ontology is more circumspect. It proceeds by means of a "certain style of argument"—one that eschews categorical assertions.[136] Weak ontology is self-reflective and aware that it cannot claim for itself "universal, self-evident truth."[137] The prefigurations upon which weak ontology draws are themselves continually in flux: "pressures for reconceptualizing or further articulating aspects of [a weak ontology] continually arise."[138]

Our engagement with the world is only ever "prefigured" and never simply "determined" by our weak ontological orientation. White chooses this language of (pre-)figuration so as to suggest that practical rationality within weak ontology does not proceed in the manner of deduction from first principles, from which a conclusion is "derived" "with certainty," but instead that the ontological figures provide only a "rough ... orientation." Weak ontology only "elicits" a particular "ethos." It does not determine one's stance in the world with any force of necessity.[139]

In White's estimation, weak ontology enables us to conceptualize how it is that self-reflective beings can be committed agents in the world, and yet be able to experience and to think of those commitments as simultaneously "fundamental *and* deeply contestable."[140] The theme with which weak ontology is fundamentally concerned is not the "pure evidence of truth" but rather with "motivation."[141] We are simultaneously "deeply" but also only "partially" constituted by our weak ontological "engagement with the world."[142] Weak ontology charts a middle way "between strong ontology and bald assertions of *my* perspective."[143] Finally, a satisfying account can be given of normative, motivational force in thinkers formerly drawn to post-metaphysical tropes.

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[136] White, SA, 8-9.
[137] White, "Weak Ontology," 17.
[138] White, SA, 11.
[139] White, SA, 44, cf., 69, 91; "Weak Ontology," 17.
[140] White, "Weak Ontology," 16, emphasis added. Cf., SA, 6.
[141] White, SA, 63.
[142] White, SA, 44.
[143] White, SA, 16.

The groundwork to which weak ontology refers should be understood as a "contestable foundation." Weak ontology constructs a foundation, whose character as a foundation is, for the weak ontologist, itself a question. A "felicitous" weak ontology is one that struggles against the tendency to treat its constructed foundation as one that is stable and perpetually supportive of weight. It resists the desire to treat these foundations as natural and necessary. A weak ontology has within itself "resources" that limit, interfere with, and "deflect" those "propensities toward naturalization, reification, and unity," which all fundamental conceptualizations carry within themselves implicitly.[144]

Weak ontology never finds itself in a condition of static, stable, contented self-certainty. Nothing is "absolutely incontestable." "No interpretation is beyond contestation." Thus, a weak ontology always "admits its own contestable status," and in so doing, it "affirms a certain openness to ontological diversity." Because it does not "close off the possibility of reimagining some aspect of [its] ontological template," a weak ontology does more than simply "state its limits," but goes further by "actively folding back upon itself … the force of that statement in its own logic." Its "own sense of contestedness" is always "foregrounded." In this way weak ontology remains alive to "the challenge of otherness."

A weak ontology is, moreover, always sincere. Its claims of contestability must be "affirmed … *wholeheartedly,*" and it can never be a merely "'provisional' or simply strategic" articulation which is, at the end of the day, actually "held at arm's length." Weak ontology is not a "rhetorical device" designed to give the impression that it is "open when it is in reality effectively closed."

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[144] White, SA, 8.

For a true weak ontologist, a "strong ontological trump card" is not invisibly "held close to the chest."[145]

For this reason, it is not sufficient to declare that one's standpoint is not immune to "contestability, fallibility, or partiality" and then to go off and begin unmasking, critiquing those who appear not to have received the memo that the antifoundationalist age has arrived, without elaborating and affirming the ethos by which one is motivated and the positive vision of a future social world to which one aspires.[146] Those who fall prey to this temptation are not engaged in a project of weak ontology, but rather in what White calls a "thin" ontology, and this is a position he attributes, albeit ambivalently, to Judith Butler (and, as we saw above, it also maps onto Brown's strategy).[147] In this strand of thin ontological political theory, we observe a "relatively familiar," "austerely simple" yet "persistent utopian hope of a 'not yet'" or the "ineffable" and vague futural "realms" of the Derridean "'to come.'" "By itself," however, this way of thinking "remains blithely unspecific about normative orientation in the here and now." For this reason, this manner of proceeding is "no longer plausible" today.[148] Those who follow in the wake of Foucault can readily acknowledge the merely "formal idea that discursive power reproduces itself imperfectly or unstably," thus opening possible sites of resistance, but ultimately, even those otherwise "sympathetic" should like to know "*why* or *how* this [discursive] imperfection might ever be taken advantage of intentionally." Without an account of "critical agency" we know much about the mechanics of power, but we know next to nothing about "resistance to power."[149]

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[145] White, SA, 49, 52, 45, 56-58, 114.
[146] White, SA, 8, cf., 108.
[147] White, "Weak Ontology," 20; SA, 14, 76-77, 88-91, 93-95, 98, 104-05, 151-52.
[148] White, SA, 90, 103, 115, 151; Derrida, *Specters of Marx;* "Of an Apocalyptic Tone."
[149] White, SA, 83, 85.

In stark contrast, then, weak ontology does aim to offer its own ontological "figurations" of what it is to be a human in society, and this it does with regard to its attentiveness to certain "existential realities," "existential universals" and "universal constitutives"—though these terms, reality or universal, must always be understood in a fully historicist fashion. These "existential realities" include: (a) language; (b) mortality/finitude; (c) "natality," i.e., "the capacity for radical novelty"; and (d) the "articulation of some ultimate background source." White argues that the selection of these four "existential realities" is non-arbitrary and they represent the minimum necessary in order to engage in traditional moral-political reflection in a way that is cognizant of the epistemic situation of late modernity. However, White also leaves open the possibility that other such constants might also prove to be "significant" and thus become candidates to be added to the list of "existential realities." The various ways in which a subject or human being draws upon these "universals," yield certain "figurations" or "portraits" of "human being"—that is, an "account of what it is *to be* a certain sort of creature." These "existential realities," "universal constitutives," and "existential universals" are described as being "irreparably" or "radically underdetermined" in meaning and import. They do not "reflect clear, crystalline truth about the world," and they advance no "strong claim to reflect the pure truth of being."[150]

White, however, does leave open the possibility that some future society may one day "converge" upon one singular "portrait" of what it is, and what it means, to be a human being. At the very least, he acknowledges that no logical necessity within the conception of weak ontology "foreclose[s this] possibility." Ontological "'reconciliation'" remains a possible, if ultimately improbable, prospect.[151]

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[150] White, SA, 9-11, cf., 89; "Weak Ontology," 17. On "natality," see Arendt, *Human Condition,* 8-9, 246-47. Cf., Arendt, "What is Freedom" in *Between Past and Future,* esp. 150 ff.
[151] White, "Weak Ontology," 17 n. 15; SA, 53 ff.

The operation of weak ontology is culturally immanent. Although, the "validity" of any weak ontology is always parasitic upon the "context of cultural meanings" within a given society, through the "interpretation" of those meanings, the weak ontologist is able to "generate a critical edge," which can "cut … against the existing social status quo."[152]

With weak ontology, the critical theorist is no longer consigned to silence nor to autistic assertions of his own perspective, by dint of his persistent failure to account for that thing which motivates his own critical work. This is a major improvement over the first strand of the discourse of difference. At least prospectively, the weak ontotheological turn rescues the neo-Foucauldian critical project from non-intelligibility.

But what does the discourse of difference actually entail *politically* in this form? At the end of the day, what is it calling for other than mere "sensitivity training" or "'political correctness'"—to use Brown's and Connolly's occasional words of derision?[153] What would satisfy it politically—that is, in terms of concrete, human organization? The discourse of difference seeks to meet the challenge through its own idiosyncratic institutional design, which, as we shall see, is quite a bit more than mere institutional design.

## 7.5. The Agonistic-Democratic Public Sphere

What does the politics of weak ontotheology actually look like on the ground? How does one recognize its distinctive public sphere? Even when the name is not expressly invoked, the political vision that, since the 1990's, has been called "agonistic" democracy is necessarily entailed by weak ontotheology's political commitments. Beginning from the Foucauldian sensibility—and despite Foucault's own taciturn reticence towards democracy—the step towards

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[152] White, SA, 38.
[153] Brown, RA, 16; Connolly, EP, xxvi, 106.

agonistic democracy was a *necessary* step, at least so long as the discourse of difference was to

avoid the charge of institutional-political irrelevance or the even more damning charge of calling

for little more than the political theory of sensitivity training or political correctness. With the

agonistic conception of democracy, the discourse of difference answers the charge squarely and

deftly.

Agonism refers to a democratic political practice in which the public sphere is opened up to

competition and contestation by all parties irrespective of identity, tradition, or political

preoccupation. Discussion remains unconstrained by any of the procedural norms developed by

the liberal tradition, debate is unencumbered by any supposed rights of man, and there are no *a

priori* restrictions on what constitutes an appropriately political topic for debate. The notion is

derived etymologically from the classical Greek *agōn,* which referred to a competitive struggle—

a tradition revived most famously by Nietzsche (and later echoed by Foucault).[154] "Nothing is

fundamental," as Connolly puts it.[155] No one can pretend to be "above the fray" of partisan

contestation.[156] There is "always another round" of contestation.[157] Democracy is itself, in

Mouffe's words, a "struggle about the definition of the people." "The people" as such is itself

"the result of a political construction." There is no "supposed 'rational' consensus" that can end

this struggle without remainder. Democratic "procedures always involve substantial ethical

commitments, and there can never be such a thing as purely neutral procedures." Every

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[154] See Homer, *Iliad,* 23.531 et passim; Nietzsche, "Homer's Contest" in Ansell-Pearson, ed., *On the Genealogy of Morality,* esp. pp. 177-79; Foucault, "Subject and Power" in EW, 3:342.
[155] Connolly, EP, ch. 1.
[156] Connolly, WNS, 39.
[157] Connolly, WNS, 59.

"compromise" is only a "temporary respite in an ongoing confrontation." Democratic politics "always takes place within a conflictual field."[158]

The agonistic conception of the public sphere is the discourse of difference's most concrete response to the perceived inadequacies of liberal conceptions of rule. The stated goal of the agonistic democratic imaginary is, as Connolly puts it, to "create more social space for difference."[159] This, in fact, is one of the principal reasons why "democratic citizenship" is even prized in the first place.[160] Given the inherent human tendencies towards naturalized sedimentation of any current, particular, political configuration, this agonistic goal can be achieved, as Mouffe enjoins, only by "leaving th[e] space of contestation forever open." Only then can we truly become "more receptive … to the multiplicity of voices."[161] Ultimately, on Connolly's view, agonistic democratic culture treats politics as a "medium" in which sedimented identities can be shaken up, "expressed and contested," giving political space for the expression of various and diverse identities, each contending one with another.[162] Agonism, in Honig's words, makes "provision for the politicization necessary *to maintain plurality* in the age of social homogenization" over against the "sedimentation or naturalization of a dominant culture's form of life."[163] The aim is to "keep the contest of identities going" against the "naturalizing" or assimilationist forces experienced by individual selves. The agonistic vision of political culture resists these tendencies, by "making … more difficult" the naturalization or sedimentation of identities, and it "actively discourages" the "ascendancy of any identity to hegemony" within our culture or our politics. Simultaneously, agonism aims to bring explicit awareness to the

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[158] Mouffe, *Democratic Paradox,* 55-56, 97, 102, cf., 92.
[159] Connolly, TPD, ix.
[160] Connolly, EP, 101.
[161] Mouffe, *Democratic Paradox,* 56, 105.
[162] Connolly, ID, 92. Cf., TPD, xv, 227.
[163] Honig, PTDP, 130, emphasis added.

"strategies of power and discipline," which we normally encounter in our day to day lives. In so doing, agonism puts us in a position to recognize and to "acknowledge" the "dissonance" concealed within our contemporary social order. Equipped with this knowledge, we may then "politicize" this dissonance and eschew the temptation to exert normalizing and assimilationist pressures on those who do not neatly fit the standards of a "politics and a way of life that is good, rational, right, or simply (but not benignly) 'ours.'"[164] This practice, Connolly dubs variously the "politics of becoming," the "politics of enactment," and the "politics of disturbance."[165] Through these democratic-agonal practices of disturbance, democratic culture comes to possess a "productive ambiguity at its very center."[166]

This is a vision of democracy which corresponds perfectly to the image of the rhizome popularized by Foucault's colleague, Deleuze, and the latter's co-author, Guattari. This generally unfamiliar term, rhizome, refers to a plant whose stem grows laterally or diageotropically, i.e., parallel to the soil, rather than ever deeper into the earth, as with trees and other types of arboreal vegetation. Common examples include ginger plants and certain types of grass. The dominant spatial metaphor is horizontal rather than vertical. "Rhizomatic" pluralism, in contrast to an "arboreal" variety, is the discourse of difference's "regulative ideal." Following this image, diversity is conceptualized not as branches emanating from a deep trunk or center, but rather as the result of multiple, interlocking, horizontally-positioned, diffuse nodes.[167]

Implicitly (and sometimes explicitly) following this apt rhizomatic metaphor, agonistic democracy completely rejects the presuppositions and the goals of much democratic theory today.

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[164] Honig, PTDP, 186, cf., 13, 194, 195.
[165] Connolly, WNS, 51, 57 ff., cf., 5, 11; EP, xvi-xvii, xix, 21, 180, cf., xiv, xxi; P, 121.
[166] Connolly, EP, 154-55. Cf., TPD, xv.
[167] Connolly, EP, 93-94, cf., 178-79, 229 n. 209; WNS, 82, cf., 11, 89, 92; Deleuze and Guattari, *Thousand Plateaus,* 6-7, 15.

On the agonistic model, democracy has no need of "shared understandings." As a model of democratic self-governance and culture, it does not presuppose a font of relative cultural fixity upon which to draw. Democratic practice requires nothing more than "public spaces" and "convergent points of reference," which enable "issues" to be "defined," and "action" to be "organized" and "pursued."[168] Similarly, the discourse of difference never aims for "general consensus" per se, even when trying to bring together "majority" democratic coalitions in the public space. Its majorities never unify around uniformly shared common principles, but, instead, citizens simply draw together into "collective assemblages" "out of some mixture of … diverse considerations."[169] Thus, the discourse of difference does not aspire to establish a "thick *agreement*" within society.[170] From its own vantage point, the only alternative to this democratic imaginary is the unrealistic "fantasy" of "fascist unity" in a fully "homogenous culture" propounded by "nervous cultural unitarians," by "devotees of a straightjacket image of order," or by those afflicted with an "'authoritarian personality.'"[171]

Implicit, then, within the claims of the discourse of difference is its full-throated rejection of the ostensibly treacherous rhetoric of the common good or way of life—a language which historically has served only to hide and legitimate oppressive, normalizing practices. The "we" of any hypothesized or "anticipated" "harmonious community" to which we might "strive to become attuned" is always and necessarily a "fictive 'we.'" To imagine—as for example Taylor or any other theorist of "deep identity" do—a non-agonistic society in which diverse citizens could unproblematically share in some overarching good without exclusion or violence to their being,

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[168] Connolly, EP, 153, 160, cf., however, 194.
[169] Connolly, EP, 95-96, cf., 116. Cf., FT, 41; P, 8-9.
[170] Connolly, P, 125.
[171] Connolly, EP, 155; WNS, 176; FT, 101; P, 4, 29; "Pluralism, Multiculturalism," 61. Drawing on Adorno et al., *Authoritarian Personality.*

inevitably runs the risk of normalizing citizens in the attempt to fold them into a greater community. In projecting this as a "'regulative ideal,'" this deep identitarian conception remains dangerous, in that it inevitably draws one towards the practice of a "non-politics of gentle assimilation."[172] The very idea of a shared and common way of life understood to be necessary, natural, essential, sacred, authentic, or otherwise of decisive significance always conceals hidden, normalizing artifices. As such, it is politically suspect. Thus, one of the preeminent goals of the new agonistic democratic culture is, in Honig's words, to "render much more complicated and tenuous the identification of a way of life as 'ours.'"[173] On this model, the "nation-state" become "just one of several sites of always ambivalent attachment."[174]

Also, implicit within this democratic vision of political order is a resounding and forceful rejection of political universalism. Human rights, for example, are morally and politically suspect. This is because there exists a "powerful historical tendency toward closure in the structure of universals." On the basis of cherished categories our culture recognizes as universal in character, we "celebrate previous crossings" of the hitherto oppressed into protected status, but all the while we "remain deaf to the claims of movements now pushed below the threshold of justice." This is the "ugly underside" of every universal.[175] It enables us, in good conscience, to block insurgent, nomadic movements bubbling to the surface, but whose peculiar type of oppression fails to fit neatly within the contours of any purportedly final universal right, presently recognized within our culture. Without an agonistic-rhizomatic form of democratic political practice, we are, as a culture, unlikely to prove attentive to the currently oppressed peoples who have not yet crossed

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[172] Connolly, ID, 28-29, 88, 116, 158, 230-31 n. 20, cf., 31, 72, 89-91, 108-14, 158, 162-63, 182, 224 n. 7, 225 n. 5, 234-35 n. 14; EP, 12-15, cf., 19 ff., 205-06 nn. 17, 20.
[173] Honig, PTDP, 194. Cf., Connolly, EP, 137, 143 ff.
[174] Honig, DF, 122.
[175] Connolly, EP, 184-86. Cf., FT, 215 n. 20.

the "threshold" of cultural recognition. Each newly recognized group may result in the introduction of "a new right onto the register of justice," but every sort of "consilidation" and "settlement" of the sort embodied within the "terms of recognition already installed in the culture" actually function as "a barrier to the *next* drive to pluralization."[176]

A flourishing, rhizomatic, agonistic democratic culture provides the antidote to this problem. Important here is the discourse of difference's Foucauldian conception of emancipatory history. As Connolly narrates the entire history of Western emancipation "over the past two centuries" (i.e., the end of slavery, women's suffrage, the treatment of atheists and homosexuals), progress came about neither through "argument" nor through "the establishment of simple facts previously overlooked." Rather, what proved to have been decisive was a "shift in sensibility."[177] This shift in sensibility, however, is irreducible to "the liberal theme of belated recognition of an implication of our own principles" implicit within our own tradition.[178] Thus, Abraham Lincoln, Martin Luther King Jr., and many civil rights warriors, for example, deeply misunderstood this nation's emancipatory history.[179] Their "self-interpretation" was simply mistaken.[180] This is the meaning of Connolly's remark that the claims of many historically oppressed groups (e.g., North American aboriginals, the LBGT movement, feminism) have historically seemed "arbitrary, capricious, or indulgent to many" of those who made up the dominant culture of the time.[181] In effect, the dominant culture considered their "suffering" to be "tolerable."[182] Though not always

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[176] Connolly, EP, 185, 192, emphasis added.
[177] Connolly, WNS, 67, cf., 149. Cf., P, 46. Cf., Honig et al., "New Realism," 187-89.
[178] Connolly, EP, 184. Cf., WNS, 51-52; FT, 132, 147; P, 121, cf., however, 36.
[179] King, "I have a Dream" and "Letter from a Birmingham Jail" in *A Testament of Hope,* 217-19 and 302; Lincoln, "Second Inaugural Address" and "Final Emancipation Proclamation" and "Speech on the Kansas-Nebraska Act at Peoria, Illinois" in *Speeches and Writings,* 2:686 and 2:424-25 and 1:328-29, 339-40, cf., 309, 337-38.
[180] Connolly, WNS, 59. Cf., Young, *Justice,* 159 and literature cited; Brown, SI, 98, 121 et passim.
[181] Connolly, EP, 188, cf., however, the discussion of the various "audiences" of an early nineteenth-century Mashpee Native American (176).
[182] Connolly, WNS, 70.

stated, homosexuality is almost invariably the paradigm case here. Till the 1970's, this human sexual identity appeared on the medical-nosological spectrum, and, even to this day, it still has an ambiguous status in the eyes of much of the public. That injury was/is "palpable and painful for a large number of people," but should they (ever) achieve full emancipation and be incorporated on the official table of universal human rights, their future inclusion would not be "simply derivable from a fixed set of principles." Instead, success is predicated upon "a whole lot of micropolitical preparation," "political initiative," and "political invention."[183] This project "once seemed impossible to many," but over the course of the last generation, homosexual emancipation has been helped along by the fact that "numerous straights have worked on themselves tactically," subjecting themselves to "second-order correction" at the level of affect.[184] New rights for emergent groups hitherto oppressed are not derived from anything, per se. Instead, they arise only when they are "*pressed* and *negotiated* into being by an assemblage of insurgents."[185] For this reason, it makes absolutely no sense for beleaguered individuals and groups to be "judged by the terms through which [they are] currently depreciated."[186] Agonistic-rhizomatic democratic practice is supportive of newly emergent emancipatory projects in a way that liberal norms of order and stability never could be.

## 7.6. The Micropolitics of Deep Respect: The Transformative Dimension of "Agonistic" Democracy

Despite its conceptual promise, the agonistic democratic project is not without its own admitted difficulties. By design, there are no *a priori* rules of order imposed upon the type of contestation that is to occur within the agonistic public sphere. At first glance, the superficial impression one

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[183] Connolly, WNS, 140.
[184] Connolly, P, 31.
[185] Connolly, P, 121.
[186] Connolly, WNS, 62.

receives is that this is a model for a free-for-all—that one may just as easily meaningfully contribute to democratic will formation by mumbling *da-da-da-da-da-da* as by brandishing a rifle. The chiefmost danger lurking on the horizon of this democratic imaginary is, however, not that it will prove unproductive or simply inane, but rather the prospect that this public sphere might slip from agonism into virulent *ant*agonism, enmity, and extreme, adversarial strife. When those who had once been friends truly become enemies, then democratic political practice becomes impossible, and civil war looms. Of this danger, agonistic democrats are well aware. Their most promising response is a call for a transformative, democratic project.

This model of democracy is not to be confused with mere institutional design, for its requirements are actually irreducible to articulable procedural-institutional norms. Although agonistic democracy names a distinctive institution, it is also much more than that. It is a vision of a future democratic political culture, sustained, ultimately, by an ethos, whose cultivation the discourse of difference requires, so long as democratic self-governance is to remain sensitive to difference.

For this reason, and although critics sometimes miss this, the agonistic project is, in fact, self-consciously aware of the danger that irreconcilable difference might lead to civil war. By no means does it welcome this prospect with open arms. Instead, as Mouffe puts it, there exist necessarily "some limits" to the "kind of confrontation which is going to be seen as legitimate in the public sphere."[187] Similarly, Connolly suggests that agonistic democratic practice is best understood as a form of "*restrained* contestation."[188]

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[187] Mouffe, *Democratic Paradox,* 93.
[188] Connolly, EP, 21, 29, emphasis added, cf., 99; P, 25, emphasis added. Cf., WNS, 96.

But restrained *by what?* The answer to this question brings us to the heart of the discourse of difference's quarrel with the liberal tradition and its practices of (mere) toleration.

The democratic practice of agonism positively requires citizens to cultivate and to exhibit the "civic virtue" of agonistic, deep "respect"—a virtue which calls on citizens to "honor [the] different final sources" of their fellow, plural citizens and to "cultivate reciprocal respect across [these] differences."[189] The civic virtue of deep respect calls upon them to "acknowledge" in some deep way the "dignity of those who embrace different sources."[190] Connolly and others within the discourse of difference have given many related names to this trait of deep respect (e.g., "receptivity," "generosity," "care," "listening," "responsiveness," "engagement," "welcoming," "acknowledgement"—often preceded by a further, descriptive adjective), but ultimately they are all talking about a similar phenomenon, practice, or civic virtue, if not the exact same thing.[191]

According to this strain of thought, this cultivation of deep respect will enable late modern citizens to "convert an antagonism of identity into an agonism of difference," thus solving the peculiar dilemma confronted by the agonistic public sphere.[192] Citizens that exhibit the civic

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[189] Connolly, ID, xxv-xxvi.

[190] Connolly, ID, xxvi.

[191] E.g., Coles, "Moving Democracy," 680 ff.; *Rethinking Generosity;* Bickford, *Dissonance of Democracy;* White, SA, 26, 69, 74, 94; Markell, *Bound by Recognition,* 180 et passim; Connolly, ID, xx; EP, xv ff., 16, cf.; WNS, 7, 9, 89, 161; P, 43; "Rethinking the Ethos," 94-95. Connolly, EP, 234-35 nn. 38, 40; P, 123-27; "Pluralism, Multiculturalism," 73 n. 24 distinguish "agonistic respect" from "critical responsiveness," but the differences remain unimportant for present purposes. There are also occasional, and apparently approbative, references to "studied indifference." E.g., Connolly, P, 42; EP xvii, 200 n. 4, 234 n. 38; WNS, 151. Confusingly, the Nietzschean notion of the "'pathos of distance'" is sometimes mentioned on this register. E.g., Connolly, ID, 179; EP, 193; "Beyond Good and Evil," 372, 378. Yet, this notion, as deployed in Connolly's work, seems to have close to nothing to do with Nietzsche's description of this aristocratic posture. See Nietzsche, *Genealogy,* 1.2, p. 26; *Beyond Good and Evil,* § 257, p. 201. There is also reference to Nietzsche's "gift-giving virtue." E.g., Connolly, FT, 145; Nietzsche, *Zarathustra* in *Portable Nietzsche,* 186 ff. Usually (neo-)Hegelian "recognition" does not make the list. Markell, *Bound by Recognition* directs this critique against, e.g., Hegel, PhG, 3:145/111 ff.; *Enzyklopädie der philosophischen Wissenschaften im Grundrisse III* in Werke, §§ 430, pp. 219 ff., esp. § 432 Z, p. 221; Taylor, "Politics of Recognition" in *Philosophical Arguments,* 225-56; Honneth, *Struggle for Recognition;* Williams, *Hegel's Ethics of Recognition;* Tully, *Strange Multiplicity.*

[192] Connolly, ID, 178.

disposition of deep respect are more inclined to treat different ways of life as valuable in themselves, even when they themselves find these other ways of life puzzling, disagreeable, unnerving, contemptible, ludicrous, or wrong-headedly mistaken. Deep respect requires of us that we learn to treat those with whom we fundamentally disagree not as enemies, but rather as adversarial, agonistic dialogic partners, whom we may respect, and whose own vision of the good life is no more and no less contestable than our own. These visions, theirs and ours, stand upon equally "shaky epistemic grounds."[193] My own particular identity at any given moment is not definitive of what or who I am. Instead there is a certain "abundance" that overflows my current configuration which does not belong to me, but in which I nevertheless participate. To experience one's identity in this way is already to take a step in the direction of being able to see "alter-identities" even within ourselves, and thereby to becoming more inclined to treat otherness we encounter outside of ourselves with deep respect.[194] Those citizens who cultivate deep respect have a greater awareness for the ways in which they are "implicated ethically with others." They have come to appreciate and understand that they share identity with some others. Within themselves they can recognize some of the impulses that motivate the identities of others. They understand that their identity is constituted through, and thus facilitated by, the difference which others offer. And finally, they understand that they are all commonly afflicted by the universal "struggle with finitude." Deep agonistic respect gives expression to an all-important "ethic of care for life," crucial for democratic practice that is truly sensitive to human difference.[195]

The central place of this civic virtue of deep respect within the project should not be overlooked. The greatest liberal political philosopher of the twentieth century contended that

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[193] Connolly, ID, 178.
[194] Connolly, ID, 120.
[195] Connolly, ID, 166. Cf., White, SA, 22.

"justice is *the first virtue* of social institutions."[196] The discourse of difference retorts by saying that actually the civic virtue of deep respect "is more fundamental than justice."[197] Drawing analogies to the history of political thought, agonistic, deep respect functions in the same way that rights had been conceived to be a response to the nineteenth century fears of the tyranny of the majority, i.e., as trumps against democratic excesses. Thus, we are told that should agonistic respect not be observed sufficiently in the future democratic culture, democratic will formation might very well transform itself into the vehicle for "moral wars" against culturally marked others.[198] For this reason, deep respect is absolutely fundamental for the agonistic democratic project. This "cardinal virtue" is its "cultural currency."[199]

Thus, the agonistic, democratic imaginary of the discourse of difference is fundamentally a transformative project. Ultimately, it yearns for a shared culture of deep respect. This transformative dimension is the "crucial," "critical," and the "most … indispensable element" of the project. It is also the element most commonly ignored by critics.[200] It is principally this transformative element that differentiates "expansive" or "deep pluralism" from a liberal, multiculturalist society that merely preaches tolerance.[201]

Given the transformative aspect of the project, agonistic democracy self-consciously presupposes a certain background culture. For this reason, it is decidedly not, as Connolly says, a "model in which no positive social vision is enunciated," and in which every social figuration is the momentary outcome of whatever happens to issue forth willy nilly from completely

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[196] Rawls, TJ, 3, emphasis added.
[197] Connolly, EP, 187.
[198] Connolly, TPD, xv.
[199] Connolly, EP, 193; P, 125. Honig et al., "New Realism," 198, 202-03 distances herself a bit from this sort of project.
[200] Connolly, EP, 223 n. 19, 127-28, 180, 183. Cf., FT, 146; P, 6.
[201] Connolly, P, 30, 33, 48, 65, 138, emphasis removed.

unconstrained "contestation."[202] Instead, deep respect is the "existential basis for democratic politics."[203] "There are," Connolly contends, "some general dispositions that *must* course through the cultural world" of contemporary, pluralistic democracy in order that it prove successful.[204] Despite its sometimes referring to itself under this label, agonistic democracy is, then, definitely not a version of what Rawls disparagingly calls "modus vivendi" democracy, where the ever changing forces of parties or individuals and their respective balances of power determine the political fabric of a nation.[205] Instead, agonistic democracy is a cultural vision that seeks to influence the future practice of politics and the formation of the ambient culture in which all citizens find themselves situated.

Thus, agonistic "democracy" is not simply an *institutional* model for democratic politics. Instead, it's a model for a future democratic *political culture,* which, among other things, is meant to serve as the background culture and horizon to a future democratic politics.[206] Thus, the project is more about "folding *agonistic respect* into … a democratic state" than it is about "'agonistic democracy'" as an institutional model.[207] However, to the extent that the discourse of difference maintains that its ethos "must become embedded in numerous institutional practices," it must also inevitably return to a threshold level of institutional reflection.[208]

This dialectical play and counter-play is best captured with the Deleuzian language of micro- and macro-politics, which Connolly adopts and extends. The civic virtue of deep respect is best

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[202] Connolly, ID, xxv. Cf., Connolly, EP, 196 et passim. See also Mouffe, *Democratic Paradox,* 93, 97, 102-03 and 129-30, cf., however, 107 n. 31, where she (unconvincingly) attempts to distance herself from Honig and Connolly. Connolly, EP, 222-23 n. 19, cf., 199 n. 1; "Twilight of the Idols" explore their similarities and differences. Cf., Connolly, P, 183 n. 13.
[203] Connolly, WNS, 39.
[204] Connolly, EP, xx, emphasis added.
[205] Connolly, WNS, 94, 96, 161; "Pluralism, Multiculturalism," 58-59, cf., 69.
[206] Connolly, WNS, 153 ff.
[207] Connolly, ID, xxv-xxvi, cf., x-xi, 11, 91, 186, 192-94, 200, 211-212, 220.
[208] Connolly, P, 65.

understood within this framework. What this discourse calls for is a variety "micropolitical practices," which occur generally under the radar of actual, institutional design, and which are themselves in the service of a broader "macropolitics of pluralization."[209] Micropolitics are practices of a self, upon a self, by a self, targeting the "visceral register of intersubjectivity." Given that the work is done at this level, beneath fully articulate, reasoned discourse, these micropolitical practices take place only "in a nether world *under* the register of justice," which is occasionally even "below the threshold of self-attentiveness."[210] Though initially oriented only toward the individual citizen, who is to work upon himself, micropolitics connects with macropolitics in that these practices of self-transformation "become translated into work upon larger constituencies" by means of myriad "interventions" of the micropolitically-formed self into TV talk shows, quotidian gossip, letters to the editor, and the blogosphere.[211] Micropolitics also "help to set preconditions for constituency participation in more robust political movements," for these practices open up space for "new inroads into electoral politics."[212] In this way, these practices of "micropolitics" can appropriately be described as the "*condition* for macropolitics"— i.e., politics as commonly understood in colloquial idiom.[213]

Seen in this light, the discourse of difference does not involve facile, moral quiescence in our individual lives. On the contrary, it is a deeply transformative project, and precisely for that reason, it is really quite "demanding" of us as human beings. The project positively "requires" these "arts of the self"—"practices of self-modification" that "often require diligent work ... upon [one's] own visceral registers of being." This process demands of us that we "modify the shape of

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[209] Connolly, WNS, 148; EP, xxvii. Drawing on Deleuze and Guattari, *Thousand Plateaus,* 208 ff.
[210] Connolly, EP, 184, 186, 68, cf., xix, 181; WNS, 11-12, cf., 10, 63. Cf., P, 121-22. Cf., "a more fundamental kind of justice" in Markell, *Bound by Recognition,* 179, cf., 224 n. 10.
[211] Connolly, EP, 70.
[212] Connolly, FT, 184, 192, emphasis removed.
[213] Connolly, EP, 73.

[our] own identity"; "forge" "new, positive identities"; and "reconfigure established convictions." These "disturbing social experiments," Connolly readily acknowledges, amount to "necessary" and "considerable work" of the self, upon the self, and by the self.[214] The activity of "*work on* [*one*]*self*" entails that the "dominant constituencies" must "revise the terms of their own self-recognition."[215] As we learn, this process may even require "agonizing self-reconstitution." The "agony of challenge to … heartfelt beliefs," might involve "a degree of self-suffering." Given this description, it becomes clear why Connolly describes the transformation as something akin almost to "shock therapy."[216] And to anyone who ask why he should undergo this therapy, the answer is in the name of "an emerging aspirational self."[217] We suffer in order to become better neighbors.

In order to be successful, however, agonistic democracy must not present itself as a totalizing or universal vision for a future politics, but instead as one option among many, to be pursued in tandem with other visions. Were this not the case, the discourse of difference would need to explain why its political-cultural vision deserved primacy over all others—a predicament the agonistic conception of democracy is expressly designed to avoid. Anything else, and it would cease to be a rhizome. The sincere practice of agonistic democracy requires a certain degree of agnosticism towards itself. Bearing all this in mind, Connolly avers that agonistic democratic culture does not represent a totalizing, hegemonic vision of politics that would overwhelm or displace all of the other voices that currently exist on the plane of contemporary democratic politics. Agonal democracy takes an "ambiguous stance" towards its own identity and

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[214] Connolly, ID, 178; WNS, 62-63, 66, 144, cf., 28, 45, 58, 67-68, 112, 122; EP, xiv, xvi, 23, 69, cf., 23, 26, 184; P, 147, cf., 5, 30-31.
[215] Connolly, "Pluralism, Multiculturalism," 59-60, cf., 61.
[216] Connolly, FT, 66, 99, 135, 169. Cf., P, 123, 125; "Rethinking the Ethos," 95.
[217] Connolly, FT, 128, cf., 188.

pronouncements. It does not present its political platform or pronouncements as the final word of God or as a "singular truth." Rather, it treats its own view as just "another possibility" among competing visions. It is not "necessary" that the agonistic conception of identity "become the view of everyone." Since it does not intend to "purge [opposing] doctrines that rest upon faith in a true identity or a particular god," it actively "expects" the "positions of its competitors … to persist on the field of discourse." It would "suffice" if no more than an "active minority of the population" accept and advance the teachings on identity and difference central to the discourse of difference's political-cultural vision. In this way, the discourse of difference could have "a robust, competitive presence in the life of the culture"—offering up its own necessarily perspectival answer to the "mysteries of existence."[218] Agonism "need not become the universal understanding through which all identities are lived."[219] In this sense, the discourse of difference's agonistic conception of democracy and identity represents only a "prod and counterpoint" to the more traditional, "hegemonic" conceptions. Its aim is only to shift slightly the terms of discourse within everyday politics, thereby establishing a new "equilibrium."[220] Agonistic democrats do not "enact closure," for "the complex that emerges is not entirely reducible either to traits of individual character or to fixed cultural blocks."[221] It does not presuppose that "a uniform set of public virtues is needed."[222] It does not aim to "*replace*" anything else, per se, which exists upon the plane of political possibilities, but only "to be placed into competition and collaboration with several others in the same state."[223] It aims only to "form

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[218] Connolly, ID, 91, 118-19, 183, emphasis added. Cf., EP, 39, 154, 190, 233-34 n. 37; WNS, 36, 39, 57, 113, 154, 158-59; "Reworking the Democratic Imagination," 199.
[219] Connolly, EP, 95.
[220] Connolly, ID, 155; EP, xxiv. Cf., WNS, 6.
[221] Connolly, FT, 176-77.
[222] Connolly, WNS, 37.
[223] Connolly, "Rethinking the Ethos," 93.

an arc within this rainbow," but it does not wish to "dominate the entire spectrum."[224] The offer to join any collective "'we'" is only ever an "invitation" or "solicitation" and never "a command." As such, "the invitation may be refused."[225] Its specific practices, or even the "motivation" thereunto, are never "commanded by some … authority."[226] It simply cannot aim to do anything more than to *inspire* others by its own example.[227] It does not "claim the right to be final judge of each dispute."[228] It is not a form of "absolutism."[229] It actively eschews all claims to "territorial hegemony."[230]

Given these normative-critical preoccupations, agonism represents an attractive, almost brilliant, model for a future political culture, embodying, it would seem, the requirements of weak ontotheology. Because it is not organized around a unitary center, it is able to maintain an almost absolute agnosticism concerning the ultimate value of human practices. But because it delineates a democratic form of political order capable of channeling political energy, it avoids the danger of falling into quietism, quiescence, or empty deconstruction. It thereby appears to sail safely between the Scylla of empty cultural deconstruction that eschews a positive affirmation or ethical stance and the Charybdis of affirming an identity as natural, necessary, true, or sacred. Moreover, with its claim to call only for contestation restrained effectively by deep respect, it is able to insulate itself against the allegation that it is forgetful of the distinction between politics and

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[224] Connolly, ID, 214.
[225] Connolly, "Beyond Good and Evil," 372, 381-82. Cf., ID, 46; "Twilight of the Idols," 135.
[226] Connolly, EP, 27-28.
[227] Connolly, P, 35. Cf., "Pluralism, Multiculturalism," 58-59.
[228] Connolly, WNS, 46.
[229] Connolly, FT, 138.
[230] Connolly, P, 48.

violent civil war borne of irreconcilable differences. The dual charges of contemporary political irrelevance and of irresponsibility are thereby averted.

And yet things are not quite as they seem.

# 8. The Antinomies of the Discourse of Difference

As we saw in the previous chapter, the weak ontotheological turn saves the discourse of difference from the difficulty of motivational non-intelligibility. It thereby fills the normative deficit in Foucault's critical project. And the agonistic conception of a future, democratic, public sphere provides a more concrete sense for both the institutional, political implications of the project and also of its transformative dimension.

   Yet, what are the attendant costs of the solutions? Another way to ask this question: Is it possible to move beyond Foucault and, at the same time, to retain the critical edge of his project? (Were there reasons for Foucault's own political reticence?) We will address this question on two different planes: first from the perspective of the ontotheological turn and (b) second, from the perspective of the agonistic, public sphere.


At first glance, the ontotheological turn appears to provide the tools with which the discourse of difference could account for its motivational sources, and thus fill the normative deficit of Foucault's project. However, the solution raises almost as many questions as it answers. If the feature of self-problematization, contestability, and fallibilism are precisely what distinguish weak from strong ontotheology, i.e., the good forms from the bad forms, then the critical reader must first have some confidence that the bad form actually exists in important, contemporary intellectuals, before he could become confident that the weak-strong distinction is actually able to do the work that it claims to do. A critical exploration of three, representative, twentieth-century intellectuals expressly identified as strong ontologists (Alasdair MacIntyre, Leo Strauss, and Eric Voegelin) shows that the weak-strong distinction is not as clear cut as it had first appeared to be

(§ 8.1). Because we discover that a sense for fallibilism is actually an integral feature of those thought to be strong ontologists, we are forced to conclude that the first and most likely candidate for distinguishing good from bad forms of ontotheology fails, and that the source for the distinction must be found elsewhere. We might infer, then, that weak ontotheologies differ from strong ones not in terms of the manner or mode of substantive position, but rather in terms of disposition or affect, and thus that the discourse of difference is actually engaged in a politics of mood. The hope is that human beings might come to experience their identities lightly, playfully, and laughingly. And yet, even here, it does not appear that weak ontotheology's promised escape from strong foundationalist thinking has succeeded. A comparison of the discourse of difference with Michael Oakeshott's philosophically self-reflective account of the conservative disposition demonstrates that the discourse of difference's turn to a politics of mood does not relieve it of the burden of making the second-order claims it hoped to avoid, which would enable it to adjudicate the conflicts that necessarily arise at the level of affect (§ 8.2).

Though the normative, motivational account buttressed by weak ontotheology was surely an improvement over Foucault's silence, it is not without its own set of problems. The case is similar with the future, agonistic, democratic public sphere. Although with this distinctive conception of the public sphere, the discourse of difference has improved upon its apolitical, anti- or extra-normative beginnings in Foucault, the discourse of difference still struggles with lingering antinomies and difficulties, which positively threaten the initial appearance of its success in politically supplementing Foucault, whilst maintaining the critical edge his work supplied. While the weak ontotheological solution terminates in a politics of mood, which fails to escape from the

necessity of higher order, adjudicative claims, the discourse of difference's rhizomatic-agonistic conception of the public sphere seems unburdened by this problem.

And yet, upon closer examination, we discover that the successful functioning of the agonistic public sphere positively requires that a threshold level of citizens *already* experience their identity in an agonistic fashion. Ultimately, the project's success is premised upon something on the order of a cultural revolution (§ 8.3). However, standing within the current constellation of political actors, we can easily assume that there is currently heady opposition to the discourse of difference's cultural revolution. Thus, we must first ask (a) how this transformation can be legitimated *democratically?* Receiving silence on that question, we next ask the even more basic question of how this future, democratic, political culture even comes into being *empirically?* The answers these thinkers give provide little solace (§ 8.4).

Next, we must ask whether the work done by deep respect is up to the challenge of the political liberal project's problem of stability; and, relatedly, whether we have good reason to believe that this hitherto unknown civic virtue of deep respect will be able to do the essential political work it had been designed to do? This previous question provides a context in which we might (re-)examine, yet more carefully, the discourse of difference's conception of order and that of the political liberal project. To what extent are they functionally different, in the final analysis? Underneath a few crucial rhetorical changes, are their respective patterns of political exclusion functionally equivalent (§ 8.5)?

Finally, we ask whether the discourse of difference is actually able to deliver on its promise of theorizing politics in a Nietzschean, tragic, disenchanted world? Or do its commitments force it to perpetually betray that promise? Does it harbor a stubborn refusal to relinquish a need for

meaning and salvation, strikingly at odds with its stated claims about the nature of the cosmos (§ 8.6)?

## 8.1. Will the Strong Ontotheologist Please Stand Up?

According to its own self-understanding, what distinguishes the weak ontotheological turn from classical, medieval, and early modern metaphysical speculation is its self-conscious awareness of its own problematic and contestable status, which embeds a kernel of fallibilism within the project, thus enabling it to distinguish weak (i.e., good/healthy) forms of ontotheology from strong (i.e., bad/dangerous) ontotheoology. This, we saw in the previous chapter.

Fundamentally, weak ontotheology raises a burning question: Is the distinction between weak and strong really adequate to its task? Another, related way to get at this question is to ask: *Who* precisely is the strong ontologist? To that question, we receive a precise answer. White explicitly identifies strong ontology with Alasdair MacIntyre, Leo Strauss, Eric Voegelin, Roman Catholic intellectuals in the natural law tradition, and most premodern and modern thinkers.[1]

The principal question is whether the strong ontological intellectual is quite as ubiquitous as we are led to believe. Put another way: Are the thinkers whom White identifies as strong ontologists actually so? Surely, fallibilism must be a key component of any weak ontology—the necessary, if not sufficient, desideratum of any weak ontology.[2] Only with this criterion fully in view could one make sense of the frequent occurrence of the language of contestability and self-problematicization that does so much conceptual work in White's and Connolly's argument. For this reason, in White's estimation, the qualifier, problematical, recurrent in Connolly's work is, in fact, precisely what indicates that Connolly belongs to the tradition of weak ontology. Moreover,

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[1] White, SA, 6-7 and n. 9, 9; "Weak Ontology," 17.
[2] Cf., Larmore, "Respect for Persons," 67.

this core appreciation of ontological contestability is what White holds to be most distinctive to Connolly's work.[3] So, let's take a more careful look at how the other, contemporary thinkers, whom White mentions, fare with regard to that criterion of fallibilism.

Of contemporary intellectuals, one could probably say with a high degree of confidence that his description of a strong ontologist hits home most as a description of Roman Catholic intellectuals in the natural law tradition. A highly abbreviated exploration of one representative, but influential, view shall suffice: John Finnis. Broadly understood, natural law is "the set of principles of practical reasonableness in ordering human life and human community."[4] These principles justify the exercise of authority in community. As such, these principles "explain the obligatory force … of positive laws." Moreover, we can call all laws defective that lack conformity to these principles. These principles, moreover, hold good, as principles even when they are overlooked, past, present, or future, for natural law has no history.[5] These principle of practical reasonableness draw upon a set of basic goods or values, that although indemonstrable are nevertheless "obvious ('self-evident') and even unquestionable."[6] These basic values include, life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion; and this list is final and exhaustive.[7] With this bedrock of understanding, we are then able to discover basic practical principles, and these principles themselves, when they are instantiated, "serve to orient" our practical reasonableness.[8] In human life, there certainly exist tragic, moral dilemmas, but these dilemmas demonstrate only the "*complexity* of ethical

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[3] White, SA, 106, 108.
[4] Finnis, *Natural Law,* 280.
[5] Finnis, *Natural Law,* 23-24.
[6] Finnis, *Natural Law,* 59, 75.
[7] Finnis, *Natural Law,* 86-90.
[8] Finnis, *Natural Law,* 63, cf., 23, 59.

considerations; they do not show that all value-judgments … are … beyond rational discrimination."[9]

Clearly what is missing in Finnis' discussion is a quality of (historical) fallibilism, and so, Finnis undoubtedly fits White's characterization of strong ontology. And yet, we should not fail to point out that despite the influence that Roman Catholic natural law theory has had on the European and American academy in the twentieth century, it nevertheless represents a view that has been effectively marginalized and displaced from the political theoretical mainstream today. So, if this were all that the weak ontological formulation had been directed against, then conceptual accuracy and critical force would have been purchased at the cost of irrelevance for the academic, political theoretical mainstream. Thus, a more serious question arises: Do any of the *other* contemporary intellectuals White mentions actually fit the strong ontological depiction?

Let us first consider MacIntyre. White contends that behind MacIntyre's "admirable willingness to engage alternative perspectives," there lurks a "core of absolute certainty." The evidence White adduces for this core of absolute certainty is the fact that MacIntyre refers to the contemporary era with thoroughly black-and-white metaphorical imagery, dubbing twentieth-century liberal modernity the "new dark ages."[10] Yet, that notwithstanding, MacIntyre's status as a strong ontologist seems highly questionable.

Contrary to White's assertion, it is fundamental to MacIntyre's philosophic project that the beliefs and convictions that we hold at any given moment are perpetually open-ended and subject

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[9] Finnis, *Natural Law,* 51 n.

[10] White, SA, 7 and n. 9 *ad* MacIntyre, *After Virtue,* 263. This claim is *prima facie* surprising, given that White later describes at least one weak ontologist (Charles Taylor), as someone who sometimes writes with a high degree of confidence or apparent finality against, and with strong antipathy for, certain types of intellectuals and thus categorically passes judgment on them. White, SA, 67-69. One should also note a strange asymmetry which emerges when White treats Foucault's famous characterization of liberal modernity as disciplinary through and through. This, to White, is only hyperbolic and its primary intention is only "to jolt us in specific ways and reorient our attention." SA, 101. There is no talk here of Foucault's core of absolute certainty.

to revision. In an appendix to the second edition of *After Virtue,* MacIntyre describes his own version of historicism (or "philosophical history") as one that necessarily "involves a form of *fallibilism.*" For this reason, it "*excludes all claims to absolute knowledge.*" "The possibility," he writes, "has always to be left open that …. some new challenge to the established best theory so far will appear and will displace it."[11]

   This general sentiment of fallible open-endedness is continued and rearticulated in later work. Towards the end of *Whose Justice? Which Rationality?,* MacIntyre states quite baldly that "no one at any stage can ever rule out the future possibility of their present beliefs and judgments being shown to be inadequate in a variety of ways."[12] Accordingly, MacIntyre earlier contends that dialectic, the Aristotelian conception of reason that he endorses, "never presents us with a conclusion which is not open to further revision, elaboration, emendation, or refutation. Dialectic is essentially unfinished at any point in its development…. The possibility of further dialectical development always remains open."[13] In addition, in a discussion of another of his major protagonists, MacIntyre argues that Aquinas' positions are not settled and static, instead they are "always open to addition by some as yet unforeseen argument…. There is no way … of ruling out in advance the possibility that what has so far been accepted may yet have to be modified or even rejected…. It is of the nature of all dialectic … to be essentially incomplete."[14]

   For our present purposes, it is not important here whether or not MacIntyre's understanding of Aristotle and Aquinas is accurate. What is important is to recognize that debate, contestation, fallibility, and open-endedness are central to MacIntyre's account. Thus, conflict takes a central

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[11] MacIntyre, "Postscript to the Second Edition" in *After Virtue,* 270, emphasis added, cf., 93, 277. For some helpful background, see Lutz, *Tradition in the Ethics;* Mitchell, "Michael Polanyi, Alasdair MacIntyre"; Hauerwas, "Virtues of Alasdair MacIntyre."
[12] MacIntyre, *Whose Justice,* 361.
[13] MacIntyre, *Whose Justice,* 100-01.
[14] MacIntyre, *Whose Justice,* 172. Cf., *Three Rival Versions,* 74-77, 125.

role in his thought. At no point does MacIntyre ever maintain the possibility of some universal, abstract, non-historical, *a priori* stance providing grounds for the mutual commensurability and evaluation of human practices.[15] Instead, from MacIntyre's (unacknowledgedly Gadamerian) view, rationality is best understood as "tradition-constituted."[16] The *only* thing that meaningfully distinguishes MacIntyre's view here from Foucault's is the former's contention that those within one tradition-constituted rationality can test another, formerly unfamiliar tradition-constituted rationality. This is possible, on his view, because we might be able to learn to understand another radically different other almost as though "from within" in the way of a new first language and thus to achieve some level of mutual intelligibility through practices of translation.[17] This allows us to engage with others, to test others—on their own terms. Thus, on MacIntyre's view, it is actually "through conflict and sometimes only through conflict that we learn what our ends and purposes are."[18] If we wish to know anything about ourselves, it is not possible to transcend this all-important "*agōn* of ideological encounter."[19] As such, MacIntyre argues that a tradition that is in good order is one which embodies continuities of conflict. In this way, one can distinguish a tradition that is living from one that is dead—a view he associates with Burkean conservatism.[20]

Because we see that historical and conflictual fallibilism is actually folded into MacIntyre's account, we are forced to conclude that his inability to obtain weak ontological status must lie elsewhere. Here, perhaps, we should recall the fact that MacIntyre wishes to vindicate the superiority of one particular worldview—a peculiar blend of historicized, Kuhnian neo-

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[15] MacIntyre, *After Virtue,* 277; *Whose Justice,* 393; *Three Rival Versions,* 5.
[16] MacIntyre, *Whose Justice,* 360 et passim. See Gadamer, *Truth and Method,* esp. 281-82. Strangely, Gadamer's name is mentioned nowhere in *Whose Justice? Which Rationality?* MacIntyre, "Contexts of Interpretation"; "On Not Having the Last Word" however, do acknowledge his debt.
[17] MacIntyre, *Three Rival Versions,* 43; *Whose Justice,* 370-88 (ch. 19).
[18] MacIntyre, *After Virtue,* 164.
[19] MacIntyre, *Whose Justice,* 393.
[20] MacIntyre, *After Virtue,* 222.

Aristotelianism, Augustinian Christianity, and Thomism, whose emphases have shifted variously over the latter part of his career.[21]

And yet this couldn't possibly be the source of White's objection to MacIntyre, for this feature is shared with an author, whom White does actually admire: Charles Taylor—an author whom White views as "squarely within the terrain of weak ontology," despite the fact that he acknowledges that Taylor wishes to "defend a specific ontological constellation *as the best*" one.[22] Also, as we've already seen, White does leave open the possibility that we may some day converge on some portrait of human life which we could share with one another without violence.[23]

In contrast to his overly brief discussion of MacIntyre in a footnote, White does not even cite a single line from the writings of Strauss, before denoting him a strong ontologist.[24] Like MacIntyre, Strauss also fails to fit neatly into White's strong ontologist, ideal type.[25]

It is understandable that White would mention Strauss' name, for a common reading of his work, and especially of his *Natural Right and History,* is that it is the intellectual product of an unproblematic and uncomplicated, moral realist. Abetted, no doubt, by the morphological similarity in English between natural right and natural law, Strauss is sometimes viewed as attempting to recover from ancient Greece precisely what neo-scholastic Thomists hoped to find in Aquinas. To be sure, some textual evidence for this view exists and the impression is understandable, but, I will argue, the impression given is ultimately misleading. First of all, we

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[21] See MacIntyre, *After Virtue,* 118, 263, 270, 277; *Whose Justice,* 10, 146-208 (chs. 9-11), 402-04.
[22] White, SA, 63, 43 n. 5, cf., 57, 64, 152.
[23] White, "Weak Ontology," 17 n. 15.
[24] In contrast, Connolly, P, 43-44, 47 is more balanced with regard to Strauss, though his discussion is confined to the text of Strauss, *Liberalism: Ancient and Modern.*
[25] For some helpful background, see Zuckert and Zuckert, *Truth About Leo Strauss;* Zuckert, *Postmodern Platos;* Smith, *Reading Leo Strauss.*

must bear in mind Strauss' rather low regard for the revival of natural law thinking in Roman Catholic circles. As he writes in a letter to Voegelin, "neo-Thomism … is of a low level, and not worth considering."[26] In these letters, he would also describe what he had sought to do in *Natural Right and History* as "nothing more than present the *problem* of natural right as an unsolved problem."[27]

The naïve view of Strauss' writings ultimately cannot be sustained. This reading seems especially unlikely, given Strauss' own biographical point of departure. The profound influence Nietzsche had on his thought till he was at least thirty years of age is well documented.[28] In a lecture from 1930, he would proclaim that "since Nietzsche, the columns, upon which our tradition rested, have been torn down.... Through Nietzsche, the tradition has been unsettled down to its *roots*. It has entirely lost its self-evident character. We stand in the world completely without authority, completely without direction."[29] "The critique of modern rationalism … by Nietzsche," writes Strauss late in his career, "cannot be dismissed or forgotten."[30]

As with his relationship to Nietzsche, something similar might be said of Strauss' connection to Heidegger. Strauss' profound (albeit ambivalent) respect for Heidegger is similarly well-documented.[31] On his view, Heidegger deftly "dethroned" all of the "established schools of philosophy." "To everyone who had eyes" to see, it had suddenly become clear how lost and

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[26] Strauss and Voegelin, *Faith and Political Philosophy,* Strauss to Voegelin, May 9, 1943, p. 18, cf., October 12, 1950, p. 74. Cf., Strauss, "On Natural Law" in *Studies,* 137; *Natural Right,* 2, 7. For background to Strauss and Voegelin's correspondence, see Fortin and Hughes, "Strauss-Voegelin Correspondence."

[27] Strauss and Voegelin, *Faith and Political Philosophy,* Strauss to Voegelin, October 12, 1950, p. 74. Cf., Strauss, *Natural Right,* vii, 31, 33.

[28] Fortin and Hughes, "Strauss-Voegelin Correspondence," 354; Strauss and Löwith, "Correspondence," Strauss to Karl Löwith, June 23, 1935, pp. 182-183. For further background, see Lampert, *Leo Strauss and Nietzsche.*

[29] Strauss, "Religiöse Lage der Gegenwart" in *Gesammelte Schriften,* 2:389.

[30] Strauss, "Three Waves of Modernity" in *Introduction,* 98.

[31] E.g., Strauss, "Introduction to Heideggerian Existentialism" in *Rebirth,* 27-29; "A Giving of Accounts" in *Jewish Philosophy,* 461, 464; "Philosophy as a Rigorous Science" in *Studies,* 30. For further background, see Velkley, *Heidegger, Strauss;* Zuckert, *Postmodern Platos.*

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empty the regnant intellectual establishment really was. For Strauss' generation, this "opened up an abyss."[32] Apart from those "ineffective rearguard action against" Heidegger by "well-intentioned" critics, "everyone … who had ears to hear" was completely overwhelmed by Heidegger's challenge to the Western tradition of philosophy.[33] The abyss that Heidegger had pried open required that very great effort be exerted by all subsequent thinkers, for, as Strauss says in his own voice, he "cannot bring himself to cling to philosophical positions which have been shown to be inadequate."[34]

Strauss' relationship to Heidegger is more than just a biographical tidbit. It is particularly important here, especially because it is most clearly in the context of his discussions of Heidegger and other more autobiographical discussions that Strauss outlines the self-consciously problematic character of his own philosophic enquiry, thus complicating the initial, naïve impression that Strauss' return to the ancients consisted only of the unproblematic adoption of classical doctrines.

Strauss insists that in the contemporary era, a "*genuine* return to classical philosophy" can be achieved only if performed "with open eyes and in full clarity about *infinite difficulties* which it entails."[35] This is to be distinguished from uncritical revival of historical dogma. "No competent man of our age would regard as simply true the complete teaching of any thinker of the past."[36] "Who," asks Strauss, "can dare to say that Plato's doctrine of ideas …. or Aristotle's doctrine of … *nous* … is the true teaching?" Though he does say that he is "inclined to sit at the feet of the old philosophers," he does not say that he is one so daring as to declare Plato and Aristotle's

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[32] Strauss, "Introduction to Heideggerian Existentialism" in *Rebirth,* 28.
[33] Strauss, "An Unspoken Prologue" in *Jewish Philosophy,* 450.
[34] Strauss, "Introduction to Heideggerian Existentialism" in *Rebirth,* 29, corrected typos.
[35] Strauss, "An Unspoken Prologue" in *Jewish Philosophy,* 450, emphasis added.
[36] Strauss, *Natural Right,* 20.

central concepts or doctrinal positions to be true.[37] A Platonist without the ideas is hardly a Platonist in any standard sense of that term. Strauss must be something else altogether. He found the non-systematic, dialogic, commonsensical approach of Plato and Aristotle to philosophizing salutary, even "if one or another of their attempted answers fails."[38] Now we are in a position to gain a full appreciation of the meaning of Strauss' return to the ancients. Strauss calls for a fresh understanding of classical political philosophy, but, of course, he is careful to qualify. "We cannot," Strauss maintains, "reasonably expect that it will supply us with recipes for today's use." Careful reading of the classics is not the source of our political redemption. At best, it can only provide us with an "indispensable starting point" for future enquiry.[39] Their "fundamental questions" are still alive for us, even if their answers can no longer satisfy us. It is, moreover, the continuity of these fundamental problems, which furnishes the conditions of possibility for the history of political thought to provide us an indispensable starting point. It is the continuity of questions, and not of answers, which yields an extra-historical framework for enquiry.[40]

Strauss' failure to fit the strong ontological straight-jacket is most visible in his discussion of what he understood the practice of philosophy to entail. Principally, his interest is in philosophy in the original, Socratic or zetetic sense of the term. Adoctrinality, provisionality, and open-endedness are essential to the depiction. Strauss defines philosophy as "knowledge that one does not know." Put more precisely, philosophy is the "knowledge of what one does not know, or awareness of the fundamental problems." All solutions to these fundamental problems, however, are themselves questionable. "The problems are always more evident than the solutions."

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[37] Strauss, "Introduction to Heideggerian Existentialism" in *Rebirth,* 34.
[38] Strauss and Voegelin, *Faith and Political Philosophy,* Strauss to Voegelin, June 4, 1951, p. 89.
[39] Strauss, *City and Man,* 11. Cf., Strauss and Löwith, "Correspondence Concerning Modernity," August 15, 1946, pp. 107-08.
[40] Strauss, *Natural Right,* 23.

Accordingly, Strauss characterizes philosophy as "nothing but genuine awareness of the problems," adding that "there is no wisdom but only *quest* for wisdom," and that the philosopher "ceases to be a philosopher at the moment at which the 'subjective certainty' of a solution becomes stronger than his awareness of the problematic character of a solution." Philosophy is for this reason "essentially not possession of the truth, but *quest* for the truth"—a quest which has an "unfinishable character." On Strauss' account, a proper appreciation for the philosophic enterprises drives us to re-examine the history of philosophy in order to gain a sense for the manifold answers which have been given to the fundamental problems, not in order to settle them once and for all, but rather in order to deepen our awareness of the human predicament. To be a philosopher, on Strauss' account, is therefore not to have a fixed set of teachings or a doctrine that one holds with a type of transcendent certainty, but rather to assume a certain posture towards enquiry and towards living and being in the world. Philosophy, on this view, is not "a set of propositions, a teaching, or even a system, but ... a way of life, a life animated by a peculiar passion, the philosophic desire or *eros*."[41] It is of especial significance here that Strauss' view of philosophy bears striking resemblance to Foucault's late description of the "philosophical life."[42]

Taking seriously the way in which Strauss described his own project and the details of his own biography, we are left with a picture not of a strong ontologist, but rather of a man struggling with Nietzsche's and Heidegger's challenge to the tradition and possibility of genuinely philosophical political reflection, while remaining attentive to the requirements of stability, continuity, decency, and order for self-reflective men and women in late modernity.

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[41] Strauss, *Natural Right,* 32, 125; "Restatement on Xenophon's Hiero" in *On Tyranny,* 196, emphasis added; "What is Political Philosophy?" and "On Classical Political Philosophy" in *What is Political Philosophy?,* 11, emphasis added and 91, emphasis added; "Progress or Return?" in *Jewish Philosophy,* 122, 131, cf., 121. Cf., *Spinoza's Critique,* 29; Strauss and Voegelin, *Faith and Political Philosophy,* Strauss to Voegelin, October 12, 1950, p. 75, June 4, 1951, p. 89-90.
[42] Foucault, "What is Enlightenment?" in EW, 1:319. Cf., however, HS, 2:8-9.

As with Strauss, so too with Voegelin. It's likely that what White finds problematic in Voegelin's thought is not only the latter's supremely condescending tone, but also his repeated references to what he calls the suprapersonal *realissimum,* transcendental or divine reality, the ascent toward essence, cosmic order, and an ordered cosmion.[43] Or, perhaps, it is Voegelin's call, in the 1930's for an extra-ecclesiastic religious renewal in order to fight National Socialism.[44] Yet, once we've already begun to speak in the equally abstruse and metaphysical language of weak ontotheology, those objections no longer seem to hold as much weight as they might have at first blush. Moreover, as we have already seen, White does not by any means object to an ontology rooted in theism simply because it is rooted in theism. He objects only to a form of theism which orients itself to the world by means of some imagined and "immaculately authoritative commands of God."[45] As we shall see, Voegelin hardly fits this description.

Like Strauss and many other Germans educated in the early twentieth century, Nietzsche was required reading for Voegelin. Like Strauss again, Voegelin took Nietzsche seriously—deadly seriously. Accordingly, in an essay from 1944, Voegelin expressed contempt for those whose primary relationship to Nietzsche could be described either as an attempt either to whitewash or to condemn the late nineteenth-century philologist-philosopher. Also abounding is his contempt for "the critic who wishes to evade the issues raised by Nietzsche" and who therefore simply refuses to take up his challenge. These readers either attempt to "overcome the consciousness of crisis by the magical method of caricaturing the diagnostician" of our times, or they dismiss the

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[43] Voegelin, *Political Religions* and *New Science of Politics* in *Collected Works,* 5:29 and 99, 130-31, 134, 136, 141, 150, 220, 224.
[44] Voegelin, *Political Religions* in *Collected Works,* 5:24.
[45] White, SA, 63-64, cf., 94.

crisis his analysis revealed by resting their weary feet upon the solid rock of their zealous political

faith in the formulae of the liberal democratic creed.[46]

Unlike Strauss, however, Voegelin's approach is thoroughgoingly historicist in that it

proceeds, at least preliminarily, on the basis of the self-conception of a given culture. The

opening lines of his most widely read work read as follows: "The existence of man in political

society is historical existence; and a theory of politics … must … be a theory of history."[47] The

science of politics that he endorses again and again is the one that follows what he calls the

Aristotelian procedure, namely one that takes the symbols one finds in one's own social

environment, surveys the variety of meanings these symbols hold in common parlance, and then

proceeds to order and to clarify the meaning of these symbols according to the criteria supplied

by an operative theory.[48] The Aristotelian procedure, so understood, conceptualizes society as "a

cosmion of meaning, illuminated from within by its own self-interpretation." For this reason, the

procedure's characteristic form of analysis always "starts from the self-interpretation of society,"

that is, from a given society's peculiar symbols of meaning.[49]

The frequent discussion of historical intellectuals gives the impression of nostalgia for some

golden age in the distant past, but this is misleading. Voegelin tells us that the various analogues

for a "ground" that have appeared in history, e.g., the Platonic *agathon,* Aristotle's *nous,* Stoic

*logos,* and Aquinas' *ratio aeterna* cannot satisfy us completely today. On his view, a "return to

the consciousness of principles" is not at all to be confused with a "return to the specific content

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[46] Voegelin, "Nietzsche, the Crisis, and the War" in *Collected Works,* 10:128, 132, 135, 147-48, cf., 133-34. The later tone of *Science, Politics, and Gnosticism* (1958) in *Collected Works,* 5:267 is comparatively harsher, referring to Nietzsche as an intellectual swindler.
[47] Voegelin, *New Science of Politics* in *Collected Works,* 5:88.
[48] Voegelin, *New Science of Politics* in *Collected Works,* 5:110, 112. Cf., *Science, Politics, and Gnosticism* in ibid., 5:295. Presumably this is a reference to Aristotle's so-called "endoxic" method. Aristotle, *Nicomachean Ethics,* 7.1 1145b2-7.
[49] Voegelin, *New Science of Politics* in *Collected Works,* 5:114, 129, 152-53, 192.

of an earlier attempt," whether it be Platonism, Augustianism, or Hegelianism, or with a "literary renaissance of philosophical achievements." All of this is precluded, owing to the historicity of human existence. Theory is bound by history, and so, the theorist is unable interpret the world from an "Archimedean point outside the substance of history." However, in contrast to a politics of the will to power or of fear, these historical attempts do, nevertheless, represent at least the type of answer that is sought. In this way, much can be learned from the earlier philosophers, even if our own starting point must inevitably be "the concrete historical situation of the age."[50]

If contented self-certainty were the distinguishing mark of a strong ontology, nothing would seem to be more distant from this than Voegelin's thought. In point of fact, the very core of Voegelin's critical polemic indicts *others* for this very problem. His critique revolves around an attempt to excavate the psychological-spiritual underpinnings of the dangerous certainty possessed by other, modern, mass political movements—i.e., totalitarianism, National Socialism, Italian fascism, Marxism, progressivism, and scientistic positivism.[51] Drawing largely upon Irenaeus' third-century depiction and also upon the early twentieth-century work of the Roman Catholic theologian, Hans Urs von Balthasar, and the philosopher, Hans Jonas, Voegelin denominates these groups as the modern gnostic revolution, thus drawing lines of continuity between putatively a-religious modern ideologies of mass, social transformation and an intellectual current within the early Church, which had—at least until the late twentieth century—traditionally been defined as a relatively undifferentiated, sectarian heresy.[52] Precisely what

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[50] Voegelin, *New Science of Politics* in *Collected Works,* 5:89, 92, 152, emphasis added. Cf., *Science, Politics, and Gnosticism* in ibid., 5:258-61.

[51] Voegelin, *Political Religions* and *New Science of Politics* and *Science, Politics, and Gnosticism* in *Collected Works,* 5:65 and 189, 221-22 and 295.

[52] I ignore here, for the moment, possible historical inaccuracy with respect to gnosticism and changes in perspective over the full course of Voegelin's career. On this theme, see Riedl, "Modernity as the Immanentization of the Eschaton."

Voegelin found so dangerous about these new apocalyptics of the modern political religions was their inner-worldly faith, which was completely resistant to criticism and thus to the disruptive influence of critical self-reflection. The new political religiosity bound the masses emotionally by means of religious-ecstatic ties to a "politically effective expectation of salvation" in the here and now, thus inspiring a sort of political-religious agitation with its own peculiarly fanatical attitude, which is characteristic of one oriented exclusively to the unthinking dogma of a believer.[53] The modern gnostic is motivated by a peculiar immanentistic parousiasm. He is characterized above all by this expectation that he can be delivered "from the evils of the time through the advent, the coming in all its fullness, of being construed as immanent."[54] His construct represents a dangerously misguided attempt at the "immanentization of the Christian eschaton," of the meaning of existence, and of the Christian idea of perfection—an attempt to bring the otherworldly, posthumous experience of the beatific vision down to earth through the establishment of a terrestrial paradise perfectly imbued with eschatological fulfillment.[55] This posture of faith directed towards fully immanent salvation leads to a dangerous suppression of questions.[56] Also, in taking the work of salvation upon himself, the gnostic inevitably aims at revolutionary destruction in order to clear the way for the new. And yet, this sort of attempt at world destruction is ultimately doomed. It "will not destroy the world, but will only increase the disorder in society."[57]

Fascinatingly, Voegelin's psychological depiction of the modern gnostic is almost exactly the same as the one the discourse of difference attributes to the strong ontologist—of whom Voegelin

[53] Voegelin, *Political Religions* in *Collected Works,* 5:29, 32, 51, 60-62, 64, 67.
[54] Voegelin, *Science, Politics, and Gnosticism* in *Collected Works,* 5:276, cf., 297-98.
[55] Voegelin, *New Science of Politics* and *Science, Politics, and Gnosticism* in *Collected Works,* 5:186-87, 189, 193, 221 and 298, 305.
[56] Voegelin, *Science, Politics, and Gnosticism* in *Collected Works,* 5:264 et passim.
[57] Voegelin, *Science, Politics, and Gnosticism* in *Collected Works,* 5:255-56.

himself is said to be a part. The gnostics are, for Voegelin, themselves too confident about the grounds of their own beliefs, and for that reason—at least in the case of National Socialism and Marxism—they pursue wholly immoderate, revolutionary political programs here on earth. Voegelin's critique seeks to uncover what he calls the psychology of experience.[58] On Voegelin's view, the world of man is characterized indefinitely by uncertainty and insecurity, which engenders profound spiritual anxiety. This phenomenon is only amplified in an age of de-divinization, which has wrenched away more traditional forms of solace from a mass of men ready to believe. The great weight of the spiritual tension required by the often cruel vicissitudes of terrestrial, human existence is simply unbearable for the vast majority of mankind, so, those of lesser spiritual stamina, who lack the pathos of existential humility, "search for a firmer foundation for their existence in this world." The psychic gain of the gnostic, intellectual projection is that it is able to speak to the psychic needs of the intellectual and of his followers. In this projection, these men hope to find "stronger certainty about the meaning of human existence." This drive for certainty is the "motive for the creation of fantasy assurances" about the meaning and direction of history and man's prospective ability to remake the world.[59] In an age of disenchantment, he worries, this pattern will prove recurrent. "The temptation to fall from a spiritual height that brings the element of uncertainty into final clarity down into the more solid certainty of world-immanent, sensible fulfillment … seems to be a general human problem."[60]

Ultimately, then, the modern gnostic claims for himself unwarranted certainty of knowledge, and that is one of his principal defects. He misunderstands the mystery of God, of creation, of

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[58] Voegelin, *New Science of Politics* in *Collected Works,* 5:187 n. 24.
[59] Voegelin, *New Science of Politics* and *Science, Politics, and Gnosticism* in *Collected Works,* 5:187-88, 191 and 309-10, 312.
[60] Voegelin, *Science, Politics, and Gnosticism* in *Collected Works,* 5:313, cf., 310.

history, of existence, and of being.[61] "The assumption that truth about the order of being ... is objectively ascertainable ... might be unfounded."[62] Upon deeper consideration, we realize that system building philosophy is foolhardy, for it requires an impossible "leap over the bounds of the finite into the perfection of actual knowledge." In contrast to more grandiose claims, Voegelin maintains that human knowledge can be had only imperfectly in the form of the *analogia entis,* modeled analogically upon some distant, unknowable order of being beyond perception and cognition.[63] This type of knowledge belongs only to "the realm of analogical-speculative deduction, and mythic symbolization."[64] In its profound wisdom, historical Christianity understood this. Owing to the Pauline account of faith, "uncertainty is the very essence of Christianity."[65] With all of this in the background, Voegelin rails against the modern gnostics precisely for their having achieved certainty about the meaning of history and for having overcome the uncertainty of faith.[66]

Like MacIntyre and like Strauss, Voegelin too is an uncertain candidate for strong ontological status, so long as fallibilism has anything to do with the category.

After these reflections, one is entitled to say that it's not clear that the strong ontologist is quite as widespread among serious thinkers as White seems to suggest, and that those select, twentieth-century intellectuals whom he expressly identifies as strong ontologists actually do not fit neatly into those categories. Moreover, it appears as though either (a) the distinction between strong and

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[61] Voegelin, *Political Religions* and *New Science of Politics* and *Science, Politics, and Gnosticism* in *Collected Works,* 5:71 and 189 and 308.
[62] Voegelin, *Science, Politics, and Gnosticism* in *Collected Works,* 5:258.
[63] Voegelin, *Science, Politics, and Gnosticism* in *Collected Works,* 5:272-73. Cf., Strauss and Voegelin, *Faith and Political Philosophy,* Voegelin to Strauss, December 4, 1950, p. 73.
[64] Voegelin, *Science, Politics, and Gnosticism* in *Collected Works,* 5:311.
[65] Voegelin, *New Science of Politics* in *Collected Works,* 5:187. Cf., Strauss and Voegelin, *Faith and Political Philosophy,* Voegelin to Strauss, December 4, 1950, pp. 73 ff.
[66] Voegelin, *New Science of Politics* in *Collected Works,* 187, 193, emphasis added.

weak ontology is not, and cannot be made, fully tenable; (b) the distinction does not do the work that White thinks that it does, and that acknowledging the contestability or fallibilism of one's basic commitments does not really differentiate adequately between strong and weak ontology; (c) both *a* and *b,* above; or (d) that the distinction lies somewhere else altogether and is not a difference in terms of manner or mode of substantive position but instead a difference of another sort altogether. This last alternative, in my view, is the most promising reading for the discourse of difference and also the most sympathetic.

Ultimately, the difference between weak and strong ontology is not a difference of substantive position, for, we have seen that those identified as strong ontologists acknowledge in explicit fashion that they take a sense of fallibilism, uncertainty, and contestability to be a central feature of the philosophic psyche. Thus, on the assumption that the distinction is tenable, the difference must be found elsewhere—not in terms of manner of mode of substantive position, but rather in terms of *mood,* or disposition.

## 8.2. The Politics of Mood—And the Conflict it Engenders

Fundamentally, weak ontology differs from strong ontology neither in terms of an openness to fallibilism, nor even in terms of the specific substantive position it reflects, but rather in terms of the mood or affective disposition involved. Emphasis is instead placed, therefore, upon the form or style of political reflection.[67] The difference between the two lies in "*how* you carry your most basic commitments."[68] The background provided by a weak ontology is one that simultaneously

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[67] White, "'Critical Responsiveness,'" 74. In the closing pages of SA, 152-53, White backtracks a good deal, writing that he realizes now that his earlier characterization was not sufficiently specific, because weak ontologists affirm a specific type of sensibility which has a substantive character to it: "an ethos of that would have us engage the strangeness of the late modern world more receptively." This backtracking fits poorly with his foregoing discussion, where the distinction between strong and weak ontology was meant to be non-substantive.
[68] White, "Weak Ontology," 14.

encourages affirmation and circumspection, assertion followed by the ritualistic unmasking of one's own pretensions. This affective disposition is simultaneously empowering and humbling. Almost entirely, the specific difference between the weak and strong ontologies is one of mood or affective disposition. This is, among other things, what White is getting at when he says that weak ontologies are not simply cognitive but also, in addition, aesthetic-affective, in that they involve a certain sensibility. What is involved is not only thinking but also feeling. As such, a weak ontology is not something of which one becomes convinced or to which one is converted. Instead, the dominant metaphor is one of cultivation, which is to say that one "patiently brings it to life by working it into one's life." It is neither a religious faith nor a rational conviction, but instead a cultivated sensibility, mood, feeling, sentiment, ethos, or disposition.[69] The idea, then, is to become a different sort of affective being. Thus, the project consists ultimately in what I call here a "politics of mood." More broadly, the project is part of the so-called affective turn within the contemporary academy.[70]

Fundamentally, as Connolly puts it, the discourse of difference is deeply concerned with the invisible, infransensible, prerepresentational sites of appraisal that operate "below linguistic sophistication, consciousness, and reflective judgment." This site is filled with thought-imbued intensities or protothoughts, which, though not extra-rational per se, are, however, irreducible to implicit thoughts or tacit judgments.[71] With these concepts, he wishes to specify the "nonconscious, culturally saturated dispositions of character that prime and narrow the range of

[69] White, SA, esp. 9-10, also 4, 11, 21, 23, cf., 116. Cf., Connolly, ID, xxx; TPD, x, xii, xiv, xviii n. 3; P, 48.
[70] See Clough et al., eds., *Affective Turn;* Terada, *Feeling in Theory;* Leys, "Turn to Affect"; Thrift, "Spatialities of Feeling" in *Non-Representational Theory,* 171-97.
[71] Connolly, WNS, 26-28.

options before conscious reflection enters the picture."[72] To speak partly in images, then, this intellectual move elevates the stomach (and the cortical organization directly associated with it) to the level that our tradition has accorded to the brain.[73] On this model, human being is a resonance machine constituted by the complex matrix of body-brain-culture.[74]

The core of the political problem, however, is that this embodied site of affect is "often invested with considerable *intensity*."[75] At a political level, this intensity can prospectively divide us. Thus, this intensity must somehow be managed or chastened, and its effects attenuated.[76]

This turn to affect is calculated to address what flies under the radar of much political philosophy today. Despite its being under-thematized in theoretical discourse, many political actors today explicitly believe, or at least behave as if, it is the case that "in crucial cases … *repugnance*" can be "the emotional expression of deep wisdom, beyond reason's power to articulate it"—to borrow the words of one exceptionally gifted representative of this strand of thought.[77] The non-liberal left's turn to affect is, in effect, an attempt to counter, on the same plane, what it perceives to be one of the cultural right's great strengths.

Ultimately in this project, man ceases to be conceptualized as *zōon logon echon* or *animal rationale,* becoming instead *zōon paizdon* or *animal ludens*—the creature that plays and laughs. Thus, Connolly enjoins his reader to "live his identity in a more ironic, humorous way," to cultivate the ability to laugh at oneself.[78] Fundamentally, White wants something similar—to

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[72] Connolly, FT, 104. These reflections are pursued further in Connolly, N. Drawing on, *inter alia,* Ledoux, *Emotional Brain;* Damasio, *Feeling of What Happens.* Cf., Haidt, *Righteous Mind.*
[73] Connolly, WNS, 174-75.
[74] Connolly, P, 57.
[75] Connolly, WNS, 27.
[76] Connolly, WNS, 35-36.
[77] Kass, "Wisdom of Repugnance," 20, emphasis added.
[78] Connolly, ID, 180, cf., 120. Cf., P, 124-25. Lombardini, "Civic Laughter" explores the role of play/laughter in Connolly and White's thought.

show what "good or felicitous play looks like."[79] However, although the commitments embodied within weak ontology are tentative and experimental, they are, White explains, not experienced by the subject in a light and transient way. Instead, they are rich and amount to much more than "air sauce and wind pudding."[80]

Both conceptually and as a politics, this approach faces a critical problem: Does the politics of mood succeed in avoiding the philosophical problems it had hoped to escape?

Ultimately misleading is the impression that the discourse of difference sidesteps the ostensive dilemmas of foundationalist thinking solely by means of its retreat into a politics of mood. The existence of seemingly intractable and interminable debate at the level of argumentative discourse and the perceived inadequacy of common human reason to resolve them inclined the discourse of difference to seek political solutions in a different sphere. But just as seemingly intractable conflict occurs in the one realm, so too does it arise in the other—at the level of affect or disposition.

Michael Oakeshott's writings should be consulted by anyone who would doubt the existence of a theoretically self-aware, late modern affect which is both fundamentally at odds with the discourse of difference's politics, and which is also philosophically defensible even on that school's own terms. Philosophically reflective conservatism, on his view, is neither a creed nor a doctrine, but instead a *disposition,* a *temperament.* The conservative, he explains, is characterized above all by his attitude towards change and innovation, and even more particularly, by his peculiar manner of accommodating himself to changes. Fundamentally, conservatism is *the* "disposition appropriate to a man who is acutely aware of having something to lose which he has

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[79] White, SA, x. White outlines the contours of this ethos at greater length in his more recent ELMC.
[80] White, SA, 10-11, 14.

learned to care for." On the view of the conservative, change is something that "can be welcomed indiscriminately *only* by those who esteem nothing, whose attachments are fleeting, and who are strangers to love and affection." Thus, the conservative exhibits a "propensity … to delight in what is present rather than what was or what may be." He "prefers the familiar to the unfamiliar … the tried to the untried." The conservative understands that every change is a threat to his identity, and for the conservative, his identity is of deep importance to him. For this reason, a conservative is characterized above all by his "strong disposition to preserve his identity." The conservative knows that "not all innovation is, in fact, improvement." Inevitably, all change "entails certain loss and only possible gain," and so he is dispositionally skeptical of all proposed, radical change, preferring instead incremental, piecemeal change mixed with every appearance of continuity.[81]

Ultimately, the conservative's dispositional preference rests upon his cultivated familiarity with, and fondness for, that which belongs to him.[82] His politics, he says, have absolutely "nothing to do with natural law or a providential order." The "disposition to be conservative … does not entail either that we should hold our beliefs to be true or even that we should suppose them to be true."[83]

Because seemingly intractable conflict occurs not only at the level of argumentative discourse, but also at the level of affect, the so-called affective turn is hardly a satisfying solution to our contemporary political problems. On the contrary, so long as we are to live together with one another without (illegitimate) violence, and if we don't all agree on matters of fundamental importance, then it would seem that we cannot avoid recourse to second order principles and

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[81] Oakeshott, "On Being Conservative" in *Rationalism in Politics,* 407-11, emphasis added.
[82] Oakeshott, "On Being Conservative" in *Rationalism in Politics,* 418.
[83] Oakeshott, "On Being Conservative" in *Rationalism in Politics,* 423.

higher levels of argumentation which are capable of adjudicating the conflict that results from the fundamentally differing affects of late modern citizens.

These difficulties inevitably play themselves out within the discourse of difference's peculiar conception of the public sphere.

## 8.3. The Cultural Revolution

Surely nothing agonistic democracy recommends appears to be conceptually impossible. The agonistic democratic project faces two empirical possibilities, and at least *ex ante* there is no reason for presuming one outcome more likely than the other. Either: (a) it remains a minority view and is generally ignored by political actors, in which case, it is largely unsuccessful; or (b) it receives a hearing within the democratic, public sphere, and is potentially successful in its stated aims. The crucial, initial question is the following: what are the actual conditions for its success; and how do the conditions of its success bear upon the ultimate meaning of the project? Answering this question, as we shall see in subsequent sections, raises yet further questions and difficulties, which exemplify problems for the ultimate success and intelligibility of the discourse of difference's political project.

Agonistic democracy presents itself as only a counterweight designed to subtly shift the political equilibrium, and this self-presentation is absolutely indispensable for the coherence of the project, given its stated aims and theoretical commitments. The question is whether it can actually remain only a counterweight and simultaneously achieve what it hopes to achieve?

Quite a bit of conceptual work is done by the civic virtue of agonistic, deep respect within the agonistic-democratic imaginary. However, deep respect is ultimately without value as an affective, democratic disposition if its practitioners never receive a hearing within the political

sphere, and it may be the case that in order to receive a hearing, some disposition altogether other than agonistic respect is in order—at least so long as it's not yet become the hegemonic political disposition governing the way in which political actors experience their own identity. And yet, the required affective disposition of the agonistic democrat encounters severe plausibility problems at the level both of individual and collective psychology, and even more importantly, at the level of rhetorical strategy.

In other registers and contexts, Connolly seems to acknowledge at least part of the problem. He refers to those occasions in which one "must fight militantly even to secure a place on the register of legitimate perspectives." In such cases, one goes to battle politically on behalf of a vision one considers to be contestable.[84] This strangely disjoined phenomenon is what Connolly calls a bicameral orientation to citizenship or what Honig refers to as the "passionate ambivalence of gothic citizenship."[85] Psychologically speaking, we must ask ultimately how plausible this model of energized zeal admixed with the inhibitory effect of radical uncertainty is? Connolly's laconic answer to this problematic formulation is only to acknowledge that it is a difficult combination and that the problem represents "a living paradox of our time."[86] Perhaps only the agonistic democrat can answer that question for him or herself whether such a Schumpeterian political disposition is psychologically possible, but what seems clear is that should such a human personality type of this sort prove possible, it is likely rare and, at least today and for the near and foreseeable future, relatively unfamiliar.

Another way to ask this question would be: is the agonistic, democratic imaginary truly able to sustain deeply important, common projects? This was Taylor's worry—that we may some day

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[84] Connolly, "White Noise," 29. Cf., FT, 124-25; P, 41.
[85] Connolly, P, 2-7 et passim; Honig, DF, 106, 121; "What is Agonism for?," 211.
[86] Connolly, FT, 10, 32.

find ourselves "living beyond our moral means," in the sense that moral sources powerful enough to sustain our tradition's most cherished, but nevertheless exceedingly demanding, commitments might increasingly lose their motivational purchase on contemporary, human groups.[87] The discourse of difference is sometimes dismissive of this charge.[88] Still, it's hard to imagine that any quasi-progressivist-inclined intellectual in a democratic age could ever fail to share this concern in the face of the political realities we confront today. As the discourse of difference acknowledges, collective action itself and the pursuit of common projects, however minimal, do in fact require some measure of consolidated fixity and cultural stability. Collective action itself presupposes that a set of norms and commonalities be privileged above others, at least within the sphere of common life. What the discourse of difference resists, however, is the tendency to naturalize these commonalities and norms.[89] Its most common strategy to achieve this end almost invariably involves its compulsive self-flagging with the sincerely felt rhetoric of contestability.

It is uncertain, however, that this is the ideal model for sustaining collective projects over the long haul, let alone for the even more difficult task of initiating reform. Some of the greatest political issues facing all varieties of progressives today all require a measure of self-sacrifice, especially in the short term (e.g., how to sustain the welfare state and the continued war on poverty in the face of mounting sovereign debt, how to address meaningfully the impending and potentially irreversible changes to our environment posed by climate change, whilst remaining cognizant of the possible deleterious effects pursuing this goal may have on job availability in certain parts of the country and consumer prices for basic goods). We can say that this problem will have been resolved if the discourse of difference can identify a really existing human group,

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[87] Taylor, *Sources,* 517.
[88] E.g., Connolly, WNS, 93; P, 3-4; "Twilight of the Idols," 135; "Pluralism, Multiculturalism," 67.
[89] Connolly, ID, 92-93. Cf, EP, 196.

past or present, which has done something good or important in the world, even when, during their own lifetime, their collective interest did not align perfectly with it or even at great cost to themselves, and that this group was motivated, at the same time, to do so by an ethical imaginary or moral source that made a claim on them, but which they also sincerely believed, in their heart of hearts, to be a contestable. Then, *and only then,* will the force of this objection disappear.

Notwithstanding the psychologically questionable image required by agonistic democratic culture and practice, one is also forced to ask how successful its own pronouncements may prove as a *rhetorical* strategy—particularly in a culture like ours in which the claims of impartiality still possess enormous rhetorical cash value. Ultimately, we would like to be able to distinguish the (justice?) claims of the agonistic democrat from what Connolly, earlier in his career, had called "special pleading … for partisan purposes"—an important distinction common within contemporary political idiom (e.g., special interests, crony capitalism) and also a distinction which his later work apparently abandons.[90] At the very least, we would like to know how those others standing within the democratic public space might be able to recognize this fundamental distinction, for presumably, a democratic audience would be more inclined to listen to one than to the other. If the vision on behalf of which the agonistic democrat fights is publicly affirmed to be contestable or if the agonistic democrat maintains that his proposals rest upon shaky epistemic ground, and if the agonistic democrat's policy proposal departs radically from the general political sensibilities of his fellow citizens at the moment of policy proposal, can one plausibly expect that the agonistic democrat will receive much of a hearing within the type of democratic

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[90] Connolly, TPD, 191. See pp. 190-98, 205, cf., 228, for a discussion of what he, in 1974, considered to be necessary in order to sustain this distinction. That the metaphor of grounding (197, 205) appears in this line of reasoning is sufficient to demonstrate that the distinction was abandoned in later work. Later, Connolly, WNS, 160 contends that the agonistic democratic sphere "does not rise above partisan identities." However, Connolly, FT, 132-33 wishes to distinguish his view from the expression of mere preferences.

public space we currently inhabit? To put it most charitably, this would seem to be a problematic rhetorical strategy.

Frequently, the discourse of difference treats this matter as a non-issue of sorts. That Connolly is, nevertheless, aware of the acute political problem that arises as a result of this tack becomes occasionally clear in select passages. For example, in a Foucauldian/Nietzschean-inflected description of the desire to punish, as it is purportedly inscribed in the current judicial-penitentiary system, Connolly wonders aloud if his analysis and policy suggestions might lead him to "forfeit contact with any political constituency powerful enough to respond to the conditions [his analysis] delineates." Ultimately, he dismisses this very real difficulty as a merely academic trap, whose conservative posture of risk-avoidance is covertly designed "to restore the appearance of necessity and stability to the practices interrogated."[91]

In other contexts, however, he assumes a different tack, revealing an awareness that this solution is not as satisfying as it appeared at first glance. This is especially manifest in his discussions of Spinoza. While Connolly recognizes Spinoza's really very wide ranging stance of toleration given his actual, historical circumstances, he nonetheless castigates him for the type of confidence he had in his own philosophic vision, with which he responded to his Roman Catholic detractors. According to Connolly, Spinoza's actual response for the universal authority of his own faith consisted only of a reply that recapitulated the logic of his Roman Catholic antagonists—a dialogic tactic which lead inevitably to a social logic of mutual castigation, with each party claiming universality for itself. Instead, Connolly tells us, Spinoza might have done better had he openly acknowledged that his political-cultural vision proceeded directly not from

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[91] Connolly, EP, 65. Cf., however, WNS, 136, 200 n. 24: "The problem ... is that ... not too many are prepared to listen even if we made progress in the diagnosis" of why it is that there is such a "huge fund of cultural resentment invested in capital punishment."

universal reason but from a contestable faith, which he happened to hold. Importantly, however, Connolly does acknowledge that perhaps this might not have been possible for Spinoza, on a rhetorical level, for it would have undermined the influence that Spinoza's philosophic position could have had. Ultimately, in Connolly's judgment, it was for Spinoza "*not politically feasible* to do so, for in that fraught context the acknowledgment might have overwhelmed Spinozism."[92]

Here is where a narrative of progressive history enters Connolly's story. He suggests that in his own day, Spinoza ultimately may indeed have been correct to insist that his philosophy rested upon universal human reason able to definitively surmount the claims of theology rather than upon a contestable faith. However, today, it has become timely to run risks.[93]

The serious question, however, is whether the fundamental dynamics of political argument have really changed in a deep way since the seventeenth century. Or put a different way: has the democratic public sphere really made considerable progress towards an agonistic one? It seems unlikely, even on Connolly's own terms. If Connolly thinks that the majority of contemporary academics are rarely quite open-minded enough to treat identity as contingent, are all too ready to normalize their own terms of deliberation, to exile and treat as dangerous those who do not remain within the confines of accepted vocabulary and presuppositions of their disciplines, and to treat postmodern discourse as heresy to be silenced and suppressed—then what grounds does he have for thinking that the discourse of difference will fare differently with politicians and/or the voting or deliberating public today?[94] This argument would succeed only on the questionable

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[92] Connolly, "Response: Realizing Agonistic Respect," 508 and n. 1, emphasis added. Cf., Brown, RA, 97. This piece is reprinted in part in Connolly, P, 19-25, though crucial language from the note has been dropped. On Spinoza, see also Connolly, "Radical Enlightenment." Connolly's interest in Spinoza is guided by the claim of Israel, *Radical Enlightenment,* that Spinoza was the chief figure in the Dutch radical Enlightenment, which was submerged by the more famous, Anglo-Franco-Teutonic moderate Enlightenment (Descartes, Hobbes, Locke, Newton, Voltaire, Leibniz, Kant, etc.).

[93] Connolly, "Radical Enlightenment," ¶ 13.

[94] E.g., Connolly, ID, xv, 39-40, 59, 68, 119, 144, 173, 221; WNS, 67; EP, 107, 109, 115, 125-26; P, 5. Cf., TPD, 225.

premise that the academy is *more* prejudiced (rather than *differently* prejudiced) than the median voter. But this seems unlikely. On Connolly's own admission, even contemporary journalists of the left completely ignore the political claims advanced by the discourse of difference.[95]

In this context, one is forced to conclude that the success of the agonistic democratic project necessarily presupposes an agonistic democratic culture, which, if at least not universally shared is at least widely enough shared so as to depart from its own originally purported minority status. However, because the agonistic democrat's understanding of personal and collective identity is still not yet widely shared, the success of the agonistic democratic project *presupposes* the displacement of much of what a large number of people and politicians in our contemporary culture *still* happen to believe about their own identities and the status of their own political commitments. In order to gain a hearing for such a position and for the widely varying voices that agonism wishes to fold into political and social discourse, a new hegemonic culture must come to the fore. "Every detachment from a particular mode of thought," Connolly writes in another context, "is also attachment to another."[96] He is absolutely correct.

The political aspirations of the discourse of difference issue forth in a distinctive, democratic cultural vision in which certain ways of experiencing identity are perforce privileged over others. Preferred are those who experience their identities in a denaturalized, de-essentialized, desanctified, ironically self-detached, contingent fashion—those whose own lived experience of identity has room for an "enhanced sense of its own contingency and relationality." Nevertheless, because some fixity of identity is crucial in order to live and act in the world, even the agonistic democratic citizen will find it necessary to treat as true or to naturalize its own lived experience

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[95] Connolly et al., "An Interview with William Connolly, December 2006," 334; "An interview with William Connolly: Interview Questions from Samuel Chambers," 329.
[96] Connolly, ID, 14. Cf., EP, 35, cf., xvi.

of identity, even should it fail to redeem a claim to intrinsic truth. Yet, absent clear and indisputable knowledge of transcendent grounds for treating their identity as somehow "reflective of being as such," the proper ethical response is to attempt to overcome this drive within oneself as much as possible.[97] In the words of Honig, the agonistic citizen is "commited to the project of denaturalizing and deconstructing concretized identities, to rousing enmity toward the orders that vouchsafe them, and to exposing the *power, violence, cruelty, and arrogance* in their resolution." This is fundamentally what it means to "live life more politically."[98] Life lived in this way represents, on Connolly's view, a contribution to freedom.[99] So understood, true human freedom consists in the capacity "to be and to become otherwise than we are." Freedom, in this sense, is a close ally of creativity.[100]

It might be the case, as Honig insists, that the affirmation of the perpetuity of contest is not "animated … by the benighted teleological belief that politically active lives are … fuller or more meaningful."[101] Still, it is as least clear that the agonistic democratic project calls upon us to live our lives a lot more politically than most of us are presently accustomed to do, and that its ultimate success is premised upon a large group of men and women actually doing so.

It is important to recognize that this view represents a wholly new, and radically unfamiliar cultural vision for many, if not most, contemporary citizens. Connolly himself ordinarily acknowledges as much. As Connolly clearly recognizes, the success of this project would certainly represent a significant shift in orientation to individual and collective identity on the part

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[97] Connolly, ID, 46, 179, cf., 227 n. 4.
[98] Honig, PTDP, 195, emphasis added.
[99] Connolly, EP, 154.
[100] Connolly, FT, 79, 145.
[101] Honig, PTDP, 14. Cf., Connolly, EP, 81. Cf., however, Connolly, FT, 191.

of the greater public.[102] Should this occur for numerous constituencies in a culture, then we can say that progress has occurred.[103] Agonistic democracy is thus a distinctive culture, which "embodies a crucial cultural disposition."[104]

In its own way, then, the discourse of difference projects its own vision of the good society. Under the discourse of difference, common purposes are simultaneously crystallized and unsettled. Citizens require determinate shape in order to pursue common purposes, but the problem for the discourse of difference is that, on its own terms, "*every* form of social completion and enablement also contains subjugations and cruelties within it." It is, thus, the task of the discourse of difference to resist the temptation to treat these common purposes as harmonious and to expose the cruelties and subjugations which they sometimes contain. Thus, in the words of Connolly, a good society would be that one that enables existential ambiguities to be "engaged and confronted, shifted and stretched," oscillating back and forth between settlement and unsettlement, thus allowing the paradox of difference to "find expression in public life."[105] This "*expansion* of diversity ... is good in itself."[106] This is what a vibrant culture looks like.[107]

Problematically, however, the goals of the discourse of difference's preferred, future public sphere seem manifestly to conflict at a deep level with the self-understanding of any number of current political-sociological groups, who would oppose it as a matter of principle; for example: (a) anyone who maintains that the government has no legitimate function other than that of the protector of voluntary, individual choices, associations, and transactions and that anything beyond

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[102] Connolly, ID, 46, emphasis added. Connolly's later suggestions that his proposals constitute only a modest shift are not persuasive. E.g., WNS, 148, cf., 62, 145, 147, cf., however, 57. Cf., EP, 39, 132.
[103] Connolly, EP, 193, 188. Cf., WNS, 187; P, 129.
[104] Connolly, EP, 153-54. Cf., WNS, 153-54.
[105] Connolly, ID, 94, emphasis added; FT, 147.
[106] Connolly, P, 6.
[107] Connolly, EP, xxix.

this is a fundamental infringement of one's right as a human being, both in terms of liberty and equality; (b) those who find the practice of deconstructing identities fundamentally disturbing and frightening; or (c) anyone who finds spiritual sustenance in their strong attachment to the way of life of their parents and grandparents, whether it be religious or otherwise. This last group might include those who wish to raise their children in a certain way that might be outside of the upper middle class, elite-educated mainstream, and it may even include those for whom it is vitally important that their own children form heterosexual nuclear families and pass along both their way of life and genetic material. With more thought and time, one might add to this highly rarefied account of political-sociological groups. Importantly, as all students of politics know, in the current configuration of the United States today, there are statistically significant populations that fit one or more of the above descriptions, and only a cloistered unfamiliarity with the world could enable one to overlook the fact that countless many reflective and intelligent men and women answer to these political-sociological descriptions. These sociological groups would inevitably be othered as a condition of the success of the agonistic democratic project.

Ultimately, the very success of the discourse of difference's project requires that the agonistic-democratic imaginary become, in some sense, hegemonic, or at least that it meet a certain threshold level of cultural hegemony. Understandably, the discourse of difference is often reluctant to say as much, but gestures in that direction can often be detected. For instance, drawing on the neo-Gramscian work of Laclau and Mouffe, Connolly dismisses the supposed antithesis of democracy and hegemony. Instead, hegemony is a phenomenon encountered in democratic politics, just as in any other form of politics, for, in any regime type, it is impossible to avoid "the predominance of some wills over others in public life." Conditions of intellectual hegemony obtain when, for whatever reason, thought is confined within a spectrum of possibility,

whether that spectrum be wide or narrow. Democracy, on Connolly's account, does not escape from this phenomenon. Democratic hegemony occurs when a coalition of democratic actors coalesce on a constellation of positions and ideas, achieve predominance within political discourse, and thereby exert considerable, almost magisterial, influence over the terms of debate in democratic politics. A hegemonic coalition exerts influence not simply through its sheer numbers and ability to carry a vote, but more specifically in shaping the fundamental alternatives and priorities of a given political culture, even on topics such as how it is that subjects are to experience their own identity.[108] Achieving a threshold level of hegemony within the culture represents agonistic democracy's condition of possibility. As a project, it simply cannot succeed unless it enfolds increasingly larger numbers of citizens.[109] If the day should ever come in which agonistic democracy became the hegemonic norm internal to our practices of democracy, it is worth considering whether or not that should be treated unambiguously as "the consensual background to our late-modern life." However, Connolly relates that he will "worry about this limit-condition only if and when its time comes," and even should it arrive, we should wish only to call it an ironic consensus.[110]

Iris Marion Young, in contrast, is even more straightforwardly candid about what it is that the discourse of difference ultimately requires. She understands politics broadly to refer to all spheres of human life which are "potentially subject to collective evaluation and decisionmaking."[111] In

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[108] Connolly, ID, 212-14, 236 n. 7; Mouffe and Laclau, *Hegemony and Socialist Strategy.* Here, Connolly, ID, 212-14, 236 n. 7, emphasis added, retreats into classical liberal language and conceptions, arguing that, despite the role that the hegemony will have in determining what will be the "fundamental alternatives and priorities of the day," democratic hegemony will neither be a complete and total hegemony, nor will it result in the liberal nightmare of minority oppression, because resisting factions will "remain effective in publicly articulating the terms of their opposition" and existing institutions will protect elemental rights of citizens.

[109] E.g., Connolly, WNS, 154, cf., 15, 71, 155, 185-86; EP, 193, 188; FT, 125, 131, 135-37, 177-78, 188, 193-94; P, 43, 48, 129; "Reworking the Democratic Imagination," 199. Cf., Honig, PTDP, 14-15, 197-98, 201 ff., 205-06.

[110] Connolly, EP, 103-04. Elsewhere, Connolly, "Rethinking the Ethos," 96 admits that he "sometimes lose[s] sleep worrying about that prospect."

[111] Young, *Justice* 9 et passim.

her own discussion of cultural imperialism—a notion which tracks very closely the Foucauldian concept of normalization—she explicitly affirms that "the dissolution of cultural imperialism ... requires a *cultural revolution,*" which is possible so long as one treats "culture as a matter of collective choice."[112] "If unconscious reactions, habits, and stereotypes reproduce the oppression of some groups, then," writes Young, "they ... should be changed."[113]

As we have seen above, the discourse of difference appears to require something on the order of a cultural revolution—to borrow Young's apt phrase. The general trajectory of the discourse of difference's argument would quickly have lead one to this conclusion.

## 8.4. The Intractable *Dēmos:* Legitimation Problems and the Rousseauian Paradox

As we have already suggested—should the agonistic-democratic project succeed, the tables on other, statistically significant political-sociological groups would have been turned, and they would find that they themselves had been othered. For the moment, the most important point is the basic recognition that these political-sociological groups are statistically significant and fervently opposed to the political program of the discourse of difference as a matter of basic principle. This recognition serves to guide our reflections in a concrete manner, enabling us to recognize what sort of shift it is that the discourse of difference is actually calling for. We'll approach the problem first from the perspective of legitimation, and next from a more concrete, empirical level of analysis.

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[112] Young, *Justice,* 124, 172, cf., 152 ff.

[113] Young, *Justice,* 150, emphasis added. Young, however, demurs a bit, recognizing not only that the "dangers to liberty are too great," and that "cultural change cannot occur ... by edict," but also that that the mass scale social therapy necessary to combat cultural imperialism thoroughly would be a "massive undertaking hard to imagine," and so she opts for the more realistic goal of consciousness raising, which involves raising self-awareness within oppressed groups that they are in fact oppressed and in what ways they are oppressed and communicating this body of knowledge to the privileged (152-55).

Principally, then, we should like to know what it is that legitimates this transformation in the democratic imaginary? Despite occasional confusion from some of Connolly's readers, the civic virtue of agonistic respect is *not* itself generated by epistemic recognition of fundamental and indefinite mutual contestability, for that particular epistemic claim is *itself* contestable, and thus there is no fundamental expectation that all democratic participants will automatically converge on this view through the providential progress of history.[114] So this solution to the difficulty is completely off of the table.

Given the opposition it certainly faces, one cannot help but wonder how any ostensibly *democratic* theorist supposes they might first legitimize this type of cultural revolution *democratically.* So long as there remains any intention of maintaining even a loose relationship between procedural democracy and the substantive ideals that motivate various types of democratic imaginaries, the problem seems close to insoluble. The democratic theorist who seeks such a cultural revolution must inevitably claim superior wisdom and seek as a leader of the *dēmos* to guide the democratic people, but, upon encountering resistance, in order to remain a democratic theorist and not transform into some other type of thinker, the democratic theorist desirous of cultural revolution must throw up his or her hands and give up. The immanently democratic theorist who has any respect for procedural democracy can appeal to no other principle beyond those by which the *dēmos* is persuaded, and the mode to be employed is thus opinion-formation through persuasive speech. But when this fails, the democratic theorist with cultural revolutionary aspirations must abandon the project, for this democratic theorist has, so long as he is to take democracy seriously, confined himself *ab initio* to these means.

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[114] For a recent example of this confusion, see, e.g., Lombardini, "Civic Laughter," 206.

Closure enacted by a democracy is, from a thoroughgoing Foucauldian perspective, indistinguishable from any other type of closure, and surely the discourse of difference in its later iterations have not denied that moments of closure arise within democratic political practice. The question is then: what legitimates the particular type of closure as embodied in the future agonistic culture? What is its own account of *democratic* authority?

Several, common historical answers to this dilemma are completely off the table for a variety of reasons. Gone is classical Marxism's solution to this problem. Marx would claim that the revolution which raises the proletariat to the hegemonic, ruling class is justified, because this class is the universal class, which is "representative of the whole of society."[115] As the bearers of a universal, egalitarian revolution, the proletariat's battle also represents a struggle on behalf of democracy.[116] This revolutionary program inevitably entails a call for the temporary dictatorship of the proletariat.[117] In practice, this dictatorship is led by a small part of the dominant class, which has defected from its own class.[118] Distrust of the authoritarian measures required by the transformation is allayed by the promise that *after* the revolution, this universal class will have abolished its hegemonic, ruling status through the final erasure of class distinctions themselves.[119] These classically Marxian solutions are, however, far removed from the discourse of difference's imaginary, not least of which because of the latter's extraordinary distrust of all universalized claims, and the fact that the working class, as such, is not its principal concern. Also gone is the idea of the common good, for, as we have seen above, its status as a meaningful (non-oppressive)

[115] Marx, *Contributions to the Critique of Hegel's Philosophy of Right* and *Economic and Philosophic Manuscripts of 1844* and *German Ideology* in MEW, 1:388-90/MER, 62-64 and 40:521/80 and 3:47/174. In contrast, Marx and Engels, *Manifesto* in MEW, 4:472/MER, 482 speak only of the immense majority.
[116] Marx and Engels, *Manifesto* in MEW, 4:481/MER, 490.
[117] Marx, *Die Klassenkämpfe in Frankreich 1848-1850* in MEW, 7:89 cf., 33.
[118] Marx and Engels, *Manifesto* in MEW, 4:471/MER, 481, translation modified.
[119] Marx and Engels, *German Ideology* and *Manifesto* in MEW 3:69-70/MER, 193 and 4:482/491.

concept has already been rejected. Also gone is a claim to represent the "authority of the better argument," which, Habermas says, has the character of an "unforced force."[120] This democratic construct, the discourse of difference views as ideological smoke screen. At best, it is justification for rule by the most articulate; at worst, justification for rule by the currently hegemonic culture, for those who defend the status quo are under no specific burden to defend controversial presuppositions of thought to which a vast portion of the population has already been successfully acculturated. What sort of claim to democratic legitimacy is made, then, by the discourse of difference?

Ultimately, an answer to our query about the nature of democratic authority within the discourse of difference is simply not forthcoming. It is noteworthy that Connolly only ever writes forthrightly of our democratic obligation to try to convince other to listen *after* the cultural revolution has already taken place.[121] As soon as we shift back to the (rotten) present, we encounter jarring juxtapositions which appear before our eyes, verso and recto, such as his simultaneous call for "a more militant democratic politics" coupled with the recognition that "we are surrounded by many who fail or refuse ... to be moved by the situation" as understood by the discourse of difference.[122] Honig's response is similar. "As critics," writes Honig, "it is our task to prepare the people for politics…. Political theorists solicit publics. And there is no justification for that."[123] She does not ask about the people who have no interest in politics so conceived, and who resent being prepared for it.

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[120] Habermas, TCA, 2:145; BFN, 306.
[121] Connolly, WNS, 93. Cf., FT, 124, 131-32; "Radical Enlightenment," ¶ 23.
[122] Connolly, FT, 10-11, cf., 40, 92-93, 95-96, 126.
[123] Honig, "What is Agonism for?," 216.

The discourse of difference gives us no principled, non-arbitrary reasons for preferring the agonistic-democratic account of the public sphere to one favored by the other groups, mentioned above, who have been othered. The discourse of difference does not appear to have any principled, non-arbitrary reason for this basic reconfiguration of political others. It is the pride of the agonistic conception of the democratic public sphere that it simply refuses to answer these types of questions. "The *why* question," writes Connolly, "is difficult to answer in advance, since it consists of suspicions and hopes that must be redeemed through positive alternatives as well as critiques."[124] But can any contemporary, sociological group who has been othered really rest satisfied with an explanation of this sort—one that makes no attempt to justify transformation non-arbitrarily?

Connolly calls this criticism a "predictable charge," and he adds even that "the point is not to deny this formal(istic) rejoinder." This "familiar objection," he says, just "misses the point." The objection is, he maintains, little more than a "ruse."[125] At times, however, he admits that this is "not a perfect answer," but he remains undiscouraged because "perfect answers are suspect."[126] At other times, he suggests only that "creative thinking is needed."[127] For the moment, let us leave this objection to the side. Let us cast aside the (possibly insoluble) question of legitimacy in a founding moment, in order to treat an even more concrete question.

The empirical-genetic account of how this cultural revolution is even possible remains mysterious or at least under explained. The violent and forcible reprogramming of Mao's China or Pol Pot's Cambodia are very clearly not what the discourse of difference has in mind, and it

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[124] Connolly, FT, 98.
[125] Connolly, WNS, 7, 96; EP, 233 n. 36. Cf., ID, 179; "Twilight of the Idols," 135-36; "Pluralism, Multiculturalism," 70.
[126] Connolly, FT, 223 n. 4, 182.
[127] Connolly, P, 126.

would be a travesty to impute this view to them, even if, there are (very) occasional moments where the discourse of difference lapses and begins to speak approbatively of applying institutional pressure upon others to induce them to work on themselves.[128]

As we have already seen, it is the culture of deep respect that ultimately sustains the agonistic public sphere, and, moreover, that this depiction does not (yet) characterize our contemporary world. The journey from point A to B is treacherous and uncertain. The discourse of difference is self-consciously aware of the problem, of the risks, and of the danger of agonistic democratic practice in a public not yet prepared for it.

In any democratic public in which the idea of the nation still functions as a regulative ideal (i.e., ours, as Connolly repeatedly acknowledges), desanctifying the common, but admittedly never universally shared, national mythos can easily result in as palpably felt black hole or constitutive lack at the fictive center of that political culture. For those who subscribe to the idea of the nation as a regulative ideal, this situation represents a "standing temptation for some bellicose constituency to occupy" the vacuum and thus give content to the idea of the nation, thus inspiring periodic drives to fundamentalization. Then the "contending claimants to the center will tear each other apart in cultural or civil war."[129] As Connolly is keenly aware, a world of subjects who are pressured to experience forced disenchantment and to learn to experience their identities as radically contingent and situational could very well generate a "reactive politics of dogmatic identity" spurred by resentment.

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[128] Connolly, WNS, 152.
[129] Connolly, WNS, 82-83, 85, 88, 95, 63, cf., 3, 8, 14-15, 39, 57, 59, 81, 84, 86-87, 90-91, 102, 112-13, 130, 144, 154-55, 173. Cf., EP, 94, 97-98, 100, 119, 167, 181-83, 93, 191-92; TPD, xv; FT, 125, 133, 136, 172-73, 180; P, 5, 27, 30; "Twilight of the Idols," 135; "Reworking the Democratic Imagination," 201-02; "Rethinking the Ethos," 94; "Pluralism, Multiculturalism," 53. The discourse of difference also knows, for instance, that even the insurgent social movements, of the sort the discourse of difference generally applauds, exhibit tendencies to naturalize what they are (e.g., to stigmatize former LBGT movement members who later take up heterosexual relationships). WNS, 60, cf., 70.

This problem elicits what Connolly refers to as his own version of the Rousseauian paradox, which is a paradox of politics as such, and "an issue … likely never to be settled definitively." The development of the civic virtues of agonistic deep respect seem somehow to presuppose a culture that prizes them and encourages their cultivation, but a culture that prizes and encourages the cultivation of such virtues seems to presuppose the development of these very virtues and also their wide proliferation within the populace. "Democratic virtue presupposes a democratic way of life, while that way of life in turn presupposes the virtues it should precede." As Connolly acknowledges democracy, as he conceives it, functions best in a political climate in which Foucauldian patterns of thought have *already* gained a strong foothold. The discourse of difference then needs, or is at least well advised, to bring about this wholly new agonistic political culture. When first introducing the problem, he insists that we bypass this paradox, as though to set it aside and to ignore it. More accurately, he later suggests that the paradox can only be resolved—or rather, artfully concealed—by means of a politics of forgetting.[130]

This paradox (or problem), even when not explicitly flagged, arises again in subtler form. For instance, during one of those rare occasions where he discusses the motive for citizens to adopt the civic virtues that agonistic democratic practice seems to require, he is forced to assume that the relevant actors will *already* experience presumptive and wide-ranging hospitality towards others as others as a part of their faith.[131] Presumably, he has in mind here the role that Christian *agapē* has played in the Christian-humanitarian-progressive imagination, for instance. However, when discussing real political problems (e.g., the prospects for a one-state solution to Israel-

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[130] Connolly, ID, 193, cf., 167; EP, 137-139, cf., xxx, 38, 80, 82, 96, 165, 217 n. 12, 228 n. 5, 192-93, 234-35 nn. 39, 42. Cf., Connolly, "Beyond Good and Evil," 372; WNS, 58, 76; P, 134-36, 182 n. 3. See also Rousseau, *Social Contract,* 2.6-7, pp. 66-72. The "paradox of politics" is pursued at further length in Honig, EP, xiii-xviii, 3, ch. 1.
[131] Connolly, P, 33, cf., 64-66. Cf., "Twilight of the Idols," 133; "Rethinking the Ethos," 98; "Pluralism, Multiculturalism," 58-59, 66, 70.

Palestine), he suggests, correctly, that "to make that project work there would have to be significant factions … who support it." In effect, there would need to be a critical mass on the ground willing to live with one another on fair and equal terms—a critical mass willing to recognize the other as deserving of their respect. However, because these conditions are currently absent, a two-state solution is to be preferred.[132] Recognition of the lesson that seems to follow from this concrete political problem completely dissolves in almost all other contexts. He prevents himself from drawing any inferences from this actual, political problem, largely because he treats politics in this part of the Middle East as an "exception rather than the rule."[133]

The problem is either ignored, treated as an exception in situations where it cannot possibly be ignored, or (more commonly) it is identified as a paradox. To identify the problem as a paradox may be accurate—at least, it's accurate for a democratic theorist hoping to legitimate radical change—but labeling it a paradox brings one no closer to solving it. The public acknowledgement that one has become "entangled in the coils of paradox" is not a panacea for serious conceptual and empirical dilemmas.[134] With his invocation of democratic paradox, Connolly ignores (or covers over?) a problem which has been well known and much discussed since at least the early twentieth century: that this peculiar Rousseauian paradox can operate—and has, in fact, historically operated—as the basis for a Jacobin logic.[135] More accurate, then, is the discourse of difference's most recent self-description: fitting are the Abrahamic and Greek notions of seer, mystic, or prophet—those, who have traditionally perceived that "time is out of joint with itself."[136]

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[132] Connolly, P, 156.
[133] Connolly, P, 30.
[134] Cf., Connolly, WNS, 42.
[135] Schmitt, GLP, 35/26. However, when he is not discussing the Rousseauian paradox at the heart of the project, he does draw attention to some elements of this Jacobin logic. E.g., WNS, 153-54, cf., 178; FT, 73.
[136] Connolly, FT, 134, 136.

The critical project of the discourse of difference rests upon a great hope. It knows of the considerable risk that its cultural experiment might "not be able to organize complex political assemblages to maintain its own general conditions of existence." Certainly, Connolly concedes that these general problems "pose difficult and dicey issues." Its future success as a project is, for this reason, said to be no more than a wager or possibility that deserves attention, and which "must ultimately be tested through experience," all the while making clear that possibility and probability are conceptually distinct terms. The project's possibility for success draws upon some moral source, which is "(*hopefully*) already there in protean form." The desired outcome is, however, neither certain nor necessary. There is no cosmic or pragmatic guarantee that things will turn out as hoped. In fact, it is openly acknowledged that "recent history in several parts of the world supports the presumption" that "*only in very rare circumstances* is it possible to craft a more multidimensional, pluralist democracy." "The discrepancies between this ideal and actuality are multiple," "the hopes and aspirations it supports occasionally stretch far beyond the realities of *actually existing politics,*" and thus, its ultimate prospects are uncertain. "The politics of becoming does not always generate positive things. Far from it." "The difficulties ... are impressive. No question about that." "The probabilities may even point in other directions." "It might break down under pressure." "It can be derailed at any point." "It may be insufficient or wither." "The outcome is uncertain." "A measure of luck would be needed." "That is part of the fragility of things." To the question as to whether this is simply too good to be true, he answers, "Yes, yes, yes," insisting, however, that the projection of a positive counterimage as a long-term aspiration will allow us to "explore the limits and needs for augmentation" of our contemporary political order. For such radical reform to be placed on such a thin reed is hardly encouraging.

Ultimately, the decision to embark on such a radical question hinges on the judgment as to whether or not the cruelty to difference operative in our culture truly does outweigh the possible and admitted dangers associated with the grand, social experiment envisioned by the discourse of difference.[137] The answer to this last set of questions is far from obvious, and it seems to be the case that quite a lot is made to hang on our being very tolerant of, and not at all averse to, risk of a very serious sort.

Ultimately, what Connolly says of Rousseau's paradox within the context of Rousseau's own writings is particularly revealing. In Connolly's judgment, Rousseau only "points to a *possible* world." There is, however,

> *no clear, historical solution* to the paradox of politics.... Its solution ... is *unlikely* to be translated into *historical actuality*.... Unless a people with a uniquely fortunate history happens to fall into the hands of an impossibly wise Legislator, the ideal itself remains humanly possible and *historically unattainable*.... To formulate the ideal ... deepens understanding of the perils of politics ... even if *the ideal is unavailable historically.*[138]

At times, Connolly allows himself to castigate others for varieties of unrealism. He insists that academics must pay attention to what he calls real politics.[139] He takes issues with Kant's universal, cosmopolitan, image of history, to the extent that it rests upon a postulate designed to preserve the general structure of the moral code rather than being tied to "the *actual empirical, historical record.*" This, he contends, is the "sore point in Kantian universalism."[140] He chides secularists for their difficulty in making sense of the "complexity ... of *actually existing ...* issues."[141] His principal objection against moderate, Hayekian neoliberalism and its "optimistic

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[137] Connolly, ID, 167; EP, 27-28, 34, 89, 223 n. 19, emphasis added, cf., xiii, xviii, xxx, 40, 94-97, 99-100, 103, 197-98; WNS, 6, 65, 82, 84, 92, 94-96, 111, 161, 187, emphasis added, cf., 5, 51, 57, 148-50, 154-55; FT, 132-33, cf., 41, 80, 137, 192-93; P, 9-10, 48, 62, 121, 127, cf., 51, 63-64, 66-67, 158-59, 183 n. 14. Cf., "Rethinking the Ethos," 94-95, 98-99; "Twilight of the Idols," 131; "Radical Enlightenment," ¶ 23; "Pluralism, Multiculturalism," 59, 70-71.
[138] Connolly, PTM, 53, 56-57, some emphasis added, cf., 49, 59.
[139] Connolly, FT, 95. Cf., Honig et al., "New Realism," 180.
[140] Connolly, FT, 115, emphasis added.
[141] Connolly, WNS, 11, emphasis added.

concept of the impersonal market," arising spontaneously without violence or remainders, seems to consist of his observation that it is actually a "utopian vision of the market" which "has never been realized anywhere." "Today," he continues, it is "too far out of touch with the world."[142] However, with his own favored democratic imaginary, he remains content with vague gestures at possibilities that are self-consciously not probabilities, dismissing the problem altogether under the drapes of paradox. Connolly is at his most honest and self-reflective when he admits that he "does not know exactly how it will get rolling."[143] It is precisely at this moment and for this reason that one becomes baffled to see the agonistic project invoked recently as an exemplar of realism in political theory.[144]

## 8.5. Stability and the Actual Prospects of Deep Respect

Still, let's imagine for the moment that the new democratic public has, in fact, come into existence and has, moreover, somehow been legitimated democratically. We encounter, nonetheless, yet further, equally important questions. Here arises political liberalism's implicit challenge to the discourse of difference. Will agonistic democratic conception of the public sphere be able to meet the challenges posed by the terms of political-cultural continuity, or what the tradition of political liberalism calls stability? Will agonistic deep respect prove sufficient for maintaining and sustaining a stable society—even on its own terms? If not—then how and in

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[142] Connolly, FT, 70-72.

[143] Connolly et al., "Interview with William Connolly, December 2006," 321.

[144] Galston, "Realism in Political Theory," 386-87, cf., 396, identifies Honig, Connolly, and Mouffe as being among the charter members of a "coherent and formidable dissenting position" of realism in political theory. Baderin, "Two Forms of Realism," esp. 142 (critically) treats Honig et al. as a distinct sub-species of realism, which she calls displacement realism. Almost in response, Honig et al., "New Realism," 179, 201, 203-05, cf., 190, accepts the label, albeit ambivalently, preferring to speak only of agonistic realism. Animated by a desire for a future worth having, this alternative realism is ambitious and idealistic. Even more minimalistic than the faux minimalism of other purported realists, it "takes nothing for granted, not even the 'real.'" Instead, it "deconstructs the binary between artifice and [reality] while nonetheless avoiding the fall into some sort of idealist rejection of the real." See also Markell, Review of Philosophy and Real Politics, esp. 176.

what way does the discourse of difference differ from political liberalism when, as it must, it is forced to deal with the problem of political stability, and thus to attempt to articulate its conditions of possibility from the point of view of real, discrete human beings, who are, as citizens, the stuff of political life?

The (often times) tacit presupposition usually lurking in the background of the discourse of difference, seems to be the presumption that increased discussion and the politicization of political-cultural issues hitherto relegated to the private realm or hidden behind a veil of universality or neutrality will not only bring about a more humane, more tolerant, more accepting culture, but that collective projects of the most demanding sort and cooperative arrangements can also be sustained throughout the process, and that this process can be helped along by somehow encouraging, but never dictatorially mandating, the cultivation of the civic virtue of deep respect—a civic virtue, moreover, probably unknown in historical cultures, including our own. The success of the discourse of difference's vision for the future democratic political order rises and falls with this set of assumptions and hopes.

This leads to a deep tension at the heart of the discourse of difference's project for its future, democratic, public culture. Simultaneously, this school seems to exhibit signs of a profound optimism and also of deep pessimism. On the one hand, they exhibit a sort of almost unwavering optimism that cooperation will issue forth from neo-Nietzschean, agonistic democratic deliberation among citizens, but, on the other hand, profound pessimism shines through in the outright rejection of the idea that some sort of common purpose or collective self-understanding might be profitably put forward as a regulative ideal for a collective body of citizens.[145] This is its

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[145] See Spragens, *Civic Liberalism,* 102.

self-described "cheerful pessimism" (Connolly) or "cautious optimism" (Honig).[146] But is the cheerful pessimism or cautious optimism, inflected in this particular way, really warranted?

One (admittedly uncertain) metric for judging the human possibility that the hitherto unknown civic virtue of deep respect will be able to sustain a stable, more humane, more tolerant, more accepting culture is to look at the actual character of academic debate as practiced by those proposing that we ourselves assume this hitherto unknown civic virtue. Certainly, the discourse of difference is absolutely correct to insist that its own claims "must be assessed on their own terms." For this reason, it simply will not do to denounce the school as a cadre of nihilists, amoralists, relativists, decadent aestheticians, or irrationalists.[147] (Also, to put it simply, this charge is factually incorrect.) This practice, of attempting to treat others with whom we disagree on their own terms, would seem to be a basic requirement for any academic who wishes to engage in a practice of deep respect, and it's generally commendable for all others besides.

Certainly, from time to time, the discourse of difference does engage critically and at length with other contemporary intellectuals, with whom they disagree, and this is where the discourse of difference is truly at its best.[148] And yet the very serious counter-accusation of caricature is, at other times, also quite palpable.[149] This observation has, perhaps, a theoretical-methodological

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[146] Connolly, EP, 29; Honig et al., "New Realism," 180-81, 203. At times, Connoly dismisses the judgment as to whether a view is optimistic or pessimistic as a passive, spectatorial stance. E.g., Connolly, FT, 41, 181; P, 10, 158-59, 183 n. 14, cf., 47-48; "Rethinking the Ethos," 101. Though he never cites her in this regard, perhaps he is drawing here on Arendt, *On Revolution,* 42-43, who considers theoretical spectatorship to be a fallacy, though she hardy explains in what sense she means this. Elsewhere, he contends that "standards of what counts as an instance of optimism and of pessimism are already entangled in a set of prior convictions concerning the character of the good life and the range of possibilities within which it can be sought." EP, 87.

[147] Connolly, EP, 25-26, cf., 125-26, 190. Cf., P, 5.

[148] E.g., Honig, PTDP, treats Sandel and Rawls at length; Connolly, "Taylor, Foucault, and Otherness" treats Taylor; ID treats Sartre, Kateb, and Taylor; EP treats Walzer, Schumpeter, and Taylor; WNS treats Habermas, Rawls, and Kateb; FT treats Friedrich Hayek; P treats Strauss.

[149] Taylor, "Overcoming Epistemology" in *Philosophical Arguments,* 18. In a discussion of Rawls, Connolly, WNS, 66 admits that he exaggerates slightly. Cf., Connolly, FT, 16. FT, 13 writes that "some readers ... may contest the accuracy of the report on neoliberal ideology. Fair enough."

basis. Political theorists, it is said, may participate unwittingly in the perpetuation of the normalizing society. The tell tale signs, however,

> are not typically presented through explicit argumentation, but through the persistent failure to contest or problematize operational practices of normalization and abnormalization. You can often recognize an intellectual's place in the politics of normalization by ascertaining where he or she stands on the strategies of deconstruction and genealogy.[150]

The logic of the claim, then, is that anyone who is not a Foucauldian or Derridean is *eo ipso* a participant in the problem that needs to be solved. Exaggerating to some degree for the moment, for the purposes of effect, the logic seems to entail that you don't need to read very carefully anyone with whom you disagree, for you can simply look at the index at the back of the book for a set of familiar names to determine whether or not they have anything worthwhile to say. It is not necessary to listen to others if you already know that they are wrong. Instead, you might simply dub them tone-deaf and pass them by.[151] But if this is what happens (all too often) in the rarefied space of academic community, what will happen in the messier world of concrete politics?

Let us shift gears now to the world of actual (as opposed to academic) politics. The discourse of difference is absolutely correct that public intellectuals advocating deep respect "should lead the way in setting the example."[152] Yet, the promise often goes unredeemed, as can be gleaned from a brief rhetorical-textual analysis. Traces of a thoroughly dismissive attitude towards anyone right-of-center are not difficult to find. It appears in fits and spurts upon the written page. From its new position of hegemony, agonists promise to "*tolerate* spaces for fundamentalisms to be," so long as these fundamentalisms do not themselves seek to contest the new equilibrium through

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[150] Connolly, EP, 91, cf., 189. Cf., "Pluralism, Multiculuralism," 65-66.
[151] E.g., Connolly, WNS, 10, 26.
[152] Connolly, P, 47.

a projected "universalization of what they are."[153] Given the discourse of difference's antipathy for mere tolerance, it is telling that tolerate is the italicized word Connolly uses to describe its practice towards its own others.[154] Just how far this toleration actually goes is hard to say, but its limits are illustrated in Connolly's brief discussion of abortion. While he calls on agonistic democrats to show "*respect* for the way the position one opposes is articulated," there can be absolutely no doubt where his project ultimately stands. His text reads: "abortion cannot be proven to be murder."[155] Tellingly, he does not pause to add that abortion also cannot be proven to be an innocent, personal choice—a conclusion which also seems to follow with apodictic certainty from the way in which he structured the issue. Elsewhere, Connolly asserts that the agonistic democratic citizen, who does not seek surety of his own identity is most worthy of his respect. Although he does not wish to punish others for living and experiencing their identity in another way, he does say that he will actively strive to convert them, and thus to try neutralize any political ambitions they might have that stem from their immodest confidence in their own identity and the privileged status of own way of life.[156] And yet conversion is merely the theological cousin to a political category much despised by the discourse of difference: assimilation. It's quite a stretch to construe attempted conversion as a practice of deep respect. In addition, we may ask, are the "shrill," "right-wing talking heads" such as Rush Limbaugh, Glenn Beck, Sean Hannity, or Bill O'Reilly respected, or are they merely tolerated? What of the "hypermasculine urban cowboys who drive pickup trucks and listen to" them?[157] The hill-billy-esque depiction, and the implications of rubish simplicity embedded in the description, leaves at

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[153] Connolly, EP, 203 n. 13.
[154] E.g., Connolly, EP, 92; ID, 43.
[155] Connolly, EP, 130.
[156] Connolly, ID, 120. Cf., however, WNS, 159, 186.
[157] Connolly, EP, 114; FT, 33, 203 n. 1. Cf., WNS, 108.

least this reader skeptical. Connolly finally shows his cards when discussing what he calls the evangelical-neoliberal resonance machine purportedly hegemonic in America today. "The problem," he contends, "is only that all these parties embrace the *wrong* ethos"[158]

In practice and despite much talk about ambiguity and complexity, the discourse of difference seems sometimes to practice an almost scandalous level of reductionism in its level of engagement with present day political debate—a reductionism irreconcilable with standard and colloquial understandings of respect. Let one example suffice: Surely, one of the greatest problems within our contemporary political economy is the dwindling number of decent job opportunities available to citizens.[159] Of that there simply can be no doubt. However, the style of argumentation deployed by the discourse of difference would appear to suggest that the solution to this problem is continually frustrated by evil men (let us call them Republicans) who make up a large portion of the nation's political elite. In a politics of upward identification, these evil men receive support from "the marginal members of the [white] middle class," and especially from those with macho tendencies. The wish of these men to "protect [their] fragile sense of identity" in an age of dislocation and emasculating disempowerment fuels their politics of resentment. This is what actually motivates their collective desire to punish racially marked urban constituencies. Thus, these evil men and their supporters build more prisons and defund public education and other features of the contemporary welfare state. This whole charade relieves pressure on the state to create jobs in the inner cities through public programs.[160] If you know that the outcomes of contemporary, electoral politics are often decided by ill-informed undecided voters; and if you

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[158] Connolly, FT, 68, emphasis added, cf., 71. The theme of the resonance machine is first developed at greater length in CCAM.
[159] Connolly, EP, 66, cf., 113, 129.
[160] Connolly, EP, 42 and ch. 2 generally; PTM, 53, 55; WNS, 103, 110; FT, 89, 93, 117.

know that what motivates most of these evil men and their supporters, who listen to the right-wing media, occurs principally on the visceral level, and that they are simply too stupid to realize that they are "manipulated … to contradict [their own] self-interest"; and, if you know, that factual correction rarely resolves the dilemma, and if you know that the puppet masters always speak in coded language, and they oppose the rapid growth of the welfare state, principally because they resist extending benefits to racial minorities—then, you know that you do not ever really need to attend to what they actually say, or to how it is that they understand themselves.[161]

It is seriously questionable if this (omnipresent) narrative represents a practice of deep respect, as the discourse of difference purports to understand that term. It's at least certain that it falls terrifically short of the attitude of "mutual respect" enjoined by a competing school of democratic theorists. On this alternative, deliberative view, mutual respect requires that dialogical partners "acknowledge the moral status of the positions they oppose." In so doing, they enable themselves the possibility of recognizing that "an opponent's position is based on moral principles about which reasonable people may disagree."[162]

I do not draw attention to all this in order to suggest that the discourse of difference is dangerously wrong-headed in its dismissiveness, nor do I wish to suggest that the path to our political salvation is paved with deliberative conversations. That is completely besides the point. I draw attention to this so as to suggest that its claim to practice deep respect strains all credulity.

In fact, the impression that one has in reading the discourse of difference is that they have no intention at all of dialoguing with the median voter in America, but instead, only with other academics and activists, and then, only with a certain type of academics and activists. This is not

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[161] Connolly, FT, 180, 186-87; P, 8. Cf., WNS, 133.
[162] Gutmann and Thompson, *Why Deliberative Democracy,* 79, 81-82.

a fatal defect of the theory, per se. Texts and arguments can surely have real effective force in the world, even when addressed to very narrowly circumscribed audiences. *The Anarchist Cookbook* and the Gospel of Mark are two splendid examples. But having such a narrowly circumscribed audience is surely a problem for any conception of politics that wishes to bring about a brighter future and simultaneously presents itself to the world under the mantle of democratic theory.

Understandably, the discourse of difference is disinclined to grant too much credence to the proposed need for meaningfully conceptualizing the possibility of stability in political theory. Honig treats it as a covert or unintentional invitation to discipline subjects, and thus as a recipe either for tolerating or ignoring evil.[163] But, in truth, it is not a political theme that can be completely ignored. The discourse of difference's actual response to the problem of stability becomes most manifest whenever it addresses in explicit detail its (negative/critical) relationship to the political liberal project. Here, at this juncture, we are forced to ask whether there even is, at the end of the day, a functional difference between the discourse of difference—at least in its most self-aware forms (e.g., Connolly)—and the Rawlsian political liberal project?

As we have seen above, the discourse of difference eschews general consensus and thick agreement, and this disavowal stands at the very core of its critique. However this may be, within Connolly's theory of politics, the work done by consensus within the political liberal project is functionally replaced by the practice of deep respect, in at least the minimal sense that it performs the regulatory work that consensus does in more liberally-inclined contemporary theories.

However, in other writings, at odds with the general thrust of his argument, it seems as though not only is quite a bit more smuggled covertly into this ethos than mere deep respect, but also that Connolly draws so close to the Rawlsian conception of overlapping consensus as to suggest that

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[163] Honig et al., "New Realism," 194, cf., 202. Cf., however, Connolly, WNS, 58.

there is actually very little in the way of functional difference between the two conceptions of political order. Correctly, Connolly argues that a positive ethos of politics is required. In order "to support … robust pluralism … an ethos that emulates or replaces the overlapping consensus" is needful.[164] Thus, when he treats the basic terms of democratic cooperation, he begins to insist that democracy has minimal values, including, but not limited to, the presumptive respect for democratic dignity, participation, electoral procedures, the rule of law, and the practice of rights. At this juncture, and in order to support the weight of these contentions, he is forced to retreat into what he calls the "overlapping consensus … reworked," in which "constituencies share overlapping commitments to each other and to a set of procedures, but this sharing now take the form of a general ethos negotiated between constituencies honoring a variety of moral sources."[165]

Upon closer inspection, his differences with Rawls' overlapping consensus begin to appear somewhat tenuous. Rawls had written, of the overlapping consensus, that "all those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides."[166] Politically liberal citizens reach within their own comprehensive, metaphysical doctrines. In so doing, they are able to provide the bedrock or substrate of that which consensually overlaps in the political liberal project. But, in the concrete, Connolly calls effectively for the very same thing, though under a different sort of nomenclature and with modifications that, upon closer inspection, make little to no functional difference, so long as one remains attuned to patterns of exclusion. It is in this sense that we can

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[164] Connolly, "Twilight of the Idols," 130
[165] Connolly, WNS, 87, 92, 94.
[166] Rawls, PL, 147.

best understand Connolly's claim that his "pluralist/pluralizing ethos … rests … upon a *translation* of the Rawlsian problematic *into new terms*."[167]

Connolly calls for a "multicultural difference and interdependencies across several overlapping dimensions, where no single source of morality inspires everyone and yet where the possibility of significant democratic collaboration across multiple lines is very much alive." This would be a politics in which "multiple constituencies ... bring chunks and pieces of their faiths with them into the public realm." So far, this seems almost indistinguishable from Rawls. Two changes stand out, however. First, Connolly replaces Rawls' preferred term (consensus) with the idea of a negotiated ethos; and secondly, he eschews reference to mono-secular reason, which he takes to be the twin of monotheism. For this reason, no references can be found in Connolly's account either to public reason or to reasonableness.

However, the functional difference carried by Connolly's two rhetorical alterations to the political liberal project remain uncertain, especially if, as I suggested earlier, one remains attuned to the operative logic of exclusion. Because Connolly concurs with Rawls in demanding that every faith give up its claim to constitute "the authoritative center around which state politics rotates," Connolly effectively reinscribes something like a private-public distinction back into his politics, notwithstanding his skepticism about the liberal tradition's assumption of the viability of fully privatized religion. He justifies this by calling it a minimal concession—a sacrifice that must be made upon the altar of contemporary politics.[168] He might or might not be correct in this claim. That point is completely immaterial for my present purposes. What stands out from this

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[167] Connolly, "Twilight of the Idols," 134, emphasis added.
[168] Connolly, P, 60; "Pluralism, Multiculturalism," 57-58. Cf., FT, 138-39.

comparison, however, is the fact that the logic of exclusion operative in both the political liberal project and the discourse of difference is identical, thus bespeaking a functional equivalence.

One is forced to conclude that although the discourse of difference has ably highlighted weak spots in the political liberal project, they have not succeeded in truly moving beyond its own conceptualization of political order and stability.

## 8.6. *Un dramma giocoso:* **The (Redemptive) Tragic View of the World**

Finally, and even more to the point, is the discourse of difference ever able to intelligibly redeem what amounts to an implied promise of mundane redemption in a world disenchanted? Today, we live in "a world governed by no prior design."[169] Thus, the discourse of difference promotes the tragic view of the world, which actively resists the claim that "the world, ... in the final instance, must be *for us* in one way or the other."[170] We must therefore strive to "overcome existential resentment against the contingency of life."[171]

But can the discourse of difference authentically make this claim? Does the discourse of difference truly abide within this view of the world? What, in truth, is the authentically tragic view, especially one within the parameters so described? Is it the one that accepts the possibility that remainders and closure may be a necessary injustice of human culture and politics (Nietzsche)? Or is it the one that resists this conclusion, in the manner practiced by the discourse of difference, however ambivalently and despite its occasional hedging?

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[169] Connolly, EP, 190.
[170] Connolly, EP, 33, cf., 198; ID, 30, cf., 169, 183. Tragedy and the tragic are also the terms Connolly, WNS, 122; FT, 107, cf., 174-75, uses to describe any "social practice that is both indispensable and inherently problematic" and the rejection of the idea of some "steady historical progress toward an identifiable good." Cf., Markell, *Bound by Recognition,* 177: "One of tragedy's lessons is that some conditions are beyond our power to transform."
[171] Connolly, WNS, 45.

If the world is not for us in one way or another, what precisely is the semantic content of the expression "*unnecessary* violences and exclusions?"[172] What, moreover, is "*undeserved* suffering?"[173] *These* are the fundamental, bedrock concepts of the discourse of difference. *These* profoundly unsettling thoughts are what motivate the project. *This* is what the discourse of difference hopes to reveal to us. This sort of recognition provides the incentive for action.[174] These are the things thought to be in need of redress.[175] We are said to be, as a culture, "too tone deaf to muffled cries of *arbitrariness.*"[176] We are reminded that "no constellation of identities ever *deserves* to define itself simply as natural ... [or] complete."[177]

All of these observations are, of course, true, but only truistically so. More importantly, nothing at all follows from this set of observations. First of all, for these terms even to remain meaningful, we should have to know how to identify *necessary* or *deserved* injuries, violences, and exclusions, or, failing that, at least to have some confidence that such things did actually exist. Yet within the thoroughgoingly Nietzschean, tragic view—one even more thoroughgoing than Nietzsche's own—there really is no such thing. There is no force of necessity or desert inscribed in nature, our way of life, history, reason, or language. There is no providential design. There is no redemptive promise of reconciliation at the end of time. There is no social configuration without loss. We have, therefore, as much reason to believe as to doubt that someday all men will becomes brothers. We have no more reason to suppose than to mistrust the prospect that every person's proposed life plan will harmonize seamlessly with every others'. Necessary and unnecessary, deserved or undeserved injuries—these are categories that do not

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172 Connolly, EP, 128, emphasis added, cf., xxx, 34, 39, 192, 195. Cf., WNS, 17, 87, 146, 158; P 29.
173 Connolly, EP, 171, emphasis added, cf., 194. Cf., FT, 129.
174 Connolly et al., "Interview with William Connolly, December 2006," 312.
175 Connolly, FT, 135.
176 Connolly, EP, 191, emphasis added. Cf., WNS, 59.
177 Connolly, EP, 188, emphasis added.

exist. Injuries either *are* or they *are* not. Never is their occurrence attended by some compensatory knowledge that they were undeserved in the eyes of some omniscient spectator of our lives. Life is but a walking shadow. *This* is the authentically tragic view of the world. The inference that because "nothing is fundamental…. Therefore, almost everything counts for something" is a *non sequitor* in grand style and of the highest order.[178]

These ultimately are the fundamental antinomies of the discourse of difference. From this vantage point, we can safely conclude that Foucault—not unlike Nietzsche—left a conception for a future politics undeveloped not out of weakness of insight, nor because of a failure of imagination, nor because of any purported academic division of labor, but, instead, out of great wisdom.

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[178] Connolly, EP, 40, ellipses in the original. Re-quoted in "Rethinking the Ethos," 99.

## III. The Reactionary Politics of Meaning in an Age Disenchanted: Carl Schmitt

## 9. Reading Carl Schmitt; Why Bother?

Here, in this Part on Carl Schmitt and the reactionary politics of meaning, I first confront head on Schmitt's controversial political affiliations and explain his ideal-typical value for this study (ch. 9). Thereafter, I reconstruct the motivation for, and the general outlines of, his critique of liberal institutions (ch. 10). Finally, I develop and critique Schmitt's account of sovereign authority (ch. 11).

This study is principally concerned with Schmitt's Weimar era works. Other works are discussed incidentally and principally only with regard to substantive shifts in his thought after 1933 and then again after 1945/50, and only to extent that these later shifts have sometimes obscured the meaning of his earlier work.

In 1958, it was still possible to write that Carl Schmitt was not so well known "to the wider public."[1] However, just under four decades later, one commentator could correctly observe that Schmitt had become a "classic."[2] Despite his new found status, interpreting the work of Carl Schmitt is a bit like treading lightly through mine fields of moral, political, and intellectual explosives. All this has not, however, slowed the charge of foes, weakened the defensive posture of friends, nor given leave to those caught in between to depart the field unscathed. All that said, we stand today in the midst of what one might accurately describe as a Carl Schmitt renaissance. How is such a thing even possible?

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[1] von Krockow, *Die Entscheidung,* 1.
[2] See Böckenförde, "Auf dem weg," 35.

Whoever seriously explores Schmitt's thought must begin by explaining and justifying the venture. Anyone who believes that Schmitt's writings merit attention, and that his critique warrants careful consideration, if only to be dismissed in the end—must face his personal and political history squarely, and thus steer clear of the facile and intellectually unpromising way-out of a so-called "deconstructive reading."[3]

The first and perhaps the most serious controversy surrounding Schmitt's body of work is his political relationship to the Nazi Party (NSDAP). By mid-1933, Schmitt had thrown his lot in with the NSDAP, to his own enormous professional benefit, especially between the years of 1933 and 1936. In exchange for their patronage, he contributed his academic stardom to the regime's legitimacy by cynically arguing on behalf of the regime's legality—in clear contravention of earlier expressed legal views. Moreover, he published several, particularly caustic remarks on the Jewish question—despite the fact that race did not appear to have been a topic of much interest to him in earlier published writings (as we will in more detail later in chapter 8) (§ 9.1).

Schmitt's Party membership raises the burning question of his relationship to the "conservative revolution," which sought the overthrow of the Weimar constitution. As we shall see, Schmitt's relationship to that movement was tenuous at best. He was in fact an (idiosyncratic) defender of the Weimar regime, although hardly a liberal democrat of deep conviction. More sympathetic commentators often speak of Schmitt's "opportunism" and "lip-service" to the regime, and while there is indeed a kernel of truth to this claim, it should not obscure from view Schmitt's basic, intellectual consanguinities with the then-developing regime. Throughout his earlier career,

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[3] Derrida, *Politics of Friendship,* 107 n. 4, cf., 83-84, 140.

Schmitt evinced a keen interest in Italian fascism, and his own Weimar thought often offers "authoritarian" solutions to liberal problems (§ 9.2).

In light of Schmitt's sordid history, it is perplexing that he is read so avidly today, especially by the non-liberal left. The present study's interest in Schmitt's body of work is generally different from the more conventional interest in his writings. His contrast with the political liberal project and the discourse of difference is especially illuminating for the present study. He shares with earlier critics of the political liberal project a quasi-Hegelian background of *Sittlichkeit* or ethical life, though his expression of this view is far more radical. Moreover, he also shares the core, pluralistic ontological presuppositions of the discourse of difference, and yet, his politics couldn't be more different (§ 9.3).

## 9.1 *L'Affaire Carl Schmitt:* **1933-1945**

After the war, Schmitt would declare, in conversation, that he "ha[d] drunk the Nazi bacillus, but it did not infect [him]."[4] Ultimately this claim does not bear scrutiny. The story of Carl Schmitt between the years of 1933 and 1945 is a deeply disturbing one. If it were not for his keen acumen, unquestioned brilliance, lively creativity, gripping prose style, and his lifelong ability to cultivate admirers and students across the political spectrum, Schmitt would have long ago been consigned to the dustbin of history. He certainly was no casual fellow traveler during the NSDAP era. Schmitt performed numerous, scholarly functions which legitimated the regime, and in exchange for his support, he benefited handsomely. In this regard, he bears comparison with another intellectual giant of the Weimar period, Martin Heidegger, who had been tarred for his

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[4] Per Pieper, *No One Could Have Known,* 176. Here Schmitt compared himself to the nineteenth-century chemist, Max Joseph von Pettenkofer himself, who made a similar (erroneous) claim with regard to his swallowing a cholera-contaminated cocktail.

relationship to the NSDAP, though it paled in comparison with Schmitt's.[5] Between 1933 and

1934, Schmitt was made Prussian State councilor, assumed a chair of law at the University of

Berlin, and became editor of a prestigious, legal journal.[6] Any interpretation of Schmitt's work,

that is not constantly alive to these elements of his biography, is not only reckless, but falsifying.

The general outline of Schmitt's acts of collaboration is well enough known that it will suffice

to recount highlights of the most egregious.[7] His blameworthy acts of collaboration fall roughly

into two categories: (a) his defense of the legality of the NSDAP revolution and some of its

subsequent crimes and (b) his increasingly vitriolic anti-semitic outbursts after 1933. For these

and other reasons, Schmitt's former student, Waldemar Gurian, dubbed him the "Crown-jurist of

the Third Reich."[8]

Schmitt's public support of the NSDAP took many forms. In April, 1933, he defended the

legality of the Enabling Act, which effectively made Germany a one-party state. "The new law,"

he writes, "is … an expression of the victory of the national revolution.… The contemporary

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[5] Both men joined the Party on May 1, 1933. Earlier, on April 22, 1933, Heidegger had sent Schmitt a letter encouraging him to join the party as he himself planned to do. (Meier suggests that this oft-cited letter does not in fact exist, though Bendersky claims to have a copy in his possession, and the catalog of the literary estate suggests that there are, in fact, two letters from Heidegger in 1933.) Later, on August 22, 1933, Heidegger wrote to Schmitt, asking him cooperate at the University of Berlin with the NSDAP's policy of educational reforms. Heidegger's NSDAP membership number was 3125894; Schmitt's, 2098860. See Bendersky, *Carl Schmitt,* 203-04, 203 n. 26, 289; "Expendable Kronjurist," 314, 325 n. 21; Safranski, *Martin Heidegger,* 241; Strong, *Politics Without Vision,* 219-20, 266; Meier, *Lesson,* 133-34 n. 22; van Laak und Villinger, ed., *Nachlass Carl Schmitt,* 75. The German and an English translation of the August 22, 1933 letter are printed in Heidegger, "Heidegger and Schmitt."— For generally critical voices with regard to Heidegger, see Marcuse, "The Struggle against Liberalism in the Totalitarian View of the State" in *Negations,* esp. 31-42; Adorno, *Jargon of Authenticity;* Löwith, "Political Implications of Heidegger's Existentialism"; Strauss, "Introduction to Heideggerian Existentialism" in *Rebirth,* 27-46; Habermas, "On the Publication of the Lectures of 1935"; "Work and Weltanschauung" in NC, 140-72; "Martin Heidegger: The Great Influence" in PPP, 53-60; PD, 131-60; Farias, *Heidegger and Nazism;* Faye, *Heidegger;* Gillespie, "Martin Heidegger's Aristotelian National Socialism"; Sheehan, "Heidegger and the Nazis"; "Normal Nazi"; Wolin, prefaces in *Heidegger Controversy;* Rorty, "Taking Philosophy Seriously." For more sympathetic defenses, see Arendt, "Martin Heidegger at Eighty"; Derrida, "Philosopher's Hell."
[6] See Bendersky, *Carl Schmitt,* 205-06, 212.
[7] For further background, see Bendersky, *Carl Schmitt,* 195-273 (chs. 10-12); Schwab, *Challenge,* 101-43; Rüthers, *Carl Schmitt.*
[8] Gurian, "Carl Schmitt," 52.

government wishes to be an expression of the nationally unified, political will."[9] Between 1933 and 1934, he also defended the *Gleichschaltung* laws, which further centralized the NSDAP's power.[10]

In an extended pamphlet published in 1933, Schmitt argued that the revolution in Germany had proceeded "legally," despite the fact that this appears to be a direct contravention of the anti-revolutionary constitutional theory he had developed earlier.[11] (We will return to this theme in the next section.)

Other public utterances he made legitimized other heinous NSDAP crimes. Following a country-wide book burning in May 1933, at German universities, Schmitt denounced the German-speaking, emigrant intellectuals, who were critical of the NSDAP, writing that they "never belonged to the German folk" nor to the "German spirit." "They are," Schmitt declares, "spit out of Germany for all of time."[12] In August 1934, Schmitt wrote an infamous article defending the bloody, sweeping, extrajudicial, intra-party NSDAP purge known as the "Night of the Long Knives." "The Fuhrer," writes Schmitt, "protects the law from the worst misuse, when he, in the moment of danger, produces law by virtue of his leadership as the highest supreme judge.… The true Fuhrer is always also a judge."[13]

Today, Schmitt's well-documented NSDAP-era anti-semitism has become one of the greatest sources of controversy surrounding his work. As early as 1933, Schmitt took a stab at Friedrich Julius Stahl, the nineteenth century constitutional theorist, who was an assimilated Jew, baptized as a Lutheran. "This conservative man," writes Schmitt with a sarcastic tone, "changed his faith

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[9] See Schmitt, "Gesetz zur Behebung der Not von Volk und Reich," 456, 458. Cf., SBV, 7/6.
[10] See Schmitt, "Das Gute Recht," 301-03; R, esp. 9.
[11] Cf., Schmitt, SBV, 7-8/5-7 with VL, 5/61, 20/74, 26/79, 106/153, 177/214-15, cf., 103/151, cf., however, 92 ff./141 ff. Cf., "Das Gute Recht," 302; Nachwort in LL, 345/95.
[12] See Schmitt, "Die deutschen Intellektuellen," 323-25.
[13] Schmitt, "Der Führer schützt das Recht" in PuB, 228.

and his folk, changed his name, and thereupon taught the Germans about piety, continuity, and tradition."[14] In that same year, Schmitt began to develop prominently in one of his pamphlets a notion of "similarity of type," which he tied explicitly to "race."[15] He does this despite the fact that—with only two noteworthy exceptions—the category of "race" had made absolutely no appearance in his thematic discussions of social homogeneity in his two most important Weimar period writings concerned with this topic.[16] As early as 1934, Schmitt began to allude to Jews in a critical fashion, though only by means of circumlocutions, i.e., as a "people who exist only in 'law.'" He treats their "type of thought" as legalistic, and he labels their influence on the German legal tradition—along with Roman law and post-Revolutionary French thought—as "foreign" to the "spirit of the German folk."[17] Later, in 1935, he referred to the anti-semitic, Nuremberger racial laws as, "for the first time," paving the way for a truly German "constitution of freedom." Thereby, "in a legal sense" the "German folk has become again … the German folk," and that the "state is now a means of folkish strength and unity."[18]

In a 1936 conference, Schmitt delivered a notoriously anti-semitic paper entitled "German Jurisprudence in the Struggle against the Jewish Spirit," calling there for a "cleansing of the libraries" and suggesting that all jurisprudential literature produced by Jewish authors be cordoned off in a section labeled "Judaica." He argued that every time a Jewish author is cited or discussed in legal literature, he must be identified as "'Jewish,'" so that all students and researchers are aware of the provenance of his ideas. Finally, he declared that "Jewish opinions … cannot be placed on [the same] level as the opinions of Germans or non-Jewish authors,"

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[14] Schmitt, BdP3, 44. Cf., BdP, 62.
[15] See Schmitt, SBV, 42/48, translation modified. Cf., "Das Gute Recht," 301-03.
[16] See Schmitt, VL, 227/258; GLP, 88/75.
[17] See Schmitt, DA, 9/45, 37/77, translation modified.
[18] See Schmitt, "Verfassung der Freiheit," 1133-35.

because the Jewish mind is not only "parasitic," but also "sterile and unproductive for the German type of spirit."[19]

Even his monograph on Hobbes—written in 1938, two years after he had fallen from grace within the NSDAP and "had foresworn the devil"—is replete with anti-semitisms.[20] There, he blames the collapse of the modern, Hobbesian theory of the state and therewith the perceived failings of liberal modernity on the "restless spirit of the Jew, who knew [how] to exploit" Hobbes' distinction between "public and private" in order to achieve both the "undermining … of the state's power" and the "emancipation of his own Jewish folk."[21] He identifies Spinoza, Moses Mendelsohn, and Friedrich Julius Stahl as the perpetrators.[22] This work's anti-semitism is not only gratuitous and despicable, but also completely ludicrous on a historical, philosophical, and theological level. The decisive theological step in Schmitt's story had already been taken in the sixteenth century, when evangelical Protestantism argued that "no one can be compelled to be a Christian," because faith is a gift of grace.[23] This line of argument is precisely what Locke picked up in the seventeenth century. "True religion," writes Locke, "cannot be compelled … by outward force," for "faith only … procure[s] acceptance with God." For Locke, this is the "principal consideration … which absolutely determines th[e] controversy."[24] It simply defies credulity that Carl Schmitt did not already know this story like the back of his hand, having been raised in the provincial, Roman Catholic Sauerland where the culture wars were anything but a distant memory.

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[19] See Schmitt, "Die Deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," 1195-97.
[20] See Schmitt, Antworten, 66, cf., 54, 69.
[21] Schmitt, L, 92-93/60, translation modified, cf., 18/9, 123-24/81-82, 118/74. Cf., LuM, 16-17.
[22] See Schmitt, L, 92/60, also, 86-89/57-58, 107-10/69-70.
[23] Luther, "Secular Authority: To what Extent it should be Obeyed" in *Selections,* 380, cf., 382-85.
[24] Locke, *Letter Concerning Toleration* in *Political Writings,* 395, 410-11.

However this may be, his notebooks prior to and after the NSDAP period do contain anti-semitic remarks, thus confuting the oft-repeated claim that Schmitt's NSDAP era anti-semitism was no more than "opportunistic" "lip-service" to NSDAP ideology.[25] That Schmitt was some sort of anti-semite for much of his life can no longer be doubted. However, what *actual* role, if any, anti-semitism might have played in Schmitt's published thought and conception of politics and law prior to 1933 remains speculative at best.[26]

Carl Schmitt never went through the de-Nazification procedures and never really explained this decision publicly. However, in a bizarre entry in his notebook from 1949, he writes: "Why do you not allow yourself to be de-Nazified? Firstly, because I don't like to have myself co-opted, and secondly, because resistance by means of collaboration is a Nazi method, but [it] is not according to my taste."[27] Apparently, the question of whether or not to take public responsibility for one's actions was, in his view, simply a personal preference—a matter of taste.

However, he did make numerous efforts to mitigate the seriousness of his collaboration. To his interrogators at Nuremberg in 1947, Schmitt would explain that the NSDAP regime was a form of "total dictatorship," which was unknown to him until he had experienced it.[28] In the closest thing to a public apology he ever published, Schmitt suggested that there are "limits" to what might be

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[25] See Schmitt, G, esp. September 25, 1947, pp. 17-18, October 16, 1948, p. 203, July 8, 1949, p. 255, January 12, 1950, p. 290, cf., however, August 17, 1949, p. 264. For thorough accounts of Schmitt's NSDAP era anti-semitism, see Meier, *Lesson,* 151-59; Gross, *Carl Schmitt.* For anti-semitism in Schmitt's earlier diaries, see Gross, "'True Enemy.'" Cf., however, Bendersky, "Love, Law, and War," 178-81; "New Evidence"; "Three Types," 23-29. Schwab claims, however, that Schmitt had expressed to him regret for his NSDAP era anti-semitism and also that Schmitt was a supporter of the state of Israel. Per McCormick, "Political Theory and Political Theology," 852 n. 58; Schwab, "Introduction" in Schmitt, L, li-lii n. 49. The phrase "lip-service" comes from Bendersky, *Carl Schmitt,* 207; Schwab, *Challenge,* 101.

[26] The most able contemporary critic of Schmitt on the Jewish question concedes as much, acknowledging that "unearthing" what he "sense[s]" "in the pre-1933 writings is in any case difficult," and so he is forced to conclude that it was merely "concealed." Gross, *Carl Schmitt,* 178.

[27] Schmitt, G, October 1, 1949, p. 272.

[28] See Schmitt, Antworten, 66. Cf., "Der Zugang zum Machthaber, ein zentrales verfassungsrechtliches Problem" in VA, 431 (= Antworten, 93-94).

expected of an otherwise "loyal citizen," when he is in a "situation" which has "become so abnormal" that he is confronted on all sides by political "terror." He reminds us also that both Plato and Thomas More found themselves advising, and making concessions to, "tyrants."[29] He also compared himself to Herman Melville's Benito Cereno, who had been forced, on pain of death, to captain a ship, which the slaves aboard the ship had commandeered.[30] The implication of this literary reference seems to have been that although it may have appeared from the outside that he was in control of the vessel he sailed, in point of fact, more subterranean forces hidden from view actually orchestrated the whole spectacle. He would go so far as even to claim that he had feared for his life at several decisive points during the tenure of the NSDAP regime. In a thinly veiled poem, Schmitt would explain that he had "know[n] the many types of terror," "the black lists with many names" and the "card files of the prosecutor." "Thrice," he writes, he had "sat in the belly of the whale."[31]

Despite numerous attempts to draw attention to mitigating circumstances, Schmitt did not ever truly come to terms with his past. The name he gave to his home in Plettenberg is truly telling. "San Casciano," he called it—a reference to the Tuscan region in which Machiavelli resided after his political fall from grace when the Medici took power. It was also an allusion to Saint Cassian of Imola, a fourth-century Bishop who had been stabbed by his own students.[32] The implication

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[29] Schmitt, ECS, Winter 1945/46, pp. 20-22.
[30] Schmitt, ECS, Winter 1945/46, pp. 21, Summer 1946, p. 75.
[31] Schmitt, ECS, July 11, 1948, pp. 92-93. A translation of the poem can be found in Schmitt, "Ex Captivitate Salus." Cf., G, January 12, 1948, p. 81, July 8, 1948, p. 177.—Most probably, these three terrors refer first to his fear during the "Night of the Long Knives," because of his close affiliation with some of those who had been executed (e.g., Kurt von Schleicher); secondly, to his subsequent but unrelated fall from grace within the NSDAP, and the fact that he was under official surveillance; and finally, to his intermittent interment between 1945 and 1947, first by the Russians and then by the Allies at Nuremberg as he awaited a possible trial for war crimes on the ground of the perceived resemblance between Schmitt's international-theoretical category of *Großraum* and Hitler's conception of *Lebensraum.* See Strong, "Sovereign and the Exception," xxxi n. 59.—For further background on the SS's denunciation of Schmitt in 1936 and the open investigative file the SD has on him, see Schwab, *Challenge,* 138-141; Bendersky, *Carl Schmitt,* 211-12, 214, 225-26, 232, 239, 241-42; "Expendable Kronjurist," 314-18, 321-23.
[32] See Straub, " Jurist im Zwielicht des Politischen" in *Götterdämmerung der Moderne,* 75.

of this choice seems clear. Schmitt thought of himself as an intellectual on the order of the great Florentine, who had fallen into disrepute and was attacked as a pariah by former students for merely political reasons.

It's also clear that Carl Schmitt never fully understood the magnitude of what had occurred in his country. When it was pointed out to him at Nuremberg that the NSDAP had overseen the murder of millions of human beings during its final years, he responded dryly that Christianity had also ended in the same way.[33] Two years later, in his notebooks, he coined a Latin neologism ("Ideocidium"), thus comparing the de-Nazification programs in 1945 with genocide.[34]

There is much to condemn in Carl Schmitt. Visceral disgust is difficult to contain. One of Schmitt's earliest North American critics, Stephen Holmes, characterizes him as a thinker who "consciously embraced evil and whose writings cannot be studied without moral revulsion and intellectual distress."[35] Jürgen Habermas refers dismissively to Schmitt as a "Reichswortführer" or mouthpiece for the Third Reich, who was "pathologically incapable of judging the proportions of what happened and his role in it."[36] Bill Scheuerman calls Schmitt "the quintessential antiliberal," whose own core illiberality impairs anyone who "attempt[s] to borrow from" his writings.[37] Raphael Gross argues that aside from "some banal, or at least commonplace, insights"

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[33] See Schmitt, Antworten, 60, cf., 53-54. A translation of some of this material later assembled in the authoritative Schmitt, *Antworten* volume is also available in Schmitt and Kempner, "Interrogation of Carl Schmitt by Robert Kempner." New material from the Nuremberg interrogations were discovered and published in 2007 as Schmitt, "'Fourth' (Second) Interrogation of Carl Schmitt at Nuremberg." For further background on Schmitt's imprisonment for the Nuremberg trials, see Bendersky, *Carl Schmitt,* 263-73; "Carl Schmitt at Nuremberg"; "Carl Schmitt's Path."

[34] See Schmitt, G, August 21, 1949, p. 265.

[35] See Holmes, Review of Carl Schmitt, 1067. Cf., *Anatomy,* 37-60.

[36] See Habermas, "Carl Schmitt in the Political Intellectual History of the Federal Republic" in *Berlin Republic,* 109, 113. Cf., "The Horrors of Autonomy: Carl Schmitt in English" in NC, 128-39; "The German Idealism of the Jewish Philosophers" in PPP, 41-42; "Life-forms, Morality and the Task of the Philosopher" in AS, 194, cf., 192, 196; PD, 70-71, 219-20; "Introduction" in *Observations,* 12-13, 24; LC, 122, cf., 98, 127; "Religion in the Public Sphere" in BNR, 146; "'The Political'"; "The Nation, the Rule of Law, and Democracy" in IO, 134-43; "Constitutionalization of International Law" in *Divided West,* 187-93.

[37] See Scheuerman, "Carl Schmitt and the Nazis," 78. Cf., *Carl Schmitt,* esp. 115, 128, 175; *Between the Norm and the Exception;* "Fascism of Carl Schmitt"; "Down on Law"; Scheuerman's response in Balakrishnan and Scheuerman, "Among Enemies?"

found in his texts, anti-semitism is actually the "core" of his "anti-emancipatory" thought.[38]

Finally, Mark Lilla complains of the "remarkable lack of seriousness among those studying …

Schmitt today," who exhibit "an unwillingness to probe too deeply into his moral universe." He

sees Schmitt as a resolute "enemy of liberalism," who preached a "politics of theological despair"

that was not "genuinely philosophical." He views Schmitt's body of work as the highly

combustible product of a "reckless mind."[39]

The current enthusiasm for Schmitt cannot avoid taking these charges into account. While his

thought may be very "interesting" for the contemporary reader, one should always remember how

firmly Schmitt threw his lot in with the NSDAP. Whatever one finally concludes about his true

intent, there can be no doubt that he *knew* he was a leading intellectual and that his public support

of the NSDAP regime contributed to its legitimacy.

## 9.2 The Myth of Carl Schmitt: The Radical, Conservative Revolution in Weimar

Apart from Schmitt's well documented, NSDAP-era collaboration and vicious anti-semitism,

surely the most significant controversy plaguing the study of Schmitt is the question of his

relationship to the radical, conservative revolution in early twentieth-century Germany, which

ultimately subverted the Weimar regime, leading to the one-party rule of the NSDAP. What role

did Schmitt play in this story, and—certainly this is a different question—what role did he *intend*

to play in this tragic drama, especially as articulated in his published writings over the course of

more than a decade?

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[38] See Gross, *Carl Schmitt,* esp. 226-27, cf., 237-38.
[39] See Lilla, "Enemy"; "Carl Schmitt" in *Reckless Mind,* 65, 76.

A long standing, popular, academic myth haunts the person and the work of Carl Schmitt. In its many variations, this myth would suggest that in his conception of sovereignty, as in many other respects of his work, Schmitt hoped to subvert the existing, liberal constitutional order, which explains his collaboration with the NSDAP beginning in 1933.[40] This myth bears on themes, which are absolutely central to Schmitt's political thought, and for this reason, this myth cannot be passed over. However, this myth neglects several important elements of Schmitt's writings and of his biography, and for that reason, is ultimately unsustainable.

Undeniably, Schmitt had a scholarly preoccupation with conceptions of dictatorship and emergency rule, as well a highly latitudinarian, even unorthodox, interpretation of the Weimar Constitution and especially of Article 48's provisions for emergency powers. What is less obvious is that this interpretation was designed with the intention of subverting the constitution. Repeatedly, Schmitt put forward central, theoretical claims which are diametrically opposed to constitutional subversion. Less important here is whether we think Schmitt's solutions were adequate to the ills of the Weimar period or whether his latitudinarian and unorthodox

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[40] For some early variations on this general argument, see Marcuse, "Struggle Against Liberalism in the Totalitarian View of the State" in *Negations,* 3-42; Neumann, *Behemoth,* 42-49, 53, 56, 481 nn. 33, 38, cf., 65-66, 152-55, 156-57, 163, 447-48; Lukács, *Destruction,* 646, 652-53, 655-59, 801, 841-43; Fijalkowski, *Wendung,* xxiii, 31, 141, cf., xxi; Mosse, *Crisis,* 283-85, cf., 353 n. 15; Gay, *Weimar Culture,* 183; Sontheimer, "Anti-Democratic Thought," esp. 51-52; Maus, "1933 'Break,'" esp. 202-04, 211-12; Hofmann, *Legitimität gegen Legalität,* xv et passim. Cf., Mohler, *Konservative Revolution,* 38-40, 319, 324-27 et passim, cf., 3, 8-9, 38 n. 22, 67, 176-77, 208-10.—For (relatively) more recent, but similar arguments, see Rüthers, *Entartetes Recht;* Herf, *Reactionary Modernism,* 44-46, cf., 3, 15, 27, 30, 108, 115-21; Habermas, "Horrors of Autonomy: Carl Schmitt in English" in NC, 138-39; Wolin, "Carl Schmitt, Political Existentialism," 397, 400, 402-03, 405, 409, 411-12 et passim; "Carl Schmitt, Conservative Revolutionary," 425-26, 428, 440 et passim; Jay, "Reconciling the Irreconcilable," 75; McCormick, "Identifying or Exploiting," esp. xlii, 109-10 n. 4; "Dilemmas of Dictatorship"; *Carl Schmitt's Critique,* 12 ff., 148, 205, 305, cf., however, 266 ff.; Scheuerman, "Legal Indeterminancy," 585-86, 588; *Carl Schmitt,* 10, 32-36, cf., 2, 4, 15, 18 et passim; Dyzenhaus, "Why Carl Schmitt?," 3; *Legality and Legitimacy,* 40-41, 70-85; Agamben, *State of Exception,* 1, 6-7, 32-33, 40, 57, 84, 86-87; Sherratt, *Hitler's Philosophers,* esp. 98-100, 103; Müller, *Dangerous Mind,* 3; Rawls, *Political Liberalism,* lix-lx.—For further background generally critical of this type of argument, see Bendersky, *Carl Schmitt;* "Carl Schmitt and the Conservative Revolution"; "Carl Schmitt in the Summer of 1932"; "Expendable Kronjurist"; "From the Führerstaat"; Schwab, *Challenge;* "Schmitt Scholarship"; Gottfriend, "Confronting the Challenge."

interpretation of the constitution is an orthodoxly "liberal" one, than is Schmitt's own self-understanding as articulated again and again in his published writings.

Beginning in his *Dictatorship* (1921), Schmitt sought to revive knowledge of this classical political practice, which had long since faded from view. In Schmitt's lights, dictatorship is something vitally more specific than simply the suspension of the separation of powers. At their core, all forms of dictatorship involve a dissolution of legal restrictions in a concrete situation in order to achieve a desired end, where that end is either the protection of the existing, or the establishment of some future, constitutional order. Inevitably, dictatorial practice assumes the character of an exception, which stands out against the backdrop of normality. Only with these qualifications in full view, is it possible to differentiate dictatorship from other form of unmediated political power, with which it is often conflated, such as authoritarianism, absolutism, despotism, and tyranny.[41]

In this context, it is vitally important to bear in mind the precise manner in which Schmitt characterized the type of dictatorship he envisioned for a republican, constitutional order, and thus, by extension, for the Weimar Republic. By means of an extensive historical study, Schmitt had distinguished what he called a "commissarial" from a "sovereign" type of dictatorship. This distinction maps respectively onto, on the one hand, the Roman republican conception, and, on the other hand, the sense the word has had after the nineteenth century as a result of political usurpers, such as Julius Caesar and Sulla.[42] In fact, reviving awareness of this "essential

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[41] Schmitt, D, 134-35/116-17, 148-51/128-29, cf., 173/150.
[42] Schmitt, D, 1-3/1-2, 105-06/86-88, 134-35/116-17.

distinction" was, on Schmitt's view, one of the decisive "result[s]" of his analysis.[43] Accordingly, the distinction recurs, in its various forms, throughout the text.[44]

In brief, the commissarial dictator is he who temporarily abrogates the letter of the law of the constitution in order to protect the constitution itself, while the sovereign dictator is he who attempts to bring about the conditions in which he might install a new political order. Fundamentally, these two conceptions of dictatorship differ from one another largely in terms of their relationship to the existing constitution.

> The commissarial dictatorship overrides [*hebt ... auf*] the constitution *in concreto,* in order to protect the same constitution in its concrete existence.... [In contrast,] the sovereign dictatorship ... seeks to establish a new condition, in order to enable a constitution, which it views as [a] true constitution.[45]

The commissarial dictator "ignores the law, but only in order to realize it." This alone is the "justification for dictatorship." Thus, any dictatorship that lacks "the aim of making itself superfluous" at some later point is "arbitrary despotism."[46] Schmitt's modern examples reveal his meaning even more clearly than does his description. In his suspension of habeas corpus, Abraham Lincoln acted as a commissarial dictator.[47]

Prior to his joining the NSDAP in 1933, nothing Schmitt wrote deviated from this basic position. As early as 1921, Schmitt had been perfectly clear that the emergency powers granted the President in Article 48 of the Weimar Constitution "contain[ed] a clear case of commissarial

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[43] Schmitt, D, x/xliv, translation modified.—Prominent American academics both before and after 1933 found Schmitt's proposed distinction to be a meaningful one. See, e.g., Friedrich, "Dictatorship in Germany," 129 and n. 15, 131; "Development of Executive Power," 196 and nn. 27-28, 202 and n. 46, cf., 191 n. 13, 192 n. 15, 193-94 n. 21, 199 n. 36; Rossiter, *Constitutional Dictatorship,* 14, 69 et passim.

[44] E.g., Schmitt, D, v/xxxix, 33/25, 25/20 ff., 80/65, 116/96, 124-25/104-06, 127/109, 129-30/111-12, 132/114, 135-37/117-19, 145-46/127, 151/129-30, 165/142, 190/165, 193-94/168, 196/170, 200/175, 203/177. For some further background on Schmitt's distinction, see Schwab, *Challenge,* 30-43; Bendersky, *Carl Schmitt,* 31-35, cf., 73-84.

[45] See Schmitt, D, 136-37/118-19, translation modified.

[46] Schmitt, D, viii-x/xlii-xliv, translation modified, cf., 6/4, 11/7-8, 26-27/20-21.

[47] See Schmitt, D, 136/118, cf., 174/150.—For further background on Lincoln vis-à-vis Schmitt, see Agamben, *State of Exception,* 20-21. Recently, we have also learned that Lincoln had also authorized his agents to wire-tap telegram lines, which is eerily similar to contemporary behavior by the National Security Agency. See Mindich, "Lincoln's Surveillance State."

dictatorship," which is to say, the type of dictatorship which is fundamentally subservient to an existing constitutional order. "The President," writes Schmitt, "can take *all* necessary measures, if they are, according to his discretion, necessary with a view to the circumstance[s] of the matter." The President has a "legally unlimited commission" for the "restoration of safety and order"— "for *this end*" alone and only "temporarily." Thus, the actions of the President signal neither the "dissolution of the entire, existing legal order" nor the "transfer of sovereignty to the President."[48] On almost innumerable occasions between the years of 1924 and 1932, Schmitt would repeat this basic position.[49]

In these legal meditations on the commissarial dictatorship prescribed by Article 48, Schmitt limits the power afforded the Presidency not only in terms of its prescribed end, its time frame, and the fact that sovereignty is not conferred, but he also limits its power by means of his stipulation that the President's underlying responsibility remains to the constitution and to parliament. Schmitt declares his view in no uncertain terms. To the

> question, whether it could become possible to eliminate the constitution itself and to introduce another constitution by referring to emergency law, [and] thus to have a kind of right to a *coup d'état*.... Such a right in no way follows from Article 48.... [There] is no doubt that the constitution itself cannot be nullified legally by means of Article 48.[50]

Hewing closely to the language of Article 48, paragraph 3, Schmitt insists on numerous occasions that the Presidential, commissarial dictator is ultimately responsible to the Reichstag, which can cancel any of the Presidency's emergency measures. This clause provides a "safeguard against

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[48] Schmitt, D, 201-02/175-77, translation modified, cf., 135-36/117.
[49] E.g., Schmitt, "Dictatorship of the President of the Reich" in D, 235-36/201-02, 238-39/204-05, 242/207-09, 244/210, 254/220 et passim; "Diktatur" in SGN, 35; "Vorwort" (1928) in D, vi-vii/xxxiii-xxxiv; VL, 27/81, 112/158, cf., 59/109-10; "Die staatsrechtliche Bedeutung der Notverordnung" in VA, 259-60, cf., 261 n. 3; LL, 321/69, cf., 337/86-87, cf., however, 322/70, 325-26/73-74; HdV, 137.
[50] Schmitt, "Dictatorship of the President of the Reich" in D, 235/201-02, 254/220, translation modified.

the misuse of power."[51] Whatever the President might do during times of emergency, an "organizational minimum" of the underlying constitutional order and state must nevertheless always be preserved.[52] In this way, the presidential-commissarial system is explicitly not an invitation to refashion the state or the constitution.

In his legal-constitutional writings from the second half of the Weimar period, Schmitt sought to supplement his reflections on the presidential-commissarial system with a new "constitutional theory," which did not "suffer" from the "complete lack of clarity" caused by the "liberal *Rechtsstaat* … 'doctrine of [constitutional]-inviolability.'"[53] In these writings, he distinguished what he called a "violation [*Durchbrechung*] of the constitution" and a "constitutional suspension [*Suspension/Außerkraftsetzung*]"—which are authorized by Article 48, because they are "constitution-regarding"—from various form of complete abrogation, such as constitutional "*annihilation*" [*Vernichtung*] and "*elimination*" [*Beseitigung*], which are "constitution-*dis*regarding" and thus illicit. On his view, "constitution-regarding violation[s] of the constitution" apply only in a discrete number of "exceptional" cases. Similarly, a "constitution-regarding constitutional suspension" has a definitely "provisional" character.[54] Thus, when meditating on the "state of exception," Schmitt wrote only of "temporarily" suspending particular articles of a constitution, and never of the constitution itself.[55]

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[51] Schmitt, "Dictatorship of the President of the Reich" in D, 233/200 ff., cf., 226/191, 256-57/223; HdV, 130 ff. In limit cases, this argument generates moral absurdities. While, on Schmitt's view, Article 48 licenses the use of mustard gas against urban populations, the President may not interfere with the number or the activity of members of the Reichstag. Cf., "Dictatorship of the President of the Reich" in D, 223/188 with 246-47/212-14. Cf., D, 201/176, 203/177.

[52] Schmitt, "Dictatorship of the President of the Reich" in D, 244-47/210-13.

[53] Schmitt, "Vorwort" (1928) in D, vii/xxxiv, translation modified. Cf., text and "Dictatorship of the President of the Reich" in D, 108/89 and 215/180.

[54] See Schmitt, VL, 99-100/147-48 et passim and some emphasis added. Cf., "Dictatorship of the President of the Reich" in D, 226/191-92, 242/209, cf., 223/188, 230/196.

[55] See Schmitt, VL, 26-27/80, 176/214, cf., 177/215. Cf., LL, 334/82.

Whatever we may happen to think of it after the fact, Schmitt appears to have seen his conception of presidential-commissarial dictatorship and his accompanying constitutional theory as the last, great hope of saving the Weimar Constitution. In a speech from 1932, Schmitt declared that in his own "entirely personal, private opinion," Germany had "no longer much latitude for grand constitutional experiments," and that the resolution of Germany's problems would be found not through "new institutions" but rather through the employment of already existing "constitutional means"—a clear reference to his latitudinarian understanding of Article 48.[56] In another passage from that year, which can be read as a likely reference to himself, Schmitt writes that "the President's capacity to make laws according to Article 48 is recognized in Germany precisely by such authors, who fe[el] themselves [to be] … the actual protector and defender of concepts [associated with the] *Rechtsstaat.*"[57] Thus, the President was, in Schmitt's well-known words from 1929 to 1932, the "guardian of the constitution," who stood above the numerous, competing parties and represented the unity both of the state and of the people.[58]

Moreover, the political reality developing in Germany of 1933, at least as Schmitt understood it, had very little to do with the conception of presidential-commissarial dictatorship he had developed in the Weimar period. As early as August 1934, Schmitt made clear that he did not understand Hitler's actions to be that of a commissarial, "republican dictator."[59] Instead, after Hitler had effectively suspended the authority of the constitution and of the Reichstag, and under the obvious conditions of a changed political system, in which Schmitt had chosen to participate, he finds himself forced by the exigencies of consistency to abandon his constitutionally-oriented

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[56] Schmitt, "Starker Staat und gesunde Wirtschaft" in SGN, 84-85, cf., 71, 78. Cf., VL, 347/367, 349/368-69.
[57] Schmitt, LL, 320/68, translation modified.
[58] See Schmitt, "Hüter der Verfassung"; HdV, esp. 130-31, 159; LL, 327/75 ff, 339/88-89. Cf., VL, 350-53/369-72, cf., 286-87/311-12, 290-92/315-16, cf., however, 302/326. For an important, early criticism, see Kelsen, "Wer soll der Hüter der Verfassung sein?"
[59] See Schmitt, "Der Führer schützt das Recht" in PuB, 228-29.

conception of dictatorship, which he had outlined in the Weimar period, developing instead a new conception of "leadership" [*Führung*], tied to a racialist notion of "similarity of type."[60] This new conception of "leadership" has no meaningful parallel in the Weimar era writings.[61]

Thus, Schmitt's meditations in the Weimar writings on commissarial dictatorship, the presidential-commissarial system, and the state of exception do not grant theoretical license to a conservative revolution or to the permanent abrogation of the rule of law. On these points, Schmitt simply could not have been more clear.

Moreover, his writings betray an unmistakable hostility to political extremism and the danger it posed to stable, parliamentary governance. As late as 1932, Schmitt appears to have been a defender of the Weimar Constitution, despite its flaws, versus extremists of the far right and of the left. There is strong evidence in his *Legality and Legitimacy*—which I will discuss at some length in a subsequent chapter—that Schmitt was deeply concerned by the prospect that a numerical majority (or plurality) might seize control of the government and wield the prerogatives of power in the way of a "tyrant," effectively disenfranchising those in the minority.[62] In one telling passage, he mentions several presidential decrees from 1932, which aimed to dissolve the NSDAP's SA and SS divisions, and he comments upon these edicts matter of factly with the remark that "thus is the President free to intervene in the entire system of existing, legal norms and to make them serviceable for himself."[63] In the final pages of *Legality*

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[60] Schmitt, SBV, 42/48, translation modified.
[61] Cf., e.g., Schmitt, VL, 350/369 et passim; HdV, 137, 144.
[62] See Schmitt, LL, 288-93/27-36, 48. Cf., VL, 120-21/166, 357-58/376-77; HdV, 112-13.
[63] Schmitt, LL, 323/71, cf., 302/48, cf., however, 338/88. However, in the infamous 1932 *Preußenschlag* legal controversy, when arguing as counsel to the Reich government (and thus, on behalf of Chancellor Franz von Papen), Schmitt would state that it would be a "slanderous equalization" to "raise" the KPD to the level of the NSDAP—a party "with which millions of Germans not only sympathize [but also] for which they have voted." *Preußen Contra Reich,* 39. After having joined the NSDAP, Schmitt would object in print to the idea of banning the NSDAP, an autochthonous "German" movement, along with the KPD, who took their orders from "Moscow"—and thereby treating them on the same "level"—as Prussia, Bavaria, and Baden had. Schmitt, R, 7; SBV, 37/41-42.

*and Legitimacy,* Schmitt argues that Weimar constitutionalism must articulate a vision of the core "substantive order" embodied by the constitution and withdraw from the value-neutral, legal positivism of "equal chance," parliamentary majoritarianism. Only this would give it the conceptual resources to exclude anti-constitutional parties. Should it fail in this task, then the "truth will have its revenge."[64] Although it would be incorrect to reduce the cause of the decline of the Weimar Republic merely to the electoral successes of anti-constitutional parties, it is, nevertheless, very difficult to read these words retrospectively without marveling at their prescience.

Additional circumstances surrounding the publication history of *Legality and Legitimacy* amplify this straightforward reading of that document. Twelve days prior to the July 31 Reichstag elections, Schmitt had reprinted a short excerpt of his *Legality and Legitimacy*.[65] An editorial notice appended to this article warns explicitly against the NSDAP coming to power in the approaching elections:

> On July 31st, whoever supplies the National Socialists with the majority [vote]— although he is not a National Socialist and he sees in this party only the lesser evil—behaves *miguidedly.* He gives the *opportunity* to change the constitution to this worldview-based, political, [and] not yet mature movement…. He surrenders Germany to this group completely…. On July 31st, it is dangerous ['to support Hitler's opposition movement'], because the 51 percent [vote] gives the NSDAP a 'political premium' of unforeseeable consequences.[66]

Long after the fact, Schmitt interpreted his efforts then as a "desperate attempt to save the last opportunity of the Weimar Constitution"—a clarion call, which was ignored by those in positions of authority who were beholden to a "jurisprudence," which "refused" to distinguish friends from

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[64] Schmitt, LL, 345/94. Cf., VL, 106/153; L, 116-18/73-74; "Dictatorship of the President of the Reich" in D, 255/222.
[65] See Schmitt, "Mißbrauch der Legalität," 1-2 (= LL, 286-89/30-33).
[66] Schmitt, "Der Mißbrauch der Legalität," 2. There is, however, some dispute as to whether this editorial notice, appended to the excerpt from *Legality and Legitimacy,* was in fact endorsed by Schmitt, or simply added after the fact by an editor. See Caldwell, "Controversies over Carl Schmitt," 371; Mehring, *Carl Schmitt,* 650 n. 36. However, from the diaries, it does not appear that Schmitt complained of any appended editorial notices. Whether or not he wrote them himself is another matter. See Schmitt, *Tagebücher 1930 bis 1934,* July 18, 1932-July 31, 1932, pp. 201-205.

enemies, and thus enabled "a party to enter through the door of legality, in order then to close the door behind itself."[67]

An essential part of Schmitt's response to this parliamentary dilemma was his earlier constitutional theory, particularly its conceptualization of the procedure of constitutional amendment. Read literally Article 76 of the Weimar Constitution allowed for revision of the constitution through a qualified, two-thirds super-majority. Schmitt, however, understood this constitutional statute quite a bit less literally, interpreting indeterminate, unbounded revision as fundamentally inconsistent with the non-formal, substantive understanding of the constitution, which he sought to develop.[68]

On Schmitt's view, conceptual boundaries curtail the possibility of infinite revision. Certain constitutional laws function as the "foundational presupposition[s] for all subsequent norms," making up an integral part of the "substance" of the constitution. Accordingly, subsequent legislation "is valid only on the basis, and only in the context, of these decisions."[69] Thus, there are some fundamental provisions of a given constitution which have the status of "qualified alterability," and which are, on that account, "protected" from amendment resolutions passed by momentary and "changing parliamentary majorities." Only thus is the constitution provided with true "duration and stability."[70]

For this reason, Schmitt distinguished conceptually between constitutional "*annihilation*" and "*elimination*" (abrogation), on the one hand, and various forms of constitutional "*change,*" "revision" (amendment), or temporary "*suspension,*" on the other hand.[71] Constitutional

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[67] Schmitt, Nachwort in LL, 345/95, translation modified. Cf., Schmitt and Kempner, "'Fourth' (Second) Interrogation," 41, 43.
[68] Cf., Schmitt, VL, 101-02/149.
[69] Schmitt, VL, 24/78, translation modified, cf., 96/144, 163/201-02.
[70] Schmitt, VL, 18-19/72-73.
[71] See Schmitt, VL, 99-100/147-48 et passim.

amendment ceases to be amendment in the true sense when the proposed amendment entails fundamental change to the underlying character of the present constitution, thus veering into the conceptual territory of constitutional abrogation. Properly understood, the procedure of constitutional amendment fundamentally presupposed that the "identity and continuity of the constitution as a whole remains preserved." The interest in continuity of the underlying order necessarily imposes limits. For example, it is, on Schmitt's view, wholly impermissible to fundamentally alter Article 76 by means of Article 76.[72]

According to Schmitt, then, Article 76 does not grant the "authority to establish a new constitution." The authority to amend is "not a normal state function" and it is "not thoroughly unlimited."[73] "The authority to alter and extend the constitution cannot be boundless and has not been conferred, in order to eliminate the constitution itself."[74] No two-thirds majority of parliament is competent to decide that a liberal, bourgeois *Rechtsstaat* with democratic voting rights can transform itself into either a Soviet Republic organized according to a council system or an absolute monarchy.[75] Similarly, no two-thirds majority, operating under the auspices of Article 76, is competent to permanently eliminate the basic rights essential to bourgeois freedom, which are outlined in the Weimar Constitution. Such a change would be fundamentally "unconstitutional."[76]

As mentioned in the previous section, in post-1933 writings, Schmitt did defend the legality of the NSDAP revolution. That this represents a manifest abandonment of his Weimar era legal and

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[72] Schmitt, VL, 103/150, translation modified.
[73] Schmitt, VL, 102-03/150.
[74] Schmitt, VL, 106/153. Cf., LL, 310-11/57-58, cf., 293/39, 300/46, 307/53-54, 302-03/48-49.
[75] See Schmitt, VL, 26/79, 104/151, cf., 99/146.
[76] Schmitt, VL, 177/214-15. In like manner, it is "not at all constitutional" for a two-thirds majority of parliament to amend a monarchical constitution such that it would be transformed into one based upon democratic principles. VL, 103/151.

constitutional theory can be determined by paying attention to subtle but unmistakable underyling shifts in his patterns of thought. For instance, between 1928 and 1932, Schmitt had written almost *ad nauseam* against what he termed the "dominant interpretation of Article 76" of the Weimar Constitution and thus of the problem of grounding limits to the power of constitutional emendation afforded by that Article. Almost invariably he identified the most prominent exponent of the view he contested with Gerhard Anschütz.[77] Yet, no more than one year later, when he would defend the 1933 Enabling Act, he wrote that "the law rests … formally upon Article 76 of the Reich Constitution," and he cites Anschütz's work for support. About the contradiction, Schmitt had nothing at all to say, except that "it is not necessary here to go into the problem of the boundaries of Article 76."[78]

Moreover, Schmitt was willing to admit the *relative* virtues of the liberal state. In 1926, Schmitt wrote that as compared with "direct democracy," "dictatorship," Russian Bolshevism, and Italian fascism, liberal parliamentarism was certainly the "lesser evil," "preferable" to these other alternatives, and that "every reasonable person would concede" this and prefer liberal parliamentarism to those "frivolous experiments." His principal objection was that this type of Churchillian mentality was, at least at the level of principle, inadequate, for ultimately it evaded the decisive question of legitimacy. "Certainly no one would be so undemanding that he regard an intellectual foundation or a moral truth as proven by the question: What else?"[79]

All this said, it would be going much too far to see Schmitt as a dyed-in-the-wool liberal democrat. The portrait of Carl Schmitt with which we are left is simply that of the consummate

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[77] E.g., Schmitt, VL, 99-106/147-53 et passim, cf., 26/79, 99/146, 177/214-15; HdV, 113; LL, 302-03/48-49, cf., 293/39, 300/46, 307/53-54, 310-11/57-58.
[78] Schmitt, "Gesetz zur Behebung der Not von Volk und Reich," 456.
[79] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 6-7/2-3. Cf., GLP, 90/76.

*Vernunftrepublikaner.* And yet all this eroded in 1933—to the great surprise of a considerable number of his contemporaries.

The accumulated evidence, moreover, suggests that during the Weimar period, Schmitt held the NSDAP movement in profound contempt. In 1934, one of Schmitt's close, Weimar-era students would claim that "in conversations" before 1933, Schmitt had referred to the NSDAP as "'organized madness.'"[80] Recently published diaries lend support to this picture, particularly entries from that week which Schmitt retrospectively identified as the "decisive" one in Weimar's downfall.[81] In the days shortly before President Paul von Hindenburg appointed Hitler as Chancellor, Schmitt stated in his notebook that Hindenburg "had gone crazy" and that Schmitt was "depressed" and had "fear for the approaching political things."[82] The day after Hitler took office, Schmitt related in his notebook that he cancelled his lectures and that he was unable to work. He remarks then that he was "angry at the dumb, ridiculous Hitler."[83] Before joining the Party, Schmitt waited three months after Hitler took office and a little over a month after the passage of the Enabling Act. His membership card's number (2,098,860) reveals that a significant number of substantially more enthusiastic Germans had preceded him in joining the NSDAP.[84]

During one of his self-exculpatory entreaties at Nuremberg in 1947, Schmitt would reveal that he had thought Adolf Hitler to be a wholly uninteresting nonentity. Instead, he had been, not unlike Heidegger, operating under the unmitigatedly naïve delusion that he, from his position of

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[80] Gurian, "Carl Schmitt," 53.

[81] Schmitt, Nachwort in LL, 349-50/100-01.

[82] Schmitt, *Tagebücher 1930 bis 1934,* January 27, 1933, January 28, 1933, p. 256.

[83] Schmitt, *Tagebücher 1930 bis 1934,* January 31, 1933, p. 257, cf., May 24, 1931, p. 111, cf., however, June 6, 1932, p. 214, January 30, 1933, p. 257. For some further background narration, see Straub, "Der Jurist im Zwielicht des Politischen: Carl Schmitt und der Staat" in *Götterdämmerung der Moderne,* 84-87.

[84] By contrast, Heidegger, who joined also on May 1, 1933, had a membership card number of 3,125,894. See Bendersky, *Carl Schmitt,* 203-04, 203 n. 26; Safranski, *Martin Heidegger,* 241; Strong, *Politics Without Vision,* 219-20, 266. See also Meier, *Lesson,* 133-34 n. 31. Cf., Schmitt, Antworten, 84-86. Gross, *Carl Schmitt,* 27-28 points out, however, that, with some exceptions, very few professors of public law were members of the NSDAP before 1933.

intellectual superiority, could somehow personally direct the movement, and that he had since

grown ashamed of some of his writings from that period. Nonetheless, he treats the question of

his own responsibility with profound silence.

> For my part, I wanted to give meaning to the word, National Socialism…. [Hitler] was so uninteresting to me that I do not want to speak about it at all…. Today, [it is] self-evident [that '(I) am ashamed, that (I) had written such things then']…. Certainly it is horrible. There isn't a further word to say about it.[85]

How did a thinker, who had been outwardly hostile towards extremist parties during the

Weimar period, and who was contemptuous of the NSDAP prior to 1933, achieve the prominence

that Schmitt did after the revolution?

At a deep level, Schmitt was a thinker, who often offered non-liberal or "authoritarian"

solutions to liberal problems. His early, measured sympathy for Italian fascism is unmistakable. It

was for him, if not a ray of sunshine in a dark world, at least something worthy of being taken

seriously in contrast to what he saw as the morass of Weimar intellectual life. As early as 1923,

Schmitt had written, with what appears to be some measure of fascination of the mythical

elements in Mussolini's fascism and also of the "new feeling for order, discipline, and hierarchy,"

which was then making itself felt in southern Europe. He notes there that although it potentially

posed some "abstract danger," this basic feeling represented the "strongest political tendency

today."[86] Thereafter, between 1928 and 1929, Schmitt predicted the decline of the "majoritarian

ideology" across much of Europe, in light of economic and political pressures, and he extolled

Mussolini's state for its ability to serve as a "higher third" to the plural and conflicting social and

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[85] See Schmitt, Antworten, 65-66, cf., 54, 69, 92.
[86] See Schmitt, GLP, 88-89/75-76. Cf., however, "Contradiction between Parliamentarism and Democracy" in GLP, 6-7/2-3. Cf., DA, 17/54. On Schmitt's relationship to, and occasional admiration for, Italian fascism, see Habermas, "Horrors of Autonomy: Carl Schmitt in English" in NC, 134; Meier, *Lesson,* 134-148; Schwab, *Challenge,* 147.

economic elements in Italy. In this way, Schmitt claims, the fascist state strove "with ancient sincerity" to be a state in a deeper sense of the word.[87]

Schmitt's apparent regard for political developments in fascist Italy must be understood against the background of deeper, historical currents in German state theory. Even when he famously announced in 1933 that Hegel had "died" with the chancellorship of Hitler and therewith the end of an era of civil servants tending to the rule-of-law, liberal constitutional state—Schmitt had not abandoned the Hegelian idea of a *Sittlichkeit* embodied in the state, which stood over and above the conflict of merely private interests within civil society. He maintained these philosophical affinities despite the fact that his conception of political leadership was radically more expansive than was Hegel's, and that his own conception of *Sittlichkeit* was divorced, he said, of any of the "moral sense" it had in the original.[88] Apparently, when Schmitt finally had an opportunity to meet *Il Duce* in April 1936, he wanted most of all to speak with him about Hegel. Ultimately, they decided that the spirit of Hegel resided then neither in Moscow, nor in Berlin, but rather in Rome.[89]

We might say then that Schmitt's choice in 1933 was that of an "opportunist" of some sort, but in saying that, we must of course remain cognizant of the necessary conditions for "opportunism." It remains deeply implausible that Schmitt could ever have taken advantage of the "opportunity" afforded, had there been absolutely no underlying, intellectual consanguinities

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[87] Schmitt, "Vorwort" (1928) in D, vii-viii/xxxv; "Wesen und Werden des Faschistischen Staates" in PuB, 125-26, 128-30.

[88] See Schmitt, SBV, 31-32/35, cf., 13/13; BdP, 62. Cf., Schmitt, DA, 37-39/77-79; BdP, 76/77; BdP1, 31; GLP, 58-69/47-48; "Der Führer schützt das Recht" in PuB, 227, L, 90/59, 92/60; GuU, 49 and n. 1; LuM, 108; NdE, 121/149; G, January 15, 1948, p. 83; Nachwort in LdER, 428-29; PR, 94-95/64. Cf., however, "Donoso Cortés in Berlin" in DC, 48/91, 56/95.

[89] See Schmitt and Mohler, *Briefwechsel,* Schmitt to Mohler, September 5, 1960, p. 418; Taubes, *Political Theology of Paul,* 70. In 1932, he suggested that the spirit of Hegel resided in Moscow, but then in 1933 revisions, he removes this passage. Cf., Schmitt, BdP, 62-63/63 with BdP3, 44.

between his own views and the then-developing, rather inchoate views of the NSDAP as he interpreted them in the historical moment of 1933. The equally safe path of "inner-immigration" was not the path, which Schmitt chose for himself. While it is true that Schmitt may not have been destined by an unwavering, historical logic to have joined the NSDAP, his general outlook appears, at least, to have primed him for it. However, when party functionaries began paying closer attention to his writings, Schmitt did not always curry favor. His first theoretical foray into NSDAP legal theory, his *State, Movement, People,* was not terribly well received. In the battle over shaping the future of NSDAP legal theory, Schmitt lost out—but certainly not for lack of trying. He appears perhaps rather simply to have misread the direction of the movement and to have profoundly overestimated his ability to shape it.[90]

Did Schmitt's written texts become weapons in the hands of conservative revolutionaries who sought to overturn the Weimar Republic? Did Schmitt cynically intend to foster a conservative revolution through his publications? At least analytically, these questions are distinct.

What I have established here is only that Schmitt's conception of sovereignty, and various related elements of his legal and state theory, are not *in the first instance* a crude apology for regime take-over by conservative revolutionaries. I have also shown that he did not seek to lay the intellectual groundwork for permanent, standing dictatorial rule in a state of exception, artificially prolonged so as to permanently abrogate the rule of a standing body of law. This much deflates much of the force of what I have called here the "myth of Carl Schmitt." However, Carl Schmitt is not thereby exonerated.

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[90] See Wolin, "Carl Schmitt, Political Existentialism," 409; Strong, *Politics Without Vision,* 239 n. 67, 254; Schwab, "Carl Schmitt: Political Opportunist?," 336; Caldwell, "National Socialism and Constitutional Law," 416-19; Bendersky, "Expendable Kronjurist," 320; Neumann, *Behemoth,* 66.

## 9.3 Why Read Carl Schmitt?

In light of Schmitt's publication record and political activities, one would certainly not be out of place to pose emphatically the following, puzzling question: Why has this otherwise authoritarian, erstwhile card-carrying member of the NSDAP become so popular today? More importantly: Why has Schmitt become so attractive to parts of the contemporary, non-liberal, left?[91] This is surely one of the great paradoxes of the contemporary academy. Surprisingly, Schmitt garnered a following in the first several decades immediately after the war by self-proclaimed Marxists, Stalinists, Maoists (e.g., Alexandre Kojève and Joachim Schickel), and later even by the continental New Left.[92] During the last several decades to the present day, he garners increasing attention from the non-liberal left.[93] Moreover, this trend shows no signs of abating, despite the fact that Schmitt's NSDAP affiliation has since become commonplace knowledge among scholars.

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[91] For some attempts to explain the surge of interest in Schmitt's writings by the non-liberal left, see Strong, "Dimensions of the New Debate," xxvi, cf., xxv; *Politics without Vision,* 221; Lilla, "Carl Schmitt" in *Reckless Mind,* 54-55, 62-65; Habermas, "The Horrors of Autonomy: Carl Schmitt in English" in NC, 138; Derrida, *Politics of Friendship,* 140-41; Seitzer, "Introduction" in Schmitt, VL, 49-50; Piccone and Ulmen, "Uses and Abuses of Carl Schmitt," 12; "Introduction to Carl Schmitt"; Meier, "What is Political Theology?," 88.

[92] On Kojève, see Taubes, *To Carl Schmitt,* 14. See also Schmitt and Schickel, "Gespräch über den Partisanen" in Schmitt, SGN, esp. 619.

[93] E.g., Mouffe, *Democratic Paradox,* esp. 36-59 (ch. 2); *Return of the Political;* Mouffe, ed., *Challenge of Carl Schmitt;* Agamben, *Homo Sacer; State of Exception; Kingdom and the Glory;* Derrida, "Force of Law"; *Politics of Friendship;* Strong, *Politics without Vision,* 218-62 (ch. 6); Honig, PTDP, 89-115, esp. 105, 108 (Schmittian by way of Derrida and Arendt); EP, esp. 2, 66-67, 85-96, 106-09; Brown, WSWS; Hardt and Negri, *Empire;* Negri, *Insurgencies;* Buck-Morss, "Sovereign Right"; Kalyvas, *Democracy;* "Popular Sovereingty"; Taubes, *Political Theology of Paul; To Carl Schmitt;* Taubes, ed., *Der Fürst dieser Welt,* vol. 3 of *Religionstheorie und politische Theologie;* Balibar, "Le Hobbes de Schmitt"; Frank, *Constituent Moments,* esp. 47-50; Žižek, "Carl Schmitt in the Age of Post-Politics." See also the academic journal, *Telos,* esp. issue nos. 72 (1987), 109 (1996), 125 (2002), 132 (2005), 142 (2008), 147 (2009), 153 (2010), 157 (2011). See also the *South Atlantic Quarterly,* vol. 104, no. 2 (2005).—On the reception of Schmitt, on the left, in English, and otherwise, see McCormick, "Irrational Choice," 315-16, 336-38; Strong, "Dimensions of the New Debate"; Habermas, "Carl Schmitt in the Political Intellectual History of the Federal Republic" in *Berlin Republic;* "Horrors of Auftonomy: Carl Schmitt in English" in NC; Kennedy, "Carl Schmitt in the West German Perspective"; Bendersky, "Carl Schmitt Confronts the English-Speaking World"; Schwab, "Schmitt Scholarship"; Müller, *Dangerous Mind,* 169-80, 221-43.

Though Schmitt certainly does not lack for defenders, there are no internationally prominent apologists of Schmitt on the left today.[94] Few actively seek to revive Schmitt's political vision in much of its detail. There are, however, legions of thinkers who make use of Schmitt's thought as an occasion to launch their own—a challenge to which liberalism writ large must respond or ignore at its own peril.[95] Though more often than not unstated, the general line of thought is, as it usually is with Nietzsche, to think *with* Schmitt *beyond* Schmitt.

However, in light of Schmitt's checkered past, careful consideration of Schmitt's work cannot be justified simply by adverting to the contemporary interest that others have paid his writings, for the propriety of their so doing is exactly what is in question. The present study's interest in Schmitt is different from the concerns and motivations that have animated many others.

More conspicuously and consistently than any other, Carl Schmitt's writings illuminate and exemplify a particular ideal type that completes the triad of political visions surveyed in this study. Unlike others, he does not shy away from the more radical expression of the conclusions to which he finds himself drawn. Moreover, his training in legal theory gives his discussion a political concreteness lacking in other, less radical, kindred spirits.

Schmitt is unique among early twentieth-century, reactionary, conservative thinkers in that his critical sympathy enabled him to read carefully and to learn from important thinkers whose

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[94] For work by some of Schmitt's defenders, see Piconne, Ulmen, and Gottfried, "Ostracizing Carl Schmitt"; Piccone and Ulmen, "Uses and Abuses of Carl Schmitt"; "Introduction to Carl Schmitt"; Picconne and Ulmen's responses in Picconne, Ulmen, Herf, "Reading and Misreading Schmitt," 136-40; Balakrishan's response in Balakrishnan and Scheuerman, "Among Enemies?"; Balakrishnan, "Age of Carl Schmitt"; *Enemy;* de Benoist, "Schmitt in France"; Gottfriend, "Confronting the Challenge"; Bendersky, *Carl Schmitt;* "Carl Schmitt as Occasio"; "Carl Schmitt and the Conservative Revolution"; "Carl Schmitt in the Summer of 1932"; "From the Führerstaat"; "Expendable Kronjurist"; "Carl Schmitt at Nuremberg"; "Carl Schmitt's Path"; "Definite and the Dubious"; Schwab, *Challenge;* "Carl Schmitt: Political Opportunist?"; "Carl Schmitt Hysteria in the US"; "Schmitt Scholarship"; "Progress of Schmitt Studies"; "Through a Glass Darkly."
[95] E.g., Mouffe, *Democratic Paradox,* 57-58 n. 2. Cf., however, *Return of the Political,* 121. See also Scheuerman, *Carl Schmitt,* 2, cf., 11.

political programs were diametrically opposed to his own (Sorel and Lukàcs, to name two).[96] He was fond of the "contrast[s] of the most beautiful typological clarity" that were revealed by setting the analyses of the far right alongside those of the far left.[97] Also, as Schmitt put it with one of his favorite lines from Bruno Bauer's writings, "only he can conquer, who knows his prey better than they themselves do."[98] This willingness—and ability—to read widely and sympathetically gave Schmitt an extraordinary breadth of vision, which has also contributed a great deal to the fact that he is being read across the political spectrum today.

Moreover, although Schmitt's own idiosyncratic form of neo-/right-Hegelianism will not be a prominent concern here, and while it is certainly true that he never self-identified as such, Schmitt stands as one of the great, twentieth-century representatives of Hegelianism.[99] Schmitt's

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[96] Schmitt awakened interest in Sorel's writings in Germany. See Schmitt, "Die politische Theories des Mythus" in PuB, 11 n; Müller, "Myth, Law," 460 and n. 6. On the Lukács-Schmitt relationship, see McCormick, *Carl Schmitt's Critique,* 32-37.

[97] See Schmitt, PT, 76/60.

[98] See Schmitt, "Neutralität und Neutralisierungen" in PuB, 333; G, March 14, 1948, p. 115; ECS, Winter 1945/46, p. 18, August 25, 1946, p. 39; Schmitt and Mohler, *Briefwechsel,* Schmitt to Mohler, October, 16, 1948, p. 35. Cf., NdE, 102/132.

[99] There is considerable controversy about Schmitt's relationship to Hegel, largely because of three facts (a) Schmitt's known associations with the NSDAP, (b) the existence of a long tradition of interpretation dismisses Hegel's political thought as amounting to little more than reactionary, Prussian conservatism or to proto-totalitarianism of some variety—a view most closely associated with Haym, *Hegel und seine Zeit* in the nineteenth century and Popper, *Open Society,* vol. 2 in the twentieth—and finally (c) the strength of a post-war, intellectual movement in Hegel interpretation, which has sought to rescue Hegel from this distorting, interpretive tradition. Thus, if it is even appropriate to refer to Schmitt as a descendant of Hegel at all, it is only in the highly restricted sense of a neo-/right-Hegelian. Habermas, PD, 70-71; LC, 127; Kervégan, "Politik und Vernünftigkeit"; Hegel, *Carl Schmitt;* Mehring, *Pathetisches Denken,* esp. 18-20*;* Derrida, *Politics of Friendship,* 120; Cristi, "Hayek and Schmitt," 529-30; *Carl Schmitt,* 96-107 (ch. 4), 175; Schwab, *Challenge,* 28, cf., 26, 57, 59, 107, 109-10, 118, 122-23, Bendersky, "Three Types," 28; *Carl Schmitt,* 222; Gottfried, *Carl Schmitt,* 103, 114-15, Kennedy, Review of Carl Schmitt, 589 identify Schmitt loosely as a right-/neo-Hegelian. In contrast, Löwith, "Occasional Decisionism of Carl Schmitt" in *Martin Heidegger,* 280 n.; Meier, *Lesson,* 15-16 and n. 42; Neumann, *Behemoth,* 483 n. 40; Marcuse, "Struggle Against Liberalism in the Totalitarian View of the State" in *Negations,* 275 n. 79; *Reason and Revolution,* 412-13, 419; Scheuerman, *Carl Schmitt,* 265 n. 21; Winfield, "Rethinking Politics"; Ottmann, *Individuum und Gemeinschaft,* 207, 220 n. 451; "Hegel und Carl Schmitt" emphasize Schmitt's differences from Hegel.—Undoubtedly, Schmitt's own political vision lacks or deemphasizes many of the prominent institutional features Hegel recommends in his own voice (e.g., limited constitutional monarchy, the rule of a professional civil service, an assembly of representative estates). See Hegel, PR, § 273 A, p. 435/308. (constitutional monarchy), § 205, p. 357/237, § 289, p. 458/329, § 291, pp. 460-61/333, § 294, pp. 461-63/332-34, § 297, p. 464/335, § 303, p. 473/343 (civil service), § 302, p. 471/342, § 311, pp. 480-81/350-51 (assembly of representative estates). It also lacks some of the more grandiose claims Hegel made on behalf of the modern state (e.g., its ability to serve as the site of the ultimate reconciliation between particularity and universality). See Hegel, PR, § 260, pp. 406-07/282-83. These features of Hegel's political thought are surely important, and it was by forcefully drawing attention to these and others like them that intellectuals in the post-war era

Hegelianism is, however, modified by the important infusion of a sort of Weberian-Nietzschean pluralistic vision.[100] With few exceptions, the neo-/right-Hegelianism of the early twentieth century was a story of productive transformation.[101]

This intellectual background to Schmitt's thought is of some relevance for contemporary discussions. The most prominent critics of academic liberalism in the 1980's and 1990's were also described by some observers as Hegelians of some variety or another—which is, however, certainly not to say that they shared much of anything at all with Schmitt's politics. Observers, however, were correct when they asked what difference their critique made in the final analysis. The discussion was heavy on ethereal, philosophical anthropologies, but light on institutional and constitutional design. With the exception of the more radical Alasdair MacIntyre—whose heritage as a former Marxist prepared him well to dispense altogether with liberalism *tout court*—

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were able to resurrect a more liberal Hegel. See, e.g., Ritter, *Hegel;* Avineri, *Hegel's Theory;* Gillespie, *Hegel, Heidegger,* esp. 110-11; Pippin, *Hegel's Idealism;* Pinkard, *Hegel's Phenomenology;* Smith, *Hegel's Critique;* Taylor, *Hegel; Hegel and Modern Soceity;* Wood, *Hegel's Ethical Thought,* esp. 12-14, cf., however, 256-60. For helpful surveys of the Hegel literature and of his reception, see Quinton, "Spreading Hegel's Wings" (Parts I-II); Gillespie, "New Hegel"; Schmidt, "Recent Hegel Literature" (Parts I-II); Ottmann, "Hegel and Political Trends"; "Hegel's Philosophy of Right." Hegel's monarch, moreover, had none of the activist features of Schmitt's President, for Schmitt's President does quite a bit more than simply "dot the I" in the legislation which passes his desk. Hegel, PR, § 280 Z, p. 451/323. There is, moreover, in Schmitt's thought no providential philosophy of history which terminates in anything resembling the "end of history" moment of a fully rational, bureaucratic, constitutional state. Kojève, *Introduction,* 32, 95 et passim. There is, in addition, certainly no notion of Absolute Knowledge in Schmitt's account. Hegel, PhG, § 788, p. 575/479 ff. Surely, there are countless other differences. Drawing attention to them serves only to prove that Schmitt and Hegel were not the same person, and that Schmitt was not simply a commentator. Yet, the similarities in temperament and basic outline remain meaningful.

[100] There is also considerable controversy concerning Schmitt's relationship to Nietzsche. It is important, however, to recognize that elements of the Nietzschean spirit might be present in Schmitt's thought, notwithstanding Schmitt's occasional criticism of Nietzsche. See, e.g., Schmitt, "Vorwort" in PR, 27/20; G, November 24, 1947, p. 49. Derrida, *Politics of Friendship,* 80, 83-84; Wolin, "Carl Schmitt: The Conservative," 427, 430, 433, 436; McCormick, *Carl Schmitt's Critique,* 9-10; Löwith, "Occasional Decisionism of Carl Schmitt" in *Martin Heidegger,* 137-69; Habermas, LC, 122, cf., 98; "Introduction" in *Observations,* 12-13, 24; Holmes, *Anatomy,* 375 n. 24 draw parallels between Schmitt and Nietzsche. However, Meier, *Carl Schmitt,* 65, 65 n. 72; *Lesson,* 59-60, 97, 99; Maschke in Quaritsch, ed., *Complexio Oppositorum,* 156 dissent vigorously.

[101] For a discussion of modifications Hegel's thought underwent in the work of a more widely recognized neo-/right-Hegelian, Hans Freyer, see Muller, *Other God,* 115-19, esp. 116, cf., 40-41, 83-84.—We know Schmitt read Freyer with great interest. References to his work abound. See, e.g., Schmitt, L, 76/49, 130/85; Drei Stufen, 930/169; "Die andere Hegel-Linie," 2; HoH, 65/63, 71 n. 17/40 n. 28.

each of these thinkers stood broadly within the liberal-progressive tradition, even when they sought to identify themselves with a "republican" tradition.[102]

Schmitt, in contrast, does not find himself torn between two traditions. Nor does he experience the characteristic pathos of all sincere syncretists—the yearning for participation in a "larger whole" or "larger life" within political community coupled with the simultaneous acknowledgement that "no construal is quite innocent," that "something is always suppressed," and that "full integration" can sometimes "demand too high a price" from certain ways of life.[103] The solution offered to this dilemma is a Gadamerian "'fusion of horizons.'" This possibility rests upon the "presumption," or "act of faith," that "all human cultures ... have something important to say to all human beings."[104] Yet more importantly, this prospective cultural reconciliation also presumes that a sufficient degree of commensurability can be achieved to effect such a fusion, or that the parties to the fusion will willingly undergo the self-transformation required, which is possible, only so long as the self-transformation demanded of the relevant parties does not do an unacceptable level of violence to their own self-understanding—a judgment, which no third party is eligible to make. All of this is a tall order indeed.

Schmitt does not belong to this group of thinkers, which one critic has called "soft antiliberals," who "malign liberalism verbally, but when faced with practical choices, reveal a

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[102] E.g., Taylor, "Politics of Recognition," 59, 61-63; "Cross-Purposes" in *Philosophical Arguments,* 181, 183-84, 202; Walzer, "Comment," 102-03; "Communitarian Critique," 16, 21-22; Sandel, *Democracy's Discontent,* 5-6; MacIntyre, "Prologue" in *After Virtue,* xiv-xv; *Whose Justice,* 336-37, 347 et passim. See also Connolly, ID, 88.

[103] Taylor, *Hegel,* 381, 415, cf., 378, 386, 451; "Overcoming Epistemology" in *Philosophical Arguments,* 17; "Connolly, Foucault, and Truth," 384. Echoing this, Sandel, *Democracy's Discontent,* 311, 322-23; *Public Philosophy,* 2, 28 writes of the "hunger" or "yearning" for a "public life of larger meaning." Unlike, Taylor, however, Sandel, "Moral Argument and Liberal Toleration: Abortion and Homosexuality" in *Public Philosophy,* 126 evinces no recognition that the demand that human practices "be defended … in the name of the intrinsic value or social importance of the practice it protects" may ultimately lead to culturally-sanctioned denigration—to which Honig, PTDP, 187 et passim objects.

[104] Taylor, "The Politics of Recognition" in *Philosophical Arguments,* 252; Gadamer, *Truth and Method,* 306-07, cf., 374-75, 397, 576.

surprising fondness for liberal protections and freedoms"—a move which ultimately renders them politically "harmless."[105] Schmitt, in contrast, takes the polemical-political spirit of that core, motivating feature of the revived Hegelian spirit much further than these later thinkers were willing, and thus his reactionary radicalism illuminates more perspicuously the stakes and contours of this ideal-typical thought world.

His juxtaposition with the discourse of difference is similarly illuminating. When Michel Foucault, Bakunin's spiritual descendant, wrote that we must learn how to "cut off the king's head," and thus, by way of metonymy, to dispense with all conceptions of sovereignty—he cannot but have had Carl Schmitt in mind, or at least the general outlines of a position like his.[106] Following the path laid by Foucault, Connolly had, in a moment of revealing clarity, maintained that the politics of deep identity "*must* have recourse to a ... supplementary 'bent' or purpose or harmonious direction in being" of some kind or another residing in nature, history, God, the human subject, etc.[107] As we shall see, Schmitt fits this *political* description, and yet he makes no *ontological* presuppositions of this sort—or at least not of the variety imagined by the discourse of difference. He accepts important pluralist premises of the discourse of difference, and yet his

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[105] Holmes, *Anatomy,* 88, 259, cf., 154 ff, 176, 181.

[106] See Foucault, "Two Lectures" in PK, 94-96, 105, 108; HS, 1:89, cf., 97; "Truth and Power" in FR, 63.—It appears that Foucault cited Schmitt only once, and then only in an eleven page manuscript, as yet unpublished, which was inserted between the lectures of February 21 and March 7, 1979. These lectures, between which the manuscript was placed, were later published as Foucault, *Birth of Biopolitics,* but the manuscript itself, is partially transcribed only in another volume. See Foucault, *Security, Territory, Population,* esp. 390, 400 n. 134.—The relationship between Schmitt and Foucault appears to be relatively underexplored. For some exceptions, see Deuber-Mankowsky, "Nothing is Political"; Ojakangas, "Sovereign and the Plebs." Cf., Wolin, "Foucault's Aesthetic Decisionism."

[107] Connolly, ID, 89, emphasis added, cf., 28-29, 31, 72, 91, 162-63, 234 n. 14. Cf., TPD, xi-xii, 225-26, cf., 229; "Taylor, Foucault, and Otherness," 373-75; Taylor, "Connolly, Foucault, and Truth" 384-85. Rarely does Connolly palpably back away from this claim. See, e.g., Connolly, P, 77, cf., 81; "Rethinking the Ethos," 98; Connolly et al., "Interview with William Connolly, December 2006," 315. Tellingly, in the second and third instances, Schmitt's name is mentioned.

politics differs radically from theirs. Thus, Schmitt's political vision gives the lie, as it were, to one of the central, albeit often unspoken, premises of the discourse of difference.[108]

However this may be, one would of course have to be stark, raving, mad to actually recommend a "Schmittian" politics. Upon that, all sober observers are agreed. And yet the critical force of this German jurist's piercing and keenly-honed intellect remains potentially valuable today, not only as the particularly lucid expression of an ideal type, but also as a polemical counter-point to some of our deepest and most sincerely felt aspirations, thus calling us to self-reflection. The questions his work asks are certainly still of great import; the answers he gives, considerably less so.

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[108] Rarely does Connolly discuss Schmitt in a serious way. Connolly, EP, 155, 227 n. 30, cf., 179 dismisses him as a theorist of "fascist unity." That he does not take Schmitt's argument seriously is revealed by his claim that "as [he] read[s] Schmitt, his text is governed by a covert aesthetic of homogeneity—an identification of the beautiful with unity." "Twilight of the Idols," 130. The qualifier, "covert," is a tacit admission that this logic can be found nowhere in Schmitt's writings. cf., P, 134, 145, 183 nn. 13-14; WNS, 201-02 n. 19.

## 10. The Legislative State and its Legitimacy in an Age of Mass Democracy: Schmitt's Critique of Liberal Institutions

Though after the war, Schmitt would claim that he was little more than an "intellectual adventurer" and that his "contemplative" disposition distanced him from the role of the prosecutor, Schmitt's work is actually polemical through and through.[1] Elsewhere, he contended that "all … concepts" of legal and political theory, as linguistic phenomena, always had a political battle in view, and were, for that reason, "*polemical*" all the way down.[2] The best way to approach Schmitt's writings is thus to begin with his sustained assault on liberal culture, theory, and institutions.

Whether or not Schmitt's critique of liberalism proceeds on the basis of a caricature of that tradition will not be a theme pursued at great length here, though certainly a good deal in the way of caricature can be found there. This is often the case whenever one attempts to speak of so protean a tradition as "liberalism" as though it were in fact a monolithic entity. It is, for instance, a serious question whether Anglo-American, common law jurisprudence and the interpretive, judicial latitude, licensed by the doctrine of *stare decisis,* render moot much of Schmitt's critique of major trends in Weimar jurisprudence. Interestingly, in later writings published subsequent to the demise of the Weimar Constitution, Schmitt even began to acknowledge the distinctiveness of the Anglo-American tradition of case law, distinguishing it from the pure "normativistic positivism" characteristic of early twentieth-century, continental European legal theory.[3]

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[1] See Schmitt, Antworten, 60, cf., 55, 68, 77, 88-89; ECS, Summer 1945, pp. 10-11. Cf., Schmitt and Kempner, "'Fourth' (Second) Interrogation," 41.

[2] Schmitt, BdP, 31/30-31, translation modified. Passage does not appear in BdP1, 6. Cf., HP, 5.

[3] See Schmitt, DA, 44-45/85-86, cf., 28/67. Cf., LdER, 413-14/58. Interestingly, what Schmitt seemed to admire most in Montesquieu's jurisprudence appears to be English in origin. D, 109/89. This is hardly surprising given that his earliest formulations of determinate legal judgment squared neatly with the English common law tradition. "Eine richterliche Entscheidung ist … richtig, wenn anzuhemen ist, daß ein anderer Richter ebenso entschieden hätte." GuU, 71.

As has been pointed out repeatedly by many able critics, Schmitt undoubtedly undersold liberalism in a number of important respects.[4] This critical work has been, and will continue to be, done, for as one of Schmitt's commentators once put it, there has never been a shortage of those looking to give a "rundown of the democratic A-B-C" by "plant[ing] a kick in Schmitt's ass."[5] Just as the world needs no more naïve apologies for this late state-theorist, so too we do not need to add another voice to the resounding chorus of those who point out the obvious: that Schmitt was not a liberal democrat of deep conviction and that his conception of "liberalism" is overly monolithic. Surely, some of its bite is lost when it is pulled from the context of Weimar era, neo-Kantian, Vienna school legal positivism against which his critique was principally directed.

Schmitt's Weimar period critique is multi-faceted. It begins generally with the Weberian notion of disenchantment, which ushered in an age of "neutralizations and depoliticizations." He argues that the late, liberal tradition is a reflection of this development, which leads to the loss of a sense for a truly meaningful distinction between legality and legitimacy: the rules of the game, on the one hand, and legitimate authority, on the other (§ 10.1). Accompanying the trend towards neutrality are significant developments in liberal constitutional and state thinking, which are, broadly speaking, the notion of the rule of law and parliamentary sovereignty, which, under conditions of twentieth-century mass democracy, result in a number of conceptual fictions, including the failure to fully appreciate the "personalism" of law and of politics—a personalism

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[4] E.g., Holmes, *Anatomy,* 57-59; Scheuerman, "Carl Schmitt's Critique of Liberal Constitutionalism," esp. 314-22; *Carl Schmitt;* Habermas, "Horrors of Autonomy: Carl Schmitt in English" in NC, 138-39; Marcuse, "Struggle Against Liberalism in the Totalitarian View of the State" in *Negations,* esp. 8, 270 nn. 8 and 10.
[5] Taubes, *Political Theology of Paul,* 105.

which contemporary opinion finds increasingly in the practice of constitutional high courts. By the end of the Weimar period, Schmitt had begun to refer to liberal regimes not by their then common appellation, *Rechtsstaat,* but rather as a "legislative state"—thus signaling that his critical point of focus was largely parliament as the site of the production of law (§ 10.2).

His critical objections to liberal parliamentarism are basically three-fold and were developed over the course of many years, spanning multiple works. The first is his question whether liberal parliamentarism under conditions of mass democracy actually retains the legitimating principles it had historically imagined for itself or wheher, in the interim, it provided itself with new ones. Schmitt identifies "discussion" and "openness" as the central, legitimating features of liberal parliamentarism's capacity for "representation" (§ 10.3). Ultimately, he found concrete political practice wanting, and this disjunction between theory and practice generates a crisis of legitimacy. In an age of worldview parties, moneyed interests, backroom negotiations, and mass media, there arises a tragic conflict between the intellectual-historical principles legitimating parliamentary government and actual practice on the ground (§ 10.4).

The second is Schmitt's polemic against interest group pluralism. On his view, the concrete reality of parliamentarism in a world of mass democracy received its intellectual reflection in the early twentieth-century theory of "pluralism." While an accurate description of what had become of parliamentarism under conditions of mass democracy, pluralism, as a theory, fails in three ways: its more traditional conception of parties no longer made sense in a political world inhabited by mutually antagonistic worldview parties, it was itself not consistently pluralistic, and finally it could not explain why human beings engage in political activities, which are, as phenomena, qualitatively distinct from other types of human activities. Ultimately, the political association is not just one among many human associations, and the logic of war is itself a

fundamental testament to this (§ 10.5). Given Schmitt's later political affiliations, his polemic against interest group pluralism, and the fact that he contributed to late-Weimar period debates on the "total state," crucial questions are raised about the possibly "totalitarian" character of his thought. As we shall see, Schmitt's thought underwent decisive shifts shortly after 1933 in the direction of an increased support for totalization. This was, however, an abrupt shift rather than a quantitative increase (§ 10.6).

The third is Schmitt's contention that liberal parliamentarism's procedural legality results in an indefinite deferment of necessary, decisive action. In the decisive hour, its overly optimistic faith in discussion and procedurality ultimately proves fatal. Liberal parliamentarism's pure proceduralism is unable to account for the occasionally necessary practice of excluding anti-constitutional parties. Ill prepared to justify the practice, without calling upon principles absent from its own formalistic logic, liberal parliamentarism and its system of pure procedurality stand in danger of failing to take the necessary step in order to avoid imminent, constitutional suicide (§ 10.7).

Schmitt's entire critique revolves around the claim that the contemporary incarnation of the parliamentary legislative state has either under-conceptualized or depleted its own legitimacy under conditions of mass democracy. At least in some passages, Schmitt expressed the hope that a source of legitimacy might be, in part, recaptured more directly from the democratic people themselves. Thus, in the eyes of some, Schmitt earns a (questionable) reputation as a type of democratic thinker. It is important then to understand the outlines of his basically Rousseauian democratic thought. Ultimately, as we shall see, Schmitt's democratic thought is best characterized as a plebiscitary one. However, its presuppositions and general outline render it so incredibly foreign and thus for us little more than a historical curiosity—hardly anything which

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popular opinion would consider to be democratic (§ 10.8). Even more controversially, Schmitt's conception of democracy is premised on a notion of "homogeneity," which in light of his later Party membership raises serious questions about its possibly racial or ethnic character. As we shall see, careful consideration of his Weimar era texts provides close to no support at all for the charge that his thoughts on homogeneity are fundamentally concerned with racial or ethnic homogeneity. Importantly, however, they also do not preclude racial or ethnic conceptions. Moreover, after 1933, his thought on this topic, as on many others, underwent a clear and demonstrable shift (§ 10.9).

## 10.1 The Meaning of Modernity: The Perilous Search for Legitimacy in a Disenchanted "Age of Neutralizations and Depoliticizations"

Liberalism, according to Schmitt, is a passing movement, a "historical force." The epoch of liberalism, as Schmitt describes it, is an age of "neutralizations and depoliticizations."[6] The germs for Schmitt's thoughts on the character of liberalism can be found in Max Weber's diagnosis of modernity as the "disenchantment of the world."[7] Schmitt—the "legitimate student of Max Weber," as Jürgen Habermas once called him—follows the general trajectory of his teacher's thought, but turns his attention towards a critique of the liberal state.[8] On Schmitt's view, what is lost in this transformation is an adequate conception of legitimate authority.

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[6] Schmitt, BdP, 68/69. Cf., "Age of Neutralizations and Depoliticizations" in BdP, 79-95/80-96.
[7] Weber, "Science as a Vocation" in FMW, 155.
[8] Habermas, *Zur Logik der Sozialwissenschaften,* 85, cf., 85 n. 9. On Schmitt's relationship to Weber, see also Mommsen, *Max Weber,* 382-89, 404-05, 410, 448-53; McCormick, *Carl Schmitt's Critique,* esp. 8, 32 n. 6, 32-42; "Fear, Technology, and the State," 646 n. 9; "Political Theory and Political Theology," 851 n. 58; Holmes, *Anatomy,* 45; Strong, *Politics Without Vision,* 218-62 (ch. 6), esp. 224 n. 15; Seitzer, "Introduction" in Schmitt, VL, 12, 31-32, 450 n. 65; Lilla, "Carl Schmitt" in *Reckless Mind,* 69; Scheuerman, *Carl Schmitt,* 228, 331 n. 16; "Fascism of Carl Schmitt," 108-09; Kennedy, *Constitutional Failure,* 212-13 n. 111; Gross, *Carl Schmitt,* 107 ff.; Taubes, *To Carl Schmitt,* 6, cf., 4-5 (cf., however, *Political Theology of Paul,* 64, 66, 69); Herf, *Reactionary Modernism,* 118 et passim; Schwab, *Challenge,* 28 and n. 65; Mehring, "'Katholischer Laie,'" 397.

In his own writings, Weber had maintained that neither mere custom, affection, private material interests, nor purely Kantian value-oriented, dutiful behavior were sufficient to establish a "foundation" for the "authority" and stability of the state. Something more was needed, and that something-more Weber called the "belief in legitimacy."[9] Famously, he distinguished three, historical ideal-types of legitimate authority: (a) traditional authority, (b) charismatic authority, and (c) rational-legal authority or legality, the latter of which he associated with the modern, rule-of-law, liberal state.[10]

In an age of disenchantment, modernization, and rationalization, the first two conceptions of legitimacy had slowly begun to wither. Increasingly, the modern, rationalized world came to be dominated by a type of rationality Weber called *Zweckrationalität,* or instrumental-rationality—which was later and more prominently given the name of "technology" by Heidegger and the Critical Theorists who followed him. This type of formal rationality concerned itself with the *means* necessary for the attainment of ends, whose specific character is treated as given.[11] As the name would suggest, instrumental rationality is, in itself, inadequate to furnish purpose, meaning, or direction to contemporary societies, for reason is here only an instrument or tool.

In terms of legitimacy, the rule of bureaucratic civil servants is the archetype of modern, rational-legal authority. Yet, however much the bureaucratic civil servant may prove effective in executing his task, his training and his official capacity give him no special insight into political ends. "Setting political goals," writes Weber, "is not a matter of expertise."[12] As such, the bureaucrat's presence within the regime can contribute to the efficiency of government, but it

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[9] Weber, WG, 122/213, translation modified, cf., 16/31, 153/263.
[10] See Weber, "Politics as a Vocation" in FMW, 78-79; WG, 124/215-16 ff., cf., 19-20/36-38, 562/975.
[11] See Weber, PE, ch. 5, p. 123; WG, 12-13/24-26; Heidegger, "Question Concerning Technology" in GA, 7:7-36/*Question Concerning Technology,* 3-35. On the Weberian background to this concern of Critical Theory, see Habermas, TCA, 1:217 ff., 243 ff.
[12] Weber, "Parliament and Government in Germany" in PW, 180.

cannot legitimate it. Weber thus located the source of modern, rational authority not in the rule of bureaucrats as such, but rather in the consistent legality within which they operated, and he contended that this was the most common form of legitimacy available to modern states. "Today," writes Weber, "the most familiar form of legitimacy is the belief in legality: the compliance with statutes which are *formally* correct and which are brought about in the usual form."[13] An entire tradition of early twentieth-century, German legal theory is erected upon this foundation.

On Schmitt's view, however, Weber and his followers had rather blithely equated legality with legitimacy.[14] The rules of the game had become synonymous with the legitimacy and the propriety of the game itself.

Schmitt's legal and political writings in the Weimar period concern themselves fundamentally with this matter and the dilemmas it poses, taking aim specifically at the neo-Kantian, procedurally formal, non-substantive, immanent conceptualization of law, as represented by Hans Kelsen's legal positivistic Vienna School of legal theory. Kelsen's work consistently separated the *is* from the *ought,* the *fact* from the *norm,* and legal procedure from those questions concerning the state's legitimacy. However, the authority of a given law must always appeal to a further authority in order to justify itself—a process which could repeat itself *ad infinitum*. In the end, then, in order to break free from this infinite regress, Kelsen was forced to posit a contentless, basic norm (*Grundnorm*), but he does not further explore the legitimacy or status of this fictional construct. Many critics, Schmitt included, see this *Grundnorm* as derived principally from the brute facticity of the already existing constitution, which these critics interpret as a

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[13] Weber, WG, 19/37, translation modified.
[14] See Schmitt, L, 101/66; LL, 269/9. Cf., Nachwort in LL, 347/97; VL, 307/331; TdP, 85/82-83. Cf., also Schmitt, NdE, 38-39/69-70 and n. 10 with Weber, WG, 18/34.

fundamentally deceptive crutch on which to lean. This, he mocks as a "tautology of a raw factuality: something is valid, when it is valid and because it is valid."[15]

More controversially, however—and perhaps this is Schmitt's most serious, intellectual error—he understood this particular vision of rule-of-law, liberal constitutionalism to be the final consummation of liberal theory in an age in which the belief in classical liberalism's doctrine of natural law had completely eroded. Kelsen's pure theory of law is the "final product of the … genuine theory of the bourgeois *Rechtsstaat.*"[16] However, because of disenchantment and the resulting erosion of belief in the "metaphysical presuppositions of bourgeois natural law," Kelsen's thought represents a vain attempt to hold onto "traditional formulas, which have long since become empty."[17] Thus, today we are only grasping after the "residue" of a former way of thinking.[18]

The twentieth century is, according to Schmitt, an "age of technology"—a characterization which refers not only to its increasing use of technical instruments but also to the general disposition of the preponderant part of society towards the world it inhabits.[19] It is an age that believes it has found in technology the "absolute and ultimately neutral ground" within which one might go about the task of serving natural and pre-given, human desires. That which is eminently controversial and potentially divisive is either supplanted or relegated to the privacy of one's home. Common ground is sought in a domain where, it is believed, controversy, or at least its

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[15] Schmitt, VL, 9/64, translation modified. Cf., Schmitt, PT, 29-30/20; DA, 13/50, 15-16/52-53, 30-32/68-70, 48-49/90; LdER, 411/56. For some background on Kelsen, see Dyzenhaus, *Legality and Legitimacy,* 102 ff.; Scheuerman, "Carl Schmitt's Critique"; Seitzer, "Notes" in Schmitt, LL, 123-24 n. 12, 137-38 n. 2; "Introduction" in Schmitt, VL, 5-6; Bendersky, "Three Types," 7-12. See also Kelsen, *Reine Rechslehre.* The first edition is translated as Kelsen, *Introduction to the Problems of Legal Theory,* and the second as Kelsen, *Pure Theory of Law.*—This school of thought was later to have considerable influence on the Anglo-Saxon world by way of one of Kelsen's admirers: the British legal theorist, H.L.A. Hart. See Hart, *Concept of Law.*
[16] See Schmitt, VL, 8/64.
[17] See Schmitt, VL, 11/65-66, cf., xiii/54, 55/107. Cf., PT, 54/41.
[18] See Schmitt, VL, 142/183, 156-57/195-96.
[19] Schmitt, "Age of Neutralizations and Depoliticizations" in BdP, 84/85, 86/87, 88/89, 94/95 et passim.

ferocity, have been neutralized. An attempt was thus made to establish a protected, public sphere "in which strife ended, and where one could agree, come to an understanding, and mutually persuade" one's fellow citizen. Men and women of differing faiths and backgrounds can easily agree that "technical comforts" are pleasant and provide much welcome repose from many of the travails of the human condition. There appears to be no principled objection, for instance, to the radio or to technically organized, postal delivery.[20]

In the seventeenth century, the revolution in state theory began with a novel, philosophical anthropology. Descartes had presented the image of man effectively as something along the lines of a mechanism. It was then left to Hobbes to transpose this image onto that of the state and thus to become the father of the modern theory of the state.[21] But modern state theory represents a collection of thoughts which ultimately undercut itself.

In Schmitt's lights, the "modern state" has come to be conceived along the lines of a "huge industrial plant," governed by "economic technical thinking," precisely as Weber had prophesied. So the general trajectory of political life increasingly follows the current of "economic interest" and "advantage" of economic groups and individuals. There are today "no longer … political problems, only organizational-technical and economic-sociological tasks."[22] In the words of an earlier social scientist, the interesting questions of politics have become, "who gets what, when, and how?"[23] In such an age, the dominant conceit draws ever nearer to the belief that one day the state will—as the socialist tradition had put it—simply "die off" and be replaced by the

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[20] Schmitt, "Age of Neutralizations and Depoliticizations" in BdP, 88-90/89-91, translation modified.
[21] See Schmitt, Staat als Mech., 139/91,141/93-94, 145/98-99. Cf., RK, 36/21; L, 48-49/32, 59/37.—Machiavelli, in Schmitt's view, exhibited a "technical conception" of politics, but he did not go so far as to "establish a theory of the state." D, 6/3, 10/7, translation modified, cf., 25/20, cf., 35/28.
[22] Schmitt, PT, 82/65. Cf., GLP, 33/24. See also Weber, "Parliament and Government in Germany" in PW, 146.
[23] See Lasswell, *Politics: Who Gets What, When, and How.*

bureaucratic "administration of things."[24] On this sort of conception, one comes to imagine that the state "machine … runs itself" without need of guidance.[25] According to Schmitt, in this general historical sweep, that which is distinctively political is thereby completely submerged in the roaring, heady upswell, which he labels the "onslaught against the political."[26]

Technology, and the frame of mind associated with it, appear to have neutralized controversy. But, Schmitt argues that this belief is mistaken, for a tool that serves all actually serves no one in particular. "Technology can provide no criterion for evaluating." Before the question of "freedom or oppression," technology is completely silent. As the second half of the twentieth century knew all too well, technology can be used to end world hunger or it can be used to destroy entire cities in a firestorm of nuclear annihilation. Technology and the way of thinking associated with it are themselves radically underdetermined. Therein lies the problem faced by the age of neutralizations.[27] "Always with the same seriousness and precision, a wonderfully rational mechanism serves any demand, may it be silk shirts or poison gas."[28] Facing this same dilemma are all of those formalized bureaucratic structures, which work on the analogy of the technological mentality he depicts. Both liberal democracy and Bolshevik Marxism "agree … in treating the state as an apparatus, which diverse, political powers can use as a technical-neutral instrument."[29]

However, the impulse standing behind the religious wars of the sixteenth century became, in the nineteenth and twentieth century, economic wars. Thus, in response to the hard-won

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[24] E.g., Engels, *Die Entwicklung des Sozialismus von der Utopie zur Wissenschaft* in MEW, 19:224, cf., 195; *Anti-Dühring* in MEW, 20:262. The idea derives from Saint-Simon. Cf., Schmitt, Staat als Mech., 142/95, 144/97; BdP, 40 and n. 11/39 and 39-40 n. 15.

[25] Schmitt, PT, 62/48. Cf., RK, 45/27, 60/35-36; LL, 265/5.

[26] Schmitt, PT, 82/65.

[27] Schmitt, "Age of Neutralizations and Depoliticizations" in BdP, 90-91/89-91, 94-95/95.

[28] Schmitt, RK, 25/14-15, translation modified. Cf., L, 63/42; "Einleitung" in DC, 11-12.

[29] See Schmitt, L, 63/42, cf., 106/68-69, 110/70-71, 116-18/73-74.

knowledge that "one and the same state cannot accommodate two contradictory economic systems," the principle, *cuius regio eius religio,* of the post-Reformation, European landscape became in the twentieth century *cuius regio eius oeconomica.* Conflict and controversy are not neutralized. They are only ever displaced.[30]

Today, the terrain has, on a global scale, apparently shifted back once again to one more familiar from the sixteenth and seventeenth centuries. The more radical branches of Islamism participate in jihad against the "West" and what it believes to be its "abysmal primitiv[eness]" in matters of spirit.[31] Those who perceive themselves to be under siege declare a "war on terror," directed against a largely faceless enemy—a war of almost cosmic proportions, because it appears to know no sovereign boundaries and the rules of engagement often appear to be formulated on the fly.

In this age of neutralizations, liberalism offers very little, for it has, according to Schmitt, no "positive theory of the state." Instead, it blithely presupposes the basic "goodness of man's nature," and it attempts to subsume political phenomena under "ethical" and economic criteria.[32] Liberalism thus "evades or ignores the state and politics." For this reason, there is "absolutely no liberal politics." There is "only a liberal *critique* of politics." Ultimately, liberalism only trades in what Schmitt calls the "negation of the political."[33]

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[30] Schmitt, "Age of Neutralizations and Depoliticizations" in BdP, 86-89/87-90, 91-92/92. Cf., G, March 5, 1948, p. 108.

[31] For an early Islamist characterization of America along these lines, see Qutb, "The America I Have Seen," 11. Undoubtedly, it is not possible to reduce Islamist antipathy towards the West, and towards the United States in particular, to contempt for their way of life, but this plays, nevertheless, no small role.

[32] Schmitt, BdP, 61/61, 69-71/70-72, translation modified. Cf., VL, 225-26/257.

[33] Schmitt, BdP, 69/70, translation modified and emphasis added. Cf., VL, 40-41/93.

## 10.2 The Rule of Law and Depersonalization

Accompanying this general tendency toward neutralization, the liberal tradition attempts to depersonalize the state—a trend which must always be viewed within the broader context of the bourgeoisie's historical struggles against the crown. This historical development terminates in liberal constitutionalism or the *Rechtsstaat* tradition, whose central feature is the distinction between, on the one hand, generalized laws enforceable without exception and, on the other hand, the commands of concretely specifiable persons.[34]

The seeds of this development are already present with great clarity in the late seventeenth century, particularly in that writer whom Schmitt correctly identifies as the "legal-philosophical founder of modern constitutional law": John Locke.[35] In his account, one of the principal, defining features of "*Political Society*" is the presence within it of a "common establish'd Law." "Law" here refers to "settled standing Rules, indifferent, and the same to all Parties," in contrast to an "Extemporary arbitrary Decree," which is the "private Judgement" of some concrete individual.[36] So understood, law is a general norm, divested of its character as the command of a particular man or group of men. Thus, in an important line, whose English Schmitt miscites, Locke asserts that "*against the Laws there can be no Authority.*" There exists no legitimate authority, not even by royal "*Commission,*" which can contravene depersonalized "Law."[37] Because there is no power, other than God, to which the legislature is bound, and because those who execute the laws are also "bound" to them, the legislature, which produces those laws, is the "Supreame" power within the state.[38]

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[34] See GLP, 53/42.
[35] Schmitt, LdER, 404/50, translation modified. Cf., D, 200/175.
[36] Locke, *Two Treatises,* 2.87, p. 324, 2.136, p. 358.
[37] Locke, *Two Treatises,* 2.206, p. 403. Miscited in Schmitt, PT, 43/32; D, 41/32.
[38] Locke, *Two Treatises,* 2.131-32, pp. 353-54.

Within this general, historical sweep, the "rule of *man*" is supplanted by the "rule of *law.*" Sovereignty embodied in a concrete person is transferred to an abstraction: the sovereignty of the law.[39] This effectively is what John Adams meant when, in the late eighteenth century, he recommended a "*government of laws, and not of men*"—words which Chief Justice John Marshall immortalized several decades later.[40] Quite naturally, the organ that produces this abstract order comes to assume a privileged status. This development results then in what the English political tradition calls "parliamentary sovereignty."[41]

This development in particular becomes one of the principal focal points of Schmitt's analysis. On his view, the contention that purely abstract, formal law rules in a sovereign manner over human society is ultimately untenable, and especially untenable in an age of mass democracy. It leads to the proliferation of multiple "concealments and fictions."[42]

In contrast, the rule of law is premised upon a more fundamental rule of men. Law is not universal or abstract, instead, it is something historical and concrete. "All law is 'situational law.'"[43] Any legal decision is always a decision of and about a person or persons in particular and concrete situations, and in this sense, the decision represents the "personalistic element" in Schmitt's conception of sovereignty, referring thereby to that which is "human in the deepest sense."[44]

Especially illuminating here is the contemporary experience of constitutional high courts— whose small size facilitates its study and whose vital relation to controversies arising from a

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[39] See Schmitt, VL, 139/181, 146-47/187, cf., 127/170.
[40] See Adams, *Novanglus,* No. 7 in *Works,* 4:106 et passim; Marbury v. Madison, 5 U.S. 137 (1803). Cf., Schmitt, DA, 12/30; GLP, 53/43.
[41] Cf., Schmitt, VL, 99/146.
[42] Schmitt, VL, 146-47/187.
[43] Schmitt, PT, 20/13.
[44] Schmitt, PT, 62/48, cf., 42/31; RK, 56/33.

standing body of law renders its study especially significant for analyzing the rule of law. However, at least at first glance, the Schmittian conception of sovereign personalism would seem to have little to say about this theme. First, Schmitt, following Bodin, maintained that sovereignty is fully and completely "indivisible."[45] Thus, sovereignty in the strictest sense is not located in the judiciary. Secondly, Schmitt's description of the President fit his depiction of the sovereign.[46] Finally, following Article 102 of the Weimar Constitution, Schmitt saw the judiciary as, in itself, "essentially nonpolitical."[47] On his view, political decisions were the privileged domain of the legislature and of state leadership.[48] Of all branches and powers within liberal, constitutional governments, the judiciary was the most "dependent"—on laws, statutes, and decrees issued by others. Hence, Schmitt echoes repeatedly Montesquieu's judgment that the judiciary was "*en quelque façon nul,*" in some way non-existent.[49]

However, the classical understanding of the judiciary breaks down when pressed too hard. Judgments by high courts pertaining to claims of "constitutionality" ultimately cannot presuppose a neat separation of "*law*" from "*politics,*" and thereby sidestep the underlying personalism of politics. "A decision concerning 'constitutionality' is never a non-political decision."[50] Instead, "the sovereignty of the law means only the sovereignty of the men, who set and administer the

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[45] See Schmitt, PT, 14/8; Bodin, *Six Books of the Republic* in *On Sovereignty,* 2.1, pp. 92, 103-04. Cf., VL, 213/246. Cf., however, D, 194/168.
[46] Cf., Schmitt, PT, 11/5 with D, 201/175.
[47] Schmitt, VL, 274/299, translation modified. Cf., LL, 268/8.
[48] Schmitt, VL, 276/301.
[49] See Schmitt, VL, 76 n. 1/459 n. 1, 184-85/221-22, 196/232, 273/299, cf., 119/164, 132/176; HdV, 19, 36 ff., 136 n. 2. Cf., GuU, 7; D, 38 n. 1/245 n. 61, 108-09/89, 116 n. 1/273 n. 43; SBV, 45/51. See Montesquieu, *Spirit of the Laws,* 2.11.6, p. 160.
[50] Schmitt, VL, 136-37/179, translation modified, cf., 118/164, 125/169, 131/174. However, in the case of "genuine political conflict," a court which resolves that conflict "according to its discretion" and not purely in accordance with "stable, preexisting, general norms" is only a court in appearance. VL, 371-72/389.

law." In this claim, Schmitt understood himself to have recaptured something of the spirit, if not the letter, of Thomas Hobbes.[51]

For many centuries the third of the three divided powers was conceived to be little more than an impartial or neutral interpreter of valid law established elsewhere. It was bound to adjudicate conflict according to general, legal norms known in advance, and applicable, to all. Today, however, the personalistic element of the court occupies growing scholarly attention, and the increasingly quaint notions of "judicial activism" and "legislation from the bench" have become fixed articles of popular wisdom. Contemporary opinion on legal reasoning actually represents a partial reversal within the tradition of liberal constitutional thinking.

As mentioned above, Locke had begun, in the late seventeenth century, to argue for the supremacy of the law itself, in contradistinction to the sovereignty of man or of men. Following this general line of thought, Montesquieu, in the mid-eighteenth century, contended that "the judges of the nation are … only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor."[52] With this in the background, Hamilton, in the late eighteenth century, could safely assume that the Supreme Court would "always be the least dangerous" branch of government, for, considered in itself, the judiciary possessed "neither force nor will, but merely judgment."[53] Some decades thereafter, Bentham could still maintain this image of the law divested of arbitrary personality. "When the judge dares to arrogate to himself the power of interpreting the laws, that is to say, of substituting his will for that of the legislator, every thing is arbitrary—no one can foresee the course which his caprice may take."[54] Mid-

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[51] Schmitt, BdP, 66/67, translation modified. Cf., BdP1, 26.
[52] Montesquieu, *Spirit of the Laws,* 2.11.6, p. 163.
[53] Madison et al., *Federalist,* no. 78, p. 402.
[54] Bentham, *Principles of the Civil Code* in *Works,* 1:325.

nineteenth-century, American jurisprudence still agreed with this view. Chief Justice John Marshall is representative, when he wrote that "judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing…. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."[55] Capping off this development, a towering figure within late twentieth-century, Anglo-American, liberal thought would declare that the reasoning practiced by justices on the Supreme Court was the "exemplar" of the type of reason that should be made use of in a well-ordered, liberal society.[56] By inference, this would mean that its conclusions could be widely "endorse[d] in light of principles and ideals acceptable to … common human reason," irrespective of the personal identity of the reasoner.[57]

Innocent of these later developments in liberal theory, Hobbes, in contrast, still maintained a level of personalism in his understanding of law—a personalism, which later disappeared from the main stream of the tradition of liberal constitutional thinking. "The Law can never be against Reason," writes Hobbes, "but the doubt is, of *whose* Reason it is, that shall be received for law."[58] "Right Reason" itself is not "constituted by Nature."[59] Given this situation, our moral and political terms of approbation and disapprobation—good and evil, right and wrong, just and unjust—are always objects of contestation. We can find no "common Rule" for these terms. They are not "simply and absolutely so" and cannot "be taken from the nature of the objects themselves." Rather, "in different tempers, customes, and doctrines of men" these terms "are

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[55] Osborn v. Bank of the United States, 22 U. S. 738 (1824).
[56] See Rawls, PL, 231 ff., cf., 216.
[57] Rawls, PL, 137.
[58] Hobbes, *Leviathan,* ch. 26, pp. 186-87, emphasis added.
[59] Hobbes, *Leviathan,* ch. 5, p. 33, cf., ch. 15, p. 109.

different." Thus, these terms obtain their significance and meaning only "with relation to the *person* that useth them."[60]

"CIVILL LAW" is the name given to this common rule within society.[61] However, the force and meaning of the "Law" is the "not the Letter" or "bare meaning" of the law, but rather the "Intention of the Legislator."[62] Problematically, however, through the "divers significations of a word, or two," the meaning of the "written Laws" can be "easily mis-interpreted."[63] Thus, in many cases, the law cannot but remain obscure, for "the significations of almost all words, are ... ambiguous."[64] Thus, in the mid-seventeenth century, Hobbes had concluded that "the Interpretation of all Lawes dependeth on the Authority Soveraign."[65] The personalistic force he represents resolves all doubtful cases.

For this reason, more seasoned, contemporary practitioners of the law increasingly distance themselves from the overly jejune conception of legal reasoning as non-political, neutral impartiality familiar from much of the history of liberal constitutional thinking. This is what one of our nation's most eminent jurists recently had to say about jurisprudential reasoning: "Many judges would say that nothing outside 'the law,' in the narrow sense that confines the word to the texts of formal legal documents, influences *their* judicial votes at all. Some of them are speaking for public consumption, and know better. Those who are speaking sincerely are fooling themselves."[66] This does not necessarily mean that we must give up altogether the "desire for impersonality and objectivity," but it does certainly render that desire and its accompanying

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[60] Hobbes, *Leviathan,* ch. 6, p. 39, ch. 15, p. 110, emphasis added.
[61] Hobbes, *Leviathan,* ch. 26, p. 183, cf., ch. 15, pp. 100-01, ch. 26, p. 184.
[62] Hobbes, *Leviathan,* ch. 26, pp. 186-87, 194.
[63] Hobbes, *Leviathan,* ch. 26, p. 191.
[64] Hobbes, *Leviathan,* ch. 26, p. 194.
[65] See Hobbes, *Leviathan,* ch. 26, p. 190, cf., p. 187.
[66] Posner, *Reflections,* 130.

conception of the rule of law quite a bit more complicated than they may have appeared to us for centuries.[67] Although we, in the industrial West, no longer shed blood over the meaning of the Eucharist, the specter of Hobbesian personalism clearly still haunts our high courts. Fundamental, political decisions must be made, and in Western, industrial societies, the high courts have increasingly assumed the role of the decider.

The rule of law as conceived by classical, liberal constitutionalism consumes much of Schmitt's critical attention. As a direct result of his preoccupation and of his conviction that personalism ultimately cannot be banished from politics, his critique of liberalism concerns itself to a great deal with the institutional body which produces law: the parliamentary legislature. As late as 1928, Schmitt had suggested that parliamentarism was not even "an autonomous political form," but instead rather a characteristic part of the developing "*system*" of liberal constitutionalism.[68] However, just one year later, as Schmitt grew even more convinced of the centrality of parliamentarism to the liberal tradition, Schmitt's analysis underwent further shifts. At that point, he had ceased using the term "*Rechtsstaat*" in order to characterize contemporary, liberal, constitutional democracy, preferring instead to refer to it as what he called thereafter the parliamentary, "legislative state."[69] This analytical alteration and accompanying shift in language emphasizes the centrality of the parliamentary production of law to Schmitt's critique.

## 10.3 Parliamentarism and the Classical Conception of Representation

First, Schmitt's critique of parliamentarism begins by isolating its "ultimate core," its "systematic basis," its "deeper grounding," and its "moral and intellectual … foundation."[70] Quite

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[67] Posner, *Overcoming Law,* 18.
[68] Schmitt, VL, 305/329.
[69] See Schmitt, "Hüter der Verfassung," 167, cf., 220; HdV, 76; LL, 263/3 et passim, cf., 274/14. Cf., DA, 28-29 and n. 17/67-67 and 106-07 n. 30.
[70] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 13/8; GLP, 30/20-21, translation modified.

uncontroversially, he suggests that the *loci classici* for liberal parliamentarism are English and French: the works of John Locke, John Stuart Mill, Edmund Burke, Jeremy Bentham, Benjamin Constant, and François Guizot. More controversially, however, Schmitt argues that in terms of liberal, parliamentary theory, there has not been substantive conceptual advance beyond these "'moldy' greats," neither by Hugo Preuss nor by Max Weber—the major, theoretical architects of Germany's Weimar Constitution. Moreover, the authors he highlights display liberal parliamentarism in its conceptual purity, because at the time of their writing, the march of liberal parliamentarism was not yet historically bound to the progress of democratic theory within European societies.[71]

On several occasions, Schmitt nods in agreement with Rousseau's famous dictum that the "people cannot be represented."[72] Nevertheless, Schmitt's understanding of proper parliamentary government requires qualification of this dictum. There are, Schmitt contends, fundamentally two "principles of political form" by which a people "achieves and maintains the condition of political unity." These two principles are *identity* and *representation.* Although in one regard, these two stand in a "decisive opposition" with one another, they are actually complementary yet "antipodal points of orientation for the concrete formation of political unity." The principle of identity refers to the "direct givenness" of a people "in its direct identity with itself." However, because the "political unity of the folk as such can never be present in its real identity," the integrative function of representation always remains an essential political principle. Even in the limit case of

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[71] See Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 6/2, 8/4, 12/7, 23/17; GLP, 43 and 43-44 n. 3/35 and 97-98 n. 5, 49/38-39, 50-53/40-42, 61/49, 63/51; VL, 201/236, 311-13/335-36, 327/349, cf.,126 /170, 303/328, 307/331; BdP, 68 n. 25/69 n. 36, 73-74/74-75; Nachwort in LL, 349/99; "Der Gegensatz von Parlamentarismus und modernener Massendemokratie" in PuB, 60 n.; L, 110/71.

[72] See Schmitt, VL, 80/128, 205/239, 262/289, cf., 218/251; Rousseau, *Social Contract,* 3.15 ¶ 5, ¶ 8, pp. 114-15. Cf., GLP, 43-44 n. 3/98 n. 5; D, 117/98, 124/105. Cf., however, RK, 35-36/21, 43/25-26.

a direct democracy, those assembled deliberate not simply as private persons, but instead, they aim to represent the unity of the people, above and beyond those non-superannuated adults who happen to be assembled there at that given moment in time.[73] A parliament can serve this integrative-representative role and can be meaningfully representative of the state's political unity—but only under certain conditions.

Schmitt's critical analysis of parliamentarism rests fundamentally upon his own idiosyncratic understanding of "representation." Ordinarily, we are inclined to think of parliamentary government as representative government *par excellence.*[74] Schmitt's notion of representation is, however, considerably more expansive, and, at the same time, also a good deal more particular and restrictive in meaning than contemporary, colloquial usage. He contends that the classical conception of "representation" and the set of ideas on which it rested have faded from collective understanding as the result of the technical age and its penchant for technical, "economic thinking."[75]

Lingering in the background of Schmitt's discussion is Hobbes' pioneering account of political representation, despite Hobbes' otherwise anti-parliamentary accent.[76] Representation is that act through which a plurality becomes a unity. At the level of the individual, human society is not, strictly speaking, united. "The Multitude," writes Hobbes, "naturally is not *One,* but *Many.*"[77] It is only through the act of representation that they attain to that unity which is not already present by nature. "It is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the

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[73] See Schmitt, VL, 204-07/239-41 , translation modified.
[74] Cf., Schmitt, VL, 216/249, 218/251.
[75] See Schmitt, RK, 43/25-26, cf., 14/8, 32-35/19-20, 37/22, 44/26; VL, 239/268.
[76] For the possible parliamentary implications of Hobbes' conception of representation, cf., *Leviathan,* ch. 19, p. 130 with ch. 18, pp. 122-23.
[77] Hobbes, *Leviathan,* ch. 16, p. 114.

Person *One.*"[78] Absent this act of representation, the people are truly little more than a "disunited Multitude," who are themselves "subject to [a] diversity of opinions."[79]

The "political unity of the folk," which constitutes its identity, is never present by nature. Thus representation—the process by which political unity is achieved—occurs in all states. The political unity of a people entails something far more than simply the brute facticity of a presently assembled people, for that which is represented is something that "rises above an assembly convened in a particular place and above the moment of assembly."[80] Thus, representation, in the Schmittian sense, is neither a merely technical "procedure" nor a "normative" process guided either by "general norms" or "social usefulness." Instead, representation is an "existential" happening. "To represent," writes Schmitt, "means to make an invisible being visible and present through a publicly present being." In this way, representation "concretizes and displays the spiritual principle of political existence."

What is represented by "every genuine government" is not simply the "folk in its natural presentness," but the *political unity as a whole.*" Such a type of representation presupposes, then, the presence of a "folk existing as a political unity," and a people so unified signifies something more than simply the "natural existence of a human-grouping living together in some way." Instead, a people, in Schmitt's sense, possesses a "type of being" which is somehow "higher, further enhanced, and more intense."[81]

In its classical form, the early theorists of parliamentarism conceived of a distinctive set of conditions by which political representation might be achieved, thereby laying the groundwork

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[78] Hobbes, *Leviathan,* ch. 16, p. 114, cf., ch. 17, p. 120.
[79] Hobbes, *Leviathan,* ch. 18, p. 122, ch. 29, p. 228. For a helpful, but sometimes contrasting account, see Skinner, "Hobbes on Persons."
[80] Schmitt, VL, 205-06/239-40, translation modified.
[81] Schmitt, VL, 209-12/243-45, translation modified. Cf., RK, 35-36/21.

for the conceptual system of liberal parliamentarism. The "essential principles" of liberal parliamentarism are, Schmitt argues, two-fold: "*openness*" and "*discussion.*"[82] Liberalism is a "consistent, comprehensive metaphysical system," whose underlying presupposition is that the "truth and justice" might "develop out of the unrestrained clash of opinion," and that from this clash and "competition" of ideas and opinions something like a "harmony" would emerge.[83] What arises out of discussion, this system calls "rational," and what cannot be reached through discussion it calls "irrational."[84] On Schmitt's view, the parliamentarian scarcely recognizes that his conception of "discussion assumes a shared, *undiscussed* foundation."[85]

As Schmitt would have it, liberalism and democracy must be distinguished from one another on the conceptual level. "The faith in parliamentarism, in *government by discussion,* belongs to the thought world of liberalism. It does not belong to democracy."[86] At the conceptual level, democracy entails only the supremacy of the popular will and does not require the admixture of open discussion under conditions of publicity as understood by early, liberal thinkers.[87] Accordingly, liberalism and democracy neither entail nor require one another.[88] However, contemporary "recognition" of this distinction has been "hindered by a century of" liberalism's and democracy's "shared struggle against royal absolutism."[89]

Schmitt's conceit concerning the conceptual disjunction between liberalism and democracy is supplemented by an historical narrative. As Schmitt tells it, during the bourgeoisie's struggles

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[82] See Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 5-10/2-5, 13/8, emphasis added; GLP, 61/48-49.
[83] Schmitt, GLP, 45-46/35, 61-62 /49, translation modified, cf., 50/39.
[84] Schmitt, GLP, 57/45. Cf., RK, 39/23.
[85] Schmitt, GLP, 58/46, translation modified and emphasis added.
[86] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 13/8, translation modified, cf., 21/15.
[87] See Schmitt, GLP, 28/19, 34-35/26; "Contradiction between Parliamentarism and Democracy" in GLP, 19-20/14.
[88] See Schmitt, GLP, 41/32. Cf., "Contradiction between Parliamentarism and Democracy" in GLP, 18-19 n. 1/91 n. 32; BdP, 68/69, 69 n. 26/69-70 n. 37.
[89] See Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 21/15, 23/17, translation modified; GLP, 30/21.

with the crown, the effort to subordinate the monarchy to a parliamentary body was understood to be a step forward on the march towards democracy, especially in that their struggle was sometimes waged at least nominally on behalf of "the people." In contrast to monarchy, parliament is certainly more democratic, but outside of the context of this historical "struggle against royal absolutism," that claim loses much of its salience.[90] When Locke, for instance, spoke of "the People," he did not have in mind what the Roman tradition called the unwashed "'*plebs,*'" but only the non-royal class, that was represented by the estates.[91] By the mid-nineteenth century, this same political class finally began to show its true colors. After having become acquainted with the more substantively democratic threat posed by the various flavors of socialism, the very same liberal bourgeoisie shifted gears. Within the unfolding democratic revolution on the European continent, the liberal bourgeoisie stood always in the middle. In the struggle between monarchists and the socialists, the liberal bourgeoisie wished to take neither side. Instead, they imagined the constitution itself, and not the people or the prince, to be sovereign, and it was in this context that the expression, the "'sovereignty of the constitution,'" began to have real traction—an expression which concealed within it an evasion of the "core political question."[92] Today, and as a result, these two forces, democracy and liberal parliamentarism, stand with one another only as a "heterogeneous, composite picture"—a motley conjunction of two distinct, historically and conceptually dissociable movements.[93]

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[90] See Schmitt, VL, 218-19/251, 265/291-92; "Contradiction between Parliamentarism and Democracy" in GLP, 23/17

[91] See Schmitt, D, 25/19; Locke, *Two Treatises,* 2.240-42, pp. 426-27.

[92] See Schmitt, VL, 53/104-05, 201/236, cf., 80/128-29, 204/238. Cf., PT, 77/61; D, 195/169 ff.

[93] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 13/9, translation modified.—By 1928, however, Schmitt had come around to the idea of a parliamentary state prospectively as a form of democracy. See Schmitt, VL, 24/78, 49/101, cf., 116/162, cf., however, 218/251; LL, 282-83/24-25.—Habermas, "Horrors of Autonomy: Carl Schmitt in English" in NC, 138 considers Schmitt's "separation of democracy from liberalism" to be one of the most "problematic move[s] that Carl Schmitt makes." However, we should not forget that this distinction—which later became a topos of the New Left—was also acknowledged explicitly by twentieth-century liberals, whose own good faith have never been in doubt. E.g., Berlin, "Two Concepts of Liberty" in *Four Essays,* 129-30, cf.,

After distinguishing liberalism from democracy, Schmitt articulates a conception of *discussion,* and of its essential presupposition, *openness,* which supported the account of legitimacy in the classical theory of parliament. The institutions of liberal parliamentarism "are meaningful only in terms of discussion, correctly understood." As Schmitt understood these concepts, discussion and openness are to be contrasted with "negotiation" of two "businessmen" or nations, wherein the aim is a "businesslike compromise." In contrast, discussion is guided by the attempt to "convince one's opponent of the justice or truth" of some matter, and it crucially presupposes, in the form of "shared convictions" or "premises," not only the cultivated "readiness to be persuaded," but also a "disinterested" disposition, free of merely "egoistic interests."[94] Openness, which inevitably came to be understood as an "absolute value" within liberal theory, positively proscribes a government run secretly by a cabal of oligarchic cabinet ministers "behind closed doors," and demands that, in order that the "right and good" be uncovered, discussion must be conducted under conditions of publicity within the public sphere.[95] The core of this conception of discussion is especially clear in the writings of Guizot and of Mill; and Kant gives a memorable formulation to the criterion of openness when he writes that "all actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public."[96] This conception of discussion and openness, Schmitt claims, represents the essential criterion for the

however, 165, writes that "freedom ... is not, at any rate logically, connected with democracy or self-government."
Shklar, "Liberalism of Fear," 37, cf., 21 calls the relationship of liberalism to democracy "a marriage of convenience."
[94] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 9-11/4-6, translation modified. Cf., GLP, 43-44 n. 3/97 n. 5; VL, 315-17/337-39, cf., 326/348.
[95] Schmitt, GLP, 48/38.
[96] See Guizot, *History,* 2.10, esp. 295-97; Mill, *On Liberty* and *Thoughts on Parliamentary Reform* and *Considerations on Representative Government* in *Collected Works,* 18:229-32 et passim and 19: 335 and 19:391, 422-23, 428, 436-41 et passim; Kant, *Perpetual Peace* in PW, 126. Cf., Madison et al., *Federalist,* no. 10, pp. 46-48.

legitimacy of the liberal, parliamentary state. To depart from these legitimating principles is—in the words of Locke, cited by Schmitt—to embark upon the "way of Beasts."[97]

In the classical conception of discussion, the parliamentary representative exhibits two essential features, which were presupposed by the early theorists' conceptual elaboration of parliamentary legitimacy.

First, under conditions of genuine representation, a representative in parliament is strictly speaking "*independent*." Accordingly, a representative is neither a simply "functionary," nor an "agent," nor a "commissioner," who serves merely as a passive conduit for voter "interests" on which he is completely "dependent." If the "representative" [*Repräsentant*] acts simply as an "advocate" [*Vertreter*], then "representation is no longer present." Importantly, then, a parliament is not a "committee," which is reduced in size for the merely "practical-technical reason" that it is nearly impossible to assemble the entirety of the people in the same place at the same time. Representation signifies something more than this.[98] Instead, the true independence of the representative consists in his independence from the "so-called imperative mandate." He is not bound unswervingly to the "instructions," "mandates," and "directions" of the individual voters who elevated him to parliament. A parliamentary body is not, and never was intended to be, the same thing as the assembly of medieval estates, whose deputies were strictly bound by instructions.[99] The basic outline of this view of parliamentary independence is clearest in the late eighteenth century in Burke's writings.[100]

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[97] Locke, *Two Treatises,* 2.181, p. 389. Cited in Schmitt, GLP, 61/49; D, 41/32.
[98] See Schmitt, VL, 212-13/246-47, cf., 219/251. Cf., RK, 24/14; Hegel, PR, § 311 A, p. 480/350.
[99] See Schmitt, VL, 262/289, 317/339, translation modified. Cf., RK, 44/26.
[100] Burke, "Speech to the Electors of Bristol" in *Selected Works,* 4:10-12. Cf., Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 9/5.

This distinctive understanding of the representative character of members of parliament, Schmitt understood to be entailed by Article 21 of the Weimar Constitution, which stated that "delegates [in the *Reichstag*] are representatives [*Vertreter*] of the entire folk. They are subject only to their conscience and are not bound to mandates." Thus, "according to the text of the written constitution" as Schmitt reads it, "the parties … officially do not exist at all."[101]

Second, on Schmitt's view, a parliament is also essentially an "aristocratic" body. Ideally, under conditions of "genuine representation," an election does not produce mere "interest-advocates," but instead results in the selection and elevation of the "*best*" from within that population.[102] *Bildung,* or education, is in this way one of the essential presuppositions of the classical conception of representation. On this model, parliament is an "assembly of learned persons," who through their own superlative "education and reason" are able to represent the "entire *nation.*"[103] The basic outline of this elite view of parliamentary representation is especially clear between the nineteenth and twentieth century in, e.g., Jefferson's and Weber's writings.[104]

## 10.4 The Crisis of Legitimacy

Schmitt's parliamentary critique reaches a fevered pitch in a brief but infamous text: his *Crisis of Parliamentary Democracy* (1923). Though the argument is introduced in the early 1920's, he appears never to have abandoned it, though he does mute the urgency and stridency of his tone quite a bit in his *Constitutional Theory* (1928), where the essential outline of the argument is repeated in a dry, matter-of-fact tone.[105]

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[101] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 11/6, translation modified.
[102] See Schmitt, VL, 217-19/250, translation modified, cf., 257/284, 292-93/318.
[103] Schmitt, VL, 310-11/334, cf., 312/335-36, 317/339. Cf., "Contradiction between Parliamentarism and Democracy" in GLP, 12/7.
[104] See Jefferson, *Writings,* Jefferson to John Adams, October 28, 1813, p. 1306; Weber, "Parliament and Government in Germany" in PW, 168-77, 180-82, 191, 219-22, 229-30, 246, 251. Cf., Weber's of "free representation" and parliamentarism in WG, 172-73/293-94. Cf., also, Hegel, PR, § 309, p. 478/348.
[105] See Schmitt, VL, 312/336 ff.

Problematically for the practice of liberal democracy, the classical conception of discussion and of openness simply does not obtain any longer under contemporary conditions of mass democracy. Few to none then or today—not even Habermas and his followers—believe these principles to have a real referent in the concrete world. Instead, they are treated as aspirational or "regulative" ideals, whose realization is continually frustrated by "empirical" conditions of on-the-ground politics in contemporary, parliamentary systems.[106] Today, Schmitt argues, under conditions of mass democracy, the legitimating criteria of "argumentative public discussion" and "openness" are "empty and trivial formalit[ies]" in which no one believes any longer and which political reality no longer reflects.[107]

*Les extrêmes se touchent*—at least in the denunciation of liberal parliamentarism. Both the right and the radical left are united in common cause.[108] Schmitt found allies in all camps. Here, his argument takes the form of an especially acerbic lament about the influence of special interests and economic considerations over political decision-making within and without the halls of the legislature. What Schmitt describes here goes beyond, and much deeper than, what we today call "pork barrel" politics, though this is the most visible symptom of the general disease.

Although his argument deploys insights which appear to be Marxian in form, Schmitt is no Marxist. His great fear is what he calls the "absolutism of the shifting parliamentary majority." This is distinct, however, from what earlier, nineteenth century liberals had called the "tyranny of the majority," in that his concern is not, per se, the rights of minorities, but rather with the broader issue of stable, legitimate authority.[109]

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[106] E.g., Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," 83; Habermas, BFN, 362, cf., 373.
[107] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 10/6; GLP, 63/50.
[108] See Schmitt, GLP, 27/18.
[109] See Schmitt, VL, 156/196, cf., 152/191, 172/210, 262/289. Cf., LdER, 401-02/47-48; LL, 293/39.

On the ground, liberal parliamentarism has drifted too far from its ideal-typical conception. The "moral and intellectual … foundation" of liberal parliamentarism is "scarcely … discernible" under modern conditions of mass democracy.[110] The system of parliamentarism as practiced under contemporary conditions does not facilitate the production of high-quality, civic-minded, disinterested political elites, and, much worse, it encourages them to treat politics as the attempt to capture increasing amounts of "spoils" for themselves and their constituents. Political actors thus confront one another not as partners to a discussion about the greater good, but rather as representatives of "social or economic power-groups across from one another, calculating their mutual interests and opportunities for power." "Argument in the actual sense," as the liberal theorists of discussion had understood it, has long ago vanished.[111] Today, the "actual activit[ies]" of parliament, where the "essential decisions" are made, are conducted not under conditions of maximal publicity in a hypothesized public sphere, but rather in the secrecy of "extraparliamentary committees." As such, the "whole parliamentary system" becomes "only a poor façade concealing the domination of parties and economic interests."[112]

Economic concerns become the beating heart whose distinctive rhythm propels contemporary, political life. Under such conditions of mass democracy, Schmitt argues, "even nonsocialists" readily admit that in important respects, politics has effectively become a "shadow of economic reality."[113] Contemporary social scientists have even given a name to this widely-recognized phenomenon: "political capture by [financial] elites."[114] The political decisions that shape the worlds that democratic citizens inhabit today are made in smoke-filled rooms through a semi-

[110] Schmitt, GLP, 30/21, translation modified.
[111] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 8/4, 11/6, translation modified. Cf., Schmitt, "Starker Staat und gesunde Wirtschaft" in SGN, 76.
[112] Schmitt, GLP, 28-29/20, translation modified.
[113] Schmitt, GLP, 30/20.
[114] See Edsall, "Can the Government."

secretive process of bargaining, and, Schmitt claims, the ultimate result is influenced more deeply

by moneyed interests than by the reasoned and free exchange of arguments under conditions of

maximal publicity, where the unforced force of the better argument could win the day. Instead,

the peculiar interests of those who hold capital and control the means of production reign

supreme.

> Great political and economic decisions, in which lies the fate of mankind today, are no longer the
> result of the balancing of opinions in public speech[es] and counter-speech[es], nor the result of
> parliamentary debates…. Exclusive committees of parties or of party coalitions make their decisions
> behind closed doors, and what representatives of the big capitalist interest groups settle on in [an]
> exclusive committee, is perhaps more important for the daily life and fate of millions of human beings
> than any political decision…. Before these facts, the faith in [a] discussing public must experience a
> terribly disillusionment.[115]

In such a situation, Schmitt observes, "the representative character of parliament is dispensed

with."[116]

Schmitt readily acknowledges that in terms of practical-instrumental considerations, the

parliamentary state may lack truly viable alternatives. "It may be," Schmitt concedes, "that there

is no other practical alternative." Yet, in such an acknowledgment, Schmitt sees only abdication.

On Schmitt's view, such a perspective consists ultimately in the effective abandonment of the

"intellectual foundation" which historically undergirded this particular regime type.[117]

The belief in the legitimating principles of liberal parliamentarism, are, as Schmitt sees it,

under-examined anachronisms inadequate to contemporary conditions of mass democracy and

party politics. Citing one of Walter Lippmann's studies, Schmitt suggests the masses have

become political pawns who salivate to the chime of propagandistic apparatus deployed by

economic powers. Accordingly, the neat and clear distinction between *persuasion* and *command*

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[115] Schmitt, GLP, 62/49-50, translation modified.
[116] See Schmitt, VL, 318-19/341-42, translation modified, cf., 208/242.
[117] Schmitt, GLP, 62/49.

breaks down.[118] Thus, today "the reality of parliamentary and party political life is far removed" from the intellectual, legitimating basis of liberal parliamentarism.[119] What results is nothing short of a "crisis"—a crisis of legitimacy which will even perdure long after the defeat of liberal democracy's early twentieth-century threats: Fascism and Bolshevism.[120]

## 10.5 Interest Group Pluralism

The second major stage in Schmitt's critique of parliamentarism is his polemic against interest group pluralism.

In institutional form, the actual practice of contemporary liberal parliamentarism under conditions of mass democracy finds classical, theoretical expression in the Madisonian conception of "republican" democracy.[121] Madison and his fellows had imagined that harmony would arise from dissonance, but later Anglo-American, social scientists appropriated this vision no longer solely as a stratagem to achieve commonality despite disintegrative pressures, but rather as a quasi-normative model of political life. Beginning early in the twentieth century in England, this theory went under the name of "pluralism" and later "interest group pluralism."[122]

A number of Schmitt's most significant Weimar era works are aimed expressly at this Anglo-American pluralistic theory, especially that of G.D.H Cole, John Neville Figgis, and Harold Laski. The significance of the theory, in Schmitt's eyes, lies not in its normative insight, but rather in its perceptive descriptive value. Though the personal political commitments of a number of these thinkers had been social democratic, bordering on socialist, their conceptualization of the state proceeded from a traditional, liberal fear: the concentration of power and the threat to

[118] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 11/6-7; Lippmann, *Public Opinion.*
[119] Schmitt, GLP, 62/49.
[120] See Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 21/15, 23/17.
[121] See Schmitt, BdP, 61/61; Madison et al., *Federalist,* no. 10, pp. 42-49.
[122] In subsequent waves, this thought, though in slightly different form, reached the shores of America and exerted considerable influence there in the halls of academia, largely under the aegis of Robert A. Dahl. See esp. Dahl, *Preface.*

bourgeois freedom that it posed. The tactic proposed as a remedy was the elevation of civil society to the level of the state, distributing power widely, thus blurring altogether the conceptual distinction between the state and civil society.

In his theory of the state, Hegel had distinguished the state proper from what he called "civil society," which was the realm of "subjective particularity," human "needs," and qualitatively undifferentiated desire. This had been an attempt to integrate the insights of classical political economy of the modern age (e.g., Adam Smith, David Ricardo) without reducing the state to the position of a mere functionary that served the dictates of the market and those hawking their wares therein.[123] Schmitt's own view of civil society closely mirrored Hegel's, who conceived of civil society and the market economy as the Hobbesian "battlefield for individual interests of all against all."[124] In Hegel's view, as well as that of Schmitt and Hobbes, the *bellum omnium contra omnes* of civil society must be resolved in the higher unity of the state.

However, within certain strands of later liberal theory and especially under pluralist theory, all of this is simply abandoned. In Schmitt's words, Hegel's distinction, which sees the state as something "qualitatively distinct and higher" than civil society, is dissolved.[125]

In Schmitt's view, this trend first received classical expression in Thomas Paine's writings. Whereas civil "society" is a "blessing" that "promotes our happiness *positively*" by answering to "our wants," "government" is only the result of "our wickedness" and "even in its best state[, it] is but a necessary evil."[126] Later and more famously, Madison echoed this thought, writing that

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[123] See Hegel, PR, esp. § 33 Z, §§ 188-89, pp. 91/64, 346-47/226-27, and, more generally, §§ 182-256, 339-98/220-74. See also Avineri, *Hegel's Theory,* 5 et passim.
[124] See Hegel, PR, § 289 A, p. 458/329, translation modified; Hobbes, *Leviathan,* ch. 13, p. 88.
[125] See Schmitt, BdP, 25/24, cf., 75-76 n./77 n., translation modified; SBV, 31-32/35. Representative work from these early twentieth-century, English pluralist theorists is reprinted in Hirst, ed., *Pluralist Theory of the State.*
[126] Paine, *Common Sense* in *Collected Writings,* 6. See also Schmitt, D, 114/94; BdP, 61/61, cf., however, 60/60.

"if men were angels, no government would be necessary."[127] The state arises only because the sundry interests of the elements making up civil society conflict with one another, and thus the "principal task of modern legislation" is "the regulation of these various and interfering interests."[128] What Schmitt ultimately thought of this solution can be gleaned from his snide remark that the authors of the Federalist Papers provided insights concerning only "practical-organizational questions," and for this reason they "lacked a genuine constitutional theory."[129]

The most proximate theoretical point of departure for pluralism is Otto von Gierke's late nineteenth-century, associational theory, which conceptualized the state as just one association among other associations—the matrix, which fosters and facilitates the individual's free choice of association. Within pluralist theory, the state is a *stato agnostico* or "'agnostic' state"—to invoke the critical language Schmitt borrowed from early, twentieth-century Italian critics of liberalism. It is a state that attempts to "refrain … from every authoritative decision." Modeled after the image of a "neutral mediator" or "*pouvoir neutre*" (B. Constant), pluralist theory hopes only to foster the formation of an equilibrium between the myriad forces of civil society.

Within this associational economy, no single entity is the decisive one, for pluralist theory itself has no "unitary center." There is, instead, a basic, qualitative equivalence between the state and the other associational groupings of human beings. The theory of pluralism maintains that the citizen is, as a human being, a member of a manifold panoply of overlapping associations, which simultaneously compete for his obedience and loyalty, e.g., churches, nations, labor unions, families, clubs. As such, the citizen "feels" that he is the subject of "a plurality of ethical bonds" and that his "loyalties can only be resolved from case to case." On this view, consistently thought

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[127] Madison et al., *Federalist,* no. 51, p. 269.
[128] Madison et al., *Federalist,* no. 10, p. 44.
[129] Schmitt, VL, 78/127, cf., however, 389/405. Cf., GLP, 56-57/45.

through to its end, a citizen might very well feel a tie to his bowling club equivalent or even stronger to that of his tie to the state.

The net effect of this pluralist formulation consists in the absolute abdication of the sovereignty of any political entity, the ultimate rejection of the idea that the political has any "specific content," and thus the denial of the state's claim to embody a "political '*Gemeinschaft*'" or overarching community. As a consequence, it is left unexplained why it is that human beings form *political* associations as opposed to other types of associations. In the end, the unity of the state is conceptualized either as a loose "federalism" or "umbrella association" of underlying associations, on the one hand, or, the theory issues forth in a final "rebuttal of the state," on the other hand.[130]

It's clear that pluralistic theory had deeply impressed Schmitt. In the 1920's, he had called it "by far the most interesting theory of the state, which has been advanced in the last decade."[131] Then, almost four decades later, Schmitt would "identify it as the dominant, political doctrine."[132] He acknowledges that certain elements of its critique are "largely justified," but pluralist theory simply goes too far. Its sheen of plausibility, Schmitt argues, derives principally from two sources.

First, pluralist theory seems plausible as a model of the state, only when it is understood in polemical contrast with "exaggerated monistic tendencies" in absolutist state theory, which imagined that the state held a "monopoly of the highest unity" and possessed its own distinctive "majesty" or "personality" in the exact same manner that God of medieval theology did.[133]

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[130] See Schmitt, BdP, 25/24, 40-41 and nn. 11-12/40-41 and nn. 16-17, 44-45/44-45, translation modified, cf., 53/52; Staatsethik, 154-55/198, 156/200, translation modified; Constant, *Principles of Politics* in *Political Writings,* 184 ff., cf., 237. Cf., Schmitt, DA, 40/80; PT, 34/24.
[131] Schmitt, BdP1, 12. Cf., "Zu Friedrich Meineckes 'Idee der Staatsräson'" in PuB, 59; Staatsethik, 155/199.
[132] Schmitt, "Hinweise" in BdP, 119.
[133] Schmitt, BdP, 42-44/42-44, emphasis added; Staatsethik, 156/199, 158/201.

Secondly, moreover, pluralist theory does indeed "correspond with the real, empirical situation" of late industrial societies, which find themselves again and again reaching political compromises with various "social and economic groups," to the point that one might be inclined to believe that the state had become the "servant or instrument of [the] dominant class or party" at a given moment. Under these circumstances, the state really does appear simply as a "moment of equilibrium between groups fighting with one another."[134]

As a theory, however, pluralism errs in the opposite extreme. Schmitt's critique consists principally of three moments.

First, Schmitt maintained that pluralist theory was completely unable to respond to the theoretical and practical difficulties, which arose especially acutely in the Weimar period: the proliferation of mutually antagonistic worldview parties. The traditional conception of parties "in the genuine sense of the word" centered around the idea of something like a "free" competition of groups soliciting votes from citizens who were not previously bound. In the traditional conception, the primary distinctions between parties revolved around "differences of opinion" only, and not around "deep-seated social contradictions." For example, the tensions between those who held traditional, landed property (Tories) and the rising commanders of capital (Whigs) were not of such a deep nature that their disagreements could not be "relativized" within the horizon of the still "self-evident … unity of the nation."[135] In contemporary parlance, parties in this sense signified "voluntary associations" and not social groups based upon deep, group "identity."

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[134] Schmitt, Staatsethik, 154/198, translation modified.
[135] Schmitt, VL, 322/345, 326/348, translation modified. Cf., LL, 337-38/87; HdV, 84 et passim.

In the concrete circumstances of Weimar Germany, this view of parties proved deeply problematic. Schmitt himself remained skeptical of the neat separation between "inner" and "outer," "private" and "public," presupposed in much liberal theory.[136] Accordingly, he maintained that "ethical individualism" was, in effect, just unwitting ideological cover for group interests and worldviews, for, on the "empirical" level, the "mass of ordinary citizens" take their directives not from private conscience or the private exercise of reason, but rather from a set of norms inherited, often uncritically, from the groups to which they happen to belong.[137]

In contrast with the traditional conception, the parties of Weimar Germany were actually "fixed organizations of masses bound according to interests or classes." What arose from their "confessional, class-based, or national differences" were "absolute contradictions." Problematically, however, the very possibility of "rational compromise" between parliamentary parties is parasitic upon the on-the-ground political sociology of those parties and thus the character and depth of their opposition to one another. "A discussion between parties is only possible so long as shared premises are at hand."[138] The fundamental meaning of all political concepts, as linguistic phenomena, are contestable and indeterminate, and they always receive their concrete meaning from within a determinate horizon of meaning (e.g., liberal bourgeois, Marxist, Roman Catholic, social democratic).[139] "In quiet or … happy times," many types of "compromise[s]" are possible, but "in critical situations," these compromises simply unravel revealing "insoluble problems."[140] When class, religious, or other sorts of antagonisms of

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[136] See Schmitt, L, 85-87/56-57, 99/65, cf., 21-23/10-11, 61/41, 79/53, 89-96/58-62, 106-07/68, 116-17/73, 127/83, 130/85, cf., however, 65/43. Cf., "Die vollendete Reformation" in L, 169.
[137] See Schmitt, Staatsethik, 156-57/200-01.
[138] Schmitt, VL, 326/348, translation modified.
[139] See Schmitt, VL, 37/89-90. Cf., SBV, 43-44/49; GuU, 67. See also Scheuerman, "Legal Indeterminacy"; *Carl Schmitt,* 15-37 (ch. 1).
[140] Schmitt, VL, 65/115, translation modified, cf., 66/117.

conviction become too great, a "genuine compromise" on matters of fundamental principle is "hardly possible."[141] "Many differences, differences of opinion, and disagreements," writes Schmitt, "can be reconciled with good will by clever and just human beings. An existential conflict is not dispelled in this way," for this is no mere "difference of opinion."[142]

For Schmitt, the "constitution"—in the political sense in which he understood it—served the role of the "shared premises" and "shared foundation," which must be "recognize[d]" and "respecte[d]" by all political actors. Successful, parliamentary politics is actually premised fundamentally upon a yet deeper "constitutional ethic."[143] In this regard, Schmitt's constitutional theory, to which we turn in the subsequent chapter, is a vitally important feature of his political thought.

However, so long as it remained domestically pluralistic, pluralist theory had nothing of much interest to say about these difficulties. Thus, secondly and relatedly, Schmitt argued that as a matter of fact, pluralists are not and cannot be consistent pluralists. On the pluralistic view, the form of a given society is the result of competitively negotiated compromises and the equilibrium that results. However this may be, the equilibrium is parasitic upon a shared, non-pluralistic background. "A pluralistic party state," writes Schmitt, "can exist only as long as two or more parties agree to recognize common premises." Even at its most minimalistic, the pluralist theory of the state must posit at least one "ethical demand," which was not itself the result of negotiated compromise. Invariably, the principle, *pacta sunt servanda,* is projected as the inviolable "rule of the game." Agreements must be observed.

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[141] Schmitt, VL, 30-31/83-84, translation modified.
[142] Schmitt, VL, 372/389, 322/345, translation modified.
[143] See Schmitt, Staatsethik, 164/207, translation modified. Cf., "Dictatorship of the President of the Reich" in D, 242-43/209.

In actual fact, then, the pluralist model requires something like a "constitutional ethic," but it could not account for this ethic pluralistically. Because pluralistic thinkers cannot account for the presence of the norms that make pluralism as a model possible, Schmitt observes that inevitably these pluralist thinkers can be observed putting forward an amorphous, universalistic, and monistic conception of a totality that embraces mankind. Only in so doing are they able to fill conceptual gaps in their otherwise pluralistic theory. In Laski's case, this totality assumes the name of "humanity"; and in Cole's, "society." Problematically, however, these monistic conceptions are not only relatively impotent "regulative ideas," which have little substantive bearing on the "concrete life of folks and social groups." More importantly, as monistic universals, they have absolutely no real place in their pluralistic theory.[144]

Thirdly, Schmitt contended that the pluralist, conceptual framework is completely inadequate when it must determine which of these social associations competing within civil society will decide in the case of conflict whether and how violent force will be deployed in order to achieve a collective goal—a fact which ultimately belies the pluralistic conceptualization of the state. In contrast to the pluralist vision, Schmitt argues that the state as the "political entity" is the "*decisive* human grouping."[145] "The political community rises above every other sort of community and society." As the "decisive political entity," the state possesses the "authority to decide" the question of life and death of its citizens. In reality, others can hold this type of authority as well, but when the state goes to war, these inferior authorities must be "suspended," if only temporarily.[146] With regard to the organization of collective violence, it is simply not "possible to place a political 'association' pluralistically on the same level with religious, cultural,

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[144] Schmitt, Staatsethik, 157-59/201-02, 161/205, 164/207, translation modified; BdP, 44/44.
[145] Schmitt, BdP, 38-39/38, translation modified, cf., 43/43.
[146] Schmitt, BdP, 46-48/46-47, translation modified.

economic, or other associations." When it goes to war, the state does not enter into "competition" with other associations for the allegiance of its citizens. In such cases, the state alone is the "determinative entity."[147]

Schmitt draws our attention to the logic of war, not out of bloodlust or because of a desire to romanticize the Jüngerian "front experience" of the First World War, but because he wishes to give the lie to interest group pluralism, by means of *reductio ad absurdum.* In effect, he aims to draw attention to what Hegel had called the "ethical *moment of war.*"[148] Mortal combat between human groupings demonstrates that there is actually something higher than civil society and its concern for the protection of individual personhood and property. In moments of war, the state calls upon the citizen to look beyond civil society and his spilt blood is a testament to this fundamental distinction. The logic of war is vital for Schmitt's argument, and it is to this logic that we will return later in the subsequent chapter.

## 10.6 Excursus: Schmitt and the Total State

To say, as Schmitt does, that the state is the "decisive human grouping" is not the same thing as to say that the state is *total* in the sense that it infiltrates all spheres of human existence. This, Schmitt does not say and in fact actively resists—at least during most of the Weimar period.

Schmitt made significant contributions to the early, scholarly discussion of the "total state," which deserve our attention in the present context. Taking cues from the development of the theory of the *stato totalitario* in Italy, Schmitt had, in two articles from 1931 and 1933, theorized what he called the "turn towards the total state" underway in Europe. There, Schmitt argued that in light of the infiltration of economic concerns into the realm of the state in early twentieth-

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[147] Schmitt, BdP, 43-45/44-45, translation modified.
[148] Hegel, PR, § 324 A, p. 492/361.

century Europe during its increasingly frequent bouts of economic crisis, the classical, Hegelian distinction between "civil society" and "state" had, in fact, broken down, and therewith the premise that the state could maintain, in fact, the sort of neutrality towards civil society, as had been imagined in the liberal theory of the nineteenth century.

It is in this context that Schmitt introduces a distinction between the "qualitative" and the "quantitative" total state. The former is stronger than the latter, but, according to Schmitt, the latter is, for that very reason, far more pernicious. On the one hand, the qualitative total state is total in the sense that it is willing and able to identify those parties or individuals hostile to the state's constitution and to censor their public communications. On the other hand, the quantitative total state, which Schmitt associates with the late Weimar Republic, is, in contrast to the qualitative total state, something dangerous, because it is "indiscriminate" and gives itself over to manifold worldview-parties, whose various demands cause it to expand and to "intervene in all possible matters and in all domains of human existence."[149] As Schmitt put it in a 1932 lecture, the total character of such a quantitative total state refers not to its "*intensity and political energy,*" but rather to its "*mere volume.*" Such a quantitative total state is "*total out of weakness*" and not out of strength, and the "expansion" of state activities in such a state is precisely "the consequence … of its weakness."[150]

Throughout these writings, Schmitt wished to preserve what he called the "*pure private sphere,*" which he placed alongside two other spheres, which he called the sphere "of the state"

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[149] See Schmitt, "Die Wendung zum Totalen Staat" and "Weiterentwicklung des totalen Staats" in PuB, esp. 172, 174-75, 177-78 and 212-13. December 1931 and February 1933, respectively. Cf., LL, 266/6, 337/87, 342-43/91-92; L, 111-12 and n. 2/71 and 76 n. 7; Staat als Mech., 140/92-93, cf., 143/96; VL, 173/ 211; HdV, 79 et passim. Cf., also, Mussolini and Gentile, "Foundations and Doctrine of Fascism," 49, 59-60. This is largely the way in which Voegelin, *Authoritarian State* in *Collected Works,* 4:58 ff. understood Schmitt in 1936. Cf., Voegelin, *Theory of Governance* in *Collected Works,* 32:364. See also Schwab, *Challenge,* 77-80; "Introduction" in Schmitt, L, xxxii-xxxiii.
[150] See Schmitt, "Starker Staat und gesunde Wirtschaft" in SGN, 74-75.

and also the "non-state [but] public" sphere.[151] On Schmitt's view, it is only a "strong" state,

which can afford to "depoliticize" certain spheres of human life, giving rein to the "sphere of the

free economy" and to the "sphere of individual freedom."[152] This paradoxical claim—that only a

strong state can afford to be liberal—appears to be the modification of a basically Hegelian

reflection on religious pluralism in the modern state. "The state," writes Hegel, "which is …

*strong,* can …. comport itself more liberally [and] entirely overlook details, which affect it, and

even tolerate within it … communities, which do not even recognize their direct duties to [the

state]."[153]

   However, after he had joined the NSDAP in 1933, Schmitt's writings began to tell a different

story, undergoing a shift in a totalizing direction. This can be seen clearly by direct comparison of

the relevant texts before and after 1933. In an important essay from 1930, written under the

republic, Schmitt writes that

> the political unity was never considered and cannot be considered to be so absolutely monistic,
> annihilating all other [subordinate] social groups.... The unity of the state is always a unity out of social
> multiplicity. It was very different in different times and in different states, but [it was] always complex
> and, in an assured sense, pluralistic in itself.[154]

Similarly, in both the first and second editions of *Concept of the Political* (1927/1932), Schmitt

had written that

> the political unity …. is the decisive unity and [is] *'sovereign'*.... The word 'sovereignty' here has a
> good meaning, just as the word 'unity' [does]. Both in no way signify that every particularity of the
> existence of every human being, who belongs to a political unity, must be determined and commanded
> by the political.[155]

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[151] See Schmitt, "Starker Staat und gesunde Wirtschaft" in SGN, 79-80.

[152] See Schmitt, "Starker Staat und gesunde Wirtschaft" in SGN, 81, 85.

[153] Hegel, PR, § 270 A, p. 420/295, translation modified and emphasis added. Cf., Hegel, *German Constitution* in Werke, 1:479/PW, 21.

[154] Schmitt, Staatsethik, 157-58/201, translation modified.

[155] Citation from Schmitt, BdP, 39/38-39, translation modified, cf., 26/25. The first edition, BdP1, 11, is more concise, but the language and sense is almost identical.

Just one year later, however, the presentation shifted entirely. In 1933, in the third edition of the same text, published by an NSDAP press, Schmitt dramatically revised this very same passage. Now it read that

> the political unity is … the authoritative unity. [It is] total and sovereign. It is '*total,'* because … [a] human being is determined entirely and existentially in political participation. Politics is fate.[156]

One year later, Schmitt would proclaim that "in the mean time, we have recognized the political as the total."[157]

Whether Schmitt's pre-1933 polemic against interest group pluralism and his meditation on the "turn to the total state" make sense to the critic is analytically different from the question as to whether, prior to 1933, he conceptualized the state as a totalizing political force reaching each and every element of human existence, as in the wide-spread image of the "totalitarian" society popularized by the Frankfurt School and others.

## 10.7 Procedural Legality and Democratic, Constitutional Suicide

The third moment in Schmitt's polemic against liberalism parliamentarism is his critique of pure parliamentary proceduralism.

It is characteristic of parliamentarism, Schmitt argues, that it allows "certain conflicts to remain latent" and thereby aims to "avoid the political decision."[158] "The essence [of liberalism]," writes Schmitt, "is negotiation, [a] temporizing half measure, in the hope that the definitive dispute, the decisive bloody battle could be transformed into a parliamentary debate and allow

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[156] Schmitt, BdP3, 21. Cf., "Die Einheit der Welt" (1952) in SGN, 497. Schmitt echoes here Napoleon's famous words to Goethe in Erfurt in 1808: "Le destin, c'est la politique." Per Maschke, ed., in Schmitt, *Frieden oder Pazifismus,* 854 n. 5.

[157] Schmitt, "Vorbemerkung" in PT, 7/2, translation modified. Cf., a similar formulation from February 1933 in "Weiterentwicklung des totalen Staats" in PuB, 213. To the best of my knowledge, nothing of this sort appears in Schmitt's writings prior to Hitler's chancellorship (January 30, 1933).—This general, totalizing trend is also reflected in Schmitt's first major monograph published under the NSDAP. See Schmitt, SBV, 11-13/11-13.

[158] Schmitt, VL, 282/306-07, translation modified, cf., 305/330.

itself to be suspended forever in an *unending discussion.*"[159] In this way, the contemporary, liberal bourgeoisie is the "bearer" of a "political romanticism," which aspires to evade conflictual decision by means of an open, unrestricted debate or "unending discussion."[160] Thus, Schmitt cites approvingly Donoso Cortés' characterization of the liberal bourgeoisie as "*una clasa discutidora*"—the class that discusses, the palavering class.[161] Staring at the devil, the liberal bourgeois blinks and then shrugs. "To the question 'Christ or Barabbas?'" the liberal "answers with a motion for adjournment or the appointment of a fact-finding commission."[162] Though it goes unacknowledged, Schmitt's depiction of the ethos of parliamentarism bears uncanny resemblance to what Marx and Engels had called "parliamentary cretinism," i.e., the "conviction"—or "incurable sickness," rather—that all the important questions that face a nation can be resolved through "majority vote."[163]

Under certain circumstances, however, parliamentarism and its system of unqualified majoritarian procedural legality break down. In those occasional crisis situations of mass democracy, the liberal, parliamentary state cannot permit itself neutrality with respect to the substantive bases that motivate other political actors within its territorial boundaries. The evidence that Schmitt brings to bear in this claim is that the parliamentary state is not neutral with respect to itself and to the conditions of its own prolongation.

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[159] Schmitt, PT, 80/63, emphasis added. Cf., L, 269/9.
[160] Schmitt, PT, 69/53, cf., 82/65; "Vorwort" in PR, 16/12, 26-28/20-21; PR, 40/27, 141/99. Cf., GLP, 46/35-36, 58/47; VL, 35/87, 305/330. The phrase, "unending discussion," is adapted from Novalis' notion of an "unending novel." See Novalis, *Vermischte Bemerkungen* in *Werke,* § 65, p. 336.
[161] Schmitt, PT, 75/59. Cf., "The Unknown Donoso Cortés" in DC, 77-78/85.
[162] Schmitt, PT, 78/62, translation modified. See also "Donoso Cortés in Berlin" in DC, 54-55/94; "The Unknown Donoso Cortés" in DC, 77-78/85-86. This choice of metaphor (Christ or Barabbas, the words of Pontius Pilate in Mt. 27.17) has caught the attention of many readers, but the theological significance should not be overstated. Weber too was fond of metaphors of an almost identical character. See Weber, "Meaning of 'Ethical Neutrality'" in MSS, 17-18.
[163] See Marx, "Der Achtzehnte Brumaire des Louis Bonaparte" in MEW, 8:173, 191; Engels, "Preußens Triumph" in MEW, 8:87-88.

The effective practice of a parliamentary, legislative state, which rigorously follows some variation of the majoritarian logic, inevitably implies that whatever numerical majority that happens to hold domestic, political power has the legally-valid monopoly on the production of law.[164] This view, however, presents some difficulties, in Schmitt's eyes.

A parliamentary-democratic constitution that obeys a majoritarian logic is only "sensible and tolerable" when conditions of homogeneity obtain, that is, when the preponderant part of the population wishes for relatively the same sorts of things. Under these conditions, a majoritarian calculus will reveal the "latently present, presupposed *agreement* and consensus." Otherwise, liberal democracy simply becomes the name of that regime under which the majority oppresses the minority.[165]

Among a relatively homogenous people, agreement on abstract fundamentals is usually forthcoming. However, in deeply divided, late industrial societies under conditions of mass democracy and worldview parties, this sort of agreement is rarely to be found. The resulting tensions are accentuated especially during moments of national crisis. Absent the conditions of relatively unproblematic consensus on matters of fundamental importance, nothing concrete prevents the ephemeral, "pure mathematical majority," which has obtained fifty-one percent of the vote, from suppressing or even disenfranchising the political minority. They may make use of "legal power in order to entrench themselves in the possession of power and close the door behind themselves," by changing election laws to favor decisively their own particular demographic or constituency; or, though Schmitt does not expressly mention it here, simply by

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[164] See Schmitt, LL, 287-88/31.
[165] Schmitt, LL, 284/27-28, 295/40-41, translation modified.

failing to hold elections at any future date. Even more dramatically, they may simply "declare their domestic competitors illegal" or "*hors-la-loi.*"[166]

Conceptually, for this not to be the case, and for the forcible subjection of the non-dominant, political minority to be avoided, the constitution of the parliamentary, legislative state must, of necessity, posit a "substantive principle of justice," namely that of the "equal chance." Problematically, this substantive principle can neither be abstracted from the parliamentary, legislative state, nor can it be subsumed under a truly neutralist framework. However this may be, the legislative, parliamentary state is unintelligible without it. Thus, above all else, the principle of equal chance is the parliamentary, legislative state's essential presupposition and foundation of its "legality." The opportunity must be reserved for each party, individual, or any bearer of an opinion to be able, through parliamentary means, to become, at some point in the future, part of a parliamentary majority and thus to participate in domestic, political power. Absent these conditions, the parliamentary, legislative state would become a "grotesque game" and a "shameless mockery of all justice."[167] A parliamentary, legislative state that does not posit a substantive principle of this sort, and which simultaneously "rest[s] on the rule of prevailing majorities," thereby finds itself unable to draw meaningful distinctions between tyranny and non-tyranny.[168]

However, this principle of the equal chance is tied ineluctably to a specific, historical, and concrete situation, for the equal chance proviso is enforced only at the whim of the constitutional majority, which holds the premiums of domestic, political power at its fingertips.[169] Here Schmitt

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[166] Schmitt, LL, 284-86/28-30, 290-91/34-35, translation modified.
[167] Schmitt, LL, 285/28-29, 287-89/31-32, 291/35.
[168] Schmitt, LL, 286-87/29-30, translation modified.
[169] Schmitt, LL, 289/33.

principally has in mind "abnormal" times, "critical moments," and periods of great distress. Thus, he does not expect the doom and gloom scenario to arise under normal, peaceable conditions of comfort and economic plenty.[170] Not even for a moment does Schmitt take seriously the prospect that, during a true crisis, the dominant, political majority will respect the constitutional "civil rights" of those whom they oppose at a deep and existential level. He acknowledges that ordinarily, parliamentary practice can content itself by resting upon vague notions of shared "good will" amongst political actors, but good will can erode.[171] "No norm," writes Schmitt, "protects or guards itself."[172] A profound faith in the good will of one's adversary changes this not one iota.

Precisely for this reason, the "loyal attitude" of all political actors both to the constitution and its substantive principles is of paramount concern to the continued health of the parliamentary, legislative state. To willfully fail to read the barometer on a particular political group's commitment to the substantive principles of the parliamentary, legislative state is effectively tantamount to willing the demise of that same state. In so doing, one abandons the principle of the equal chance in the very moment of exercising the self-same principle. "It is self-evident," writes Schmitt, "that one can hold open an equal chance only for those whom one is certain would do the same. Any other use of such a principle would not only be suicide in practical terms, but also an offense against the principle itself."[173]

However, the principle of equal chance itself calls for "unconditional parity" amongst political actors. All political actors must be treated in the same way. Yet, in defending the principle of

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[170] See Schmitt, LL, 284/28, cf., 288/32, 290/34, cf., 267/7, 281/23. Cf., VL, 54/105.

[171] Schmitt, LL, 289/33, cf., , 281/24..

[172] Schmitt, LL, 306/54.

[173] Schmitt, LL, 289-90/33, cf., 270/10. Cf., Justice Robert H. Jackson's dissenting opinion in Terminiello v. City of Chicago, 337 U.S. 1 (1949).

equal chance, one may sometimes be forced to abrogate the self-same principle. However, by so discriminating amongst the participants, the parliamentary, legislative state thereby calls into question the sanctity of the principle of equal chance. This is, according to Schmitt, an "insoluble antinomy," which stands at the very heart of the theory of the parliamentary, legislative state.[174]

On Schmitt's view, raising the threshold for the purchase of the premium of political power from a simple majority to a two-thirds or higher qualified, super-majority changes the equation very little, or at least not in basic principle; and in so doing, other conceptual difficulties arise. One still has to explain why an additional supplement to the simple majority is required. One must be able to explain, in the case of a statutory requirement of a two-third majority, what precisely is gained in terms of legitimacy by having an additional one-sixth over and above a simple majority—and how precisely what is gained in legitimacy is actually gained. The answer that it is simply more difficult to find this additional one-sixth needed in order to form such a qualified super-majority, while fundamentally correct, does not furnish a true principle or "*ratio*" on which this procedural restriction might rest. Two men abused by 98 others are no less abused than 49 men abused by 51. To suppose otherwise, Schmitt writes, would be a "strange sort of 'justice.'"[175]

Nor, on Schmitt's view, should it satisfy anyone that a temporary, two-thirds parliamentary super-majority coalition of 400 out of 600 can momentarily pass an oppressive law and hold the rest of the nation hostage to it. The level of support for it might later sink to 201, but the will of the 399 remaining parliamentary actors are blocked thereafter.[176]

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[174] Schmitt, LL, 290-91/34-35, translation modified.
[175] See Schmitt, LL, 294-95/40-41, translation modified.
[176] See Schmitt, LL, 305-06/51-52.

Moreover, the very distinction imposed by a constitutional assembly between higher law (i.e., those constitutional laws requiring super-majority to amend) and lower law (i.e., statutes passed by a simple majority) effectively displaces the legislative body from its place of supremacy within the idea of the bourgeois, parliamentary *Rechtsstaat.* However, it is not clear on what grounds or on whose authority it does so.[177] In abandoning the conception of unmediated, parliamentary supremacy, the underlying democratic legitimacy of the state is called into question, and an answer to the following question is demanded: What precise order, body, or idea holds that position, which is higher than parliament within this regime?

Similarly, the introduction of an ostensibly "'impartial third party'" might serve as a stopgap. However, in the introduction of such a "supra-parliamentary" and "supra-democratic" solution, one has thereby given up on the immanent, legitimating principles of the parliamentary, legislative state and introduced, through the backdoor, a pragmatic measure that cannot be subsumed conceptually under the pure principles of the parliamentary, legislative state. Thus, in this move, its pure "system of legality" would have been "abandoned."[178]

Moreover, Schmitt also doubts the adequacy of the traditional conception of the judiciary as a check on the legislative. The judge always arrives after the decisive battle has already been fought.[179]

It is Schmitt's fundamental contention that the dominant legal theorists of his era had no truly meaningful answer to these difficulties and questions. He takes himself to have demonstrated conclusively the truth that no parliamentary state can be "neutral towards itself and its own presuppositions." The parliamentary, legislative state cannot be understood to be simply a

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[177] See Schmitt, LL, 309/56.
[178] Schmitt, LL, 290 /34, translation modified.
[179] See Schmitt, LL, 288/32; HdV, 32-33.

"'neutral' procedural mechanism and voting procedure,"which is "indifferent" towards, and "accessible" to, any "content" which appears before it in the form of a majority coalition.[180] It is neither a "party-politics legislative machine" nor a "technical-functional tool."[181]

Perversely, he took the conservative revolution in Germany as a solid confirmation of his views. Some five years later, Schmitt would declare with an air of apparent intellectual satisfaction that the "wonderful armature of a modern state organization requires uniformity of will and uniformity of spirit." Otherwise, its "system of legality will … break down."[182]

## 10.8 Rousseauian Democracy and Plebiscitary Legitimacy

Throughout his Weimar era writings, Schmitt is never quite clear whether he prefers state "unity from above" or "from below" or some mixture thereof.[183] At least superficially, *Dictatorship, Political Theology,* and *Guardian of the Constitution* give the first impression, whereas *Crisis of Parliamentary Democracy* and *Constitutional Theory* give the latter. There was, however, always a formally democratic element latent within Schmitt's conception of the modern state after 1919. "The legitimacy of the Weimar Constitution," writes Schmitt, "rests upon the constitutional-constitutive power of the German folk."[184] In Schmitt's view, this was the supreme embodiment of the "democratic principle."[185] In the penultimate year of the Republic, his hopes in parliament had even more completely eroded, and he would declare that "parliament had become the showplace of a pluralistic system" dominated by the "compromise" position between "totally

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[180] Schmitt, LL, 283/27.
[181] Schmitt, LL, 343-44/93.
[182] Schmitt, L, 118/74.
[183] See Schmitt, Staatsethik, 158/201. Cf., Donoso Cortés, "L'Église et la Révolution" in *Oeuvres,* 1:337. *Pace* Taubes, *To Carl Schmitt,* 13.
[184] Schmitt, VL, 88/136, translation modified.
[185] Schmitt, VL, 65/115-16, cf., 53/104-05, 58/109, 61/112, 85/132-33 et passim.

determining" worldview parties.[186] Yet, even in this dire situation, Schmitt held, at least formally, to a democratically-inflected position, maintaining that democratic, "plebiscitary legitimacy is the single type of state justification that may be generally acknowledged as valid today." "There is," Schmitt declares, "simply no other sanction available."[187] At this point, the formula he preferred was one he adopted from the great theorist of the French Revolution, Abbé Sieyès: "authority from above, confidence from below."[188]

Paradoxically, despite his somewhat justified reputation as an arch-authoritarian, Schmitt was also something of a "democrat" in at least a *very* minimal sense—as some scholars are apt to point out and sometimes even to exaggerate.[189] Thus, it behooves us to consider here in some detail the *actual* nature of Schmitt's democratic thought. This also provides a suitable occasion to examine, in the next section, one of the most controversial features of Schmitt's Weimar writings: his conception of "homogeneity."

Schmitt was quite conscious of the eccentricity of his own conception of democracy, for it was no less idiosyncratic in his own day. He adverts to the contemporary "linguistic usage" that governs contemporary idiom, and with typically German Anglophobia, he dismisses it as an artifact of the "Anglo-Saxon world press."[190] In contrast, Schmitt's conception of democracy corresponds to a "classical … tradition," and is, for that reason, "no longer recognized."[191] "Entirely elementary truths," writes Schmitt, "fall into oblivion and [are] apparently unknown to

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[186] Schmitt, LL, 337-38/87, translation modified.
[187] Schmitt, LL, 340-41/90-91, translation modified, cf., 313-16/59-63, 318/65. Cf., VL, 88/136; GLP, 39/30.
[188] Schmitt, LL, 340-41.
[189] E.g., Strong, *Politics Without Vision,* 234; Mouffe, *Democratic Paradox,* 42-43; Balakrishnan, *Enemy,* esp. 263-65.
[190] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 15/10. Cf., GLP, 43 n. 3/97 n. 5.
[191] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 20/14, translation modified. Cf., GLP, 34/25.

the contemporary theory of the state."[192] In his thought on democracy, he refers to a conception of democratic will formation, which scarcely any contemporary democratic citizen could recognize as meaningfully democratic.

The principal point of departure for Schmitt's idiosyncratic democratic theory is Rousseau's *Social Contract.* As the "philosopher of modern democracy," his formulations are "fundamental for democratic thought."[193] Any deficiencies in Schmitt's account likely flow from this source.

For Schmitt, following Rousseau, democracy means not much more than a basic isomorphism between the popular will and the activity of the sovereign state. As Schmitt puts it, the "core of the democratic principle" consists of the "assertion of an identity between law and the will of the people." The sufficient condition for democracy is that there exists an "identity of governed and governing." The "essence" of democracy entails only that "all decisions … are valid only for those who themselves decide."[194] In a democracy, law is simply what the people have commanded. *Lex est quod populus juissit.*[195]

Especially prominent in Schmitt's mind is Rousseau's conceptual distinction between that quasi-mystical entity he called the "general will" and the summation of disparate, arbitrary, individual wills that he called the "will of all"—a distinction notoriously difficult to draw.[196] Though difficult to wrap one's head around, the "general will" is "the essential concept of

[192] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 22/16, translation modified.
[193] See Schmitt, GLP, 34/25; "Contradiction between Parliamentarism and Democracy" in GLP, 19/13. Cf., VL, 94-95/143, 235/264-65, 252/280. Perhaps unsurprisingly, in light of Schmitt's capable use of him, Rousseau made conspicuous appearance on the long list of Enlightenment and pre-Enlightenment intellectuals, whose ostensible hostility to the "open society" earned them a savage rebuke from scores of mid-twentieth-century Anglo-American thinkers and Continental European émigrés. Famously, Rousseau was designated as the father of twentieth-century "totalitarian democracy." See Talmon, *Origins;* Popper, *Open Society,* 1:121, 2:45, 52; Russell, *History,* 711.
[194] Schmitt, GLP, 34-35/25-26, translation modified. Cf., "Contradiction between Parliamentarism and Democracy" in GLP, 20-21/14-15, 28/19; VL, 223/255, 234/264, 256/284, 390/406.
[195] Schmitt, VL, 146/187, 258/286. Cf., LL, 281/24.
[196] See Schmitt, GLP, 34-35/25-26; VL, 245-46/274. Cf., PT, 62-63/48-49; "Contradiction between Parliamentarism and Democracy" in GLP, 19/13-14; LL, 281/24. See Rousseau, *Social Contract,* 4.1, pp. 121-22, 4.2 ¶ 8, p. 124.

Rousseau's state-philosophical construction."[197] "Homogeneity" is Schmitt's solution to Rousseau's puzzle. It is "the fundamental presupposition" of democracy.[198] "The folk," writes Schmitt, "[is a] moral quantit[y], and not simply a factual quantit[y]."[199] The democratic attempt to formulate the popular will through an arithmetic procedure of summation remains meaningful only so long as one presupposes that some relative degree of "homogeneity" prevails amongst the *dēmos*.[200] To this topic, we will return in the next section.

"Everything," writes Schmitt, "depends on how the will of the folk is *formed*."[201] However, the way in which Schmitt conceptualized democratic will formation is quite revealing. Schmitt's preferred conception of democratic legitimacy is not at all a *participatory, deliberative,* or even a parliamentary *representative* model of democracy; and it is most certainly not an "*agonistic*" one. Borrowed from the Roman legal tradition, Schmitt's is instead an *acclamatatory* and *plebiscitary* model of democracy, wherein the people do not themselves necessarily deliberate or set policy, but rather respond to binary questions that are posed to them with a simple "yes" or "no."[202] "Since ancient times," writes Schmitt, "one knew that [the folk] are not able to discuss and to deliberate."[203] Because the people do not deliberate, the "value of the answer depends entirely on the posing of the question."[204] Plebiscitary referenda are clearly the most concrete, modern democratic practice which would correspond to Schmitt's discussion of democratic legitimacy;

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[197] Schmitt, D, 100/120, translation modified.
[198] Schmitt, VL, 262/289, cf., 229-30/260. Cf., LL, 281/24.
[199] Schmitt, D, 123/104, translation modified.
[200] See Schmitt, LL, 284/27-28; "Contradiction between Parliamentarism and Democracy" in GLP, 19/13; VL, 214/248, 230/260. Cf., GLP, 34-36/25-27. See Rousseau, *Social Contract,* 4.2, ¶ 1, p. 123.
[201] Schmitt, GLP, 36/27, translation modified.
[202] See Schmitt, LL, 340/89; "Contradiction between Parliamentarism and Democracy" in GLP, 19-20/14, 22-23/16-17; VL, 83-84/131-32, 240/269-70, 243-45/272-74, 260/287, 277/302-03, 315/338, cf., 86-87/134, 326/348, 350/370; "Wesen und Werden des faschistischen Staates" in PuB, 126.
[203] Schmitt, LL, 317/64, translation modified, cf., 339-40/89.
[204] Schmitt, VL, 240/269, cf., 279/304.

and yet, Schmitt acknowledges that "as a routine procedure for legislation" this practice is for the most part "practically impossible in a modern state."[205]

Despite the Rousseauian background to his thought, universalistic egalitarianism is completely foreign to Schmitt's conception of democracy. This, he believes, belongs to the world of liberalism, but not to the democratic tradition.[206] Drawing upon an ancient conception of democracy preserved in Aristotle, Schmitt writes that "every real democracy rests upon [the principle] that not only are equals treated equally, but … that unequals are treated unequally."[207]

Equality necessarily raises the question of equality of what and in what respect. A number of answers have been given to this question in modern history. The first modern egalitarian, Hobbes, had imagined that human beings were equal largely in terms of their equal ability to deprive another of his life.[208] More than a century later, Kant had revived the Christian tradition of *imago dei*-thinking, conceiving of the equality of human beings as residing in a quality he called their "*dignity.*"[209] Today, this latter formulation is the predominant, if sometimes only implicit, understanding of human equality.

These doctrines and others like them, Schmitt sees as fundamentally unpolitical. Human beings, in Schmitt's view, can be *politically* equal only in terms of qualities they share with one another, which extend beyond their universal human character, whether conceived biologically or transcendentally. The doctrine of "universal human equality," which contends that "all those 'who bear a human face'" are equal as such, is fundamentally "unpolitical" and "without

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[205] Schmitt, VL, 259/287, translation modified.
[206] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 16/11, 18/13.
[207] See Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 13-14/9; Aristotle, *Politics,* 3.9 1280a11-12. Kennedy's note was helpful here (p. 89 n. 23).
[208] Hobbes, *Leviathan,* ch. 13, p. 86.
[209] Kant, *Groundwork for the Metaphysics of Morals* in PP, Ak. 4:435 et passim; Gen. 1.26-27.

value."[210] That is, to Schmitt's mind, only an "indifferent equality," which has been "robbed of its value and its substance."[211] In contrast, Schmitt contends that "equality is politically interesting and valuable, only so long as it has substance." This qualification necessarily implies the "risk of inequality."[212]

Actual democracies appear to acknowledge all of this through their own practice, and from this practice, Schmitt extract considerable significance. "Hitherto," Schmitt avers, "there has not yet been a democracy, which did not recognize the concept of foreign, and which could have realized the equality of all human beings."[213] All states with the wherewithal to do so choose to police their own borders, and no nation of any kind has ever built a fence while appealing to an universalistic-humanitarian argument. Even the most progressive democracies do not open their arms to all comers without restriction, though they are increasingly unable to explain cogently why they do not do so.

In this way, inequality is a "necessary correlate" of equality. Efforts to avoid this conclusion result only in evasive fictions. Schmitt does concede that modern democracies bring "relatively extensive human equality within the citizenry." At the same time, however, as a liberal democratic state attempts to approximate asymptotically a hypothetical "absolute human equality" within the political sphere, inequality simply "retreats" into yet another sphere—that of economics. Then, economics comes to "dominate" politics. Inequality itself does not thereby "disappear."[214]

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[210] Schmitt, VL, 226-27/257-58, translation modified. Cf., "Contradiction between Parliamentarism and Democracy" in GLP, 16/11. The phrase derives from Fichte, *Die Staatslehre* in *Sämmtliche Werke,* 4:423, and it was repeated and made famous by the German Republic's first President, Friedrich Ebert, in a speech he gave before the National Assembly on February 6, 1919.

[211] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 16-17/11-12.

[212] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 14/9, translation modified.

[213] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 16/11, translation modified.

[214] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 17-18/12-13, translation modified.

Moreover, drawing heavily, once again, on the classical Rousseauian distinction between the "will of all" and the "general will," Schmitt attacks the most prominent feature of democratic practice in contemporary states. He decries the secret ballot as fundamentally "undemocratic," for the procedure obstructs corporate will formation and treats democracy as the summation of preferences on the model of "statistical" or "arithmetic," economic preference maximization. In contrast, the democratic citizen, on Schmitt's view, must express himself as a "'*citoyen,*'" and thus as a "'representative of the whole,'" and not as a *bourgeois* or merely "private man" whose political behavior follows directly from his own peculiar, "private interest." This, the secret ballot does not do, and for that reason it cannot produce "genuine public opinion"—not even if "one hundred million *private* people" happen to agree.[215]

Although the quality of public opinion seems to be of such decisive moment to Schmitt, the strictures he puts on the formation of public opinion are considerable. Because he believes that freedom of discussion is a feature of the liberal and not of the democratic tradition, he would even go so far as to maintain that not even censorship can impugn the democratic credentials of a regime—or at least not the censorship of the newly emerging media of film, which, in 1928, still was silent. Thus, in a comment on Article 118 of the Weimar Constitution, he suggests that "no state can leave" the production of film "uncontrolled," and, moreover, that "the state must place it in the service of the existing order."[216]

In addition, there are political matters, which the democratic people at large are ill-equipped to address. In modern industrial societies, very few possess "the time and the ability … to concern

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[215] See Schmitt, VL, 207/240, 244-46/273-74, 280-81/305-06, cf., 81-82/130, 253/280; "Contradiction between Parliamentarism and Democracy" in GLP, 22/16, emphasis added; "Wesen und Werden des faschistischen Staates" in PuB, 126. Cf., Schmitt, D, 123/104; Rousseau, *Social Contract,* 4.4 ¶ 35, p. 135, cf., 2.4 ¶¶ 2-3, p. 60, 4.2 ¶ 3, p. 123; Cicero, *De Legibus,* 3.3.10.
[216] Schmitt, VL, 168/206-07. Cf., "Weiterentwicklung des totalen Staats in Deutschland" in PuB, 212; "Starker Staat und gesunde Wirtschaft" in SGN, 74.

themselves with political things."[217] Thus, Schmitt assigns what he calls "technical" issues that require "specialized information" to those "competent and responsible technical experts." Those "matters cannot be handled by the mass" of the enfranchised voters.[218] In advanced, industrial societies, presumably this list would include almost everything concerning the economy.

The possibly Caesarian implications of Schmitt's discussion of democracy leave him unfazed. Cognizant of both Jacobin practice and of Marxist-Leninist theory, Schmitt affirms that even "the minority can have the true will of the folk." He shows that he has understood the force of Rousseau's infamous "forced to be free," when he acknowledges that the "will of the folk … can never be … the absolutely unanimous will of all … citizens." In extreme cases, it might even be expressed by a "single human being" without impugning its democratic legitimacy.[219] In a "genuine democracy," moreover, the merely "tacit consent" of the people might prove adequate for imparting democratic legitimacy.[220] Following Rousseau, Schmitt insists that "consistent democratic theory" permits any regime type, e.g., aristocracy, monarchy, democracy, so long as those governing recognize that the "folk remain sovereign."[221] Thus, even dictatorship is not necessarily un- or anti-democratic, though it is certainly illiberal.[222]

Within Schmitt's idiosyncratic, democratic thought world, the President of the Reich plays an enormous role. So long as he governs in accordance with "true leadership," the President acts a "trustee," who "unites in himself the trust of the entire folk." Although the danger always exists

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[217] Schmitt, D, 143/124, translation modified.
[218] Schmitt, VL, 279/304.
[219] See Schmitt, GLP, 34-36/26-27, translation modified; Rousseau, *Social Contract,* 1.7, ¶ 8, p. 53. Cf., Schmitt, D, 122-24/103-05; VL, 252/280, 279/304.
[220] Schmitt, VL, 90-91/138-39, cf., 94-95/143.
[221] See Schmitt, VL, 94-95/143, translation modified; Rousseau, *Social Contract,* 2.6 ¶ 9, p. 67 and n., 3.3, pp. 89-90. Cf., Schmitt, D, 121-22/102-03.
[222] See Schmitt, GLP, 37/28, 41/32, cf., 35/26; "Contradiction between Parliamentarism and Democracy" in GLP, 22-23/16-17. Cf., "Wesen und Werden des Faschistischen Staates" in PuB, 126; VL, 237/266.

that he will degenerate into either a "party-man" or "harmless person," "ideally" he will prove to be a "political leader" "in an especially decisive and intense sense" whose orientation transcends the "limits and the framework" of party politics.

For Schmitt, although the President represented a holdover of sorts of the "monarchical element" in the mixed form of the modern, liberal state, his democratic, "plebiscitary legitimacy" was of even greater significance. In Schmitt's view, the fact that the "'President is elected by the entire German folk'" (Art. 41) gave him "direct connection with the folk." In this way, the presidential system represented an element of "direct democracy" within the constitution, in contrast to the proportional representation and worldview-party politics of the parliamentary system.[223] Weber's conception of "charismatic" legitimacy and of "leadership democracy" constitute an important background to Schmitt's conception of democracy.[224]

## 10.9 Identity Politics, German Style: Homogeneity

There has been much controversy and confusion about the nature of Schmitt's category, "homogeneity." Ultimately, all of this stems from his later NSDAP membership, his documentable attempt to assimilate NSDAP racialist motifs, and from the anti-semitic remarks which appear in his posthumously published notebooks. At least in the Weimar texts, however, "homogeneity" does not mean, in the first instance, racial or ethnic homogeneity, although it does not preclude such homogeneity either. We might find Schmitt's views repulsive. Still, there is independent value in trying to determine just precisely what it is that he thought and why it is that he thought it.

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[223] Schmitt, VL, 350-51/369-71; LL, 273/13; translation modified; Weimarer Verfassung, Art. 41. See also Schmitt, VL, 341/362, translation modified, cf., 326/348, 335/355 ff., 347/367. Cf., PT2, 51-52/66; LL, 272/12.
[224] See Weber, WG, 140-42/241-45 (charisma), 126/219, 155-58/267-71 (leadership democracy). Cf., Weber, "Parliament and Government in Germany" in PW, 220-22, 227-30. For an early, controversial discussion of similarities in political conceptions, see Mommsen, *Max Weber and German Politics.*

Particularity and distinctiveness—cultural, moral, religious, ideological, or otherwise—are absolutely fundamental to Schmitt's conception of homogeneity. It is precisely for this reason that he excludes "humanity" as a political concept.[225] With a view to frequency of utterances, the types and bases of homogeneity of most interest to him are those of "national" mores or sentiment; a "feeling of national unity" or a sense of "belonging to a particular folk"; "shared fate and tradition" or "civilizational," "cultural," or "social" similarity; "moral similarity" or civic virtue (e.g., Aristotelian *aretē,* Ciceronian *virtus,* Machiavellian *virtù,* Montesquieuian *vertu*); "shared religious conviction," confession, or "faith"; and Marxian class-consciousness. Sometimes Schmitt even speaks of "ontological similarity." All that said, Schmitt's conception of homogeneity certainly does not conceptually preclude the possibility of racial or ethnic homogeneity. Admittedly, then, there are a few scant mentions in the Weimar period texts of vague notions such as "physical … qualities" and "physical … similarity."[226]

Of course, homogeneity can never be complete. Homogeneity that is "absolute" is an "impossib[ility]." In fact, politics presupposes some difference. Appeals to justice are intelligible only on the assumption that not everyone wants exactly the same things, or shares exactly the same overarching vision of how all human desire ought to fit together. Hence appeals to a higher-order principle become necessary in order to adjudicate the resulting disputes.[227] Schmitt's point is that conflict, which is not to become bloody and which can, for this reason, remain contained within the sphere of politics, must occur within a circumscribed arena of relative similarity.

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[225] See Schmitt, VL, 234/263, cf., 226-27/257-58.
[226] See Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 14/9; GLP, 88/75, cf., 80/68; VL, 65/116, 227-30/258-61, 276/301, 322/345, 376/392, 379/395, translation modified, cf., 214/248, 252/280; LL, 268/8.
[227] Schmitt, VL, 274/300.

"Race," as an analytic category, appears only twice in Schmitt's two most important Weimar texts which treat the topic of homogeneity, and never once does it appear as a decisive or fundamental feature. In *Crisis of Parliamentary Democracy,* "race" makes no formal appearance at all in the thematic discussion of homogeneity, though, much later, in his discussion of Georges Sorel and national myth, it is mentioned once as one among many possible sources, which could potentially contribute to "national feeling."[228] Moreover, only once in the entire 404-page text of *Constitutional Theory* is the idea of "shared race" even broached as the possible substance of political homogeneity, and again it is mentioned only as one among many other categories.[229]

Somewhat more ominously, however, in his Weimar-era writings, Schmitt mentioned several times the racially-charged immigration policies of early twentieth-century Australia and the Greek-Turkish Treaty of Lausanne (1923). Signed after the dissolution of the Ottoman Empire, the latter treaty led to the forcible relocation of ethnic Turks and Greeks to areas within their respective ethnic-national borders. These more forcible tactics were pursued, Schmitt writes, when the initial "attempt" at "gradual, peaceful *assimilation*" proved to have been a failure.[230]

The complete omission of race or ethnicity as a possible substrate of social integration and homogeneity would have been historically and sociologically unsound. In his posthumously published magnum opus, *Economy and Society,* Max Weber devoted an entire chapter to the theme.[231] "The feelings of commonality," writes Weber, "which are signified under the name,

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[228] See Schmitt, GLP, 88/75.
[229] See Schmitt, VL, 227/258. In D, 104/85 "feudal theories of race" are briefly mentioned without further comment and outside of a discussion of homogeneity.
[230] See Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 14/9; VL, 232/262. Cf., LdER, 389-90/38.
[231] See Weber, WG, 234-44/385-98, cf., 527-30/921-26.

'national[ity],' are not uni-dimensional, but rather they can be fed out of very different sources," which include but are not limited to a "racially conditioned *Habitus*."[232]

It would be a mistake to infer from a few scant remarks about various types of homogeneity that Schmitt's own conception of homogeneity was fundamentally motivated by racial or ethnic animus. As readers of Schmitt, we need constantly to remind ourselves that Hermann Heller, the eminent, Jewish social democratic professor of law, made very similar arguments about the category of "social homogeneity" contemporaneous with Schmitt's own publications.[233] That Schmitt's category was not of a fundamentally racialist character was also clear to Schmitt's contemporary readers, who were themselves outspoken critics of racialist theories of politics, e.g., Eric Voegelin. Both before and even after 1933, the thought that Schmitt's conception of homogeneity had anything at all to do with race did not even appear to have occurred to Voegelin.[234]

In point of fact, Schmitt had even published remarks that were critical of racialist politics. As early as 1916, Schmitt had mocked the "entire romanticism of racial theory" whose theorists confused "moral constructions" for "natural scientific ... differences of race."[235] Then, three years later in his *Political Romanticism*—and repeated verbatim six years later in the revised second edition—Schmitt had been dismissive of the "mystical Romanticism of race," whose idea of a

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[232] Weber, WG, 244/397, translation modified, cf., 528/923.
[233] Heller, "Politische Demokratie und Soziale Homogenität" in *Gesammelte Schriften,* 2:421-33.
[234] See Voegelin, "Review Essay of Verfassungslehre, by Carl Schmitt" and *Authoritarian State* in *Collected Works,* 13:61-62 and 4:219-20. Cf., *Theory of Governance* in *Collected Works,* 32:363, 366. For his monographs on race theory and further background, see Voegelin *Race and State* and *History of the Race Idea* in *Collected Works,* vols. 2 and 3; Federici, *Eric Voegelin,* 4-5. See also Voegelin, "The Growth of the Race Idea" in *Collected Works,* 10:27-61.— The same is also true of Lukács, a Hungarian Jew, whose remarks on Schmitt occur in a work which also discusses NSDAP racial theory. See Lukács, *Destruction,* 655-59, cf., 667 ff.
[235] Schmitt, TDN, 14.

"chosen race" would serve as a "foundation for its claim to world domination." He called it a "delusion."[236]

That Schmitt's concern with homogeneity is not fundamentally racialist in character is clearest from an important terminological discussion in his *Constitutional Theory*. Though occasionally he will use them as synonyms, Schmitt indicates that he prefers the latinate, French-derived term, *Nation* to the Germanic word, *Volk,* because, in his mind, "nation" specifies "political" existence, whereas "folk" specifies only "ethnic or cultural" bonds, but not necessarily this decisive "political" feature, with which he was so preoccupied during the second half of the Weimar period.[237] A "nation," in contrast to a "folk," refers to a people, who are "individualized through a politically distinctive consciousness." In the concrete, this entails that those who make up a nation share, for instance, a language; "historical life" and "historical destiny, traditions, and recollections"; and "political goals and hopes." By themselves, none of these features are sufficient to constitute a nation, but they all contribute to the politically vital sense of "commonality" and "feeling of national belonging."[238]

At other times in Schmitt's discussion, homogeneity appears to signify nothing more than widely-shared agreement about "fundamental questions" concerning political-morality and the type of governmental structure in a given, geographic area. Thus, Schmitt writes that differences in the evaluation of the moral rectitude of slavery between the North and the South in the United States of the late nineteenth century "endanger[ed]" its "homogeneity." Similarly, he contends that the Weimar Constitution "guarantees homogeneity" in the sense that it provided for a

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[236] Schmitt, *Politische Romantik* (1st ed.)*,* 7; PR, 38/26.
[237] See Schmit, VL, 79/127; D, 142/123. Cf., however, BdP, 38/38.
[238] See Schmitt, VL, 231/261-62, translation modified. On the role and power of "myth" in national-identity, see also GLP, 75/88 et passim.

constitutional, parliamentary democracy, which thereby "exclude[d]" both monarchy and Soviet-style worker-councils.[239]

This story shifts dramatically, however, in Schmitt's writings during the NSDAP regime—and this is the source of all subsequent charges of an ineluctably racialist character to Schmitt's discussion of homogeneity. As early as 1933, a racial/ethnic element was introduced into Schmitt's conception of popular homogeneity. In his first monograph published under the new regime, Schmitt praised Hitler and other NSDAP jurists for keeping the "idea of race" at the "epicenter" of their attention, and for never once treating it merely as a "theoretically conceptualized postulate." "The similarity of type [*Artgleichheit*] of the German folk, who are united in themselves, is the unavoidable presupposition and foundation for the concept of political leadership.... Without the axiom of similarity of type, the National Socialistic state could not persist and its legal-life would be unthinkable."[240] Reflective of this change, even Schmitt's conceptual language underwent a shift. Whereas Schmitt, in the Weimar writings, had always used the hellenic and teutonic terms, *Homogeneität* and *Gleichartigkeit,* to refer to his conception of homogeneity, after 1933, he began to speak of *Artgleichheit.*[241]

Whether Schmitt's more reprehensible written utterances printed in the NSDAP press are essentially tied to his earlier body of work is one of the most controversial questions that has plagued his writings to this date, and we should always read his earlier writings with these questions in mind. Here, I have attempted only to draw attention to the logic of Schmitt's

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[239] Schmitt, VL, 376-77/393-94.
[240] Schmitt, SBV, 42/48, translation modified, cf., more generally, 32-46/36-52. Cf., DA, 9/45.
[241] Similar, almost imperceptible changes also appear in Schmitt's early work under the changed political climate. For instance, in 1933, in republished revisions to an earlier work, Schmitt's preferred language for "association"-type concepts shifts to ones with NSDAP-resonances (e.g., *Genossenschaft* supplements and even supplants *Assoziation*). Cf., Schmitt, BdP, 44-45 with BdP3, 26-27. Then, by at least 1934, Schmitt had begun to speak of *Volksgenossen*—a term for a "comrade" of sorts, but whose post-1933 use associated one with the racialist policies of the NSDAP. See DA, 54/97.

conception of homogeneity as it is articulated in the Weimar writings, and thus to its apparent

discontinuity with the explicitly racialist turn his thought took after 1933.

## 11. The Polemical-Decisionistic Ground of Sovereign Authority

After the revolutions and in an age of disenchantment, what is the basis for the legitimacy of the state's authority? Schmitt seems certain that in an age of mass democracy, it does not lie in parliament.

The bulk of Schmitt's Weimar period writings are written with the sometimes express, often implicit, intention to raise awareness of the autonomous, substantive, political core, which stands behind the political practice of any given political culture. This autonomous core may be embodied in the state, a constitution, or even a revolutionary movement, but that core is always to be found somewhere, and it must be recognized for what it is if we are truly to understand the political phenomena we hope to study.

Modern liberal culture and institutions attempt, albeit unsuccessfully, to hide from view the metaphysical foundation of their own thought world. This, Schmitt aims to unmask. Schmitt was all too aware that his occasional talk of the "substance of the state" appeared "scholastic" to many of his readers, but this did not deter him at all.[1] On his view, "metaphysics is something unavoidable." Every constellation of ideas and "every movement" assumes for itself, wittingly or not, a "specific, characteristic attitude towards the world." This attitude embodies a decision, which has always already been made, concerning what will serve as the "ultimate authority" or "absolute center." That center does not need to be God, but a center there must be.[2] "Every epoch of political and state thought," writes Schmitt, "has conceptions, which appear in a specific sense [self-]evident to it, and, [which] .... make sense to great masses without further ado."[3] Thus, each

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[1] Schmitt, D, 141/122, cf., 44/246 n. 4.
[2] See Schmitt, "Vorwort" in PR, 22-23/16-17, translation modified.
[3] Schmitt, GLP, 31/22, translation modified.

epoch has its own "central domain," around which the thought of that age revolves.[4] In basic agreement with Edward Caird, Schmitt contends that "metaphysics is the most intensive and the clearest expression of an epoch." This "metaphysical image" a given age has of itself supports and validates its "form of … political organization."[5] In this specific sense, there is a "metaphysical kernel" to all politics.[6]

Whereas Schmitt's critical insights into liberal constitutionalism and parliamentary practice are certainly provocative, if not ultimately dispositive, his attempt to conceptualize the nature of that substantive core which lurks behind political practice is considerably less so, and in the final analysis, it appears that the conceptualization actually fails to achieve what he set out to show. Nevertheless, this attempt was absolutely central to his theoretical efforts, and without it, his project remains unintelligible. Loosely, we might call this authoritative core "sovereignty" or the "political," though these were not always the terms which Schmitt used.

Naturally, Schmitt's account of sovereign authority begins in his *Political Theology*. Though at least nominally preoccupied in that text with exceptional events (the "state of exception"), Schmitt aims principally to direct our attention forcefully to "apocryphal acts of sovereignty" we encounter in contemporary, political life, although we believe ourselves to have long ago left them behind. Ultimately, he does so for the diagnostic insight they afford us, for sustained consideration of these liminal events teaches us about the inescapability of sovereign-type decisions (§ 11.1). The "decision" and Schmitt's decisionistic jurisprudence is best expressed

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[4] Schmitt, "Age of Neutralizations and Depoliticizations" in BdP, 80-83/81-83 et passim.
[5] See Schmitt, PT, 59-60/45-46. Cf., PT2, 56/70.
[6] Schmitt, PT, 65/51. Cf., Hegel, *Wissenschaft der Logik I* in Werke, 5:14; *Enzyklopädie III* in Werke, § 552, pp. 10:360-61.

through a line he borrows from Hobbes: "authority, not truth, makes the law." Analogically, the decision has the quality of creation *ex nihilo* (§ 11.2).

Schmitt continues this decisionistic line of thought in his *Constitutional Theory,* tying it to the political unity of the sovereign people, whose "constitution-making power" during a founding moment yields a constitution, which serves as the concrete embodiment of their collective decision (§ 11.3). Though some of Schmitt's later, NSDAP-era writings give the impression that he eventually abandoned this decisionistic way of thinking for a "concrete order" jurisprudence, this impression is ultimately misleading (§ 11.4).

The reflections contained within his *Constitutional Theory* were aimed expressly at more formalistic, Weimar era legal theory, arguing that the pure, unsupplemented *Rechtsstaat* tradition failed to understand the "political" dimension of all modern constitutions. However, the account he offers raises almost as many questions as it solves. Moreover, at this point, his conception of sovereign authority still remained fundamentally incomplete, for he contends that "political being" precedes constitution making (§ 11.5). Thus, it is only in his thoughts on the "political" that the account is truly completed. The political, whose "criterion" is the friend-enemy distinction, is ultimately responsible for grounding political unity. Though its "level of intensity" draws upon all spheres of human life, the political is itself irreducible to these spheres (moral, economic, theological, aesthetic, etc.). It is precisely in this sense that the criterion of the political is "autonomous" and even architectonic (§ 11.6).

Later in life, principally in his thoughts on the *jus publicum Europaeum,* Schmitt sought to mute the tone of his reflections on the concept of the political. Ultimately, however, this attempt proved to have been abortive one—fundamentally inconsistent with the Weimar era reflections (§ 11.7). No small number of commentators have been puzzled by the incontrovertible centrality

of violence in Schmitt's account of the political, and many have suggested that it amounts ultimately to an "aestheticization" of violence. This conclusion, however, proves to be off-target. The centrality of enmity has much more to do with the Nietzschean-Weberian pluralist background to Schmitt's thought, and the simultaneous commitment to the idea that politics in its highest sense is capable of imparting meaning, form, and seriousness to human life, in stark contrast with the "shapelessness of cosmopolitanism" (§ 11.8). Unquestionably, Schmitt's thought is dark. The more meaningful question, however, is whether he is successful in what he had set out to accomplish. Ultimately, Schmitt fails to gain a "horizon [beyond] liberalism." At just one remove, the criterion of the political is susceptible to the very same charges he brings against his intellectual opponent (§ 11.9).

## 11.1 Sovereignty and the Significance of the State of the Exception

The underlying purpose of Schmitt's exploration in *Political Theology* is both to provide a more compelling conception of the state's sovereign authority, and, in light of having done so, to articulate and circumscribe the sphere of jurisprudence, i.e., the normal situation to which actual, legal norms apply. Through polemical exaggeration of a real political circumstance, Schmitt aims to revive awareness of "sovereign"-type political practice—recognition of which is otherwise forcefully occluded by other developments in legal and state theory. In Schmitt's account, the sovereign ultimately stands for the source of authority within a state, within a specific geographic area, and for a particular people. So understood, the sovereign within the state is logically prior to the legal order deployed by the state.

Schmitt's preoccupation with the decision and the state of exception follows from his desire to give the lie to the contented self-assurance of the legal positivistic theorist that the rule-of-law

framework stands pure, completely formal, and without need of additional, external supplement—wholly consistent, self-sufficient, itself its own foundation. "A distinctive feature of the bourgeois *Rechtsstaat* constitution," Schmitt writes, "is to ignore the sovereign." It is able to do so only because its "mistrusting" nature also encouraged it to "ignore" the state of the exception.[7] Liberal constitutionalism, in ignoring the sovereign, mistakenly believes itself to have escaped the phenomenon of personalistic authority, but, the decision concerning the state of exception is somehow extra-legal, and its presence points beyond itself, to some deeper, more elemental authority at work.

The basic, motivating insight, from which *Political Theology* derives its plausibility, is the principle *necessitas non habet legem*. Necessity stands outside of the law. A standing body of law is ill-equipped to respond to dire exigencies. It can delegate authority to someone who will respond to these exigencies, but that standing body of law cannot delineate in any detail what sort of actions will be required in order to respond adequately to the crisis. This is simply a "purely factual specification" which can only be made in the concrete moment of action.[8]

Thus, Schmitt contends that liberal thought is conceptually unable, on its own terms, to cope with the state of the exception—and was so from the very beginning. When liberal thought does come across emergency situations and thereby the need to declare martial law, liberal thought must cease to be liberal, because the element of personalism required by the state of exception resists "general codification" and cannot be cleanly "subsumed" under a pure conception of rule-of-law, liberal constitutional jurisprudence.[9] Thus, Schmitt declares that the state of exception was unintelligible to Locke, for it was simply "incommensurable" with the liberal-rationalist

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[7] See VL, 100/156-57, 244/273.
[8] Schmitt, D, 135/117, cf., 178-79/154, 184/160, 188-90/163-64 et passim.
[9] Schmitt, PT, 19/13.

thought world he inhabited.[10] Though commentators sometimes assume otherwise, Schmitt was

certainly familiar with Locke's discussion of "prerogative."[11] He believed it to be an awkward

attempt to draw the Aristotelian-Scholastic tradition of *epieikeia* or *aequitas* (judicial "equity")

into his own system, and that Locke ultimately failed to "see a problem of particular political

relevance" within his own discussion. Nevertheless, the presence of such a discussion within

Locke's *Second Treatise* "demonstrates how [Locke's] apparently plausible system [was] not that

simple."[12]

It is a basic truism of martial law that emergency conditions might require the temporary

suspension of some of those rights and liberties ordinarily considered to be the most basic from

the point of view of the liberal constitutional state.[13] This fact is pregnant with meaning for

Schmitt. During times of crisis, certain features of that standing body of law, sometimes thought

to be core or essential, are temporarily suspended, e.g., personal freedom; the right to privacy,

especially of one's residence and personal communications; freedom of expression, association,

or assembly; the right to private property; the right to the undelayed access to the courts when

accused of a crime. In the name of order, continuity, and public security, it sometimes becomes

necessary to dissolve or temporarily to abrogate the rule of law or, more precisely, to suspend

certain articles of that standing body of law, without suspending altogether the entirety of the

constitution. This is possible, on Schmitt's view, because the constitution is irreducible to its

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[10] Schmitt, PT, 20/13-14, cf., 43/32.

[11] E.g., Holmes, *Anatomy,* 58; Strong, *Politics without Vision,* 236 n. 55.

[12] See Schmitt, D, 40-42/32-33, translation modified, cf., 7/4, 42 n. 1/246 n. 65, 46 n. 2/247 n. 7, 121/102, 124/105, 136/117-18; Locke, *Two Treatises,* ch. 14, 2.159-68, pp. 374-80; Aristotle, *Nicomachean Ethics,* 5.10 1137a31-38a3; Aquinas, *Summa Theologiae,* II-II Q. 120 aa. 1-2. Cf., Aristotle, *Politics,* 3.15-16 1286a7-87b36.—Even the non-liberal democratic theorist, Rousseau, failed truly to understand the state of exception. Although he had made provisions for dictatorship during times of crisis, he could not account for it theoretically, because his stipulation that the will guiding the state be formally general failed to provide sufficient grounding for the necessary degree of particularity required by every adequate response to the state of exception. Schmitt, D, 125/106, cf., 121/102. Cf., Rousseau, *Social Contract,* 2.4 ¶ 5, pp. 61-62 (generality) with 4.6, pp. 138-40 (dictatorship).

[13] Cf., Schmitt, D, 174-75/150-51.

individual constitutional laws, and because the temporary suspension of particular articles does not entail that that article's validity has been violated, but rather instead that its validity is only temporarily *aufgehoben* or sublated.[14]

In the most dire circumstances, certain inviolable rights, freedoms, and liberties suddenly become violable, and the inviolable is violated in the name of the preservation of the whole. It is only in these dire emergencies that the liberal constitutional state is willing to consider the possibility that the preservation of the whole has precedence over its parts, and that in these specific instances neither those rights thought to be inalienable nor an abstract notion of human dignity are decisive. These moments are admittedly rare, and especially so in stable societies, but they come sharply into focus, when one takes a historical-synoptic view and accustoms oneself to pay attention to precisely those moments which defy the regularity of constitutional order.

Fundamentally, it is Schmitt's contention that legal theory willfully overlooked these moments, erecting its borders not at the limits of its presumptive purview, but instead, at the limits of its competence to make sense of paradoxes wholly insoluble within the framework it had worked to develop since the late seventeenth century. Schmitt's fundamental intent is thus to locate those "apocryphal acts of sovereignty" which contemporary legal and state theory believe to be relics of a superseded past and which they are, for that reason, disinclined to acknowledge, instead papering them over with deceptive, conceptual fictions or by shrugging its shoulders and simply looking the other way.[15] Therein lies the significance of his repeated, taunting citation of a line from Gerhard Anschütz's work: "'Here is where public law stops.'"[16] This comment encapsulated for Schmitt a generally pervasive unwillingness to look beneath the covers.

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[14] See Schmitt, VL, 109-12/156-58, cf., 26-27/80, 100-01/148, 106-07/154, 176/214.
[15] See Schmitt, VL, 108-09/155, cf., xiv/55, 150/190, 177-78/215-16.
[16] Schmitt, "Vorbemerkung" in PT, 8/4; PT, 22/15. Cf., VL, 56/107, 331-32/352-53. Cf., also, DA, 15/52.

That the exception *is decided upon* in times of emergency seems clear even to the hostile reader. Schmitt's further, and more controversial, point is that once we have located *he who has made this decision,* we have thereby located the precise articulation of sovereignty within the state. Schmitt's fixation on the state of exception is thus subservient to this task of locating sovereignty in a legal world thought to be devoid of the category. "Sovereign is he who decides on the state of exception."[17]

Despite the fact that Schmitt's meditations derive their plausibility from the dire circumstances of emergencies, Schmitt in no way intends to restrict the implications of his analysis to this sphere alone. Instead, the state of the exception has, he claims, more "general" significance for the theory of the state. The crux of the matter for Schmitt consists in the following question: How is it "logically possible" that a norm can be valid in most moments and then in one concrete case, that this same norm might be temporarily suspended and even its very validity sublated, if only for a moment? Something more fundamental must be at work.[18]

Schmitt's preoccupation with the state of exception serves an underlying purpose. The analysis represents an attempt to specify what precisely constitutes the "normal, everyday frame of life" to which legal theory applies itself and for which it is valid. "There exists no norm that is applicable to chaos." He who decides what will count as the exception is effectively he who decides when

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[17] Schmitt, PT, 11/5, translation modified. Cf., D, 17-18/13-14, 24/18, 194/168-69, cf., 46 n. 2/247 n. 7, 182/157; VL, 107/154, 364/382, 371/389; LL, 265/5-6; PT2, 116/122.—This mode of analysis, as Schmitt informs us, follows generally, though with some important departures, the one first offered in Book I, chapter 10 of Jean Bodin's *Six Books of the Republic.* There, Bodin sets out the inalienable marks or prerogatives of sovereignty, by which the sovereign is to be distinguished from all other subjects within the commonwealth and which must be in the sovereign's hands in order to preserve the state. Though the principal mark of sovereignty for Bodin is that of legislation, in which "all the other rights are comprehended," Schmitt hones in on Bodin's fourth prerogative of sovereignty: the "right of judging in [the] last instance," from which no appeal is possible. See Schmitt, PT, 13/8 ff.; D, 25/20; GLP, 53-54/43; Bodin, *Six Books of the Republic* in *On Sovereignty,* 1.10, pp. 46, 56-58 (#1), 67 (#4), 71, cf., 59 (#2), 64 (#3), 73 (#5), 78 (##6-7), 81 (#8), 83, (#9), 84-86 (##10-11). Cf., Hegel, PR, § 275, § 278 A, § 279 and A, pp. 441/313, 444-45/316-17; *German Constitution* in Werke, 1:474/PW, 17, 479/21.
[18] See Schmitt, PT, 11/5, 21/14. Cf., D, 17/13.

the rule obtains, that is, when the rule is in fact a rule. The exception itself circumscribes the normal situation, and in determining the exception, the sovereign determines "whether the normal situation actually prevails." The extra-ordinary demarcates the ordinary, fencing in what can unproblematically be treated as the ordinary. A decision or set of decisions stand behind every order, legal or otherwise. Every legal order, in which legal prescriptions assume their validity, must first be achieved and its condition for possibility brought about. Therein lies the decision in its "absolute purity" and "form." In this way, the state of exception is a *Grenzbegriff,* or limit concept. It aims to specify, from the outside inward, the way in which the distinctively political is constituted. Thus, the limit concept "pertain[s]" first not to the "routine" and ordinary, but rather to the extraordinary, to the exceptional, and to the "outermost sphere."[19]

As was his intention, Schmitt's conception of sovereignty, defined with respect to the state of exception, yields a conception of the state, which differs markedly from that held by rule-of-law, liberal constitutionalism. Schmitt understands the legal order and the state to be two distinct entities, and he wishes to see what the state looks like in the absence the law, for, at this point, it is Schmitt's ultimate conviction that law is fundamentally premised upon the state, and that one cannot approach the study of law, without beginning with the state. It is only in the state of exception, in that moment when the legal norms and regulations no longer obtain and are themselves suspended, that the state emerges rarefied and unadulterated. In the state of exception, the "law recedes" but the "state remains." What is left behind in this movement is "complete power" and "unlimited authority." From this vantage point, the state is defined not in terms of the monopoly on legitimate violence, as Weber would have it. Instead, the "essence" of the state's

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[19] Schmitt, PT, 11/5, 19-20/13, translation modified. Cf., D, 136-37/118-19; BdP, 46/46; Staatsethik, 155/199, 160/203; LL, 321/69.

sovereignty consists in its "monopoly to decide" on those concrete particulars that elude the grasp of the quotidian legal order. In this way, the state of exception "reveals the essence of the state's authority," which is to "produce law" that need not be justified in terms of a prior law, in whose name it could be said to be right.[20] In these circumstances, "the distinction between just and unjust becomes a useless formality."[21]

Today, Schmitt's fascination and preoccupation with politics *in extremis,* with margins and with borders, seems bizarrely tendentious. It is Schmitt's contention, however, that it is sometimes in the extreme and the exaggerated that we can see with greater clarity. On Schmitt's view, it is only the dual prejudices of "rationalism" and of a deistic, natural scientific metaphysics, which believes the natural order to unfold with clock-like regularity, that could ever support an exclusive concern with the normal, the ordinary, and the quotidian at the complete expense of its antithesis. In times of peace and relative stability, the smooth functioning of our legal norms and the mechanical and deductive applicability of these norms to concrete, particular cases appear commonsensical and unproblematic. And yet, at the margins of political practice and human life, a different narrative emerges, which complicates these first impressions. It is in this way that we should understand Schmitt's contention that the "exception is more interesting than the rule" and that "in the exception the power of real life breaks through."[22]

Thus, Schmitt's fixation with the state of exception has very little to do with a preoccupation with liminal experiences in and of themselves or with states of crisis as such, but rather with the diagnostic insight afforded by paying attention to the liminal. In Schmitt's view, long standing

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[20] Schmitt, PT, 18-20/12-13, translation modified. Cf., Weber, "Politics as a Vocation" in FMW, 78.
[21] Schmitt, D, 19/14.
[22] See Schmitt, PT, 21-22/14-15, cf., 49/36-37, 61-62/48. Cf., DA, 25-28/64-66, cf., 32/70.; WdS, 64.

stability breeds analytical complacency, which in turn gives birth to misleading and wishful self-interpretations.

Perhaps only a writer standing amidst a crisis could hold a belief of this sort with the depth of conviction with which Schmitt held it.

## 11.2 The Decision

In some form or another, the decision plays a significant role in many of Schmitt's major works from the Weimar period, and, as such, it constitutes one of the primary, unifying threads running through his Weimar political thought. In *Political Theology,* the decision functions as the concrete determination by a sovereign agent as to whether or not a state of exception is present, and also how to restore the normalcy of law and order within that state.[23] In *Constitutional Theory,* the decision finds its place in Schmitt's conception of the post-revolutionary founding of the state by means of the national constitution making power and its decision's concrete embodiment in the constitution.[24] Finally, in *Concept of the Political,* the decision concerns the deeply significant determination of the political group's enemy and whether or not a condition of war is actually present.[25] A Carl Schmitt without decisionism and without a place for the decision would be unrecognizable.

Although he never did explicitly call himself this, Schmitt is a "decisionistic" thinker. There are, Schmitt writes in 1922, fundamentally only two types of juristic thought: normativist and decisionistic.[26] His decisionism is effectively a particularly radical expression of what has long been known in the Anglo-American tradition as the "command theory" of law. Yet, Schmitt appends to it a metaphysical quality.

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[23] Schmitt, PT, 11/5.
[24] See Schmitt, VL, 21-23/75-77, 28/82, 69/119, 75-76/124-25, 207/241.
[25] See Schmitt, BdP, 7, 27/27, 30/29-30, 34-35/34-35, 39-40/38-39, 43/43, 45-54/45-53 (§ 5).
[26] See Schmitt, PT, 44/33.

To flesh out his decisionistic jurisprudence, Schmitt draws not only upon the Roman Catholic, ultramontane, counter-revolutionaries, but also upon Hobbes, whom he calls both the "classical representative" of this way of thinking and also the "great decisionist." Without specifying who is competent to judge as the "final authority," the "correctness of the content" of a legal prescription remains fully indeterminate. The content of a legal maxim cannot bridge this gap by itself. "What matters for the reality of legal life is who decides." In contrast to later liberal thinkers, who made efforts to reject all "'arbitrariness'" from their respective system, and thus to "banish from the realm of the human mind every exception," Hobbes put forward an "ultimate concrete deciding authority," and for this reason, conceptualized his mighty leviathan as an "immense *person.*" In this way, Hobbes always retained an aura of "personalism" in his theory of the state, and he "rejected all attempts to substitute an abstractly valid order for a concrete sovereignty of the state."[27]

On Schmitt's quasi-Hobbesian view, the central questions are not fundamentally what is right, what is good, what is reasonable, what is just, what is fair, what suits our interests, what is efficient, or what is legal? Instead, the central questions become the ones that Schmitt repeats throughout his checkered career: "*Quis judicabit?*" and "*quis interpretabitur?*"[28] *Who* will judge and *who* will interpret in the concrete instance? Ultimately, these are questions of authority.

The nature of Schmittian decisionism is clearest from his productive appropriation of a line from chapter 26 of the Latin translation of Hobbes' *Leviathan: Auctoritas non veritas facit legem.*[29] It is authority, and not truth, which makes the law. This fundamental, Schmittian conceit

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[27] See Schmitt, PT, 43-46/32-34, 54/41, 61/47, translation modified, cf. 65-69/51-53. Cf., L, 54/34, 82-83/55; "Die vollendete Reformation" in L, 168; DA, 23-24/61-62, 34/73-74.
[28] See Schmitt, "Hinweise" in BdP, 122; PT2, 33/51, 107/115; "Die vollendete Reformation" in L, 166-68, 172-75; VL, 49/101, 70/120; SBV, 44/50.
[29] See Schmitt, PT, 44/33, 66/52.

recurs throughout almost all of his most important writings from the Weimar period, and it also can be found in both the NSDAP and post-war era writings, thus attesting to its importance for Schmitt.[30] *Auctoritas non veritas facit legem* is not only the hallmark of decisionistic jurisprudence, it is, moreover, *the* window into Schmitt's legal-political-moral universe. Everything else flows from it.

In Schmitt's hands the Hobbesian phrase takes on its own life, unmoored from the context of the argument in Hobbes' text.[31] "Before and outside of the state," writes Schmitt, "law does not exist, and the value of the state lies precisely in [the fact] that it creates the law, by deciding the dispute concerning the law."[32] Seventeen years later, Schmitt became yet clearer and even more concise: "Nothing … is true: everything … is command."[33] When properly understood, fundamental law, which proceeds from a true "act of sovereignty," is actually "concrete *will* and *command.*" To use scholastic terminology, law is "*voluntas*" and not "*ratio.*" Law, in a monarchy, is the will of the king; in a democracy, the will of the people.[34] The form and shape of

[30] See Schmitt, D, 22/16; GLP, 54/43, cf., 56/44; VL, 140/182; HdV, 136 n. 2; DA, 23/61; L, 68-69/44-45, 82/55, cf., 68 n. 1/51 n. 3, 78/50, 80/53; "Hinweise" in BdP, 122.

[31] Hobbes, *Leviathan* in *Opera Latina,* 3:202, emphasis added: "In civitate constituta, legum naturae interpretatio non a doctoribus et scriptoribus moralis philosophiae dependent, sed ab authoritate civitatis. Doctrinae quidem verae esse possunt; sed *authoritas, non veritas, facit legem.*" (Somewhat inexplicably, Schmitt's version reads *autoritas,* Hobbes' version reads *authoritas,* but classical Latin prefers *auctoritas.*) *Pace* Strong, "Sovereign and the Exception," xix n. 29, the sense of the English differs *considerably* from Schmitt's pithy Latin, which is always quoted in isolation and outside of its context. The English version of *Leviathan,* which corresponds to, but does not slavishly translate, this Latin text reads: "The Interpretation of the Lawes of Nature, in a Common-wealth, dependeth not on the books of Morall Philosophy. The Authority of writers, without the Authority of the Common-wealth, maketh not their opinions Law, be they never so true." Hobbes continues in the English version with a further gloss that has no counterpart in the Latin, and which seems to depart in meaning even further from Schmitt's invocation of the phrase. The further text of this paragraph includes: "That which I have written in this treatise, concerning the Morall Vertues … though it bee evident Truth, is not therefore presently Law; but because in all Commonwealths in the world, it is part of the Civill Law: For though it be naturally reasonable; yet it is by the Soveraigne Power that it is Law." Hobbes, *Leviathan,* ch. 26, p. 191. Hobbes' point here, at least taken in isolation within this singular paragraph, in both the Latin and the English, would seem to be the truistically true one that moral truths, though they may themselves be true ("doctrinae … verae esse possunt"), become law not by virtue of their status as moral truths but, instead, only through the activity of the legislating sovereign who puts these truths into law.—I owe my original knowledge of the textual discrepancy to the invaluable Curley, ed., of Hobbes, *Leviathan,* 180 n.

[32] Schmitt, D, 22/16, translation modified.

[33] Schmitt, L, 82/55. Cf., Nietzsche, *Genealogy,* 3.24 in KGW, 6/2:417/150; Dostoyevsky, *Brothers Karamazov,* 649, cf., 69, 82, 263, 589, 604, 625, 632; 1 Cor. 6.12. (Per a suggestion from Michael Gillespie.)

[34] Schmitt, VL, 139/182, 142/183, 146/187, cf., 258/286. Cf., D, 23/17; LL, 271/11, 281/24.

society, and especially the laws that speak to that social order, are not, in the last regard, the deductive conclusions of reason, nor of valid norms, nor do they follow from some abstract "truth." Instead, the preeminent category in Schmitt's legal and state theory is the decision and, by extension, the decider. The question of *who* is ultimately privileged over *what* and *wherefore.*

Schmitt's departure here from Bodin is revealing. In the *Six Books of the Republic,* Bodin had written that "he is absolutely sovereign who recognizes nothing, after God, that is greater than himself."[35] To obey positive law is effectively to follow the order legislated by God. "If justice is the end of law," Bodin writes, "law the work of the prince, and the prince the image of God; then by this reasoning, the law of the prince must be modeled on the law of God."[36] Schmitt, of course, knew this all of this and even alludes to it in other works.[37] Nevertheless, in *Political Theology,* God makes no explicit appearance within the juristic framework, thus leaving the distinct impression that the sovereign—namely, a human being immanently situated within a human world—has been elevated to the position occupied by God in Bodin's original formulation. Certainly there is no place in Schmitt's thought for the classical Graeco-Roman, scholastic, and early modern vision of a God-as-legislator, who produces something like a natural law that embodies his divine commands. This conception, he maintains, has simply lost all credibility in the contemporary era.[38]

In Schmitt's thought world, the decision abides in a pure vacuum, an unconstrained, infinite nothingness. It arises from this nothingness, on the model of the creator God depicted in the Hebrew Bible. "Considered normatively," Schmitt explains, "the decision is born *ex nihilo.*"

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[35] Bodin, *Six Books of the Republic* in *On Sovereignty,* 1.8, p. 4, cf., pp. 8, 10-11, 25, 31, 39, 1.10, pp. 46, 59, 76.
[36] Bodin, *Six Books of the Republic* in *On Sovereignty,* 1.8, p. 45.
[37] See Schmitt, VL, 49/101; DA, 22-23/61; D, 16-17/12-13, 27/21. Cf., Staatsethik, 158/201.
[38] See Schmitt, BdP, 66/66-67; GLP, 52-53/42; "Vorwort" in PT, 8/3; PT, 20/14, cf., 50/38; G, September 1, 1948, p. 195; "Die vollendete Reformation" in L, 141-42; VL, 141-42/183, 156/195, cf., 139/181; DA, 34/73-74; LdER, 398/44-45; D, 118/98 ff., cf., 21/16 ff.

Thus, following de Maistre, the type of "decision" that Schmitt has in mind is a "pure decision not based on reason and discussion and not justifying itself." It is, in this way, an "absolute decision created *ex nihilo*."[39] To make a decision is "more important than how a decision is made." There exists, moreover, no "higher authority" which "could review the decision." This is de Bonald's conception of sovereignty, on which Schmitt reports with apparent approval.[40]

Human normativity and the jurisprudence of the decision inhabit independent spheres. "The decision," writes Schmitt, "frees itself from all normative ties and becomes in the actual sense absolute…. The norm is annihilated in the exceptional case."[41] The decision is absolute, autonomous, existential, and extra-rational. It is "independent of argumentative grounding," and as a decision it holds an "autonomous value." "In certain circumstances," moreover, the decision is not only "absolute," but also "independent of the correctness of its content."[42]

Lest there be any confusion, *auctoritas non veritas facit legem* does not signify that "might makes right"—an oft-repeated misunderstanding of Schmitt. Quite the contrary, for Schmitt maintains that "power proves nothing in law."[43] Thus, although he contends that Hobbes himself did not adequately do so, Schmitt himself insists at every relevant juncture on distinguishing power (*potestas*) from authority (*auctoritas*).[44] His central contention is that we have lost today a sense for adequately drawing this distinction. Schmitt's concern is not, therefore, decision for the sake of decision, but always the more fundamental question of legitimate authority.[45] How

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[39] Schmitt, PT, 42/31-32, 83/66, translation modified. Cf., D, 23/17.
[40] Schmitt, PT, 71-72/55-56.
[41] Schmitt, PT, 19/12, translation modified.
[42] Schmitt, PT, 42/31, translation modified.
[43] Schmitt, PT, 26/17. Cf., D, 24-25/19, 40-41/32, 122/103, 128-29/110; WdS, 29, 69 et passim.
[44] See Schmitt, DA, 23/61; VL, 75-76 and n. 1/124 and 458-59 n. 1, 290/315, cf., 258/286; HdV, 136-37 n. 2; BdP, 42 n. 13/42 n. 17. Cf., D, 25/19.
[45] See Schmitt, DA, 21/60.

persuasively, however, Schmitt himself distinguishes authority from power remains an, if not *the,* central question facing his work.

## 11.3 The Constitution as the Concrete Order Embodying the Decisionistic *Pouvoir Constituant*

Self-consciously, Schmitt's *Political Theology* still remained within the horizons of a general "theory of the state."[46] In contrast, his *Constitutional Theory* (1928) attempted to carve out a yet more fundamental terrain: a conceptual "*system,*" which was neither a theory of the state nor a mere commentary on present and historical constitutions.[47] Though in certain circles this text is hardly even read, it is, in fact, the work upon which Schmitt's earliest academic celebrity actually rested. It was, in Schmitt's words, the text with which he became "one of the best known legal theorists of Germany and of Europe."[48]

In his *Constitutional Theory,* Schmitt's decisionistic conception of sovereignty is rearticulated, through with some adjustments; most notably, through the addition of the conception of a quasi-democratic constitutional power, which underlies state sovereignty. The constitution, understood in Schmitt's specific sense, serves as the institutional embodiment of the decision made by a particular political culture.

In terms of constitutional theory, Schmitt saw the eighteenth century as the "beginning of a new epoch," and the French Revolution as the ideal-typical expression of that new, political consciousness. Thus, he calls the state theory of that revolution a "main source" of "modern constitutional theory."[49] Of course, not all states arise through the "conscious act" of a revolutionary, founding moment, on the model of America 1776/1787-88, France 1789, Russia

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[46] See Schmitt, PT, 11/5, cf., 13/8, 18-20/12-13, 35/25, 49/36 et passim.
[47] Schmitt, VL, xi/53. Cf., PT2, 25/45.
[48] Schmitt, Antworten, 87.
[49] Schmitt, VL, 49-50/101, 78/126, cf., xiii/54. Cf., PR, 42-43/29.

1918, and Germany 1919.[50] Nevertheless, these are the ideal-typical moments with which Schmitt's analysis is concerned, and which he holds to be revelatory for the nature of constitutional theory as such.

Accordingly, Schmitt's constitutional theory draws liberally upon Abbé Sieyès' theoretical conception of *la nation* and the *pouvoir constituant,* the constitution-making, constitutive power within the nation.[51] In the wake of the "elimination of all theistic and transcendent conceptions," the "traditional concept of legitimacy manifestly lost all [its] evidence." What remained was a "new concept of legitimacy," namely that of the *pouvoir constituant.*[52] The importance of this backdrop to Schmitt's thought world simply cannot be understated. For Schmitt, the *pouvoir constitutant* is the "foundation" of the constitution; and the "nation," the "substance of the state."[53] Within the horizon of his constitutional theory, the *pouvoir constituant* becomes the vehicle of Schmitt's decisionistic jurisprudence. Burkean, organic gradualism is left behind somewhere in the far off distance.

In a deep sense, a constitution is not only a political document but also a political act. To give oneself a constitution and thus to give the decision concrete embodiment are acts of "self-determination"—to echo the language made famous by Woodrow Wilson, and from whom Schmitt borrows here and here alone.[54] A constitution gives voice to the "fundamental," "human," and "political" "decisions," which have been made regarding the "concrete form of

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[50] See Schmitt, VL, 23/77, cf., 160/199, 163/201.
[51] See Schmitt, VL, 49-50/101, 78/126; Sieyès, "What is the Third Estate?" in *Political Writings,* 132, 136 et passim.
[52] Schmitt, PT, 65/51, translation modified.
[53] Schmitt, D, 140/121, 144/125, cf., 137/119.
[54] Schmitt, VL, 71/120.

political existence" of a given people.[55] To this foundation, Schmitt gives the name of *Gesamtentscheidung,* or holistic decision.[56]

A constitution so understood is not at all a "'social contract'" drawn up by atoms who come together to bargain with one another, nor is it a body of settled agreements, upon which a disparate body of individuals converge so as to set for themselves rules of the game by which they could adjudicate whatever conflict might arise amongst them. Rather, a constitution represents a "conscious decision," which "determin[es] the political existence" of a given people "in its concrete form of being." It is only in virtue of this hypothesized, "existing political will" that it even becomes possible to speak of a constitution's "valid[ity]"[57] "The Weimar Constitution," Schmitt writes, "is valid, because the German folk 'gave itself this constitution.'"[58] *This* was the German people's "most important political decision."[59]

This "concrete political decision" on which a constitution rests must be understood in contradistinction to a "norm."[60] "A constitution," writes Schmitt, "is not based upon a norm, whose correctness would be the ground of its validity." Instead, a constitution "is based upon a political decision concerning the type and form of its own being."[61] There are simply no "procedural provisions," which could hem in the operation of the decision.[62] The decision "requires no justification via an ethical or juristic norm," for a constitution does not arise from

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[55] Schmitt, VL, 28/82, 207/241, cf., 75-76/125.
[56] See Schmitt, VL, 20/75, 59/109, 75-77/125-126, 162/201, cf., 24/78, 26/80, 45/98, 78/126 (*Totalentscheidung*).
[57] Schmitt, VL, 21-22/75-76, cf., 68/118, 75-76/125.
[58] Schmitt, VL, 10/65, cf., 88/136.
[59] Schmitt, VL, 60/110-11.
[60] Schmitt, VL, 69/119.
[61] Schmitt, VL, 76/124, translation modified.
[62] Schmitt, VL, 79/128, cf., 83/131.

"rules standing above it."[63] To suppose otherwise, leads to an infinite regress—a fruitless historical investigation for the legitimating procedures or substantive order according to which all subsequent orders can be said to be legitimate.[64] Instead, this infinite regress finds its rest only within the matrix of a political unified people. "Before every norm," writes Schmitt, "stands the concrete existence of the politically unified folk."[65]

Standing behind the constitutional order, the *pouvoir constituant* is the concrete embodiment of a primordial "sovereign dictatorship."[66] As a power, this *pouvoir constituant* is the "unlimited and illimitable possessor of *jura dominationis,*" the right of political rule. As such, its power is "in principle unlimited." It "arises out of an infinite, unfathomable abyss," and though it is itself "formless," it is "always producing new forms." Accordingly, it can be described as "that [thing] which organizes the unorganizable." However, as soon as it itself achieves a form, it ceases to be a *pouvoir constituant* and becomes instead a *pouvoir constitué.* In this formative transformation, the constituting force becomes that which is constituted.[67]

It is only in the moment of a founding or a revolution that the *pouvoir constituant* ever truly exists in its fully unmediated form. "Either sovereign dictatorship or constitution; the one excludes the other."[68] Anything else is "revolution." Importantly, however, there is no room within Schmitt's thought for a Trotskyite "permanent revolution." Instead, on his view, every revolution is only ever a momentary "'transition'" before the establishment of a new

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[63] Schmitt, VL, 87-88/136.
[64] See Schmitt, VL, 88-89/137.
[65] Schmitt, VL, 121/166, translation modified.
[66] Schmitt, D, 129/111.
[67] Schmitt, D, 140-44/121-25, translation modified. Cf., "Dictatorship of the President of the Reich" in D, 237-38/203-04.
[68] Schmitt, "Dictatorship of the President of the Reich" in D, 238/204.

constitutional order. Thus, because sovereign dictatorship is "functionally dependent upon a conception of the correct constitution," which it aims to install after the revolution, the sovereign character of the *pouvoir constituant* is meant "in an entirely different sense" than the traditional sovereignty of an "absolute monarch."[69]

Although at its most fundamental level it serves first the "constitution-making power," the *pouvoir constituant* does not exhaust itself completely in the making of a constitution. Instead, it, and the "political decision" which it represents, remain "outside of," "beside," "before," and "above" the constitution itself, and in this way, it is "ever-present."[70] Just as soon as a constitution is drafted, the *pouvoir constituant* is effectively "dispatched." However this may be, the constitution's "genuine content" remains the after effect of the *pouvoir constituant*, which underlies the constitution. Thus all those who govern within the state do so only "in the name of" this primordial *pouvoir constituant.*[71] Effectively speaking, then, it is only with reference to this *pouvoir constituant* that "every authentic constitutional conflict" can be resolved, "every hole in the constitution" filled, and every "unforeseen case" decided.[72]

## 11.4 The Abiding Significance of Decisionism in Schmitt's Thought

At no point in the Weimar period does Schmitt abandon his decisionistic jurisprudence. Towards the close of his life, however, Schmitt would complain about the "intense polemic against this perspective," which "had distorted the decision into a fantastic, arbitrary act, distorted decisionism into a dangerous worldview, and distorted the word decision into a term of abuse and a buzzword"[73] In addition, certain NSDAP era works have convinced some of Schmitt's readers

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[69] Schmitt, D, 145-46/126-27, translation modified, cf., 150/128. Cf., VL, 101/149, cf., 103/151; "Diktatur" in SGN, 35; "Dictatorship of the President of the Reich" in D, 237-38/203.
[70] See Schmitt, VL, 91/139-40, 242/271. Cf., D, 145/127.
[71] Schmitt, D, 144/125-26, translation modified, cf., 148/127. Cf., VL, 212/245.
[72] Schmitt, VL, 77/125-26, 84/132, translation modified.
[73] Schmitt, GuU, v.

that he eventually abandoned his earlier decisionism.[74] However, as we shall see, this impression is ultimately misleading.

As Schmitt's first real attempt to analyze the developing political system in Germany, *State, Movement, People* (1933) outlined a conceptual triad of political elements, which would comprise "political unity." He identified the NSDAP "movement" as "the *politically dynamic* element" in his conceptual triad and thus as the fundamental principle of unity around with the state and the people would revolve.[75] Already in this work, Schmitt had begun to describe the Party movement as the source of *order,* which would give the state and the people its characteristic *form.* "[The] Party," writes Schmitt, "carries the state and the people.... [It is] the political body, in which the movement finds its special form [*Gestalt*]. It has been designated [as] 'order' [*Orden*] by sociologists."[76] The "concept of leadership [*Führung*] derives entirely from the concrete, substantive thinking [*konkreten, substanzhaften Denken*] of the National Socialist movement."[77]

What was needed, then, was some means by which to incorporate his decisionistic legal theory into his new tripartite analysis provided in *State, Movement, People* and the significance he accorded there to the Party movement. This, he attempted to achieve by developing a new conception of jurisprudential reasoning. Thus, almost immediately after having joined the NSDAP, Schmitt adds to his normativism-decisionism schema a third category of legal thinking which he calls "institutional jurisprudence," and which was modeled loosely after the work of the French jurist, Maurice Hauriou. Drawing a distinction between, on the one hand, a decisionism based upon a "genuine decision" and, on the other hand, a "degenerate decisionism," Schmitt

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[74] E.g., Bendersky, "Three Types," esp. 1-2, 4, 6, 14, 19, 31, 105 n. 23; von Krockow, *Entscheidung,* 94-98, 102-04; Strauss, *Gesammelte Schriften,* Strauss to Jacob Klein, October, 10, 1934, p. 3:524; Böckenförde, "Ordnungsdenken, Konkretes," 1313.
[75] Schmitt, SBV, 11-12/11-12, translation modified.
[76] Schmitt, SBV, 13/12, translation modified.
[77] Schmitt, SBV, 42/47, translation modified.

contends that the "the decisionist stands always in danger of missing ... the being latently contained in every *great political movement*."[78] Shortly thereafter, Schmitt further develops his tripartite conception in his *Three Types of Juristic Thought* (1934), referring there to this new jurisprudential category of legal reasoning as "concrete order and formation thinking" [*konkretes Gestaltung- und Ordnungsdenken*].[79] At times, he even appears to present the three ideal-typical forms of jurisprudential reasoning as though they were categorically exclusive of one another, and, moreover, even occasionally to suggest that he was abandoning decisionism for concrete order thinking.[80]

For an adequate understanding, however, consideration of both the context and the general trajectory of his prior work are absolutely essential. In actual fact, it was the attempt to accord central significance to the Party movement that had occasioned the development of a new category of legal reasoning. However, this development put great strain on Schmitt's earlier formulations, producing considerable tensions within his thought, which were never truly resolved or even acknowledged.

In his *Three Types of Juristic Thought,* Schmitt would go on to argue that decisions are intelligible only insofar as they emanate from a given, pre-existing order. "Legal suppositions," writes Schmitt, "develop directly out of concrete presuppositions of a condition presumed as normal and of a human type presumed as normal…. The norm or rule does not create the order; rather, only on the basis and in the framework of a given order does [the norm] have an assured,

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[78] See Schmitt, "Vorbemerkung" in PT, 7-8/2-3, translation modified. Cf., BdP3, 21; DA, 45-46/86-87.
[79] See Schmitt, DA, 7/43, 47-48 and n. 34/89-90 and 112 n. 57, 54-55/98, cf., 10-11/47-48, 25/64, 31/69, 35/74, 37-40/77-80, 42-43/81-82, 45/86-87, 52-53 and n. 42/94-95 and 114 n. 69. Cf., L, 110, 121/70-71, 80. For other references in NSDAP era texts, see, e.g., "Die Auflosung der europaischen Ordnung im 'International Law' (1890-1939)" in SGN, esp. 382; LdER, 388-89/37, 411-12/56-57, 421/65.
[80] See Schmitt, DA, 10/47, 47/88, 49/91, 55/98-99.

regulative function."[81] Here, Schmitt begins to look a bit more like Burke and his German admirers. Thus, on the basis of these texts, some commentators have argued that Schmitt was "primarily a *traditional* conservative thinker."[82]

Importantly, however, in these later writings, Schmitt does not *ever* tell his reader whence this hypothesized order arises. This profound silence is all the more noteworthy given that his earlier work had addressed this theme clearly and explicitly. Schmitt's decisionism had been intended to answer precisely the "paradox" of how it is that order arises out of "chaos."[83] His constitutional theory, moreover, represented a grandiose attempt to give conceptual expression to the idea of a constitution as a "concrete order," embodying a nation's "fundamental political decision." The effort to uncover the constitution's source of legitimacy in an order preceding it was, in Schmitt's own words, utter "nonsense" and a "meaningless game."[84] "Here," writes Schmitt, "any constraint or any legal form is … completely unthinkable."[85] The constitutive source lying behind the constitution "is bound to nothing," for it knows "no duties." Instead, it is, in Schmitt's bizarre expression, *unkonstituierbar,* or unconstitutable.[86]

Thus we are forced to ask of Schmitt the following: From what more primordial *Ur*-decision does the concrete order, which he describes in *Three Types of Juristic Thought,* arise? The two pages Schmitt devotes there to contrasting decisionism with concrete order thinking do not even come close to addressing, let alone resolving, this glaring conceptual difficulty.[87] Yet, any failure

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[81] Schmitt, DA, 9/46, 11/48-49, translation modified, cf., 19-20/56, 34/73.
[82] Bendersky, "Three Types," 2 et passim, emphasis added. See also Schwab, *Challenge,* 125.
[83] See Schmitt, PT, 16/10, 19-20/13. Cf., DA, 21/59, 23-24/61-62.
[84] Schmitt, VL, 10/65, 88-89/136-37, translation modified.
[85] Schmitt, D, 140/121, translation modified.
[86] Schmitt, D, 143/124, translation modified.
[87] See Schmitt, DA, 23-24/61-62, cf., 31/69-70, 34/73.—At least at first glance, the only exemplar of jurisprudential reasoning, which Schmitt surveys in that work, which could plausibly and meaningfully lay claim to uniting concrete order and formation thinking with his earlier formulated decisionism, would be one on the analogy of the sort that he attributes to Tertullian. There, both the creator of the order and the decider are *ex hypothesi* one and the same person (i.e., God). Yet this view, Schmitt forecloses, in a number of ways through important and explicit qualifications. First

to address this question would ensure that concrete order thinking as an ideal type could not meaningfully be distinguished from decisionism.

Because Schmitt does not ever resolve the obscure origin of this mysterious order, and because Schmitt's Weimar writings addressed this clearly and explicitly—one is forced to conclude that the development of the theory of concrete order thinking was a political act, in the narrow, colloquial sense: an awkward and failed attempt to integrate the primacy of the Party "movement" with the decisionistic framework outlined in his Weimar writings—and thus not as the recognition of an intellectual error or a lasting shift in his thought. The closing pages of *Three Types of Juristic Thought* absolutely confirm this suspicion. There, Schmitt writes that

> the deep and decisive meaning of *the new concept of jurists,* which the National Socialist movement has introduced in Germany, can [now] be recognized…. Now there is need of a concrete order and formation thinking, which is a match for the many new tasks … and for the new form of community…. Contained in this advance of a new jurisprudential manner of thinking is … a *transition to a new type* of jurisprudential thought that can do justice to the nascent communities, orders, and formations of a new century.[88]

However this may be, Schmitt did not ever really abandon decisionism. After the war, once the political climate had changed, one can find no significant or sustained discussions of concrete order and institutional thinking in Schmitt's writings.[89] However, the phrase, "concrete order," recurs here and there in post-war works, thus giving the (entirely misleading) impression of

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of all, he correctly acknowledges that Tertullian's type of juristic view does not actually correspond to a "pure decision[ism]," because the "decree of a personal God, so long as one believes in God, is always already 'in order.'" After creation, there no longer exists room for a pure, theological decision, but only space for providential intervention into the created, already existing order. Thus, even here, the union of decision and concrete order thinking proves a conceptual failure. Schmitt also writes that such a view along the lines of Tertullian's was only possible "before the dissolution of the ancient and Christian conceptions of world order." Finally, in order to forestall the charge that is he just another bland figure in the *Renouveau catholique* movement (as many perceived Hauriou to be), Schmitt explains that it would be an "unfortunate … misunderstanding" to reduce concrete order and formation thinking to the level of "typical Roman Catholic theory." Concrete order and formation thinking is thus not to be understood as a "mere restoration of past things or [a] conservation of outdated arrangements." See Schmitt, DA, 21-22/60, 48/89-90, translation modified, cf., 7/43, 18/55, 23-24/61-62, 34/73.

[88] See Schmitt, DA, 54-55/97-99, translation modified, cf., 18/55, 42-43/82-83, 48/90, 52-53/94.— For the first, general argument to this effect, see Löwith, "Occasional Decisionism of Carl Schmitt" in *Martin Heidegger,* 158, 281 n. 81. See also Wolin, "Carl Schmitt, Political Existentialism," 407-08, 410-11.

[89] Per Bendersky, "Three Types," 30.

continuity with the NSDAP era texts, which claimed to disavow decisionism.[90] However, other post-war discussions help to correct this mistaken impression.

In the post-war writings, Schmitt began to develop thematically the idea of "*nomos*" as a conception of legal order. For all intents and purposes, this term functions as a loose synonym for the notion of concrete order, in the sense it came to have in the post-war writings.[91] Significantly, his post-war discussion of nomic order makes manifestly clear the link to his earlier decisionistic cast of mind, although in these later writings he also seeks to integrate it with one of his late- and post-war theoretical preoccupations: the theme of geo-spatial order. Here, there is no suggestion that *nomos* or concrete order precedes the legal and political order chronologically or even logically. Instead, *nomos* is the name of the decisionistic event in which all subsequent order unfolds. "*Nomos* in its original sense," writes Schmitt, "is a constitutive, historical event, an act of *legitimacy,* which, in the first place, makes meaningful the legality of mere laws."[92]

This impression finds further concrete reflection in yet later writings. In 1969, in a very brief, prefatory note to a reprint of one of his very early, Wilhelmine-era works, he makes passing reference to "institutions" and "concrete orders." However, it is clear, in this context, that he still stands by his conception of the "independence of the decision" as contrasted with norms, thus affirming essential elements of his earlier, decisionistic formulation. Moreover, he does not say here that he has repudiated decisionism as an explanation for the underlying origin of the concrete

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[90] E.g., Schmitt, Nachwort to "Freiheitsrechte und institutionelle Garantien der Reichsverfassung" in VA, 172-73; NdE, 19/48, 20/50, 37/67, 38-40/69-70, 96/126, 115/143, 131/160, 159/188, 164/192, 174/201, 175 n. 1/202 n. 9, 207-08/234, 194/220, 198/225, 200/227, 211/238, 281/304 et passim, cf., 216-17 and n. 1/244 and n. 4, 208/235; PT2, 40/56 52/67, 101/110, 106/114.

[91] E.g., Schmitt, PT2, 40/56.

[92] Schmitt, NdE, 42/73, translation modified, cf., more generally, 36-48/67-79. For earlier, yet still relatively underdeveloped, references to "nomos" in Weimar and NSDAP era major works, see, e.g., VL, 142/184; DA, 12-15/49-51, 21/59.

order to which he refers.[93] In addition, two years later, in the final pages of his final monograph, Schmitt refers back to his "theory of decisionism and the inner laws of its consummation" as it had been elaborated in 1922, and he appends no reservations or qualifications.[94]

## 11.5 The Necessarily "Political" Character of the Constitution

In addition to providing concrete embodiment to Schmitt's decisionism, his constitutional theory also represented an important bridge work between two of his most important Weimar era works: *Political Theology* and *Concept of the Political.* Fundamentally, his constitutional theory took aim at more formalistic, Weimar era legal theory, arguing that while the *Rechtsstaat* legal tradition had made important contributions to all modern constitutions, it failed to understand the supplemental, "political" dimension of all constitutions.

Fundamentally, Schmitt resists treating the constitution "formally," in which each part is of equal moment. On Schmitt's view, proper appreciation of the nature of a constitution calls for drawing a basic distinction between a constitution "in the positive sense"—as he sometimes writes—and "constitutional laws." This distinction, Schmitt viewed as one the fundamental contributions of his constitutional theory, and he returned to it again and again in order to resolve legal *aporiai.* A constitution as a whole is irreducible to its individual, enumerated constitutional laws, and with respect to the constitutional whole, some of those individual constitutional laws are of a deeper moment than are others. From this, he concludes that constitution was a whole which is not simply the mere sum of its parts.[95] A constitution, on Schmitt's view, has a spirit

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[93] Schmitt, GuU, v.
[94] Schmitt, PT2, 107/115, translation modified.
[95] See Schmitt, VL, 20-22/75, 44/96, cf., 177-78/214-15, 386/402 et passim. The examples he gives are illustrative of his meaning. On the one hand, Article 1 of the Weimar Constitution declared the state to be a "republic" and that its authority derived from the people, and Article 135 provided for freedom of conscience and belief, whereas, on the other hand, Article 129 provided for the privacy of the personal documents of civil servants, and Article 149 mandated the provision of theological faculties in the universities. All of these appear in the written letter of the constitution, and yet

which transcends the merely mathematical aggregation of individual laws that it contains. Accordingly, the constitution is irreducible to the sum of the enumerated constitutional statutes. "The constitution," writes Schmitt, "is always something higher and more comprehensive than some individual statute." On account of its "fundamental significance," the constitution is to be regarded as something "special and distinctive."[96]

Borrowing a Montesquieian and Hegelian metaphor, we might say that in Schmitt's eyes, the constitution itself of a given state has a "spirit" reflective of the "consciousness" of a people, and that this is a spirit to which one can be, or fail to be, true.[97] Accordingly, he understands the constitution of any given state to be something other and more than simply a written document outlining a set of articulated norms of behavior drawn up in committee, enumerated one by one and loosely held together as an aggregate of legalistic statutes. Instead, he understands a constitution more along the lines of what Aristotle had called *politeia,* that is, a collective way of being in the world—a certain "order" [*taxis*] or "way of life" [*bios*] of those inhabiting a particular, geographic area at a particular historical juncture.[98]

The constitution's unity resides not in the unity of the written constitution as an organized and systematic whole, but rather in the more primordial, "concrete political unity" from which the constitution itself derives.[99] Only in this light does it become sensible to speak of the constitution as a "unified whole."[100] A constitution is thus not to be understood simply as an arbitrary selection of normative statutes, as a "closed constitutional system of pure norms," or as a "series

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these are not of equal significance to the whole. See VL, 11-12/67-68, 18-19/73-74, 23-24/77-78. Cf., "Vorwort" (1928) in D, vii/xxxiv.
[96] Schmitt, VL, 18/73.
[97] See Hegel, PR, § 274 and A and Z, pp. 440/312-13; Montesquieu, *Spirit of the Laws,* 1.3, pp. 8-9 et passim. For earlier discussions of *Volk* and of *Volksgeist,* see Schmitt, PR, 39-40/27, 91-95/62-64, cf., 179/130, 94 n. 1/166 n. 9.
[98] See Schmitt, VL, 4/60, cf., 43/95. See Aristotle, *Politics* 3.1 1274b38, 4.11 1295a40-b1.
[99] Schmitt, VL, 22/76.
[100] Schmitt, VL, 3/59.

of individual positive constitutional laws." Instead, a constitution refers fundamentally to an "ontological element of concrete order" that arises out of the "presumptive, unified will" of a given people, which is the basis of their "political existence."[101] Thus, even more important than the stipulation that a constitution be written is the presumption that it gives substantive expression to the collective will of a given nation, whose pre-existing unity the constitution presupposed, and whose fundamental provisions are insulated from shifting parliamentary majorities or momentarily stabilized semi-contractual arrangements. As such, Schmitt regards not the magna carta of 1215, but rather Oliver Cromwell's constitution of 1653 as the first, truly modern constitution.[102]

Here arises also one of the most distinctive features of Schmitt's argument in *Constitutional Theory:* the idea that the modern constitution is comprised of two, distinct constituent parts: the bourgeois, *Rechtsstaat* part, on the one hand, and the "political" part, on the other hand. However, this "distinction"—as one of Schmitt's more sympathetic readers once put it with laconic understatement—is "not easily understandable."[103] Neither the political part nor the non-political part can exist apart from the other. As a result of this mutual admixture, there is no such thing as a pure, bourgeois *Rechtsstaat* or liberal, rule-of-law constitution. A French constitution is fundamentally different from an English one, and the essential difference is not one of natural language. An additional "political" dimension always supplements the *Rechtsstaat* component. Nevertheless, all significant, modern constitutions are influenced in some way by the bourgeois, *Rechtsstaat* or liberal, rule-of-law constitutional tradition. Thus, in Part II of *Constitutional*

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[101] Schmitt, VL, 10/65-66, translation modified.
[102] See Schmitt, VL, 40/92, 44-46/98. Cf., however, D, 133/115, cf., 131/113.
[103] Böckenförde, "Concept of the Political," 43.

*Theory,* Schmitt sets out to analyze at length the essential character of this legal tradition, in the belief that properly understanding it would demonstrate his fundamental claim.

The "*telos*" of the *Rechtsstaat* legal tradition is "*bourgeois*" freedom, which it obtains by means of two principles: one Schmitt calls its "distributional" principle; and the other, its "organizational." The entire armature of the bourgeois, *Rechtsstaat* tradition is designed with the intention of reducing and controlling state power, in order to "protect the individual against the state." The limitations imposed on the state by the *Rechtsstaat* constitutional tradition aim thereby to preserve a "guarantee of bourgeois freedom." This is a vital part of the substantive aspirations of that legal-constitutional tradition and its underlying principle of "bourgeois" or "liberal individualism."

As Schmitt interprets that tradition, it seeks to obtain a guarantee of bourgeois freedom through its two, central features or "principles." In the service of the guarantee of bourgeois freedom, these central "principles" consist first in the system of "basic rights" (what Schmitt dubs its principle of "distribution"), and secondly in the doctrine of the separation of powers (its principle of "organization"). Taken together, these two principles "signify the essential content of the *Rechtsstaat* component of the modern constitution."

The principal source of Schmitt's insight in this matter is clearly Article 16 of the French "Declaration of the Rights of Man and of the Citizen," which stated that "every society, in which the guarantee of rights is neither assured nor the separation of powers determined, does not have a constitution." In Schmitt's narrative, this statement from a moment in 1789 inaugurated a new era of constitutionalism, by pithily expressing the historical culmination of liberal constitutional thinking since the late seventeenth century.

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The "distributional" principle of the modern, *Rechtsstaat* constitution "presuppose[s] the sphere of freedom of the individual as something given prior to the state." The sphere of individual freedom is "*in principle unlimited*" and that of the state, "*limited.*" The codified protection of the bourgeois freedoms, as represented by the system of "basic rights," "fulfills" the distributional principle of the *Rechtsstaat* constitution, and in this way, their codified presence constitutes an "essential component" of the constitution. They "belong to the substance of the constitution." On this view, Hamilton was quite incorrect to insist that the inclusion of a Bill of Rights in the United States Constitution would be "unnecessary." These "basic" rights—many of which appear explicitly in the Second Principal Part of the Weimar Constitution (Articles 109-81)—are essential for preserving a wide sphere of bourgeois freedom.

The "distributional" principle of the modern, *Rechtsstaat* constitution on its own, however, is insufficient to guarantee bourgeois freedom, and so an "organizational" principle is introduced, which "facilitates the execution" of the *Rechtsstaat's* distributional principle. This organizational principle consists of the now familiar Montesquieuian-Madisonian notion of the separation/balance of powers. Importantly, however, this organizational principle has its own further conceptual requirements, which more directly serve the bourgeois *Rechtsstaat's* distributional principle.

True separation of powers is vitally predicated upon rule-of-law legality, in which law is understood as a general norm, in contradistinction to the commands issued by a monarch or oligarchic body, with circumscribed tasks in mind for specific persons, and from which the issuer of the command is exempt. Under the rule of law, those who write the laws are bound to write them in general form, and, as such, the law applies to those who issue the laws as well, thus inscribing into the constitution a general aspiration for equality before the law.

Law in this sense is an essential correlate to the separation of powers. Absent the rule of law so conceived, the modern state, despite its separations, becomes simply an "absolutism" of the legislative branch, where state function bends to the caprices of whoever occupies parliament at any given moment. The singular absolutism of monarchy becomes instead a "multi-headed absolutism." So, without the rule of law in place and its condition of generality, the historical movement which sought to hem in the tyrannical excesses of the arbitrary caprice of royal prerogative transforms itself into a different type of tyranny. Thus, the *Rechtsstaat's* "'Archimedean point'" is fundamentally the "general[ity]" and generalizability of its laws, and therewith its "rejection of the rule of *persons.*" By rendering all law into "general norm[s]," it divests the law of the character of "*will.*"

According to the self-understanding of the bourgeois, *Rechtsstaat* tradition, the basic rights or freedoms have, at least on their face, an "*absolute*" or inviolable character. Situated within the *Rechtsstaat* framework, the "individual's sphere of freedom" can be violated only "on the basis of" a general and generalizable law. As such, their violation or "temporary setting aside" must always "appear as exceptions" to the general rule.

But this bourgeois, *Rechtsstaat* component of the modern constitution is not, of itself, sufficient to constitute a political unity, on which a state might rest.[104] Accordingly, as already

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[104] See Schmitt, VL, 125-30/169-73, 139/181, 151-52/191, 154/194, 157/197 ff. (§ 14), 160/199, 166/204, 175-77/213-15, 182/220 ff. (§ 15), 200/235, 258/226, translation modified, cf., xiii/55, 110/156-57, 131-32/174-75, 161-63/200-01. See also Madison et al. *Federalist,* no. 84, p. 445 (bill of rights); "Déclaration des droits de l'Homme et du citoyen de 1789," Article 16; Montesquieu, *Spirit of the Laws,* 2.11.6, pp. 156-66; Madison et al., *Federalist,* nos. 47-48, pp. 249-60, no. 51, pp. 267-71. Cf., *Federalist,* no. 9, esp. p. 38 (separation of powers).—Historically, these bourgeois freedoms—embodied within the Second Principal Part of the Weimar Constitution—have included, but are not necessarily limited to, such liberties and protections as, for example, "personal" freedom and the freedom of movement (Articles 111, 114); freedom of emigration (Article 112); equality before the law (Article 109); the right to a fair trial in an ordinary court (Article 105); the principle of *habeas corpus* and thus the general right to be informed of the legal grounds for one's imprisonment (Article 114); the general prohibition against *ex post facto* laws (Article 116); the guarantee of the "inviolability" of private property (Article 153); the "inviolability" of one's living space (Article 115); freedom of trade, commerce, and of occupation (Article 151); freedom to contract (Article 152); freedom of religion (especially Articles 135-37); freedom of expression (Article 118); privacy of communications, including mail (Article

mentioned, the modern constitution is comprised of two distinct and distinctive parts: both this *Rechtsstaat* "component" and also a "political" "component," which necessarily supplements it. In this way, the modern constitution actually has a "mixed" form.

In contrast to the political component, the *Rechtsstaat* component of the constitution is merely "formal," in that the distinctive mark of its legal conception is the stipulation for "generalit[y]," in accordance with the bourgeois, *Rechtsstaat* tradition's conception of rule-of-law legality. As such, its formal "concept of law" signifies only an abstract, generalized, and generalizable "norm," in contradistinction to the "substantive" or "political" conception of law, or "*nomos.*" In this latter, political sense, law is an "act of sovereignty" corresponding to the nation's *pouvoir constituant*—a "*command*" of a distinctive person or persons, which arises from their unwavering consciousness of the distinctiveness of the "political form of existence of the state."

Standing "independently alongside" one another, the *Rechtsstaat* and political components are both integral and important features of the modern constitution in its current form. Neither component, however, stands alone with true self-sufficiency. No constitution "of a politically existing folk" can be based entirely upon *Rechtsstaat* principles, for "by themselves" they constitute neither a complete constitution, nor a "political unity," nor even an "independent state-form." Instead, the *Rechtsstaat* component of the constitution plays an entirely different role. It consists ultimately of a "series of limitations and controls" which exert a "moderating" influence on the constitution, thereby "supplementing" the core "political principles," which underlie the constitution and which actually give the state its "political form."[105]

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117); freedom of the press (Article 114); freedom of assembly (Article 123); the right to petition (Article 126); and the freedom of association (Article 124).
[105] See Schmitt, VL, 116/162, 142-43/184, 146/187, 148-49/188-89, 199-204/234-38, translation modified and some emphasis added, cf., 125/169, 163/201-02, 168/207.

Schmitt's constitutional theory, however, does not ever adequately explain how and why a catalog of basic rights and the bourgeois freedoms they protect would prove inadequate as a foundation upon which the political unity of the state might rest. Even in that text, Schmitt appears, if only for a moment, to treat the catalog of basic rights within a constitution as a possible source of political unity. For example, he writes of the codification of basic rights in a constitution as an historical event in which "principles are established, upon which the political unity of a folk is based."[106] Thus, Schmitt goes on to describe the bourgeois freedoms, and the basic rights safe-guarding them in the Second Principal Part of the Weimar Constitution, as a "comprehensive political decision of the German folk concerning the type of their existence."[107]

Regarding the ultimate inadequacy of the liberal principles of basic rights to constitute a state in the full political sense, at least without an additional, political supplement—Schmitt's principal response in 1928 seems to consist only of his lapidary and approving citation from Giuseppe Mazzini: "'Freedom,'" writes Schmitt, "'constitutes nothing.'"[108]

Further important questions still remain. The whole of Schmitt's constitutional theory revolved around the notion of a popular *pouvoir constituant,* which provided the constitutional order with its legitimate authority. What, however, politically unifies the people prior to the constitutional act? It is certainly not the constitution or its underlying *pouvoir constituant* themselves that perform this integrative function, for the Schmittian idea of the constitution and its underlying

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[106] Schmitt, VL, 160/199, translation modified.
[107] Schmitt, VL, 162-63/201, translation modified.
[108] Schmitt, VL, 200/235. By 1932, however, as the crisis had intensified, Schmitt's tune had already changed. At that point, he declared, even more radically, that the Second Principal Part of the Weimar Constitution—which adumbrated the basic rights—represented an additional and "second, heterogeneous constitution" and that it was "only a fragment of another type of constitution." LL, 294/40, 296/42, cf., 298/45, 300/46, 303-04/50, 307/53, 310-12/57-58, 313/60, 329/77, 344/94. Nonetheless, right before the shades were drawn, he began to clamor for the supremacy of the Second Principal Part of the Weimar Constitution and the system of bourgeois rights and freedoms contained therein. LL, 344-45/94, cf., 310-11/57-58.

*pouvoir constituant* presuppose both a people for whom it would be appropriate and out of which it would arise. The *pouvoir constituant* "never constitutes itself, but always something else."[109] Ultimately, this means that "political being" is something that "precede[s] constitution-making."[110] At its base, then, this political being rests essentially upon the "nation," wherein that term signifies a "bonding of men existing *politically,*" who are conscious of the "political distinctiveness" they share with one another.[111]

But where does this political come from? Schmitt's constitutional theory does not attempt to answer this dilemma. Instead, it presupposed the answer he had given in his reflections on the "political"—the first fruits of which had already appeared in print one year earlier. Schmitt's concept of the political is thus the "key" to his constitutional theory and to his thought more broadly.[112]

## 11.6 The (Relative) Autonomy of the Political and the Substantively Polemical Criterion of Politics

It is only in *Concept of the Political* that Schmitt completes his theory of sovereignty, for it is there that he specifies the fundamental character of the decision that gives a particular, political unity its determinate shape and which underlies the legitimate authority of the state.

The political refers to that primordial, human concept which underlies all political phenomena, including but not limited to the state. In this way, the political is more fundamental than the political entity, the state. We understand the political not by beginning with the state, but instead, the other way around. Thus, the state itself should be "defined and understood" in terms of the

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[109] Schmitt, D, 143/123.
[110] Schmitt, VL, 50/102.
[111] Schmitt, VL, 75-79/125-27, cf., 52-53/101, 60/110-11.
[112] Cf., Böckenförde, "Concept of the Political," 37, 41-43.

"political."[113] The fact "that the state is a unity, in fact the decisive unity, rests upon its political character."[114]

As the bearer of the political, the state is sovereign, though not in the sense of the bygone era of absolutist monarchical rule. Instead, its sovereignty consists in its possession of the prerogative according to which it alone declares who are its friends and who are its enemies—a decision which, in the most extreme cases, determines who it is against whom a political entity will wage war.[115] "The question of sovereignty is," writes Schmitt, "the question of the decision on an existential conflict."[116]

However, in *Concept of the Political,* Schmitt takes a decisive step beyond his *Political Theology.* In the final pages of *Political Theology,* Schmitt had stated that the "core of the political idea" is the "exacting *moral* decision."[117] However, Schmitt's writings in the second half of the Weimar period move decisively away from even this "moral" element. In later work, no longer can the moral lay claim either to sustaining or to constraining the political. In the years thereafter, the autonomy of the political is not only affirmed, but it becomes clear that politics itself is also architectonic. Thus, Schmitt severs the Aristotelian-Hegelian link between politics and moral judgment. He now presents political thought as something radically autonomous and self-sufficient. It is both "independe[nt]" and "closed" upon itself.[118] Both the "concrete reality of the political" and "ontological reality" have no truck with "normativities," "abstract orders," or

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[113] See Schmitt, PT2, 25/45. Cf., BdP, 20/19; VL, 41/93.
[114] Schmitt, BdP, 44/44, translation modified.
[115] See Schmitt, BdP, 39/38-39.
[116] Schmitt, VL, 371/389. Cf., PT2, 116/122.
[117] Schmitt, PT, 83/65, emphasis added, cf., 62/48, 82/64. This passage has suggested to some interpreters that a "moral" vision animates Schmitt's work in the Weimar period. E.g., Strauss, "Notes on Carl Schmitt"; Meier, *Carl Schmitt; Lesson.* Cf., Schmitt, GLP, 68/56, 80-81/68-69, 83/71; Staatsethik, 155/198; PR, 161/116, 169/122, 172/124, 177/129, 207/147, 222/158, 226/161. Cf., however, D, 13/10.
[118] Schmitt, BdP, 66/67, translation modified.

any other such "fictions."[119] "Essential political decisions," writes Schmitt, "elude normative circumscription."[120]

The political is autonomous, and thus to be distinguished from, the "moral," the "aesthetic," and the "economic" and the respective criteria which govern those spheres. The political possesses "its own criteria which express themselves in a characteristic way." The political is autonomous not in the sense that it constitutes a wholly "new subject matter," but rather in the sense that it can neither be "grounded" in, nor "reduced" to, these other distinctions drawn from other spheres. It is thus somehow "different" from them, and it is not directly "derivable" from these other "relatively independent" spheres. Thus, the fundamental criterion of the political is irreducible to the distinction of "good and evil," which is characteristic of the "moral sphere"; "beautiful and ugly," of the "aesthetic sphere"; and "profitable and unprofitable," of the sphere of "economics."[121]

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[119] Schmitt, BdP, 28-29/28, 72/72, translation modified.

[120] Schmitt, VL, 108/154, translation modified.

[121] Schmitt, BdP, 26-28/25-27. Cf., BdP1, 3 ff.; PT2, 25/45; "Age of Neutralizations and Depoliticizations" in BdP, 84-85/85; VL, 88/136; "Contradiction between Parliamentarism and Democracy" in GLP, 17/11; L, 117-18/74. For comparison, see Weber, "Politics as a Vocation" in FMW, 118, 123, cf., 117. Cf., Hegel, PR, § 338 A, pp. 501-02/370. *Pace* Strauss, "Notes on Carl Schmitt," ¶¶ 7-9, pp. 101-04, who calls this interpretation that I put forward here that of a "superficial reader," who has failed to see and to recognize that Schmitt here is simply recapitulating and merely mouthing some of the pieties of the positivistic, academic "literature." Strauss points instead to Paul Natorp as a possible source. The first piece of evidence Strauss presents for this claim is the observation that the word "autonomous" is sometimes put in (he thinks ironic) quotation marks, and he notes that Schmitt writes that liberalism "exaggerates the 'autonomy' of the different realms of human life to the point of specialization and even to the point of complete isolation." But, Schmitt also writes that the "autonomy" of the various realms is something one might plausibly "recognize," and the issue he seems to have is the exaggeration and not so much the separation. Schmitt, BdP, 71, cf., 62, emphasis added: "Es ist sehr merkwürdig, mit welcher Selbstverständlichkeit der Liberalismus außerhalb des Politischen die 'Autonomie' der verschiedenen Gebiete des menschlichen Lebens *nicht nur anerkennt,* sondern zur Spezialisierung und sogar zur völligen Isolierung übertreibt." Moreover, Although Schmitt does signal in later work that he thinks of quotations marks as sometimes marking reservations, it is important that Schmitt does not always or consistently use quotation marks to refer to the "autonomy of the political." See Schmitt, BdP, 28/27; PT2, 83-84/93-94, 96/105. Strauss also cites a passage from BdP, 83/84, but although it shows clearly Schmitt's resistance to the "aesthetization" or "economization" of "intellectual life," it's not clear that it establishes the point Strauss would have it establish. Ultimately, Strauss wishes to argue that for Schmitt, the realms of aesthetics, ethics, and economics do not stand alongside of the political, but that the political is authoritative. In saying this, however, he ultimately concedes the autonomy (qua superiority) of the political from other domains. In 1963, Schmitt, "Hinweise" in BdP, 118, 120 agreed explicitly with Strauss, an "attentive reader," that his criterion of the political "concerned something other than the 'autonomy of [a] subject matter' or even of a 'value-domain,'" and then two pages later, however, Schmitt isolates for praise Strauss' insight that the affirmation of the political consisted in the affirmation of the "seriousness" of political

The political is autonomous, though not in the sense that it is basically on the same level as these other spheres of human life. Rather, the political is autonomous in terms of its autarky and architectonic superiority. Although it corresponds neither with the moral, the economic, nor with the aesthetic, its autonomy does not signify a complete separation from all other spheres of human life, for in point of fact it draws on all of these indirectly. Rather, it is autonomous in the sense that none of these spheres determine or constitute its peculiar operation, nor can it be seen as grounded in, or reducible to, these other criteria.

Having cleared away space upon which he might inscribe the peculiar terrain of the political, Schmitt finds himself in a position to outline the "*essence* of the political."[122] Ultimately, what is the most distinctive about the political is not the peculiar matter over which it is constituted, but instead its "*level of intensity*." Today, he argues, this is "the only scientific and defensible criterion." For Schmitt, this is a vitally important point. What is most distinctive about the political is that it concerns itself principally with those matters which possess the deepest and most abiding meaning for us as human beings, and which are, on that account, able to draw together human beings into a distinctively political unit. The criterion of the political, in contrast to all other criteria, marks off the "most extreme degree of intensity," and for this reason this criterion is the "strongest and most intense."[123]

Ultimately, the proper context in which to understand Schmitt's conception of the political is the radical revolutions of the early twentieth century. During revolution, the state is no longer the

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life. Schmitt, however, nowhere praises the further claim of Strauss, "Notes on Carl Schmitt," ¶ 27, p. 117 that "the affirmation of the political is ultimately nothing other than the affirmation of the moral." For a slightly differing perspective with which I am in agreement, see McCormick, "Political Theory and Political Theology," 837; "Irrational Choice," 325-37. For a perspective differing dramatically from mine, see Meier, *Carl Schmitt,* 11-16, 31, 46-47 46 n. 44; *Lesson,* 1-25 (ch. 1), esp. 13, 16, also 39-42, 135, cf., however, 123.

[122] Schmitt, BdP, 20/19, translation modified and emphasis added, cf., 45/45.

[123] See Schmitt, BdP, 27-28/26-27, 38/38, translation modified, cf., 30/29, 60/59; PT2, 25/45, translation modified, cf., 22/42.. Cf., Staatsethik, 159/203; HP, 26 n. 1; BdP1, 4, 10.

bearer of the political, and yet human beings still appear to act politically. For this reason, one must presume that there is some more primordial, organizational category at work, and this category, Schmitt aims to demarcate. As becomes clear during the liminal moments of revolutionary action, the political undergoes qualitative shift as soon as a new group arises that is willing to fight on behalf of that thing which draws them together with especial intensity, and this qualitative shift is completed within a given territory once there is no longer anyone able or willing to do the same in order to oppose them.[124]

With all that in the background, the distinctively political criterion can actually be expressed in a relatively terse formulation. "The specific political distinction to which political action and motives can be reduced is that between *friend* and *enemy*."[125]

The friend-enemy distinction is an, if not *the,* central axiom within Schmitt's thought. As early as 1921, the enemy appeared in a prominent way within his work. The sort of dictatorial powers required in a state of exception are treated fundamentally as instruments in the service of a battle against an "enemy" or "political opponent"[126] At least by 1926, Schmitt had already begun to move decisively in the direction of his quest to isolate purely "political categories," which included "political allies" and "opponents."[127] The next year, the "the conceptually formulated result … [was] first articulated" in *Concept of the Political.*[128] One year later in his *Constitutional*

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[124] Schmitt, PT2, 24-25/44-45.

[125] Schmitt, BdP, 26/26.

[126] Schmitt, D, 11/7, 135-36/117-18, 175-78/151-53, 192/167, cf., ix/xliii, 137/119, 181/157, 188/163 (*Feind*), 3 n. 1/231 n. 2, 58/49, 190/164-65 (hostis-*Erklärung*), 134/116, 172/149, 184/160, 200/174, 203/178 ([*politischer*] *Gegner*), 94/78, 165-66/141-42, 186/161 ([*politischer*] *Gegner, Feind*), This begins to explain Schmitt's statement that the *Concept of the Political* was the "result" of his work in *Dictatorship.* See PT2, 24-25/44-45.

[127] Schmitt, "Contradiction between Parliamentarism and Democracy" in GLP, 17/11, translation modified.

[128] Schmitt, PT2, 25/45, translation modified.—There are three main editions of *Concept of the Political.* The first edition was an abbreviated version published in 1927 in the *Archiv für Sozial Wissenschaft und Sozialpolitik.* The second edition, much expanded, revised, and also supplemented by the 1929 lecture, "Age of Neutralizations and Depoliticizations," was published in 1932 and then reprinted in 1963, both times by Duncker & Humblot. The third edition was published in 1933 by the Hanseatische Verlagsanstalt. There is a considerable dispute as to which version of the text represents the superior copy. In 1935, Löwith, "Occasional Decisionism of Carl Schmitt" in *Martin*

*Theory,* the friend-enemy distinction served as the "essential presupposition of political existence" and thus as the grounding of "political consciousness" and the underlying condition of national unity.[129] On the journey to Schmitt's theory of the legal order, of the state, and of the constitution, all roads end here.

Provisionally at least, we might translate the friend-enemy distinction as Us-Them, Insider-Outsider, or "we" and the "Other," for Schmitt himself describes the enemy as the "other" and the "stranger."[130] In this way, the friend-enemy distinction at the heart of Schmittian politics points in the direction of community, in the sense of a we-being as marked off from others.

This helps to render slightly more intelligible an idiom, which today cannot but strike the reader as fanciful if not ludicrous. In contemporary, common parlance, as Schmitt knew well, "political" refers to the bustling activity of elected representatives, and when we are cynical, it refers also to those shady, backroom bargains we abhor but nevertheless expect from our politicians. Thus, in common speech, politics is used often in the sense of "'party politics.'"[131]

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*Heidegger,* 158-59 had argued that the third edition was a departure from Schmitt's earlier thought, and merely a response to the changing political environment, and by implication, the second edition was the superior text. See also Bendersky, "Carl Schmitt Confronts," 131. In 1988, Meier began to argue that the third edition of the text was the "superior" edition, particularly in the regard that it putatively responded to Leo Strauss' critical, book review from 1932 and thereby continued the "hidden dialogue" between these two thinkers. Meier argues that Schmitt in 1963 chose to reprint the ostensibly inferior 1932, second edition text, only because the 1933 text showed traces of having been written under NSDAP circumstances and thus contained elements, which were "politically assailable" at the date of reprinting. See Meier, *Carl Schmitt,* 6-7 n. 5, 17-29, 24 n. 25, 36; *Lesson,* 26 and n. 26, 37-38 and n. 31, 69, 70-71 n. 8, 79 n. 36. For further publication history, see also Schmitt, BdP, 9, 96; PuB, 75 n. While I acknowledge all of the additions to which Meier draws our attention, they do not decisively affect my interpretation. Moreover, the 1963 reprint of the 1932 text is the more widely available text, and it serves as the basis of the English translation. In what follows, unless noted otherwise, I will cite from the 1932/1963, second edition of the text of the *Concept of the Political.* Although I do note here that it was this 1932 edition—and not the one from 1933—which Schmitt chose to have reprinted in 1963, I ultimately do not wish here to resolve or to debate which edition contains the authoritative text.

[129] See Schmitt, VL, 162/201, 169/207, 214/247, 234/263-64, 247/275, 253/281, 322/345, 364-65/382-83, 389/405, translation modified, cf., 146/187, 279/304, 298/322, 372/389.
[130] Schmitt, BdP, 27/27. Cf., VL, 377/394.
[131] See Schmitt, BdP, 32/32; VL, 272/298, 298/322.

There is even *some* textual support for this preliminary translation of Schmitt's friend-enemy distinction. As Schmitt would have it, the enemy does not need to be "morally evil" or even "aesthetically ugly." The Schmittian enemy is not the "private opponent whom one hates." The enemy "in the political sense" need not be "hated personally." It has nothing at all to do with the "psychological expression of private feelings," he is only the enemy of the "collectivity."[132]

However, Schmitt's general claim here is really not much more than a rearticulaton of Hegel's view on the basic "impersonal[ity]" of modern warfare, in that combatants no longer confront one another "with hate."[133] Accordingly, the friend-enemy distinction cannot just be translated into the distinction of Us-Them, for war always loom on the horizon of the Schmittian friend-enemy distinction and this looming possibility is itself constitutive of the distinction. War is, as Schmitt never tires of repeating, the "ever-present possibility."[134] In this, Schmitt follows the spirit of Hobbes who had maintained that the "nature of war, consisteth not in actuall fighting, but in the known disposition thereto."[135] Friends and enemies need not be at war to know that they are mortal enemies, and thus that they could be potential combatants at some point in the future. This

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[132] Schmitt, BdP, 27-29/27-29, translation modified.—In an important footnote, often cited by sympathetic readers, Schmitt indicates that the German language is insensitive to the distinction he wishes to draw between friend and enemy, but that Greek and Latin idiom are more appropriate. Schmitt maintains then that the enemy as he understands it should be associated not with the *echthros,* which is the "private" enemy, but rather with the *polemios,* the "public" enemy. Here Schmitt draws on a passage from Plato's *Republic,* where Socrates distinguishes between the nature of war between Greeks, on the one hand, and war between Greeks and non-Greeks (i.e., barbarians), on the other. This conceptual distinction, Schmitt contends, is later preserved in the Latin distinction between *hostis* (the "public enemy") and *inimicus* (the "private enemy"). So, as Schmitt notes, when Christ in the Sermon on the Mount issues the command "love your enemies," the nominals used in the Greek, as in the Latin translation of the Vulgate, are thus *echthrous* and *inimicos* (i.e., "private" enemy)*,* and not *polemious* and *hostes* (i.e., "public" enemy). BdP, 29 and n. 5/28-29 and n. 9, cf., 46-48/46-47. See also Plato, *Republic,* v 470c5-d1, 470b7-9; Mt. 5.44; Lk. 6.27. Cf., Rm. 11.28. Cf., however, Plato, *Euthryphro,* 7c10-d5. Schmitt, "Über das Verhältnis der Begriffe Krieg und Feind" in PuB, 279-80; "Hinweise" in BdP, 118, 124 attempt further etymological reflection.
[133] See Hegel, PR, § 328 A, p. 496/365, § 338 Z, p. 503/371. Cf., similar passages from Hegel's *System der Sittlichkeit,* which Schmitt quotes with approval in Schmitt, BdP, 62*/*63.
[134] Schmitt, BdP, 32/32, cf. 29/28, 33/32-33, 34-35/34, 36/35, 45/45.
[135] Hobbes, *Leviathan,* ch. 13, ¶ 8, pp. 88-89. See also Strauss, "Notes on Carl Schmitt," ¶ 11, p. 105.

precise kind of enmity belongs to the category of war, which Schmitt calls "'war as condition" or "status," as opposed to the type of enmity characteristic of actual war.[136]

The friend-enemy distinction concerns matters of "life and death."[137] Thus, the distinction has a "concrete and existential sense" and serves more than a symbolic or metaphorical role. The "enemy" is neither the "competitor" of the economic sphere, nor the mere "debating adversary" across from whom one sits placidly and engages in idle chit chat, only, at the end of the day, to return to the comforts of one's home.[138]

For Schmitt, the extra-ordinary is often more interesting and revealing than the ordinary, the liminal more illuminating than the core. Schmitt's friend-enemy distinction really only becomes manifest "the closer it approaches the most extreme point," that is, when war looms or becomes actuality.[139] The "high points of *great politics*" consist in those "moments in which the enemy is perceived as the enemy in concrete clarity."[140] "In times of untroubled security" we do not notice the existential antagonism at the heart of political life, but in the midst of existential conflict, the "normative illusions with which men like to deceive themselves regarding political realities" simply "vanish."[141] It is in this sense that war, as an "ever-present possibility," is the "presupposition" of the political as such.[142]

None of this, moreover, has disappeared in the liberal age of neutralizations. The liberal state trades protection of person and property for obedience. Echoing Descartes but with a Hobbesian twist, Schmitt argues that the "*protego ergo obligo* is the *cogito ergo sum* of the state." There is,

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[136] Schmitt, "Über das Verhältnis der Begriffe Krieg und Feind" in PuB, 278.
[137] Schmitt, VL, 364/382, translation modified.
[138] Schmitt, BdP, 28/27-28, cf., 33/33, 63-64/64, 70-71/71-72. Cf., G, September 23, 1948, p. 199.
[139] Schmitt, BdP, 30/29.
[140] Schmitt, BdP, 67/67, translation modified. Cf., "The Unknown Donoso Cortés" in DC, 78/85.
[141] Schmitt, BdP, 53/52.
[142] Schmitt, BdP, 34-35/34.

to quote Hobbes, a "mutual relation between Protection and Obedience."[143] However, the liberal citizen is ill-prepared to understand the significance of this relationship.

The "individualism" of "liberal thought" blinds it to the "sacrifice of life" that the state must, from time to time, justifiably call upon its own citizens to make. A truly consistent individualism, which takes it bearing "from the viewpoint of the private individual," believes that the individual alone possesses the imprescriptible authority to put in jeopardy his own physical well-being. Were a "life and death struggle" thrust upon this private individual without his having "personally" accepted this injunction, he would, at least from within his own perspective, have experienced a severe form of "'repression,'" which is, on his view, "*eo ipso* something evil."[144] The liberal citizen is thus a bourgeois in Hegel's (and Rousseau's) sense of the word: someone "who does not want to leave the apolitical riskless private sphere." As such, he is a "political nullity," who understands his own existence to be that of the "individual against the totality." Sacrifice and "bravery" are not in his ready-to-hand vocabulary, for, to him, self-abnegation on behalf of something greater than himself is completely unintelligible.[145]

However this may be, when the fatherland is truly threatened, its defense cannot accurately be depicted as a voluntary choice. In such trying times, the state possesses the unquestionable right "to demand from its own members the readiness to die."[146] It "must" "demand the sacrifice of life."[147]

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[143] Schmitt, BdP, 53/52; Hobbes, *Leviathan,* "Review and Conclusion," p. 491. Cf., Schmitt, L, 113/72, 127/83, cf., 69/45; Staat als Mech., 143/96; ECS, Winter 1945/46, p. 20, Summer 1946, p. 67; "Hinweise" in BdP, 122.
[144] Schmitt, BdP, 70/71, cf. 48-49/48, 72/73.
[145] Schmitt, BdP, 62/62-63. Cf., Schmitt, VL, 253/280. See also Hegel, "On the Scientific Way of Treating Natural Law" in Werke, 2:494/PW, 151. Cf., Rousseau, *Emile,* 1, p. 40; *Social Contract,* 1.6 n., p. 51.
[146] Schmitt, BdP, 46/46.
[147] Schmitt, BdP, 70/71.

This ostensibly illiberal and violent logic Schmitt actually inherits from Hegel and not from the more bourgeois Hobbes. "The individual person is … a subordinate, who must dedicate himself to the ethical whole. Thus, if the state demands his life, the individual must give it.… The meaning of courage as [a] disposition lies in [its] true [and] absolute end, the *sovereignty* of the state."[148] For Hobbes, in contrast, a soldier, for instance, who finds himself in mortal danger (i.e., "within the Guards of the enemy") may justifiably surrender to his captor. Moreover, a subject in involuntary confinement may always justly resist, and a criminal being brought to the gallows should not, as a matter of right, be expected to go quietly. Obedience to the state and the covenant is premised on the protection of life. Thus, for Hobbes, if a subject's life is threatened, his obligation to obedience immediately dissolves.[149]

Here Schmitt's Machiavellian *Realpolitik* moment appears. However, as we will see in a later section, the Machiavellianism is ultimately only one part of the story.

Man is a fallen being. Darkness lurks at his innermost core. A human being is something "'dangerous' and dynamic." For this reason, "all genuine political theories presuppose man to be 'evil.'"[150] Contrary to what Kant may have believed, the dream of "perpetual peace" is simply not viable in a world forever full of "devils."[151] One must be ever prepared to defend oneself against those who would march against one's fatherland. A decadent people does not decline quietly, dying of old age. Instead, a decadent people are simply conquered, or worse, erased from the face

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[148] See Hegel, PR, § 70 Z, pp. 152/102, § 328, p. 496/364, translation modified, cf., § 324, pp. 491-94/360-63 et passim. However, standing in the empirical world of the twentieth-century and the aftermath of the First World War, Schmitt could not but differ from Hegel on the question as to whether wars of the future would become inexorably more humane as history proceeded. See Hegel, PR, § 338 and Z, pp. 502/370-71.

[149] See Hobbes, *Leviathan,* ch. 14, ¶ 28, p. 98, ch. 21, ¶¶ 21-22, pp. 153-54, cf., ch. 14, ¶ 8, p. 93, cf., however, ¶¶ 15-17, pp. 151-52. See also Strauss, "Notes on Carl Schmitt," ¶ 13, pp. 106-07. Cf., Schmitt, Staat als Mech., 143-44/97; "Die vollendete Reformation" in L, 157-58, 160, 171 n. 6.

[150] Schmitt, BdP, 61/61, cf., 58/58, 60/60, 68/68. Cf., PT, 72-74/56-58; RK, 13/7-8, 54/32; D, 9/6, 109/90, 112-14/92-94,123/104, 148 n. 2/280 n. 22. Cf. also, G, February 10, 1948, p. 95; "Vorwort" and text in PR, 3-7/1-5 and 38/26, 83/56, 104/70, 115/78, 172/124, 198/142; L, 56/35; Staat als Mech., 143-44/97.

[151] Kant, *Perpetual Peace* in PW, 112.

of the earth. "If a people no longer possesses the energy or the will to maintain itself in the sphere of politics, the latter will not thereby vanish from the world. Only a weak people will disappear."[152] In this, Schmitt echoes Machiavelli's counsel to the prince: "For a man who wants to make a profession of good in all regards must come to ruin among so many who are not good."[153] The "incapacity or unwillingness" to distinguish friend from enemy and thus to stand forth into the political is, for Schmitt, a "symptom of the political end." So went the *ancien régime,* so went Tsarist Russia, and, though Schmitt in 1932 could not yet mention it here, so too went the Weimar Republic.[154]

Schmitt has nothing but contempt both for traditional, Christian conceptions and for all liberal progressive currents in international law, for, on his view, all ontologically monistic, moral norms have no place in international relations.

In Schmitt's completely twisted account of the Gospel, not even the teacher of universal, brotherly love commands us to "love and support the enemies of one's people." "In the thousand-year struggle between Christians and Moslems," writes Schmitt, "never did it occur to a Christian, that one must surrender Europe to Islam out of love for the Saracens or Turks, rather than to defend it."[155]

In addition, the entire, moralizing tradition of just war theory and its claims of *jus belli,* Schmitt considers to be little more than flimsy cover for an ulterior "political purpose."[156] War itself has no "normative" valence, but only an "existential meaning." It can only be "justified" in terms of an "ontological" threat to one's own form of existence. "There exists no rational

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[152] Schmitt, BdP, 54/53, cf., 38/38, 50/49, 53/52. Cf., "Starker Staat und gesunde Wirtschaft" in SGN, 74.
[153] Machiavelli, *Prince,* ch. 15, p. 61.
[154] Schmitt, BdP, 67-68/68.
[155] Schmitt, BdP, 29/29, translation modified.
[156] Schmitt, BdP, 50/49. Cf., L, 73-74/47-48.

purpose, no norm no matter how true, no program no matter how exemplary, no social ideal no matter how beautiful, no legitimacy or legality which could justify men in killing each other…. A war's meaning lies not in its being fought for ideals or for legal norms, but rather in that it is waged against a real enemy."[157] It is "only the actual participants themselves," who "can decide" who their enemies and who their friends are and whether the "extreme case of conflict" has arrived. They alone are able to determine "whether the otherness of the alien in the concrete [and] present case of conflict entails the negation of their own form of existence, and thus [must] be repelled or fought, in order to preserve their own ontological way of life."[158] In the context of the struggle of "concrete, fighting human beings," the accusation of "immorality" is nothing more than a deceptive "political means."[159] Human beings do not ever go to war out of motives which are "'purely' moral." When it appears that they are so doing, what has actually occurred is the "transform[ation]" of a moral motive into a political one, in the sense that this non-political category has become "sufficiently strong" so as to effectuate the grouping of human beings into friends and enemies.[160]

He also dispenses altogether with one of the most important postulates of contemporary, international law: the concept of "humanity," especially in its "ethical-humanitarian form." Thereby, he leaves behind the benevolent cosmopolitanism of the Stoic/Christian/Kantian ideal of universal, shared human dignity. The concept of humanity is misleading, because it universalizes, projecting an image of a "universal society." It thereby precludes meaningful consideration of the concept of the political and the "real possibility of war" entailed by concrete "friend and enemy

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[157] Schmitt, BdP, 49-50/49, translation modified.
[158] Schmitt, BdP, 27/27, translation modified. Cf., VL, 365/383, 372/389.
[159] Schmitt, BdP, 67/67, translation modified. Cf., L, 128-29/84.
[160] Schmitt, BdP, 36-37/36-37, translation modified.

groupings." "Humanity," writes Schmitt, "is not a political concept, and no political entity, community, or *status* corresponds to it." When a "particular" state declares a war on behalf of a "universal concept," such as humanity, it is, in the concrete, using this norm only as an "ideological instrument of imperialist expansion."[161]

The League of Nations of Schmitt's era was not anything like a world state. Instead, it was only a "league" or alliance. As an alliance, it did not definitively curtail the possibility of war. Instead, it simply gave a new character to future wars. To the extent that its deliberative apparatus in Geneva provided a sheen of legitimacy to those wars, on which the alliance might embark, it actually removed some of the obstacles to war. Because it could not actually proscribe war, the League's "'tendency'" towards universal humanitarianism remained only an "ideal postulate," and a relatively impotent one at that.[162]

On Schmitt's view, world pacifism, or the aspiration thereunto, represented an inextricably bizarre paradox, at least if the aspirants had any intention of following through on their aspirations. To rid the world of war, one must rid the world of belligerents, but the necessary condition for ridding the world of belligerents is precisely to become a belligerent oneself. Thus results that completely convoluted expression H.G. Wells and Woodrow Wilson had used in order to describe the First World War: "the war to end all wars." Schmitt, the good German, saw all of this as a "manifest fraud."[163]

We may, if we so wish, muse about a possible cosmopolitanism or speculate about world democracy or a pacified globe, and regard the nation-state as an "atavistic remnant of barbaric

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[161] Schmitt, BdP, 55-56/54-55, translation modified. Cf., Schmitt, Staatsethik, 162/205; "Völkerrechtliche Formen des modernen Imperialismus" in PuB, 184-203.
[162] See Schmitt, BdP, 57/56, translated modified. Cf., L, 76/49; VL, 73/122.
[163] Schmitt, BdP, 36-37/36, 49/48, 77/79. See also Strauss, "Notes on Carl Schmitt," ¶ 18, pp. 110-11.

times," which will some day, in the not too distant future, "vanish from the earth." But, on the ground and in the concrete, we still and for the foreseeable future have nation-states; and these nation-states are angled towards one another in the mortal posture of potential, adversarial aggression.[164]

Schmitt enjoins us not to follow the common sense of our age and to think of war wholly as mere aberrations, and thereby to miss their deeper significance and their diagnostic ability to reveal the precise character of our nature as political animals. War is the "exceptional case" that stands out against the peace, but it is precisely in the exceptional cases that the "core of the matter" is revealed. It is "in real combat" that the deepest meaning and "extreme consequence" of the friend-enemy distinction becomes known to us. Only in this "extreme possibility" does "human life" assume its political character. The political is thus that "meaningful antithesis" in whose name men are called upon to spill blood. A world without war is one that is thoroughly apolitical. An "irrevocably pacified world would be," writes Schmitt, "a world without politics."[165]

While Schmitt believes world peace to be deeply improbable, he does not ever say that it is impossible. He remarks only that "for the present, it is not here."[166] Such an admission, however, deflates partly, if not entirely, much of the logic of the political as presented—and so, as we will see in a later section, Schmitt must inevitably move beyond the initial impression of Machiavellian *Realpolitik.*[167]

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[164] Schmitt, BdP, 28/28, translation modified.
[165] Schmitt, BdP, 35-36/35, translation modified.
[166] See Schmitt, BdP, 54/53-54, translation modified, cf., 58/57. Cf., however, HdV, 111: "Politik [ist] unvermeidbar und unausrottbar."
[167] See Strauss, "Notes on Carl Schmitt," ¶¶ 16-23, pp. 109-12, ¶ 27, p. 115, however, his conclusions are different.

## 11.7 The *Jus Publicum Europaeum:* An Abortive, Post-war Attempt to Soften the "Political"

That infamous text, *Concept of the Political,* would haunt Schmitt for the rest of his life, troubling him deeply. In the post-war notebooks, he would complain bitterly that that book had become one that is rarely read carefully, but whose central thesis is nevertheless often cited by enemies, thus standing as an unwitting testament to its central claim.[168] "The reproach," complains Schmitt later in 1963, "of an alleged primacy of the concept of enemy is universally widespread and stereotyped."[169] "The core of the political," he writes elsewhere in the same year, "is not enmity as such, but rather the distinction between friend and enemy; [it] presupposes both friend *and* enemy."[170] Though he never distanced himself from the text of *Concept of the Political,* he did, however, make an (ultimately abortive) attempt to mute its bellicose tone through conceptual refinement and the development of a yet larger framework—albeit many years after the text first appeared.

In the early 1940's, around about 1943/44, Schmitt introduced a historical, ideal-typical conceptual framework, which he began to call the *jus publicum Europaeum,* and which loosely paralleled Hegel's reflections concerning the grand "European family" of "nations" in international relations.[171] These reflections reached their apotheosis in Schmitt's *Nomos of the Earth* (1950).

According to Schmitt's narrative, the wars of religion of the sixteenth and seventeenth centuries had brought about "the dissol[ution] of the *respublica Christiana,*" such that the Church

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[168] See Schmitt, G, April 28, 1948, p. 140, June 10, 1948, p. 161. Cf., Antworten, 64.
[169] Schmitt, Vorwort in BdP, 14, cf., 16.
[170] Schmitt, TdP, 93/91, translation modified.
[171] See Schmitt, LdER, 387/36; Hegel, PR, § 339 Z, p. 502/371.

could no longer serve its previous role of bracketing the ferocity of war.[172] A new world order, the *jus publicum Europaeum,* stepped up to take its place. Serving as a common framework of understanding between (European) nations, the *jus publicum Europaeum* was "a comprehensive spatial order supported by states."[173] Its basis did not "lie … in [a] consensus with [a] determinate content, which was theological, moral, or [made up of] juristic norms, but rather in the institutional and structural quality of the political structure." Within this new framework, war came to be understood as something on the "analogy" of a gentleman-like "duel between European states," who although at war, saw one another not as perfidious criminals who must be wiped off the face of the earth, but rather as parties to a war, in which they could recognize one another as having the "same character as a state [and] the same rights."[174] This framework thus functioned as an instrument for the "limiting and bracketing of war," and in contrast with the bloodletting of the wars of religion, this new framework represented a "rationalization and humanization" of war between states.[175]

Tragically, however, this *jus publicum Europaeum* would not last forever, and in the course of modern history it began slowly to dissolve. According to Schmitt's intellectual history of war, this new order would only last from the sixteenth to the nineteenth century.[176] Thus, by 1950, Schmitt had begun to worry openly about the "declin[e]" of "the hitherto Eurocentric order of international law."[177] Continuing with essentially Weimar- and NSDAP-era themes, he blamed the occurrence of this "dissolution" on the Wilsonian "spacelessness of … general

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[172] See Schmitt, NdE, 117/145, 120/148.
[173] Schmitt, NdE, 183/210, translation modified.
[174] Schmitt, NdE, 114-15/142-43, translation modified. Cf., TdP, 11/3, 16-18 and n. 7/9-11 and n. 10, 39-41/34-36, 42 n. 22/51 n. 51, 44/39, 53/49, 56/52, 64/60, 90/88, 92/90.
[175] Schmitt, NdE, 112/140, 114/142.
[176] Schmitt, NdE, 112/140.
[177] Schmitt, NdE, 6/39, translation modified. Later, his tone grew more dire. See "Vorwort" in BdP, 17. Cf., TdP, 14/7, 96/95.

universalism."[178] What most liberal progressives viewed as a sign of progress, Schmitt saw instead as a disastrous "crash into the nothingness of an aspatial and foundationless universalism."[179] Ultimately, according to Schmitt, this dissolution was driven by the imperative for a "*global* economy" and the need for ever expanding markets.[180] This process, however, rendered null and void the formerly meaningful distinction between civilized, barbarian, and savage nations, and thereby dissolved the "spatial and spiritual" framework which had held together the civilized nations.[181] Thus, in a turn of great irony, Carl Schmitt—the Weimar jurist who wrote as the theorist of political enmity—sought to position himself as "the last, self-conscious representative of the *jus publicum Europaeum*" *after* the manifest horrors of the first half of the twentieth century.[182]

Later, in the 1963 foreword to the re-issued edition of *Concept of the Political,* Schmitt identified that work's "main deficiency" as its underdeveloped conceptualization of the "enemy." At that time, the concept was "not clear and precise enough," for he had failed to distinguish systematically between "conventional," "real," and "absolute" enemies, as he did later in his contemporaneously published *Theory of the Partisan.*[183] Lest any confusion linger, in the notes added to this re-issued edition, Schmitt also asserted that the "absolute enemy" in the sense of a

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[178] Schmitt, NdE, 200/227, 203/230. Later, he would blame "professional revolutionar[ies]." See TdP, 91/89, cf., 94/93. Cf., PT2, 24/44.
[179] Schmitt, NdE, 211/237, translation modified.
[180] Schmitt, NdE, 208/235. Cf., D, 110/90.
[181] Schmitt, NdE, 207/234.
[182] Schmitt, ECS, Summer 1946, p. 75.
[183] See Schmitt, "Vorwort" in BdP, 17-19, cf., 11, 13, 17; TdP, 87-96/85-95, esp. 87/85, 94/92, cf., 55-56/51-52, 58/54. Cf., "Hinweise" in BdP, 124; PT2, 118/123; L, 121/80.—Here, Schmitt thanks George Schwab by name, whose own work had muted some of the darkness of Schmitt's friend-enemy distinction in the pre-World War II text of the *Concept of the Political,* by translating *Feind* with the softer word "enemy," with the implicit distinction that "enemy" is not quite as extreme as the much harsher language of the mortal enemy: the "foe." See Schwab, *Challenge,* 51-55, 53 n. 39; "Introduction" in Schmitt, BdP, 9-10, 10 n. 19, and pp. 33 n., 36 n. See also Schwab, "Enemy or Foe." Cf., Ulmen, "Anthropological Theology," 77; "Return of the Foe."

"class-, race-, or timeless, eternal enemy" was not the concern of his "criterion of the political" at all.[184]

However, we, as interpreters, do not need to follow all of Schmitt's own, often times self-exculpatory and after the fact (re-)interpretations of his own work. We should thus be wary of what one of Schmitt's other, more critical interpreters has pointed to, namely, the "strong influence [Schmitt's] self-interpretation has had on the research about him."[185]

We need not ground these suspicions purely in dogmatic skepticism, for the suspicion has a conceptual core to it. In point of fact, one encounters profound and insurmountable conceptual difficulties in the attempt to reconcile Schmitt's *Concept of the Political,* with this later romanticization of this supposed *jus publicum Europaeum*—as Raymond Aron recognized and pointed out to Schmitt in correspondence.[186] The general thrust of Schmitt's Weimar era writings clearly pointed in the direction of a radical, ontological "pluriverse" of states.[187] The later notion of a *jus publicum European*—notwithstanding its questionable historical accuracy—thus does not appear to have a firm conceptual place in Schmitt's thought world, at least not in the one constructed by the Weimar-era writings.

Later, after the war, Schmitt would speak of "the bracketing and clear limiting of war" and the "relativization of war" as constituting "great progress in the sense of *humanity.*"[188] To judge how well his later romanticized imagination gelled with his earlier writings, one needs only to recall

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[184] Schmitt, "Hinweise" in BdP, 118. In several different works from 1963, Schmitt began to cite one passage from the 1932 edition of *Concept of the Political,* which he presumably believed to be supportive—albeit ambiguously—of this later distinction of absolute and real enmity, foe and enemy. See TdP, 94 n. 52/92-93 n. 93; "Hinweise" in BdP, 119; BdP, 37/36-37.

[185] See Gross, *Carl Schmitt,* 24. See also Müller, *Dangerous Mind,* 7, cf., 4, 61.

[186] Aron to Schmitt, October 1, 1963 (unpublished). Per Müller, *Dangerous Mind,* 99-100, 264 n. 54.

[187] Schmitt, BdP, 54/53.

[188] Schmitt, Vorwort in BdP, 11, emphasis added. Cf., TdP, 37/32.

Schmitt's unforgettable, pithy phrase from 1932: "Whoever says *humanity* wishes to deceive."[189]

Schmitt's questionable historical claim, that when pre-twentieth-century Europeans spoke of "humanity" they originally meant only "European humanity," can, in truth, hardly satisfy anyone.[190]

## 11.8 The Nietzschean-Weberian Background to the Politics of Meaning

Death, struggle, and violence are unquestionably central features of Schmitt's thought world. But why is this so? Is it out of a merely sadistic disposition that fetishizes the drip-drop of human blood? In effect, a number of commentators have suggested something like this: that Schmitt's preoccupation proceeds from what is commonly described as his "aestheticization" of violence.[191] In this way, Schmitt is, more or less, assimilated with Ernst Jünger and with the Italian Futurists. This view, however, squares poorly with Schmitt's writings and misses entirely their core meaning.

Walter Benjamin's "Work of Art in the Age of Mechanical Reproduction" (1939) remains the classical treatment of the aestheticization of politics. Following closely the conception of art, encapsulated in the slogan, *l'art pour l'art,* Benjamin describes aestheticization as the attempt to apply to that object the criteria characteristic of art, namely, beauty and ugliness, and then to treat the positive attribute (beauty) as something that is an end-in-itself. He argues that the aestheticization of politics leads inevitably to war, indeed to the "apotheosis of war," and that all this line of thought is characteristic of fascism. "With logical consistency," writes Benjamin,

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[189] Schmitt, BdP, 55/54, translation modified and emphasis added. Cf., BdP1, 19-20; VL, 158/198; DA, 32/70. Pieper, *No One Could Have Known,* 175 claims that Schmitt had also said to him that "'anyone who speaks of the *bonum commune* is intent on deception.'"

[190] Schmitt, NdP, 201/228.

[191] E.g., McCormick, "Irrational Choice," 320; Habermas, "Horrors of Autonomy: Carl Schmitt in English" in NC, 137; Wolin, "Carl Schmitt: The Conservative," 433-34, 443-44; Holmes, *Anatomy,* 44. Cf., Derrida, *Politics of Friendship,* 124, 126, 132, cf., 134 n. 10.

"fascism amounts to the aestheticization of political life…. All efforts at the aestheticization of politics culminate in one point: … war."[192]

However, Schmitt expressly denied all of these charges *avant la lettre*. He is quite clear that he does not mean to apotheosize war for its own sake, and, moreover, that he is an opponent of "aestheticization" of cultural realms outside of the world of art.

In his discussion of the political, Schmitt makes plain that this conception aims neither to valorize war itself, nor even to suggest that there is no meaningful distinction between politics and war. Although war is an "ever-present possibility," this does not mean that that war itself or "militarization" are the "goal," the "end," or even the "content" of "politics." These things are not "ideals." Moreover, both with and against Clausewitz, Schmitt argues that war and politics are not at all the same thing. They are not subject to the same "grammar." Rather, the political always draws the battles line according to which war is waged, and in this way, war does not even have its own independent "logic."[193]

In addition, Schmitt had, in an earlier work, passionately decried the "expansion of the aesthetic" into all other spheres of life, already underway in a bourgeois culture heavily

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[192] See Benjamin, "Work of Art in the Age of Mechanical Reproduction" in *Gesammelte Schriften* (GS), 1.2:506-08/*Illuminations,* 241-42, translation modified.—Though Benjamin cites Filippo Tommaso Emilio Marinetti, one wonders if Benjamin had Schmitt in mind here. In Benjamin's writings, approbative references to, or resonances with, Schmitt's work can be found in Benjamin, "Curriculum Vitae (III)" in GS, 6:217-19, esp. 6:219/*Selected Writings* (SW), 2:77-79, esp. 2:78; *Origin of the German Tragic Drama* in GS, esp. 1.1:412 n. 14, 413 nn. 16-17/*Origin,* esp. 239 nn. 14, 16, 17; Nachlass in GS, 2.3:1097, 1372; "Critique of Violence" in GS, 2.1:179-203/SW, 1:236-252; "Theologico-Political Fragment" in GS, 2.1:203-04/*Reflections,* 312-13; GS, Benjamin to Schmitt, December 9, 1930, p. 1.3:887 (reprinted in *Gesammelte Briefe,* 3:558).—After the war, Schmitt was always eager to emphasize the few admiring words Benjamin had written of him. See Schmitt, HoH, 64/62, cf., 7/5, 62-67/59-65; Schmitt and Taubes, *Briefwechsel,* Schmitt to Taubes, November, 29, 1977, p. 37. On numerous occasions, Taubes would echo this. See Taubes, *To Carl Schmitt,* 16-17, 46-47; *Political Theology of Paul,* 7, 97-98; Schmitt and Taubes, *Briefwechsel,* Taubes to Schmitt, December 23, 1977, p. 43, cf., July 1970, pp. 27-28 (draft), November, 17, 1977, p. 34.—For general discussions of the much-hyped Schmitt-Benjamin connection, see Weber, "Taking Exception to Decision"; Bredekamp, "From Walter Benjamin to Carl Schmitt"; Müller, "Myth, Law, and Order"; Kennedy, "Carl Schmitt and the Frankfurt School," 42-45; Agamben, *State of Exception,* 52-64; Derrida, "Force of Law"; Lilla, "Riddle of Walter Benjamin"; Taubes, *Political Theology of Paul,* 70-76, cf., 7, 64; Noack, *Carl Schmitt,* 110-14.

[193] Schmitt, BdP, 33-34/33-34, 34 n. 10/34 n. 14, cf., 37/37; Clausewitz, *Vom Kriege,* 1.1.24, p. 210. Cf., however, Schmitt, GLP, 83-84/71 et passim.

influenced by the intellectual currents of the eighteenth- and nineteenth-century Romantic movement. This aestheticizing movement, he belittled for its fundamentally shiftless character, its unquenchable thirst for novelty in matters of a political nature, and its disdain for all centers of gravity within human life apart from those that happen to spur the aesthetic productivity of the romantic subject.[194]

   The preoccupation of his with death, struggle, and violence should, instead, be understood within the framework of his Nietzschean metaphysics, which are coupled then with what I am calling his neo-/right-Hegelianism, which results in a fixation on the importance of something substantive, like *Sittlichkeit,* standing above civil society and embodied concretely in the state. The more general outlines of the political sociology of this soft-Nietzschean metaphysics were first announced with great force by *the* towering intellectual figure of the twentieth century: Max Weber.[195] It took a Schmitt to complete the vision.

   The values of various peoples are manifold and, as incommensurables, their posture with respect to one another is that of existential and interminable indeterminacy. "The various value spheres of the world," writes Weber, "stand in irreconcilable conflict with each other." In considering, for example, the "value of French and German culture," there is no intelligible way to go about "decid[ing] 'scientifically'" between them. In this circumstance, we are confronted simply by two "different Gods," who "struggle with one another, now and for all time to come." Thus, "the only appropriate metaphysic" is that of "absolute polytheism." When it is "interpreted in its own terms," "life" is an "unceasing struggle of these Gods with one another." These Gods

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[194] See Schmitt "Vorwort" and text in PR, esp. 16/12, 20-21/15-16, 26/19 and 140-41/99, 227-28/161-62. Cf., BdP, 26-28/25-27; "Age of Neutralizations and Depoliticizations" in BdP, 83-85/84-85.
[195] For a helpful background on Weber, with a view also to major trends in early German, twentieth century German philosophy, and to Nietzsche, see Strong, *Politics Without Vision,* 91-145 (ch. 3 and "Interlude"), esp. 103 and n. 32, 137 ff; Strauss, *Natural Right,* 35-80 (ch. 2); Bloom, *Closing,* 194-216.

command mankind to do their bidding in manifold ways, and the contradictions posed by their various commandments cannot be reconciled by means of any neutral, third term. "The ultimately possible attitudes toward life are irreconcilable, and hence their struggle can never be brought to a final conclusion." One must simply "make a decisive choice" between these competing "attitudes toward life."

Of course, it is the case that in our daily lives and in many realms, "value-spheres cross and interpenetrate" unproblematically. We can, indeed, "compromise" on many matters. But the "shallowness of our routinized daily existence" sometimes blinds us to the fact of the "irreconcilably antagonistic values" with which we are, from time to time, confronted. In these decisive moments, Weber suggests, we cannot "avoid the choice between 'God' and the 'Devil,'" which is an "irreconcilable death-struggle." Between God and the devil, "compromise" is not possible. "Conflict" is thus the watchword of the new polytheism.[196]

It is in these moments that Weber's Nietzscheanism rears its head in particularly stark form. At the tail end of his life, Weber is reported to have said to a student that he could not himself have completed the most significant part of his own research without the work that Nietzsche (and Marx) had done before him. The world we inhabit today, he contended, is largely the one on which these two have left their indelible imprint.[197] Here, in this above depiction of the war of Gods and the people who pray to them, Weber gives sociological articulation to the dictum of Nietzsche's Zarathustra, that "every people speaks its tongue of good and evil, which the neighbor does not understand."[198]

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[196] Weber, "Science as a Vocation" in FMW, 147-48, 152; "Meaning of 'Ethical Neutrality'" in MSS, 17-18. For the "religiously … 'unmusical'" Weber, these "gods" are little more than metaphors for projected, Nietzschean horizons. Weber, *Gesamtausgabe,* 2/6:65, Weber to Ferdinand Tönnies, February 19, 1909.

[197] See Weber, *Max Weber: Werk und Person,* 554-55 n. 1.

[198] See Nietzsche, *Zarathustra* in KGW, 6.1:57/*Portable Nietzsche,* 161, cf., 70/170.

Weber had, however, not taken the Nietzschean conceit quite far enough. A certain reticence had prevented him from drawing out in any explicit detail what the politics of a war of the Gods would actually look like. At the end of the day, the form of "struggle" in modern politics that Weber could best imagine was the "party struggle" of the sort which concerned principally only the "patronage of office" and the petty squabble over the mostly material perquisites of political power.[199]

Schmitt inherited Weber's task, and he executed it with great bravado. For Schmitt, the radicalizer of the more sober Weber, this struggle of the new Gods and their adherents is a struggle to the death. Human beings are, on Schmitt's view, capable of an intensity, zeal, and dynamism that Weber simply never not fathomed.

Echoing Weber in his soft-Nietzschean mode, Schmitt suggests that the "political world" is not a "universe," but is instead a "pluriverse." The political landscape of mankind is radically "pluralistic," but in a sense wholly different from the theorists of interest group pluralism, who had not taken their own pluralism quite seriously enough. There exists no "universal" or "world-'state'" that could meaningfully embrace humanity in its entirety and thus neuter the logic of the political. Within the "pluralism of spiritual life," there is no "neutral domain." There is only the war of the competing Gods and the mortal combat of those who pray to them. "Spirit struggles with spirit."[200]

Here Schmitt steps beyond—and must step beyond—what I above called his Machiavellian *Realpolitik.* War is, for Schmitt, essentially and fundamentally *Kulturkampf*—but one with

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[199] Weber, "Politics as a Vocation" in FMW, 87.
[200] Schmitt, BdP, 54/53, translation modified, cf., 45/45. Cf., Schmitt, Staatsethik, 160/204; "Age of Neutralizations and Depoliticizations" in BdP, 94-95/95-96; GLP, 89/76; VL, 158/198, 363/381.

metaphysical undertones and with the ever-present possibility that this war of culture might be enacted upon a real field of battle.[201]

The type of enemy Schmitt is speaking of in *Concept of the Political* is not just any sort of enemy. The enemy in the Schmittian sense is not a debating partner, not someone who has wronged you personally, and not someone with whom you are in economic competition. Instead, the type of enemy with which Schmitt is concerned is the enemy in the "ontological sense" of the word.[202] Thus, in the 1933 revisions to this text, Schmitt began to refer to political distinctions as essentially "*metaphysical* antagonisms."[203] For Schmitt, the friend-enemy distinction is itself something "ontologically strong," and it serves as the "*substance* of the political unity."[204] In identifying the ontological enemy, the political community comes into being and assumes its distinctive shape and character. At least in the most extreme case, these ontological and existential enemies, whom Schmitt describes, come to blows and yearn for the annihilation of the other. Combat, as he understands it, is thus meant "in the sense of the ontological primordiality" of the word. It is the "most extreme realization of enmity"—the "*ontological negation of another being.*"[205]

Schmitt's reflections possess a significance which transcends international relations, the more ordinary sphere of political enmity, for Schmitt is concerned here not only with the external enemy who lies outside of the borders. At least potentially, there are also enemies that lie within our midst. The political entity is charged with the task of "establish[ing] the normal situation." Among other things, this entails, the pursuit of "peace," "'calm, safety, and order'" so as to obtain

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[201] Cf., Schmitt, "Die vollendete Reformation" in L, 159.
[202] Schmitt, BdP, 50/49, translation modified.
[203] Schmitt, BdP3, 19, emphasis added.
[204] Schmitt, BdP, 39/38-39, translation modified and emphasis added. Cf., however, Staatsethik, 159-60/202-03.
[205] Schmitt, BdP, 33/33, cf., 37/36, translation modified and emphasis added. Cf., G, August 11, 1948, p. 190.

that respite from internal enmity and the prospect of war that follows from it. With such an end in view, it might become necessary to single out those domestic or "'internal enem[ies]'" whose presence threaten to push the state to the precipice of "civil war."[206] Simply put: one has not understood Schmitt's thought world, if one has overlooked the *internal* enemy.

There are friends and there are enemies. That is the political. There is not much more to say about it. In the words of a late, Parisian intellectual, Schmitt's concept of the political is an attempt "to 'frame' the topic of a concept unable to constitute itself on philosophical ground."[207] The only interesting question that remains is *why* did Schmitt say this?

What distinguishes an enemy from a friend? On Schmitt's account, it is not some capricious decision that political leaders make; nor does it follow from wounded honor, ambition, imperialistic or colonizing aspirations, or a battle over scarce resources; nor is it determined simply on the basis of the territorial boundaries of sovereign nations; nor is it merely something racial or ethnic; nor is it a command handed down to a particular nation by its own particular, providential God. Friends and enemies, in Schmitt's thought world, divide themselves on the basis of their answer to the following question: What constitutes a meaningful life? For Schmitt, this is still a political question—for all things are potentially political which can achieve the level of intensity which proves necessary to group human beings in a decisive and lasting manner.

Enemies are enemies, because they maintain mutually antagonistic visions concerning ways of living and being in the world. The central conflict between friends and enemies is that between divergent conceptions of the good life. Thus, the mortal combat in which enemies engage in Schmitt's political world revolves around each respective party's "type of existence" and

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[206] Schmitt, BdP, 46-47/46-47, cf., 38/37.
[207] Derrida, *Politics of Friendship,* 146.

"ontological way of life." Precisely for this reason, the Schmittian enemy is defined as "existentially something different and alien."[208]

The belief that another's way of life radically calls into question one's own is the ultimate source of political enmity. The mutually incommensurable "conviction[s]" shared by both sides that they possess the "good," the "true," and the "just" bring about the "worst enmities." This is, in Schmitt's estimation, one of the basic insights around which Hobbes' political thought revolved, and which he inherits from him.[209] Further, as Schmitt notes, in agreement with Trotsky, it is only from deep conviction that one has the "courage to make use of force and to spill blood."[210] It is only when confronted by someone or by a group of someones whose shared way of life calls into question everything about our own that we begin to truly understand who it is that we are. This is the meaning of Schmitt's repeated invocation of that difficult-to-translate and ever-enigmatic line from his poet friend, Theodor Däubler: "*Der Feind ist unsre eigne Frage als Gestalt.*"[211] The enemy is the concrete shape of our own question.

At the end of the day, politics, for Schmitt, is fundamentally about seriousness and about human meaning. A world in which nothing remained, which was truly worth dying and killing for, would effectively be a world wholly bereft of meaning. A world such as this would be altogether flat. There would be many diversions, things of interest, and ways to pass the time, but surely, at least, this would be a world without intensity and without seriousness—a world only of games. Clocks would still rhythmically tick, marking off the minutes and hours passed, but history in a meaningfully human sense would have ceased and therewith the deeds which are its

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[208] Schmitt, BdP, 27/27, translation modified.
[209] Schmitt, BdP, 65/65. Cf., L, 69/45; VL, 30/83; "Hinweise" in BdP, 122.
[210] See Schmitt, GLP, 77/64, translation modified.
[211] See Schmitt, ECS, April 1947, pp. 89-90; G, December 25, 1948, p. 213, February 13, 1949, p. 217, May 23, 1949, p. 243; TdP, 87/85; Cf., "A Pan-European Interpretation of Donoso Cortés" in DC,112/114.

substance. In the words of the nineteenth-century critic who first gave this horror a name, only a "pitiable contentment" would remain.[212]

This was Leo Strauss' insight about Schmitt. What Strauss saw in Schmitt's writings was a defense of the idea of human, collective life as the most *serious* and meaningful matter pertaining to human being as such. Many years later Schmitt called Strauss an "attentive reader" and confirmed this core claim of his interpretation.[213] In Strauss' 1932 review, he had drawn attention to an otherwise unremarkable passage in Schmitt's *Concept of the Political,* where Schmitt had written that if "the distinction of friend and enemy [and] even [its] mere eventuality ceases, there would be only … amusement … but neither politics nor [a] state." Strauss glossed this passage, with the remark that "politics and the state are the only *guarantee* against the world's becoming a world of entertainment; therefore, what the opponents of the political want is ultimately

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[212] Nietzsche, *Zarathustra* in KGW, 6/1:9/*Portable Nietzsche,* Prologue, § 3, p. 125, translation modified.

[213] Schmitt, "Hinweise" in BdP, 118. Elsewhere, Schmitt's praise for this essay was high. In 1932, Schmitt wrote to his publisher at Duncker & Humblot, Ludwig Feuchtwanger: "In the mean time, some one hundred discussions of 'Concept of the Political' have appeared, out of which I have learned little. Of interest is only that of Dr. Leo Strauss ... who has written a very good essay on it; very critical of course." Schmitt and Feuchtwanger, *Briefwechsel,* Schmitt to Feuchtwanger, June 10, 1932, p. 377, cf., Feuchtwanger to Strauss, April 15, 1935, p. 378 n. 5. The former student of, and assistant to, Schmitt, Günther Krauss, recounted that Schmitt had said to him that Strauss' review essay had seen "through [him] and X-rayed [him] as nobody else ha[d]." Reprinted in Meier, *Carl Schmitt,* xvii, cf., 8-9 and n. 7; *Lesson,* 69-70 n. 5.—Contrary to the impression given by Meier's otherwise quite impressive work on Schmitt, Strauss emphatically did not think that Schmitt was a "political theologian" nor did they engage in a "hidden dialogue" with one another, which first found reflection in Schmitt's changes to the 1933 edition of *Concept of the Political,* in response to Strauss' critique. Strauss knew, from Löwith, of the changes Schmitt made to his 1933 edition of *Concept of the Political.* Strauss, *Gesammelte Schriften,* Löwith to Strauss, December 6, 1933, p. 641. Nevertheless, in a 1934 letter to Jacob Klein, he asserted only that his criticism of Schmitt had prodded Schmitt to develop what Schmitt called "order thinking" in his *Three Types of Juristic Thought* (1935). Strauss, *Gesammelte Schriften,* Strauss to Jacob Klein, October, 10, 1934, p. 3:524, cf., Klein to Strauss, October 13, 1934, p. 3:525. In 1935, Löwith, under pseudonym, published his critique of Schmitt, interpreting all of Schmitt's NSDAP-era writings as an opportunistic attempt to accommodate himself to a then-developing NSDAP legal tradition. Löwith, "Occasional Decisionism of Carl Schmitt" in *Martin Heidegger,* 158, 281 n. 81. In a letter of 1964, Strauss praised Löwith's essay. Strauss, *Gesammelte Schriften,* Strauss to Löwith, July 11, 1964, p. 3:692. The idea of a post-war "'dialogue'" or "silent confrontation" between Schmitt and Strauss is a creation of Schmitt's own making. Schmitt and Taubes, *Briefwechsel,* Schmitt to Taubes, November 29, 1977, p. 37, March 13, 1978, p. 53-54, cf., November 26/27, 1977, p. 40 (draft). We may plausibly infer that Schmitt made similar statements to other recipients of his correspondence. Schmitt's literary estate contains copies of 17 letters and four postcards from Meier to Schmitt (dated 1976-1984) and two letters from Schmitt to Meier (dated 1976-1977). See van Laak und Villinger, ed., *Nachlass,* 108, 202. See also Meier, *Carl Schmitt,* 130; *Lesson,* 119 n. 153, cf., 69-70 n. 5; "Nachwort zur dritten Auflage" in *Carl Schmitt, Leo Strauss, und 'der Begriff des Politischen,'* 196.

tantamount to … a world of amusement, a world without *seriousness* ... which is only possible if man has forgotten what genuinely matters…. [Schmitt] affirms the political because he sees in the threatened status of the political a threat to the seriousness of human life."[214] Some three decades later, Schmitt expressly confirmed the core of Strauss' interpretation in the terse language of his "References" section of the 1963 re-issue of *Concept of the Political:* "In his review from 1932 … Leo Strauss la[id] his finger upon the word *amusement.* Correctly. The word is inadequate here and corresponds to the then inchoate status of reflection. Today, I would say *play,* in order, with more concision, to express the contrary concept [of] *seriousness* (which Leo Strauss correctly recognized)."[215] As Schmitt explains in his monograph on Shakespearean tragedy, play is what "little children and frisky cats" do. Play and seriousness, the comic and the tragic, are in unending tension with another, for "in play lies the fundamental negation of the serious situation [*Ernstfall*]."[216] In contrast to play, genuine tragedy "is based upon … the living experience of a shared, historical reality." This incontrovertible reality is something given and never something produced by man's playful act of autonomous creation. It is ultimately tragic action so understood that imparts to human life its "special and unusual quality."[217]

Only when one is fully cognizant of this background to Schmitt's concept of the political does it even become possible to understand how so deeply reactionary and counter-revolutionary a thinker as Carl Schmitt could, in the early 1960's, grow so excited by the idea of godless Marxian guerrillas marching through the hills, the mountains, the jungles, and the rice paddy fields, writing so rapturously of the likes of Mao Tse-Tung, Fidel Castro, Ernesto Che Guevara, and Ho

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[214] See Strauss, "Notes on Carl Schmitt," ¶ 27, pp. 115-17; Schmitt, BdP, 54/53, translation modified.
[215] Schmitt, "Hinweise" in BdP, 120, cf., 117.
[216] Schmitt, HoH, 41-42/40, translation modified.
[217] Schmitt, HoH, 47/45, translation modified.

Chi Minh. The partisan, the guerilla—whom today we call the "terrorist"—was for Schmitt so much more than simply an especially mobile "*irregular* fighter," autochthonously tied to a specific locale, which he defended. He was above all characterized by his "especially strong … ties" of loyalty and by his "intensive political engagement," all of which gave the partisan, in Schmitt's eyes, his "intensively *political* character."[218] In his treatment of the partisan, Schmitt sought conscientiously to go beyond a merely "military-technical … classification," and thus to "keep the development of *the concept of the political* in view."[219] In Schmitt's world, the partisan is "one of the last sentinels of the earth … of a not yet completely destroyed world-historical element," who holds out against the threatening "crucible of industrial-technical progress."[220] The partisan stands firm to that thing which imparts meaning to his life, even upon threat of almost assured death. In that consists not just his courage, but also his intensely *political* character.

Schmitt's many tirades against universal abstractions, and thus against human rights as such, stem neither from his desire to aestheticize violence nor even from a more basic inhumanity. Instead, they stem from an overriding fear of what Hegel and his generation had called the "shapelessness of cosmopolitanism."[221] Politics, in the distinctively Schmittian sense of that word, provides human life with form and shape. To become acquainted with the concept of the political is to restore a sense for a dimension of human life, lost on those living in an age of neutralizations and depoliticizations.

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[218] Schmitt, TdP, 21/14-15, translation modified and emphasis added, cf., 15/8, 26/20, 28/22, 49/45, 92/90.
[219] Schmitt, TdP, 51/47, 53/49, emphasis added.
[220] Schmitt, TdP, 73-74/71, translation modified, cf., 79-81/76-79.
[221] Hegel, "On the Scientific Way of Treating Natural Law" in Werke, 2:529/PW, 179.

## 11.9 Empty, Insubstantial Neutralism Enveloped by the Darkness of Battle

Not a single one of his readers could possibly fail to notice the darkness of Schmitt's thought. This is, however, emphatically not the same thing as to say that it is untrue. Thus, the more pressing question is whether he succeeds in accomplishing what he set out to show; or, rather—as I will argue—did the argument he developed over the course of the Weimar period eventually and inevitably undercut itself? In the Weimar writings, Schmitt had raged against the formalistic neutralism of the liberal outlook, and with great effect. But, as we shall see in these concluding remarks, his own thought betrays a similar sort of neutralism, from which at least his Weimar era writings never truly escaped, and moreover, from which he could never truly escape, without renouncing many central features of these important Weimar era works.

One of Schmitt's principal tasks in the Weimar writings had been to go beyond Weber's conception of legitimacy. In Schmitt's view, Weber's great insight had been to give legitimacy a central place in his sociological analysis. Yet, at the end of the day, for Weber, legitimacy as such is qualitatively indistinguishable from the phrase "*considered to be* legitimate."[222] This is, of course, the very height of a classically Weberian value neutrality—the very sort of neutrality which made Schmitt's blood boil.

Schmitt's antagonism to this way of thinking is clear enough. To be political in Schmitt's sense of the word is, by definition, to be non-neutral. What remains less clear is that Schmitt's Weimar writings ever really got beyond this impasse. Strikingly, Schmitt's own account of constitutional legitimacy bears uncanny resemblance to Weberian formulations. "A constitution is legitimate," writes Schmitt, "if the power and authority of the constitutive power, upon whose

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[222] Weber, "Politics as a Vocation" in FMW, 78, emphasis added.

decision [the constitution] rests, *is recognized*." Schmitt's entirely self-conscious qualification that he means to address here "not only … [a] factual condition, but also [a] legal order" in no way changes the basically Weberian contours of Schmitt's formulation.[223] Importantly, this resemblance is no idiosyncrasy of some select passage, or a peculiarity of *Constitutional Theory* as a work. The spirit against which Schmitt raged appears, however paradoxically, to pervade his entire Weimar era oeuvre, lurking at just one remove.

As I have shown, all roads end with Schmitt's concept of the political. However, Schmitt's concept of the political ultimately proves to be rather hollow, and it shares liberalism's substantive neutralism. According to the basic conceptual schema with which Schmitt presents us, the concept of the political is, at least at its most feverish pitch, synonymous with battle and struggle. Though they are not the same thing, to affirm the political is, at least in the most extreme case, to affirm battle and struggle as such. But what Schmitt has not, will not, and cannot specify is that-on-behalf-of-which one ought to struggle in the extreme and decisive case when mortal combat actually arises. Ultimately, Schmitt's concept of the political is simply a recapitulation of a liberal neutralist logic. Fundamentally, on Schmitt's account, the level of intensity of a group's convictions is sufficient to establish a distinctively political unity, and yet, this understanding of the political is itself substantively neutral. The twentieth-century Mujahideen are no less and no more capable of the political in its fullest sense than is the rural yeomanry of eighteenth-century Virginia.

One of his central Weimar era claims had been that the liberal constitution ineluctably required a "political" component over and above its catalog of basic rights, and yet according to the logic of the political, any collectivity of human beings who can say, with regard to their catalog of

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[223] Schmitt, VL, 87/136, translation modified and emphasis added.

basic rights, "give me liberty or give me death," becomes thereby political. Even further, according to Schmitt's criterion of the political, the collectivity of human beings who can say "give me convenience or give me death" and sincerely mean it are no more and no less political than are the members of the Paris Commune of 1871. They all meet Schmitt's criterion of the political, at least prospectively. Schmitt's polemic has, in fact, not moved beyond that which it criticizes. This, then, is the precise sense in which he ultimately remains trapped "within the horizon of liberalism"—to borrow an apt phrase from one of his most insightful, early critics.[224] The concept of the political thus does not end up accomplishing what Schmitt would have it accomplish.

In the radical pluriverse Schmitt offers us, enmity comes to the fore as the central, political category in politics. Schmitt has next to nothing to say about friendship or solidarity, apart from, as Lilla puts it, the "impression" he gives "that friendship arises *only* from shared animosities."[225] What was for Lilla and for others only an impression is actually an established fact. Schmitt was familiar enough with the term "political friendship," but in his singular usage of the term in his major works, it refers precisely to the phenomenon of shared enmity, of the sort that, for example, the Soviet Union, an "*interested third party,*" shared with North Vietnam in the 1960's in their mutual struggle against the international bourgeoisie.[226]

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[224] See Strauss, "Notes on Carl Schmitt," ¶ 35, p. 122, cf., ¶¶ 30-32, pp. 119-20. Cf., Marcuse, "Struggle Against Liberalism in the Totalitarian View of the State" in *Negations,* 30-31, 34-35; Löwith, "Occasional Decisionism of Carl Schmitt" in *Martin Heidegger,* 142, 144, 146, 150-51 et passim.
[225] Lilla, "Carl Schmitt" in *Reckless Mind,* 56, emphasis added. See also Marcuse, "Struggle Against Liberalism in the Totalitarian View of the State" in *Negations,* 273 n. 51; Meier, *Lesson,* 50-52. *Pace* Mouffe, *Democratic Paradox,* 49-50.
[226] Schmitt, TdP, 93/91. Schmitt's example is more obscure than the one I've chosen here: that of the Spaniard, Juan Martín Díez, and the British Empire, in their mutual struggle against Napoleonic France.

It is not for nothing that Schmitt muses in his notebooks that "one classifies oneself through one's enemy," or that he asserts: "Name your enemy, and I will tell you who you are."[227] At one point, in 1957, Schmitt goes so far as to write, "I think, therefore I have enemies; I have enemies, therefore I am"—self-consciously evoking Descartes' metaphysical foundation of *cogito ergo sum.*[228] Our sense of self derives fundamentally from the other. Thus, Schmitt would contend that "one lives always in the gaze of a more radical brother."[229] So long as human beings wish to know themselves, Schmittian enmity will not be banished from the world. The original tragi-drama of the two brothers, Cain and Abel, will play itself out for all eternity.[230]

Why does Schmitt have so little to say about friendship and solidarity? It is precisely because he ultimately leaves standing precious little of substance, upon which such conceptions might be predicated. At the end of the day, what Schmitt leaves standing is *authority*—naked, shivering, political existential, extra-moral, secularized fideistic, decisionistic authority.[231] *Auctoritas; non veritas.* In 1923, Schmitt's paean to Sorelian "myth" as a new and extra-rational "foundation of … authority" represented the drapes in which this naked, shivering authority might dress itself.[232] However, by 1927/1932, Schmitt's mythological drapes grew tattered, as he invited the audience to peer behind them and to gaze dumbfoundedly at the ontologic, existential struggle, which they hid from view.

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[227] Schmitt, ECS, April 1947, p. 90; G, May 23, 1949, p. 243, cf., December 12, 1948, p. 213, February 13, 1949, p. 217.
[228] Schmitt, "Die andere Hegel-Linie," 2.
[229] Schmitt, "Age of Neutralizations and Depoliticizations" in BdP, 80/81, translation modified.
[230] See Gen. 3.15; Schmitt, BdP, 67/68; ECS, April 1947, p. 89; G, January 17, 1949, p. 215, February 13, 1949, p. 217.
[231] Cf., Löwith, "Occasional Decisionism of Carl Schmitt" in *Martin Heidegger,* 142; Wolin, "Carl Schmitt, Political Existentialism"; "Carl Schmitt: The Conservative."
[232] See Schmitt, GLP, 89/76. Cf., L, 123-24/81-82.

## 12. Conclusion

Both within and across nations, the twin, interrelated forces of pluralism and polarization are so apparent today that few political observers can meaningfully ignore them. For some time now, the idea of pluralism, variously conceived, has proven to have been the great planetary mass around which much of contemporary political theory has orbited.

Rival contemporary theories of politics can usually be defined in great part by their conception of, and relationship to, this fact of pluralism. The regnant theories have responded in a variety of ways. Here and in barest summary form, I will mention but three of the most important—those surveyed in the preceding pages. The first, typified by John Rawls' political liberalism, attempts to take a step back from the fray, purporting to be freestandingly postmetaphysical and thus, in a certain sense, non-parochial in aim and possibly even justification. It seeks to adjudicate conflict largely by means of moral precepts or procedures derived from the shared faculty of human reason. The second, typified by Michel Foucault and William Connolly, supports a conception of democracy that is rhizomatic in character. Because it has no unified center of gravity, it claims to have decided no controversy in advance, instead, offering up safe space for the free play of difference. The third, typified by Carl Schmitt, conceptualizes plurality just as deeply as does the second school. In contrast to this school, however, he rejects both the institutional possibility and conceptual intelligibility of a politics that eschews reference to an authoritative center of gravity, contending that the way in which deep conflict is and must be resolved in liminal situations itself demonstrates the indispensability of recourse to such ideas. For this reason, the pluriverse he imagines is a pluriverse not of individual persons but of peoples. Thus, he ties democracy to the notion of homogeneity, demanding that citizens subscribe to a shared constitutional ethic whose

substantive, "political" content derives its legitimacy from a (very often fictive) originary act of constitution-giving, constitutive power.

In the face of very real concrete sociological forces that palpably threaten to drive us apart, the tasks of determining how much we have *in common* with one another, how to conceptualize this shared thing, and to what extent the answers to these questions even matter—have become concerns of no small urgency. They are especially urgent given that the conceptual intelligibility of much liberal democratic theory is either explicitly or implicitly premised upon the idea of shared *Ur*-norms. Critical theory, history, and a quick glance around the world all suffice, however, to thoroughly disabuse anyone of the idea that these norms enjoy self-evidentiary purchase. Both domestically and internationally, we have lately begun to see evidence here and there that the social fabric has started to fray. Only at great peril can we ignore these portentous signs; and, in addition, we must insist that our theories of politics be able to make sense of them.

On the domestic front, democratic cooperation has become more difficult. By now, political brinksmanship has become a permanent fixture in the arsenal of parliamentarians. Finger-wagging may satisfy some; but it does precious little to explain how or why this pyrrhic strategy has come to seem sensible to increasingly many powerful political actors. Across truly irreconcilable differences, a temporary truce may well be possible, but meaningful and sincere compromise only rarely; and consensus, impossible.

Similarly disquieting developments can also be discerned abroad. In the triumphalism of the post-World War II era and then again in the 1990's, it may have seemed as though liberal institutions and practices would, in due time, blossom around the globe. Planted in any garden, peaceable, tolerant, egalitarian sprouts would eventually emerge from the soil. This, after all, had

been the story of the North Atlantic world over the past several centuries. This was the clear direction of progress.

The popular uprisings that swept the Near East and North Africa but a few years ago whetted our appetites for the vicarious experience of revolutionary fervor. But for a moment, possible vindication of that narrative glimmered. There was great hope that liberal democratic institutions and practices, as though dropped from the sky, would finally break the hold the strongman mode of governance had had on the region. Momentarily forgotten were the hard-won lessons the coalition of the willing had already learned in Iraq (and Afghanistan). With a couple slight tilts of the earth, that jubilant Spring became an arid Winter.

To the great surprise of almost everyone, a bloody, internecine insurgency has erupted in that land and—even more surprisingly—drawn a veritable flood of supporters from Europe. Today, droves of young men (and even some women) voluntarily quit their (sometimes comfortable bourgeois) homes for adventure, respect, belonging and a deeper sense of meaning or purpose— in a newly established caliphate. The more we profile these young men and women, the more we discover that the comforting and all too convenient snap diagnoses of mental illness, poverty, and bloodlust fail to capture the entire story. Similarly and partly in response, far-right, populist politics in Europe and the United States have once again appeared, fueled by resentment towards immigrants and political elites, who—so the narrative goes—just don't "get it."

Moreover, twenty-five years after the end of the Cold War, we teeter dangerously close to the possible renewal of that conflict with a nation whose character and inner motivation we still very little *understand.* Precisely where *we* see almost incomprehensible machismo, pathetically puerile nostalgia, and irredentist jingoism, *they* see the geo-political expression of the last bulwark against European decadence.

Few celebrate these happenings, but this is the dark side of contemporary pluralism and polarization. Difference takes many forms—both within and across nations. To be sure, domestic and global collapse is not yet a real possibility, but these and other similarly unsettling events are not to be ignored. Our theories of politics can appropriately be judged by the extent to which they are able to make sense of them. Understanding the nature of a problem is always the first step towards its resolution.

We must take pluralism and polarization seriously, but regnant theories ill equip us to understand what precisely can and often does go wrong in global and domestic politics. The first theory would seem to suggest that those who disagree just need to talk to one another more often or more deeply. Parochialism is the single greatest obstacle to tolerant fairness; and should that last remnant of a now superseded era fall away, few serious obstacles would yet remain in the way of consensual political order. For those who will not enter the conversation on the terms prescribed, the steely barb of "unreasonableness" stands ready in the quiver. Justifiably skeptical of this first response, the second asks that we come together in a similar sort of discussion, but this time with fewer preconceptions, and—when conversation stalls—that we lubricate the discursive path with sincere outpourings of deep respect. Apparently, they do not pause to ask how or why someone, from the first person perspective, might not experience this general posture and civic virtue of deep respect as obvious and self-evident gains, but possibly as prospective threats to their cherished way of life. And the third appears, at base, to offer only the wholly unedifying observation that divisive conflict dissolves just as soon we are able to identify that group that can meaningfully say, in unison, "give me *x* or give me death." Each explanation on its own fails to satisfy, but taken together they do form a more compelling, composite picture.

In this study, I have critically surveyed three especially significant schools of thought, which I called the political liberal project, the discourse of difference, and the reactionary politics of meaning. Drawn from the liberal democratic center and the non-liberal left and right, these three are united by their consistently *pluralistic* core and their sensitivity to the idea of a *background* to politics. Naturally, each school conceives the relevant terms in its own distinctive way, but these relevant terms remain crucial across the three schools. These three schools represent the fundamental alternatives for conceptualizing the background to politics in an age of pluralism and polarization. Their being almost unparalleled in sophistication and breadth explains, at least in part, the prominence and influence they have had within and upon the discipline.

Though no single one of these schools ultimately stands well on its own, if we consider the virtues and vices of each, we can construct a more compelling, composite picture. From the political liberal project, we come to appreciate the importance of a moral background to a democratic politics that wishes to be fair, tolerant, and just with stable continuity across generations, in the face of unpredictable demographic and sociological shifts. Also of significance is what I have called its romantic moment, i.e., its self-conscious association with a determinate tradition of moral enquiry. But its liberal principle of legitimacy and its aspiration for worldview neutrality are in strong tension with this school's principal virtues. From the discourse of difference, we gain a healthy skepticism for all innocuous sounding universalist or neutralist claims. This school is especially sensitive in this regard owing to its deep appreciation for the constitutive force of background culture ("power"). But should we take all of its epistemic and critical claims seriously, we would quickly discover that we have nothing to say about what is worth preserving. Though both are appreciably significant steps beyond a distinctively Foucauldian problematic, the school's purportedly minimalistic conception of democratic culture

("agonism") and its idea of weak ontotheology ultimately do not suffice to mitigate this defect. From Schmitt, we learn of the democratic importance of threshold level, underlying agreement (the idea of the nation, homogeneity, etc.), which he presents as being embodied in the underlying substance of a constitution—itself conceived to be the result of the constitutive power of a (politically) united people. An idea much like this one is undoubtedly present in Rawlsian political liberalism, but Schmitt foregrounds it a good deal more forcefully and thematically. Still, Schmitt's congenital distaste for liberalism and moralizing abstractions as well as his ungrounded contention that all liberal constitutional ideas are purely formal and in need of more substantive "political" supplement—prove impossibly distracting for those of us who wish to live in the present day world.

A distinctive picture of political order emerges from out of the turbulent confluence of these three schools. Ultimately, this study argues that political order is always importantly premised upon a *Leitkultur,* or guiding cultural horizon. Stated as succinctly as possible, what this means is that political order always relies upon the social availability of some sort of loosely shared, implicitly understood cultural formation, which is mis-described as being either the work of purely self-reflective reason or as being made up of substantive premises to which all "reasonacfble" persons might be expected to assent. It is, for this reason, neither universal nor neutral in character. Though the idea loosely tracks the constitutive force that the (neo-)Foucauldian school attributes to "power," it is nonetheless inappropriate to characterize this guiding cultural background as a subtle vehicle for *pernicious* normalization—i.e., something towards which we must always have a critical posture. The view defended by the dissertation is simply a corollary of an understanding of human cognition/practical reason as being always already situated and shaped. In this sense, cognition has a necessarily pre-judgmental structure.

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As mentioned in the Introduction, this view of the nature of human cognition is best expressed by prominent post-Heideggerian thinkers such as H.-G. Gadamer, Charles Taylor, and Alasdair MacIntyre; and further support can also be found in some of the recent research in social psychology.

Though certain strands of twentieth-century philosophical liberalism may be in strong tension with this view, it is not the case—I believe—that this conception is incompatible with all forms of liberalism. On the contrary, a comparatively more self-aware liberalism is one that acknowledges something like this idea.

Although the precise shape and composition of this guiding cultural horizon are rarely fully manifest to those standing within it, it is, nevertheless, possible to speak meaningfully of some of its distinctive features. In the foregoing, I have drawn attention to just one centrally important element of the guiding cultural horizon upon which both the political liberal project and discourse of difference draw: the discourse of dignity. A fully adequate historical discussion would surely require greater length and nuance. Still, the sketch I have provided should suffice for present purposes. This view of a human being—conceived, in the abstract, as a bearer of dignity and as something like an end in himself—is crucial for any of the myriad conceptions of basic equality, respect, or fair treatment that do crucially important normative work in both the politically liberal and neo-Foucauldian conceptions of democratic political order. Importantly, as I have argued, when viewed from the lens of naturalism—in the sense I gave this term in § 3.1—we find little support for a notion like this one. *If,* as I contend, this naturalistic view is just as much a part of our intellectual heritage as liberal democratic *Ur*-norms; *if* it represents the increasingly dominant mode of understanding within our culture; and *if* it has a greater, or at least an equal, claim to worldview neutrality as compared with any other view—*then* naturalism's apparent failure to

provide support for a notion like this one cannot be a finding of little significance. This is especially so given that central concepts of the political liberal project, Habermasian democratic theory, and the discourse of difference don't even get off the ground without a notion like this one. Equal moral personhood, discourse ethics, and deep respect fail to motivate and capture the attention of any human group without having explicit or implicit recourse to a similar sort of idea.

This discourse of dignity is an integral element of the guiding cultural horizon, in the sense I have given to this latter idea. This conception of man as a bearer of this attribute called dignity is just one constitutive element among (presumably) many such elements, which cannot be adequately treated here. Without a shared, guiding cultural horizon like this one, we would not only very likely find ourselves in a bad way, but also render unintelligible our most promising theories of politics.

A number of further concretely political and theoretical conclusions are implied by, or follow from, the foregoing analysis.

First, in the realm of *concrete politics,* two conclusions, in particular, are at least *implied* by this study: First, the idea of political centrism deserves to be recognized as an indispensable virtue and civic orientation for democratic self-governance. Those who dismiss it as bending to unreason or as cowardly prostration before power may be able to write rhapsodically about worlds that might be, but their doing so ultimately betrays an especially acute lack of imagination for how the world might look without it. Admittedly without much luster of its own, centrism is a virtue whose importance is felt by all only when it is absent.

Secondly, we should seriously question the wisdom of foreign nation-building; not on the basis of a principled anti-paternalism or post-colonial sentiment, but rather out of the recognition that our well-intentioned efforts will almost always come to naught if the citizenry's civic

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consciousness does not bear a coherent, internal relationship to the inner logic of the institutions and practices of liberal democratic self-governance. If these innovations will come, they will more likely come from within than from without.

Finally, one particularly important *theoretical* corollary follows from the foregoing analysis—one which bears upon the contemporary character of the discipline of political theory. Though it has taken a number of forms, a persistent criticism has been directed at the main stream of political philosophy for several decades now. Academic, liberal theory is said to be too "Kantian" in orientation. Critics variously charge that this genealogy causes academic political thought to be universalistic-cosmopolitan in aspiration and thus to ignore human difference (post-structuralism/-modernism); its heritage necessarily yields an unencumbered, punctual philosophical anthropology insensitive to the human hunger for larger meaning and need for cooperative projects (communitarianism); and its Kantian penchant for conceptualizing politics as applied ethics renders its proposals overly sanguine, because tone deaf to the dynamics of actual politics (realism).[1] Yet, upon closer examination—as I believe the analysis in Part I shows—the common core of this charge seems off base, missing the swirling, sometimes turbid undercurrents.

Though I certainly cannot pretend to fully substantiate this claim here, I surmise that the real story of the development of main currents in late twentieth-century liberal theory is actually a tale of a departure from this Enlightenment promise of cosmopolitan reconciliation through shared, universal human reason. Under the surface, all of this has been effectively superseded by

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[1] E.g., Rorty, "Postmodernist Bourgeois Liberalism," 583 ff. (his view later shifted); Honig, PTDP, 126 ff.; Mouffe, *Democratic Paradox,* 34, 129 et passim; Connolly, WNS, 32 ff. (post-structuralism/-modernism); Sandel, *Liberalism and the Limits of Justice,* 1 et passim; *Democracy's Discontent,* 8 ff. (communitarianism); Geuss, *Philosophy and Real Politics,* 1, 7 ff. et passim; Williams, *In the Beginning,* 2 ff., 9 ff., 29 ff. (realism).

Romantic, folkish meditations on we-consciousness or culture as the underlying basis of a just political order. Accent, emphasis, and preferred idiom may differ, but an idea like this one has become increasingly apparent as the underlying basis of liberal theory—at least of those varieties that take seriously the idea of pluralism. For this reason, I intend, in future work, to revisit the eighteenth- and nineteenth-century intellectual debates (e.g., Kant-Herder), which, I will argue, actually prefigure our own today. Retracing the contours of these debates is much more than a task of mere intellectual historiography. More significantly, it will enable liberal theories of legitimacy to better defend themselves from hostile critics.

That the external and internal dangers that threaten the liberal democratic order are real seems, to me, incontestable. I hope in this study to have pointed out the ways in which political theory over the last half century has been unable to deal with these dangers, because it has been blind to its own cultural, moral presuppositions. This is not, of course, a solution to the problems liberalism faces as it tentatively steps into the twenty-first century, but perhaps it can serve as a beginning. *Ab integro nascetur novus ordo.*

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## Biography

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