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Political Liberalism: Reply to Habermas

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## REPLY TO HABERMAS\*

First, I want to thank Jürgen Habermas for his generous discussion and acute comments on my work, and for his setting the stage for me to reply to the instructive criticisms he raises. Doing this offers me an ideal context in which to explain the meaning of *political liberalism* and to contrast it with Habermas's own powerful philosophical doctrine. I must thank him also for forcing me to rethink things I have said. In doing this I have come to realize that my formulations have often been not only unclear and misleading, but also inaccurate to my own thoughts and inconsistent. I have benefited greatly by trying to face up to his objections and to express my view so that its main claims are made perspicuous and more exact.

My reply to Habermas begins in part I by reviewing two main differences between his views and mine which in good part are the result of our diverse aims and motivations. With this done, I try to reply to his more central criticisms, though for reasons of space I focus largely on what I believe are the most important criticisms in parts II and III of his paper. We agree on many philosophical points, though there are basic differences I try to make clear, especially in parts I and II below. Throughout, I take for granted some acquaintance with his writings, and so much of my discussion consists of reminders of what he says.

## I. TWO MAIN DIFFERENCES

Of the two main differences between Habermas's position and mine, the first is that his is comprehensive while mine is an account of the political and it is limited to that. The first difference is the more fundamental as it sets the stage for and frames the second. This concerns the differences between our *devices of representation*, as I call them: his is the ideal discourse situation as part of his theory of communicative action and mine is the original position. These have dif-

\* I am much indebted to many people who have helped me with this reply since I started thinking about it several years ago at the suggestion of Sidney Morgenbesser. Thomas McCarthy has given me indispensable guidance and shared with me his deep knowledge of Habermas's views from early on; and several discussions with Gerald Doppelt were highly instructive at the start. In later conversations, Kenneth Baynes was always generous with his advice and council. I am also much indebted to Samuel Freeman and Wilfried Hinsch, and to Erin Kelly and David Peritz for their valuable assistance and comments throughout. I owe special thanks to Burton Dreben who has been a wonderful critic at every turn, and especially in part II, in which I hope I have finally got right the three ideas of justification. The reply is far better as a result of their unflinching interest and suggestions. To others I indicate my indebtedness as we proceed.

ferent aims and roles, as well as distinctive features serving different purposes.

(1) I think of political liberalism<sup>1</sup> as a doctrine that falls under the category of the political. It works entirely within that domain and does not rely on anything outside it. The more familiar view of political philosophy is that its concepts, principles and ideals, and other elements are presented as consequences of comprehensive doctrines, religious, metaphysical, and moral. By contrast, political philosophy, as understood in political liberalism, consists largely of different political conceptions of right and justice viewed as *freestanding*. So while political liberalism is of course liberal, some political conceptions of right and justice belonging to political philosophy in this sense may be conservative or radical; conceptions of the divine right of kings, or even of dictatorship, may also belong to it. Although in the last two cases the corresponding regimes would lack the historical, religious, and philosophical justifications with which we are acquainted, they could have freestanding conceptions of political right and justice, however implausible,<sup>2</sup> and so fall within political philosophy.

Thus, of the various freestanding political conceptions of justice within political philosophy, some are liberal and some are not. I think of justice as fairness as working out a liberal political conception of justice for a democratic regime, and one that might be endorsed, so it is hoped, by all reasonable comprehensive doctrines

<sup>1</sup> I do not know of any liberal writers of an earlier generation who have clearly put forward the doctrine of political liberalism. Yet it is not a novel doctrine. Two contemporaries who share with me this general view, if not all its parts, and who developed it entirely independently, are Charles Larmore—see for example his “Political Liberalism,” *Political Theory*, xviii, 3 (August 1990); and the late Judith Shklar—see her “The Liberalism of Fear,” in Nancy Rosenblum, ed., *Liberalism and the Moral Life* (Cambridge: Harvard, 1989). At least two aspects of it are also found in Bruce Ackerman’s *Social Justice in the Liberal State* (New Haven: Yale, 1980). On pp. 357–61, Ackerman states the relative autonomy of political discussion governed by his principle of neutrality and then considers various ways of arriving at this idea of political discourse. To be mentioned here also is the related view of Joshua Cohen in his account of deliberative democracy; see his “Deliberation and Democratic Legitimacy,” in Alan Hamlin and Philip Pettit, eds., *The Good Polity* (Cambridge: Blackwell, 1989), and his “Notes on Deliberative Democracy” (unpublished, 1989). It is a great puzzle to me why political liberalism was not worked out much earlier: it seems such a natural way to present the idea of liberalism, given the fact of reasonable pluralism in political life. Does it have deep faults which preceding writers may have found in it which I have not seen and these led them to dismiss it?

<sup>2</sup> This raises the question whether the doctrine of the divine rights of kings or of dictatorship could be plausible without in some way moving outside the political. Does the answer throw any light on the conditions leading to democracy?

that exist in a democracy regulated by it, or some similar view. Other liberal political conceptions have somewhat different principles and elements; but I assume that in each case their principles specify certain rights, liberties, and opportunities, assign them a certain priority with respect to other claims, and make provisions for all citizens to make essential and effective use of their freedoms.<sup>3</sup>

The central idea is that political liberalism moves within the category of the political and leaves philosophy as it is. It leaves untouched all kinds of doctrines, religious, metaphysical, and moral, with their long traditions of development and interpretation. Political philosophy proceeds apart from all such doctrines, and presents itself in its own terms as freestanding. Hence, it cannot argue its case by invoking any comprehensive doctrines, or by criticizing or rejecting them, so long of course as those doctrines are reasonable, politically speaking (PL II: 3). When attributed to persons, the two basic elements of the conception of the reasonable are, first, a willingness to propose fair terms of social cooperation that others as free and equal also might endorse, and to act on these terms, provided others do, even contrary to one's own interest; and, second, a recognition of the burdens of judgment (PL II: 2-3) and accepting their consequences for one's attitude (including toleration) toward other comprehensive doctrines. Political liberalism abstains from assertions about the domain of comprehensive views except as necessary when these views are unreasonable and reject all variations of the basic essentials of a democratic regime. That is part of leaving philosophy as it is.

In line with these aims, political liberalism characterizes a political conception of justice by three features:

- (a) It applies in the first instance to the basic structure of society (assumed in the case of justice as fairness to be a democratic society). This structure consists of the main political, economic, and social institutions, and how they fit together as one unified system of social cooperation.
- (b) It can be formulated independently of any particular comprehensive doctrine, religious, philosophical, or moral. While we suppose that it may be derived from, or supported by, or otherwise related to one or more comprehensive doctrines (indeed, we hope it can be

<sup>3</sup>See my *Political Liberalism* (New York: Columbia, 1993), pp. 5f., 156f. (hereafter PL). These conceptions are distinct from the familiar liberalisms of Immanuel Kant and J. S. Mill. Their views clearly go well beyond the political, relying on ideas of autonomy and individuality as moral values belonging to a comprehensive doctrine.

thus related to many such doctrines), it is not presented as depending upon, or as presupposing, any such view.

- (c) Its fundamental ideas—such ideas in political liberalism as those of political society as a fair system of social cooperation, of citizens as reasonable and rational, and free and equal—all belong to the category of the political and are familiar from the public political culture of a democratic society and its traditions of interpretation of the constitution and basic laws, as well as of its leading historical documents and widely known political writings.

These features illustrate the way in which a political conception of justice is freestanding (PL I: 2).

(2) Habermas's position, on the other hand, is a comprehensive doctrine and covers many things far beyond political philosophy. Indeed, the aim of his theory of communicative action is to give a general account of meaning, reference, and truth or validity both for theoretical reason and for the several forms of practical reason. It rejects naturalism and emotivism in moral argument and aims to give a full defense of both theoretical and practical reason. Moreover, he often criticizes religious and metaphysical views. Habermas does not take much time to argue against them in detail; rather, he lays them aside, or occasionally dismisses them, as unusable and without credible independent merit in view of his philosophical analysis of the presuppositions of rational discourse and communicative action.

I mention two passages in *Faktizität und Geltung*.<sup>4</sup> From the preface:

Discourse theory attempts to reconstruct this self-understanding [that of a universalistic moral consciousness and the liberal institutions of the democratic state] in a way that empowers its intrinsic normative meaning and logic to resist both scientific reductions and aesthetic assimilations...After a century that more than any other has taught us the horror of existing unreason, the last remains of an essentialist trust in reason are destroyed.<sup>5</sup> Yet modernity, now aware of its contingencies,

<sup>4</sup> Frankfurt am Main: Suhrkamp, 1992 (hereafter FG with citations and *Between Facts and Norms* in the text). William Rehg has prepared a translation of the entire work and I am grateful to him and Thomas McCarthy for giving me a copy (*Between Facts and Norms* (Cambridge: MIT, forthcoming)). Without it I could not have acquired an understanding of this long and complex work. Since I refer to this work a number of times, I do so simply by giving the page reference to the German text. References to Habermas's criticisms of me in his essay I give by the number in this JOURNAL.

<sup>5</sup> There are two odd phrases in this passage: 'existing unreason', and 'essentialist trust in reason'. Yet Habermas has 'existierender Unvernunft' and 'essentialischen Vernunftvertrauens', respectively, so Rehg's translation is correct. By the former phrase I assume Habermas means the existence of human institutions and conduct that violate reason (*Vernunft*), and by the latter, the trust in the capacity of our reason to grasp the (Platonic) essences correctly.

depends all the more on a procedural reason, that is, on a reason that puts itself on trial. The critique of reason is its own work: this Kantian double meaning is due to the radically anti-Platonic insight that there is neither a higher nor a deeper reality to which we could appeal—we who find ourselves already situated in our linguistically structured forms of life (FG 11).

Now, read as not appealing to religious or metaphysical doctrines, political liberalism could say something parallel to this passage regarding political justice,<sup>6</sup> but there would be a fundamental difference. For in presenting a freestanding political conception and not going beyond that, it is left entirely open to citizens and associations in civil society to formulate their own ways of going beyond, or of going deeper, so as to make that political conception congruent with their comprehensive doctrines. Political liberalism never denies or questions these doctrines in any way, so long as they are politically reasonable. That Habermas himself takes a different stand on this basic point is part of his comprehensive view. He would appear to say that all higher or deeper doctrines lack any logical force on their own. He rejects what he calls an essentialist Platonic idea of reason and asserts that such an idea must be replaced by a procedural reason that puts itself on trial and is the judge of its own critique.

In another passage in chapter 5 of *Between Facts and Norms*, after an explanation of how the ideal discourse situation proceeds, he stresses that the principle of discourse requires that norms and values must be judged from the point of view of the first-person plural.

The practice of argumentation recommends itself for such a jointly practiced, universalized role taking. As the reflexive form of communicative action, it distinguishes itself socio-ontologically, one might say, by a complete reversibility of participant perspectives, which unleashes the higher-level intersubjectivity of the deliberating collective. In this way, Hegel's concrete universal [*Sittlichkeit*]<sup>7</sup> is sublimated into a communicative structure purified of all substantial elements (FG 280).

Thus, according to Habermas, the substantial elements of Hegel's view of *Sittlichkeit*, an apparently metaphysical doctrine of ethical life (one among many possible examples), are—so far as they are valid—fully sublimated into (I interpret him to mean expressible, or articulated, by) the theory of communicative action with its procedural presuppositions of ideal discourse. Habermas's own doctrine, I be-

<sup>6</sup> This is the sense of the remark, justice as fairness: political not metaphysical.

<sup>7</sup> I assume this concrete universal is a reference to Hegel's idea of *Sittlichkeit*, as expounded in his *Philosophy of Right*.

lieve, is one of logic in the broad Hegelian sense: a philosophical analysis of the presuppositions of rational discourse (of theoretical and practical reason) which includes within itself all the allegedly substantial elements of religious and metaphysical doctrines. His logic is metaphysical in the following sense: it presents an account of what there is.<sup>8</sup> And what there is are human beings engaged in communicative action in their lifeworld. As to what ‘substance’ and ‘substantial’ mean, I would conjecture that Habermas intends something like the following: people often think that their basic way of doing things—their communicative action with its presuppositions of ideal discourse, or their conception of society as a fair system of cooperation between citizens as free and equal—needs a foundation beyond itself discerned by a Platonic reason that grasps the essences, or else is rooted in metaphysical substances. In thought we reach behind, or deeper, to a religious or metaphysical doctrine for a firm foundation. This reality is also expected to provide moral motivation.<sup>9</sup> Without these foundations, everything may seem to us to waver and we experience a kind of vertigo, a feeling of being lost without a place to stand. But Habermas holds that “In the vertigo of this freedom there is no longer any fixed point outside the democratic procedure itself—a procedure whose meaning is already summed up in the system of rights” (FG 229).<sup>10</sup> (I return to this view of Habermas at the end of part V.)

The preceding comments bear on Habermas’s last two paragraphs (131). Here he says we each see our own views as more modest than the other’s. He sees his view as more modest than mine, since it is purportedly a procedural doctrine that leaves questions of substance to be decided by the outcome of actual free discussions engaged in by free and rational, real and live participants, as opposed to the artificial creatures of the original position. He proposes, he says, to limit

<sup>8</sup> I think of metaphysics as being at least a general account of what there is, including fundamental, fully general statements—for example, the statements ‘every event has a cause’ and ‘all events occur in space and time’, or can be related thereto. So viewed, W.V. Quine also is a metaphysician. To deny certain metaphysical doctrines is to assert another such doctrine.

<sup>9</sup> On these points, see his remarks on Ronald Dworkin, FG 86ff.

<sup>10</sup> Another example is what Habermas says (130) that once both public and private autonomy (I discuss these in III and IV) are incorporated in law and political institutions in accordance with the discourse-theoretic account of democracy, “it becomes clear that the normative substance of basic liberal rights is already contained in the indispensable medium for the legal institutionalization of the public reason of sovereign citizens.” The word for ‘vertigo’ in the quotation in the text is *der Taumel* which can mean: reeling, giddiness, or, figuratively, delirium, ecstasy, frenzy. Rehg’s ‘vertigo’ seems appropriate here.



moral philosophy to the clarification of the moral point of view and to the procedure of democratic legitimation, and to the analysis of the conditions of rational discourses and negotiation. In contrast, my view, he thinks, takes on a more ambitious task, since it hopes to formulate a political conception of justice for the basic structure of a democracy, all of which involves fundamental substantive conceptions, which raise larger questions that only the actual discourse of real participants can decide.

At the same time, Habermas thinks I see my view as more modest than his: it aims to be solely a political conception and not a comprehensive one. He believes, though, that I fail in doing this. My conception of political justice is not really freestanding, as I would like it to be, because whether I like it or not, he thinks that the conception of the person in political liberalism goes beyond political philosophy. Moreover, he claims that political constructivism involves the philosophical questions of rationality and truth. And he may also think that, along with Immanuel Kant, I express a conception of a priori and metaphysical reason laying down in justice as fairness principles and ideals so conceived. I deny these things. The philosophical conception of the person is replaced in political liberalism by the political conception of citizens as free and equal. As for political constructivism, its task is to connect the content of the political principles of justice with the conception of citizens as being reasonable and rational. The argument is set out in *Political Liberalism*, III: 1-3. This argument does not rely on a Platonic and Kantian reason, or if so, it does so in the same way Habermas does. No sensible view can possibly get by without the reasonable and rational as I use them. If this argument involves Plato's and Kant's view of reason, so does the simplest bit of logic and mathematics. I come back to this in part II.

(3) As I have said, the stage for the second difference between Habermas's position and mine is prepared for by the first. This is because the differences between the two analytical devices of representation—the ideal discourse situation and the original position<sup>11</sup>—reflect their different locations, one in a comprehensive doctrine, the other limited to the political.

<sup>11</sup> I have not always been clear about this and thought for a time that a more useful comparison might be between the ideal discourse situation and the position of citizens in civil society, you and me. On the latter, see "Kantian Constructivism in Moral Theory," this JOURNAL, LXXVII, 9 (September 1980), pp. 533f.; and PL 28. I am indebted to Jon Mandle for valuable correspondence on this topic.



The original position is an analytical device used to formulate a conjecture. The conjecture is that when we ask—What are the most reasonable principles of political justice for a constitutional democracy whose citizens are seen as free and equal, reasonable and rational?—the answer is that these principles are given by a device of representation in which rational parties (as trustees of citizens, one for each citizen) are situated in reasonable conditions and constrained by these conditions absolutely. Thus, free and equal citizens are envisaged as themselves reaching agreement about these political principles under conditions that represent those citizens as both reasonable and rational. That the principles so agreed to are indeed the most reasonable ones is a conjecture, since it may of course be incorrect. We must check it against the fixed points of our considered judgments at different levels of generality. We also must examine how well these principles can be applied to democratic institutions and what their results would be, and hence ascertain how well they fit in practice with our considered judgments on due reflection.<sup>12</sup> In the either direction, we may be led to revise our judgments.

Habermas's theory of communicative action yields the analytical device of the ideal discourse situation, which offers an account of the truth and validity of judgments of both theoretical and practical reason. It tries to lay out completely the presuppositions of rational and free discussion as guided by the strongest reasons such that, if all requisite conditions were actually realized and fully honored by all active participants, their rational consensus would serve as a warrant for truth or validity. Alternatively, to claim that a statement of whatever kind is true, or a normative judgment valid, is to claim that it could be accepted by participants in a discourse situation to the extent that all the required conditions expressed by the ideal obtained. As I have remarked, his doctrine is one of logic in the broad Hegelian sense: a philosophical analysis of the presuppositions of rational discourse which includes within itself all the apparent substantial elements of religious and metaphysical doctrines.

From what point of view are the two devices of representation to be discussed? And from what point of view does the debate between them take place? Always, we must be attentive to where we are and whence we speak. To all three questions the answer is the same: all discussions are from the point of view of citizens in the culture of

<sup>12</sup> See fn. 16 at the end of this section for further remarks on reflective equilibrium.

civil society, which Habermas calls the *public sphere*.<sup>13</sup> It is there that we as citizens discuss how justice as fairness is to be formulated, and whether this or that aspect of it seems acceptable—for example, whether the details of the set-up of the original position are properly laid out and whether the principles selected are to be endorsed. In the same way, the claims of the ideal of discourse and of its procedural conception of democratic institutions are considered. Keep in mind that this background culture contains comprehensive doctrines of all kinds: these are taught, explained, debated one against another, and argued about, indefinitely without end, as long as society has vitality and spirit. It is the culture of the social, not of the publicly political. It is the culture of daily life, with its many associations: its universities and churches, learned and scientific societies; and endless political discussions of ideas and doctrines are commonplace everywhere.

The point of view of civil society includes all citizens. Like Habermas's ideal discourse situation, it is a dialogue, indeed, an omnilogue.<sup>14</sup> There are no experts: a philosopher has no more authority

<sup>13</sup> See FG, ch. 8; and the considerably earlier (1962) *The Structural Transformation of the Public Sphere*, T. Burger, trans. (Cambridge: MIT, 1989). Here terminology can get in the way. The public reason of political liberalism may be confused with Habermas's public sphere but they are not the same. Public reason in PL is the reasoning of legislators, executives (presidents, for example), and judges (especially those of a supreme court, if there is one). It includes also the reasoning of candidates in political elections and of party leaders and others who work in their campaigns, as well as the reasoning of citizens when they vote on constitutional essentials and matters of basic justice. The ideal of public reason does not have the same requirements in all these cases. As for Habermas's public sphere, since it is much the same as what I called in PL (14) the background culture, public reason with its duty of civility does not apply. We agree on this. I am not clear whether he accepts this ideal (129-30). Some of his statements in FG (see 18, 84, 152, 492, 534f.) certainly seem to suggest it and I believe it would not be consistent with his view, but regrettably I cannot discuss the question here.

<sup>14</sup> I blame this term on Christine Korsgaard. Habermas sometimes says that the original position is monological and not dialogical; that is because all the parties have, in effect, the same reasons and so they select the same principles. This is said to have the serious fault of leaving it to "the philosopher" as an expert and not to citizens of an ongoing society to determine the political conception of justice. See Habermas's *Moralbewusstsein and kommunikatives Handeln* (Frankfurt am Main: Suhrkamp, 1983). The third essay is entitled: "Diskursethik: Notizen zu einem Begründungsprogramm." I refer to the English translation entitled *Moral Consciousness and Communicative Action*, C. Lenhardt and S. W. Nicholsen, trans. (Cambridge: MIT, 1990), and refer to the third essay as "Notes." The reply I make to his objection ("Notes," pp. 66ff.) is that it is you and I—and so all citizens over time, one by one and in associations here and there—who judge the merits of the original position as a device of representation and the principles it yields. I deny that the original position is monological in a way that puts in doubt its soundness as a device of representation. There is also his *Erläuterungen zur Diskursethik* (Frankfurt am Main: Suhrkamp, 1991); a translation by Ciaran Cronin with his introduction is entitled *Justification and Application* (Cambridge: MIT, 1993).

than other citizens. Those who study political philosophy may sometimes know more about some things, but so may any one else. Everyone appeals equally to the authority of human reason present in society. So far as other citizens pay attention to it, what is written may become part of the ongoing public discussion, *A Theory of Justice*<sup>15</sup> along with the rest, until it eventually disappears. Citizens' debates may, but need not, be reasonable and deliberative and they are protected, at least in a decent democratic regime, by an effective law of free speech. Argument may occasionally reach a fairly high level of openness and impartiality, as well as show a concern for truth, or when the discussion concerns the political, for reasonableness. How high a level it reaches depends, obviously, on the virtues and intelligence of the participants.

The argument is normative and concerned with ideals and values, though in political liberalism it is limited to the political, while in discourse ethics it is not. By addressing this audience of citizens in civil society, as any democratic doctrine must, justice as fairness spells out various fundamental political conceptions—those of society as a fair system of cooperation, of citizens as free and equal, and of a well-ordered society—and then hopes to combine them into a reasonable and complete political conception of justice for the basic structure of a constitutional democracy. That is its primary aim: to be presented to and understood by the audience in civil society for its citizens to consider. The overall criterion of the reasonable is general and wide reflective equilibrium;<sup>16</sup> whereas we have seen that in

<sup>15</sup> Cambridge: Harvard, 1971 (hereafter TJ).

<sup>16</sup> I add here two remarks about wide and general reflective equilibrium. Wide reflective equilibrium (in the case of one citizen) is the reflective equilibrium reached when that citizen has carefully considered alternative conceptions of justice and the force of various arguments for them. More specifically, the citizen has considered the leading conceptions of political justice found in our philosophical tradition (including views critical of the concept of justice itself) and has weighed the force of the different philosophical and other reasons for them. We suppose this citizen's general convictions, first principles, and particular judgments are at last in line. The reflective equilibrium is wide, given the wide-ranging reflection and possibly many changes of view that have preceded it. Wide and not narrow reflective equilibrium (in which we take note of only our own judgments), is plainly the important philosophical concept.

Recall that a well-ordered society is a society effectively regulated by a public political conception of justice. Think of each citizen in such a society as having achieved wide reflective equilibrium. Since citizens recognize that they affirm the same public conception of political justice, reflective equilibrium is also general: the same conception is affirmed in everyone's considered judgments. Thus, citizens have achieved general and wide, or what we may refer to as full, reflective equilibrium. In such a society, not only is there a public point of view from which all citizens can adjudicate their claims of political justice, but also this point of view is mutually recognized as affirmed by them all in full reflective equilibrium. This equilibrium is fully intersubjective: that is, each citizen has taken into account the reasoning and arguments of every other citizen.

Habermas's view the test of moral truth or validity is fully rational acceptance in the ideal discourse situation, with all requisite conditions satisfied. Reflective equilibrium resembles his test in this respect: it is a point at infinity we can never reach, though we may get closer to it in the sense that through discussion our ideals, principles, and judgments seem more reasonable to us and we regard them as better founded than they were before.

## II. OVERLAPPING CONSENSUS AND JUSTIFICATION

(1) In his second section, Habermas raises two questions.<sup>17</sup> The first question is whether an overlapping consensus adds to the justification of a political conception of justice already taken to be justified as reasonable. Put another way, he asks whether the doctrines belonging to the consensus further strengthen and deepen the justification of a freestanding conception; or whether they merely constitute a necessary condition of social stability (119-22). By these questions, I take Habermas to ask, in effect: What is the bearing of the doctrines within an overlapping consensus on the justification of the political conception once citizens see that conception as both reasonable and freestanding?

The second question concerns how political liberalism uses the term 'reasonable': Does the term express the validity of political and moral judgments or does the term merely express a reflective attitude of enlightened tolerance (123-26)?

Habermas's two questions are intimately related. The answer to both questions lies in the way in which political liberalism specifies three different kinds of justification and two kinds of consensus, and then connects these with the idea of stability for the right reasons and the idea of legitimacy. I begin with the three kinds of justification in the following order: first, *pro tanto* justification of the political conception; second, full justification of that conception by an individual person in society; and, finally, public justification of the political conception by political society. I then explain the other ideas as we proceed.

Consider *pro tanto* justification. In public reason the justification of the political conception takes into account only political values, and I assume that a political conception properly laid out is complete (PL 221, 241). That is, the political values specified by it can be suitably ordered, or balanced, so that those values alone give a reasonable answer by public reason to all, or nearly all, questions concerning constitutional essentials and basic justice. This is the

<sup>17</sup> I have gained much from the valuable discussion with Wilfried Hinsch and Peter de Marneffe on earlier drafts of this section.

meaning of *pro tanto* justification. By examining a wide range of political questions to see whether a political conception can always provide a reasonable answer we can check to see if it seems to be complete. But since political justification is *pro tanto*, it may be overridden by citizens' comprehensive doctrines once all values are tallied up.

Second, full justification is carried out by an individual citizen as a member of civil society. (We assume that each citizen affirms both a political conception and a comprehensive doctrine.<sup>18</sup>) In this case, the citizen accepts a political conception and fills out its justification by embedding it in some way to the citizen's comprehensive doctrine as either true or reasonable, depending on what that doctrine allows. Some may consider the political conception fully justified even though it is not accepted by other people. Whether our view is endorsed by them is not given sufficient weight to suspend its full justification in our own eyes.

Thus, it is left to each citizen, individually or in association with others, to say how the claims of political justice are to be ordered, or weighed, against nonpolitical values. The political conception gives no guidance in such questions, since it does not say how nonpolitical values are to be counted. This guidance belongs to citizens' comprehensive doctrines. Recall that a political conception of justice is not dependent on any particular comprehensive doctrine, including even agnostic ones. But even though a political conception of justice is freestanding, that does not mean that it cannot be embedded in various ways into—or mapped into, or included as a module in<sup>19</sup>—the different doctrines citizens affirm.

Third and last, there is public justification by political society. This is a basic idea of political liberalism and works in tandem with the other three ideas: those of a reasonable overlapping consensus, stability for the right reasons, and legitimacy. Public justification happens when all the reasonable members of political society carry out a justification of the shared political conception by embedding it in their several reasonable comprehensive views. In this case, reasonable citizens take one another into account as having reasonable comprehensive doctrines that endorse that political conception and this mutual accounting shapes the moral quality of the public cul-

<sup>18</sup> Some citizens might not have a comprehensive doctrine, except possibly a null doctrine, such as agnosticism or skepticism.

<sup>19</sup> This phrase was used twice in PL 12f., 144f. One might also mention the way in which, in algebra, a group may be included as a subgroup in each group of a certain class of groups.

ture of political society. A crucial point here is that while the public justification of the political conception for political society depends on reasonable comprehensive doctrines, this justification does so only in an indirect way. That is, the express contents of these doctrines have no normative role in public justification; citizens do not look into the content of others' doctrines, and so remain within the bounds of the political. Rather, they take into account and give some weight to only the fact—the existence—of the reasonable overlapping consensus itself.<sup>20</sup>

This basic case of public justification<sup>21</sup> is one in which the shared political conception is the common ground and all reasonable citizens taken collectively (but not acting as a corporate body<sup>22</sup>) are in general and wide reflective equilibrium in affirming the political conception on the basis of their several reasonable comprehensive doctrines. Only when there is a reasonable overlapping consensus can political society's political conception of justice be publicly, though never finally, justified. This is because granting that we should give some weight to the considered convictions of other reasonable citizens, general and wide reflective equilibrium with respect to a public justification gives the best justification of the political

<sup>20</sup> Here I assume that the existence of reasonable comprehensive doctrines and of their forming an overlapping consensus are facts about the political and cultural nature of a pluralist democratic society, and these facts can be used like any other such facts. Reference to these facts, or making assumptions about them, is not reliance on the religious, metaphysical, or moral contents of such doctrines.

<sup>21</sup> I refer to public justification as a basic case for political liberalism because of its role in that doctrine and of its connection with the ideas of a reasonable overlapping consensus, stability for the right reasons, and legitimacy. That idea of justification is a part of the rebuilding of a fundamental conception of TJ III, and expressed in section 79 on the conception of a social union of social unions and its companion idea of stability, which depends on the congruence of the right and the good. (On this last, see Samuel Freeman's account in the *Chicago-Kent Law Review*, LXIX, 3 (1994): 619–68, sects. I–II.) This conception depends, however, on everyone's holding the same comprehensive doctrine and so it is no longer viable as a political ideal once we recognize the fact of reasonable pluralism, which characterizes the public culture of the political society required by the two principles of justice. Now we face a different problem and the ideas of a reasonable overlapping consensus and the rest are used instead. Once we see the different nature of the task, the reasons for the introduction of these further ideas fall into place. We see why, for example, political justification must be *pro tanto*. One is not replying to objections but rather trying to fix a basic inherent conflict (recognized later) between the cultural conditions needed for justice as fairness to be a comprehensive doctrine and the requirements of freedom guaranteed by the two principles of justice. With this understood, I believe the complexities—if such they are—fall into place.

<sup>22</sup> By this I mean that there is no political body that acts by vote on the political conception. That is contrary to the idea of the reasonable. The conception of political justice can no more be voted on than can the axioms, principles, and rules of inference of mathematics or logic.



conception that we can have at any given time.<sup>25</sup> There is, then, no public justification for political society without a reasonable overlapping consensus, and such a justification also connects with the ideas of stability for the right reasons as well as of legitimacy. These last ideas I now set out more fully.

First, I distinguish two different ideas of consensus, as misunderstanding here is fatal. One idea of consensus comes from everyday politics where the task of the politician is to find agreement. Looking to various existing interests and claims, the politician tries to put together a coalition or policy that all or a sufficient number can support to gain a majority. This idea of consensus is the idea of an overlap that is already present or latent and could be articulated by the politician's skill in bringing together existing interests the politician knows intimately. The very different idea of consensus in political liberalism—the idea I call a *reasonable overlapping consensus*—is that the political conception of justice is worked out first as a free-standing view that can be justified *pro tanto* without looking to, or trying to fit, or even knowing what are, the existing comprehensive doctrines (PL 39f.). It tries to put no obstacles in the path of all reasonable doctrines endorsing a political conception by eliminating from this conception any idea which goes beyond the political and which not all reasonable doctrines could reasonably be expected to endorse. (To do that violates the idea of mutuality.) When the political conception meets these conditions and is also complete, we hope the reasonable comprehensive doctrines affirmed by reasonable citizens in society can support it, and that in fact it will have the capacity to shape those doctrines toward itself (PL IV: 6-7).

Consider the political sociology of a reasonable overlapping consensus: since there are far less doctrines than citizens, the latter may be grouped according to the doctrine they hold. More important than the simplification allowed by this numerical fact is that citizens are members of various associations into which, in many cases, they are born, and from which they usually, though not always, acquire their comprehensive doctrines (PL IV: 6). The doctrines that different associations hold and propagate—as examples, think of religious associations of all kinds—play a basic social role in making public justification possible. This is how citizens may acquire their comprehensive doctrines. Moreover, these doctrines have their own life and history apart from their current members and endure from one generation to the next. The consensus of these doctrines is importantly

<sup>25</sup> See my remarks in fn. 16 above in part I.



rooted in the character of various associations and this is a basic fact about the political sociology of a democratic regime and crucial in providing a deep and enduring basis for its social unity.

In a democratic society marked by reasonable pluralism, showing that stability for the right reasons is at least possible is also part of public justification.<sup>24</sup> The reason is that when citizens affirm reasonable though different comprehensive doctrines, seeing whether an overlapping consensus on the political conception is possible is a way of checking whether there are sufficient reasons for proposing justice as fairness (or some other reasonable doctrine) which can be sincerely defended before others without criticizing or rejecting their deepest religious and philosophical commitments.<sup>25</sup> If we can make the case that there are adequate reasons for diverse reasonable people jointly to affirm justice as fairness as their working political conception, then the conditions for their legitimately exercising coercive political power over one another—something we inevitably do as citizens by voting, if in no other way—are satisfied (PL 136ff.). The argument, if successful, would show how we can reasonably affirm and appeal to a political conception of justice as citizens' shared basis of reasons, all the while supposing that others, no less reasonable than we, may also affirm and recognize that same basis. Despite the fact of reasonable pluralism, the conditions for democratic legitimacy are fulfilled.<sup>26</sup>

Given a political society with such a reasonable consensus, political liberalism says that as citizens of this society we have achieved the deepest and most reasonable basis of social unity available to us as citizens of a modern democratic society.<sup>27</sup> This unity yields stability for the right reasons, explained as follows:<sup>28</sup>

<sup>24</sup> Here I am speaking from within political liberalism. Whether a citizen will say the same within that citizen's comprehensive doctrine depends on the doctrine.

<sup>25</sup> As I noted in part 1, Habermas's comprehensive doctrine violates this.

<sup>26</sup> In this paragraph, I am indebted to Thomas Hill's discussion in Los Angeles, April 1994, of how the concern with stability connects with the ideas of public justification and overlapping consensus. He stressed aspects of the matter I had not so clearly addressed.

<sup>27</sup> In PL 3-4, the aim of the view so named is not, I now think, stated in the best way. There the text seems to focus on how stability can be achieved under conditions of reasonable pluralism but that question has an uninteresting Hobbesian answer. Rather, PL tries to answer the question as to the most reasonable basis of social unity given the fact of reasonable pluralism; see PL 133f., 202. Once we answer this question, we can also answer the other two questions I asked: What is the most appropriate conception of justice for specifying the fair terms of social cooperation between citizens of a democratic regime regarded as free and equal? What is the basis of toleration, given the fact of reasonable pluralism as the inevitable outcome of free institutions?

<sup>28</sup> Once stability for the right reasons is attained and supports this basis of social unity, political liberalism hopes to satisfy the traditional liberal demand to justify

- (a) The basic structure of society is effectively regulated by the most reasonable political conception of justice.
- (b) This political conception of justice is endorsed by an overlapping consensus comprised of all the reasonable comprehensive doctrines in society and these are in an enduring majority with respect to those rejecting that conception.
- (c) Public political discussions, when constitutional essentials and matters of basic justice are at stake, are always (or nearly always) reasonably decidable on the basis of the reasons specified by the most reasonable political conception of justice, or by a reasonable family of such conceptions.

Two comments. One is that this basis of social unity is the most reasonable since the political conception of justice is the most reasonable one and it is endorsed, or in some way supported by, all reasonable (or the reasonable) comprehensive doctrines in society. A second comment is that this basis of social unity is the deepest because the fundamental ideas of the political conception are endorsed by the reasonable comprehensive doctrines, and these doctrines represent what citizens regard as their deepest convictions, religious, philosophical, and moral. From this follows stability for the right reasons. The contrast is a society in which when citizens are grouped by their full justifications, their political conceptions are not embedded in, or connected with, a shared political conception. In this case, there is only a *modus vivendi*, and society's stability depends on a balance of forces in contingent and possibly fluctuating circumstances.

These explanations of the three kinds of justification may seem to raise a grave question. For one might ask: If political justification is always *pro tanto*, how can public justification of the political conception of justice be carried out? The answer, of course, is given by the existence and public knowledge of a reasonable overlapping consensus. In this case, citizens embed their shared political conception in their reasonable comprehensive doctrines. Then we hope that citizens will judge (by their comprehensive view) that political values are normally (though not always) ordered prior to, or outweigh, whatever nonpolitical values may conflict with them.<sup>29</sup>

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the social world in a manner acceptable "at the tribunal of each person's understanding." So Jeremy Waldron put it in his *Liberal Rights* (New York: Cambridge, 1993), p. 61.

<sup>29</sup> There are several statements to this effect in PL IV: 5. If one fails to note this background condition of a reasonable overlapping consensus, the assertion in the text taken alone appears to express a comprehensive moral point of view that

If this seems unrealistic to hope for, two things indicate why it may not be. First, those holding a reasonable comprehensive doctrine must ask themselves on what political terms they are ready to live with other such doctrines in an ongoing free society. Since reasonable citizens hold reasonable doctrines (PL 59), they are ready to offer or endorse a political conception of justice to specify the terms of fair political cooperation. Hence, they may well judge from within their reasonable comprehensive doctrines that political values are very great values to be realized in the framework of their political and social existence, and a shared public life on terms that all reasonable parties may reasonably be expected to endorse.

Second, we finally come to the idea of legitimacy: reasonable citizens understand this idea to apply to the general structure of political authority (PL 135ff.). They know that in political life unanimity can rarely if ever be expected on a basic question and so a democratic constitution must include procedures of majority or other plurality voting to reach decisions. It is unreasonable not to propose or endorse any such arrangements. Let us say, then, that the exercise of political power is legitimate only when it is exercised in fundamental cases in accordance with a constitution, the essentials of which all reasonable citizens as free and equal might reasonably be expected to endorse. Thus, citizens recognize the familiar distinction between accepting as (sufficiently) just and legitimate a constitution with its procedures for fair elections and legislative majorities, and accepting as legitimate (even when not just<sup>30</sup>) a particular statute or a decision in a particular matter of policy.<sup>31</sup> (I come back to the idea of legitimacy in part V.3.)

So Quakers, being pacifists, refuse to engage in war, yet they also support a constitutional regime and accept the legitimacy of majority or other plurality rule. While they refuse to serve in a war that a democratic people may reasonably decide to wage, they will still affirm democratic institutions and the basic values they represent. They do

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ranks the duties owed to just basic institutions ahead of all other human commitments. How otherwise is it possible that values of the political, a subdomain of all values, normally outweighs whatever other values may conflict with them? A troubling assertion, however, occurs only when one forgets that a reasonable overlapping consensus is assumed to obtain and that the text is commenting on the public justification of the political conception carried out by the members of society.

<sup>30</sup> It is unreasonable to expect in general that human statutes and laws should be strictly just by our lights. I cannot discuss here the extent of reasonable deviation allowed.

<sup>31</sup> Stuart Hampshire rightly stresses this point; see his review of PL in the *New York Review of Books* (August 12, 1993), p. 44.

not think that the possibility of a people's voting to go to war is a sufficient reason for opposing democratic government.

One might ask why the Quaker's religious doctrine prohibiting their engaging in war does not put their allegiance in doubt. Yet our religion may enjoin many things. It may require our support of constitutional government as that which, of all feasible political regimes, is most in accord with the religious injunction to be equally concerned with the basic rights and fundamental interests of others as well as our own. As with any reasonable doctrine, many political and nonpolitical values are represented and ordered within it. With that granted, allegiance to a just and enduring constitutional government may win out within the religious doctrine.<sup>32</sup> This illustrates how political values can be overriding in upholding the constitutional system itself, even if particular reasonable statutes and decisions may be rejected, and as necessary protested by civil disobedience or conscientious refusal.

What we have said elaborates the idea of a justified and freestanding political conception and enables us to answer Habermas's first question. Recall that he asked whether the idea of an overlapping consensus adds to the justification of the political conception or whether it simply lays out a necessary condition of social stability. The answer to his first question is given by the third idea of justification, that of public justification, and by how it connects with the three further ideas of a reasonable overlapping consensus, stability for the right reasons, and legitimacy.

(2) We can now briefly discuss Habermas's second question: Does political liberalism use the term 'reasonable' to express the truth or validity of moral judgments, or simply to express a reflective attitude toward tolerance?

In answer to this, I have nothing to add beyond what has been said already. Political liberalism does not use the concept of moral truth applied to its own political (always moral) judgments. Here it says that political judgments are reasonable or unreasonable; and it lays out political ideals, principles, and standards as criteria of the reasonable. These criteria in turn are connected with the two basic features of reasonable persons as citizens: first, their willingness to propose and to abide by, if accepted, what they think others as equal citizens with them might reasonably accept as fair terms of social cooperation; and, second, their willingness to recognize the burdens of judgment and accept the consequences thereof. For the political

<sup>32</sup> The same considerations, duly modified, hold in the case of those who reject abortion rights supported by a democratic regime.

purpose of discussing questions of constitutional essentials and basic justice, political liberalism views this idea of the reasonable as sufficient. The use of the concept of truth is not rejected or questioned, but left to comprehensive doctrines to use or deny, or use some other idea instead. And, finally, the reasonable does, of course, express a reflective attitude to toleration, since it recognizes the burdens of judgment, and this in turn leads to liberty of conscience and freedom of thought (PL 54-61).

Yet Habermas maintains that political liberalism cannot avoid the questions of truth and the philosophical conception of the person (131). I have indicated before that I do not see why not. Political liberalism avoids reliance on both of these ideas and substitutes others—the reasonable, in one case, and the conception of persons as citizens viewed as free and equal, in the other. When in civil society we set up justice as fairness, or indeed any political conception, these ideas are always described and expressed by conceptions and principles within the political conception itself. Until this way of proceeding is shown unsatisfactory, or to fail in certain ways, political liberalism need not give ground. I grant that the idea of the reasonable needs a more thorough examination than *Political Liberalism* offers. Yet I believe the main lines of the distinction between the reasonable and both the true and the rational are clear enough to show the plausibility of the idea of social unity secured by a reasonable overlapping consensus. Certainly people will continue to raise questions of truth and the philosophical idea of the person and to tax political liberalism with not discussing them. In the absence of particulars, these complaints fall short of objections.

### III. LIBERTIES OF THE MODERNS VERSUS THE WILL OF THE PEOPLE

(1) In this section, I begin my reply to Habermas's objection as raised in III before the summary of his own view (130-31); in the next section, I complete my reply beginning with what he says in that summary. The objections concern the correct relation among two familiar classes of basic rights and liberties, the so-called liberties of the ancients and the liberties of the moderns. Habermas agrees that I share the hope of Jean-Jacques Rousseau and Kant of deriving both kinds of rights from the same root. This is shown in the fact that both kinds of liberties appear equally in the first principle of justice, which is adopted in the original position. That these liberties have the same root means, he thinks, that the liberties of the moderns cannot be imposed as external constraints on the political process of citizens' self-determination. He then refers to the two-stage (*Zweistufig*) character (127-28) of the political conception of justice

as fairness, by which I take him to mean that this conception starts with the hypothetical situation of the original position where principles of justice are selected once and for all by the parties as equals subject to the veil of ignorance, and next it moves to citizens' regular application of those same principles under the actual conditions of political life.<sup>35</sup> The two-stage character of the political conception leads, he believes, to the liberal rights of the moderns having a priori features that demote the democratic process to an inferior status (127-28). This last statement I wish to deny.

Habermas also grants that I start from the idea of political autonomy and model it at the level of the original position. But while the form of this autonomy is given what he calls "virtual existence" in that position and so in theory, that form of autonomy does not "fully unfold in the heart of the justly constituted society." The reason for this is stated in a long passage I shall cite nearly entirely though in three parts, commenting on each part separately. I refer to the passage beginning with 'For the higher the veil of ignorance' (128) to the words 'prior to all political will formation' (129). This passage is the basis of my discussion of the relations among the basic liberties. It contains some puzzling statements and I fear I may not understand him. All the same, the passage raises deep questions about how our views are related.

(2) I begin with an apparent misunderstanding of the idea of what I call the *four-stage sequence*, and even if only that, I should explain it. This sentence goes:

For the higher the veil of ignorance is raised and the more Rawls's citizens take on flesh and blood, the more deeply they find themselves subject to principles and norms that have been anticipated in theory and have already become institutionalized beyond their control (128).

Two essential points. First, the four-stage sequence describes neither an actual political process, nor a purely theoretical one. Rather, it is part of justice as fairness and constitutes part of a framework of thought that as citizens in civil society we who accept justice as fairness are to use in applying its concepts and principles. It sketches what kinds of norms and information are to guide our political judgments of justice, depending on their subject and context.

We begin in the original position where the parties select principles of justice; next, we move to a constitutional convention where, seeing ourselves as delegates, we are to draw up the principles and rules of a constitution in the light of the principles of justice already

<sup>35</sup> I am indebted to Frank Michelman for clarification on this point.

on hand. After this, we become, as it were, legislators enacting laws as the constitution allows and as the principles of justice require and permit;<sup>34</sup> and, finally, we assume the role of judges interpreting the constitution and laws as members of the judiciary. Different levels and kinds of information are available at each stage and in each case designed to enable us to apply the (two) principles intelligently, making rational decisions but not partial ones favoring our own interests or the interests of those to whom we are attached, such as our friends or religion, our social position or political party.

This framework extends the idea of the original position, adapting it to different settings as the application of principles requires. In judging a constitution, say, we are to follow the principles of justice as well as general information about our society, the kind framers of a constitution would want to know, which is then permitted us, but not particular information about ourselves and our attachments, as indicated above. This kind of relevant information, assuming sufficient intelligence and powers of reason, is thought to ensure that our judgment is impartial and reasonable, and following the principles of justice is to guide us in framing a just constitution; and similarly for the other stages (TJ 31). Here I skip over a difficult question: What is the relevant information when the existing society contains grave injustices—as societies always do—as American society did in 1787-91<sup>35</sup> (and still does), such as slavery and denying the suffrage to women and those who did not meet the property qualification? Some think that no constitution excluding slavery could have been adopted at that time, so is that knowledge relevant? *A Theory of Justice* takes the view that all such information is irrelevant and assumes that a just constitution is realizable. After working out what that constitution is under what I call *reasonably favorable conditions*, it sets the aim of long-term political reform once, from the point of view of civil society, it turns out that a just constitution cannot be fully realized. In Habermas's terms, it is a project to be carried out (FG 163).

<sup>34</sup> Here there is a formidable complication that I can only mention here, namely, that there is an important distinction between legislation dealing with constitutional essentials and basic justice, and legislation dealing with political bargaining between the various interests in civil society which takes place through their representatives. The latter kind of legislation is required to have a framework of fair bargaining both in the legislature and in civil society. The complication is formidable because it is a difficult task to spell out the criteria needed for drawing this distinction and illustrating it by instructive cases.

<sup>35</sup> I use these dates to include the whole period from the constitutional convention through the ratification of the Bill of Rights. In this and the next sections, I am grateful to James Fleming for this and many other valuable suggestions bearing on constitutional law, most all of which I have followed.



The second point, related to the preceding, is that when citizens in political offices or civil society use this framework, the institutions they find themselves under are not the work of a political philosopher who has institutionalized them in theory beyond citizens' control. Rather, those institutions are the work of past generations who pass them on to us as we grow up under them. We assess them when we come of age and act accordingly. All this seems obvious once the purpose and use of the four-stage sequence is made clear.<sup>36</sup> What may cause misunderstanding is the thought that, using an abstract idea like the original position as a device of representation and imagining the parties to understand their selection of principles to hold in perpetuity, justice as fairness apparently supposes citizens' conception of justice can be fixed once and for all. This overlooks the crucial point that we are in civil society and that the political conception of justice, like any other conception, is always subject to being checked by our reflective considered judgments. Using the idea of perpetuity here is a way of saying that when we imagine rational (not reasonable) parties to select principles, it is a reasonable condition to require them to do so assuming their selection is to hold in perpetuity. Our ideas of justice are in this way fixed: we cannot change them to suit our rational interests and knowledge of circumstances as we please.<sup>37</sup> Checking them by our considered judgments is, of course, another matter.

(3) The next aspect of Habermas's objection raises a question about the meaning of political autonomy and how it is realized. The question is well expressed by the sentence that under a just constitution citizens "cannot reignite the radical democratic embers of the original position in the civic life of their society" (128). The idea is put more fully in the second part of the passage. So after 'beyond their control', we have:

In this way, the theory deprives the citizens of too many of the insights that they would have to assimilate anew in each generation. From the perspective of the theory of justice, the act of founding the democratic constitution cannot be repeated under the institutional conditions of an already constituted just society, and the process of realizing the system of basic rights cannot be assured on an ongoing basis. It is not possible for citizens to experience this process as open and incomplete, as

<sup>36</sup> On the two points of this and the preceding paragraph, see TJ section 31, pp. 196f. and 200f.

<sup>37</sup> In the last two paragraphs, I hope to address Habermas's concerns about the framework of the four-stage sequence. I thank McCarthy and Michelman for instructive discussion.

the shifting historical circumstances nonetheless demand. They cannot reignite the radical democratic embers of the original position in the civic life of their society, for from their perspective all of the *essential* discourses of legitimation have already taken place within the theory; and they find the results of the theory already sedimented in the constitution. Because the citizens cannot conceive of the constitution as a *project*, the public use of reason does not actually have the significance of a present exercise of political autonomy but merely promotes the nonviolent *preservation of political stability* (128).

First, a remark about the meaning of autonomy. In political liberalism, autonomy is understood as political and not as moral autonomy (PL II: 6). The latter is a much wider idea and belongs to comprehensive doctrines of the kind associated with Kant and Mill. Political autonomy is specified in terms of various political institutions and practices, as well as expressed in certain political virtues of citizens in their thought and conduct—their discussions, deliberations, and decisions—in carrying out a constitutional regime. It suffices for political liberalism.

With this remark in mind, it is not clear what is meant by saying that citizens in a just society cannot “reignite the radical democratic embers of the original position in civic life.” We are bound to ask: Why not? For we have seen above in considering the four-stage sequence that citizens continually discuss questions of political principles and social policy. Moreover, we may assume that any actual society is more or less unjust—usually gravely so—and such debates are all the more necessary. No (human) theory could possibly anticipate all the requisite considerations bearing on these problems under existing circumstances, nor could the needed reforms have been already foreseen for improving present arrangements. The ideal of a just constitution is always something to be worked toward. On these points, Habermas would seem to agree:

...the justification of civil disobedience relies on a dynamic understanding of the constitution as an unfinished project. From this long term perspective, the democratic constitutional state does not represent a finished structure but is a delicate and above all a fallible and revisable undertaking, whose purpose is to realize the system of rights *anew* in changing circumstances, that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically. This is the perspective of citizens who are actively involved in realizing the system of rights and who want to overcome the tension between social facticity and validity, aware of different contexts (FG 464).

Habermas seems to think that justice as fairness is somehow incompatible with what he says here. He refers (in the quotation before the one above) to an already just society (which includes, I assume, a just constitution and basic structure) and also to the “*essential* discourses of legitimation.” He says that the constitution cannot be conceived as a project—as something yet to be achieved—and so public reason cannot involve the exercise of political autonomy but only the preservation of political stability. Perhaps he means that citizens can be politically autonomous only if they are autonomous from top to bottom—that is, by giving themselves a constitution issuing from their fundamental debates, from their “essential discourses of legitimation,” and similarly in all lower-order enactments. Yet it is doubtful that he might think that in a well-ordered society as described ideally in justice as fairness, radical democratic embers cannot be reignited because citizens cannot actually give themselves what they view as a just constitution when they already have one.

If this is the difficulty, however, it is easy to address. To make clearer the idea of political autonomy we say, first, citizens gain full political autonomy when they live under a reasonably just constitution securing their liberty and equality, with all of the appropriate subordinate laws and precepts regulating the basic structure, and when they also fully comprehend and endorse this constitution and its laws, as well as adjust and revise them as changing social circumstances require, always suitably moved by their sense of justice and the other political virtues. To this we add, second, whenever the constitution and laws are in various ways unjust and imperfect, citizens with reason strive to become more autonomous by doing what, in their historical and social circumstances, can be reasonably and rationally seen to advance their full autonomy. Thus, in this case a just regime is a project as Habermas says, and justice as fairness agrees.

Even when the constitution is just, however, we are bound to ask: Why can citizens not be fully autonomous? Are the citizens of Rousseau’s society of *The Social Contract* never fully autonomous because the Legislator originally gave them their just constitution under which they have grown up? Why should that memorable deed long past make any difference when they now comprehend the just constitution, and intelligently and wisely execute it?<sup>38</sup> How could the Legislator’s wisdom deprive citizens of the insights they have assimilated for themselves over generations? Why can those insights not be assimilated by citizens from their reflections and experience with these institutions

<sup>38</sup> See *The Social Contract*, bk. II, ch. 7.

and as they come to understand the grounds of the constitution's design? Does Kant's *Groundwork* deprive us of our achieving the insights of the moral law by reflecting on that work? Surely not. Why is understanding the justice of the constitution any different?

Moreover, not every generation is called upon to carry through to a reasonable conclusion all the essential discourses of legitimation and then successfully to give itself a new and just constitution. Whether a generation can do this is determined not by itself alone but by a society's history: that the founders of 1787-91 could be the founders was not determined solely by them but by the course of history up until that time. In this sense, those already living in a just constitutional regime cannot found a just constitution; but they can fully reflect on it, endorse it, and so freely execute it in all ways necessary. What is there especially significant about our actually giving ourselves a just constitution that is reasonable and rational when we already have one and fully understand and act on it? While political autonomy expresses our freedom, no more than with any other kind of freedom is it reasonable to maximize acts thereof, but only so to act when it is appropriate. Perhaps though Habermas would object to the four-stage sequence as a framework for reflection even when it is interpreted as I have explained in part III.2 above; he may see its series of increasingly thinner veils of ignorance as too confining and restrictive.

(4) I turn to the third and last part of the passage (128-29), supplemented by a later statement. The consequences Habermas spells out he grants were not my intention, though he thinks my views do have that result. This is shown

...by the rigid boundary between the political and the nonpublic identities of the citizens. According to Rawls, this boundary is set by basic liberal rights that constrain democratic self-legislation, and with it the sphere of the political, *from the beginning*, that is, prior to all political will formation (128-29).

The supplementary passage (129) runs as follows:

These two identities then constitute the reference points for two domains [one characterized by political values, the other by nonpublic values], the one constituted by rights of political participation and communication, the other protected by basic liberal rights. The constitutional protection of the private sphere [I would say the nonpublic sphere] in this way enjoys priority while 'the role of the political liberties is...largely instrumental in preserving the other liberties'.<sup>39</sup> Thus,

<sup>39</sup> Here Habermas quotes from PL 299, "Basic Liberties and Their Priority." The point of the paragraph from which his citation is taken is to say that not all basic

with reference to the political value sphere, a prepolitical domain of liberties is delimited which is withdrawn from the reach of democratic self-legislation (129).

I begin with the meaning of the italicized phrase near the end of the first quotation. Habermas says that '*from the beginning*' means: prior to all will formation. If so, then what he says is not accurate to justice as fairness for this reason. From the point of view of citizens in the background culture, I have supposed that at the stage of the constitutional convention, after having selected the principles of justice in the original position, we adopt a constitution that, with its Bill of Rights and other provisions, restricts majority legislation in how it may burden such basic liberties as liberty of conscience and freedom of speech and thought. In this way it restricts popular sovereignty as expressed in the legislature. In justice as fairness, these basic liberties are not in a prepolitical domain; nonpublic values are not viewed, as they might be in some comprehensive doctrine (such as rational intuitionism or natural law), as ontologically prior and for that reason prior to political values. Some citizens no doubt hold such a view, but that is another matter. It is not part of justice as fairness. This conception allows—but does not require—the basic liberties to be incorporated into the constitution and protected as constitutional

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liberties are important or prized for the same reasons. I mention that one strand of the liberal tradition prizes what Benjamin Constant called "the liberties of the moderns" above the "liberties of the ancients," and in which the role of the political liberties is perhaps largely instrumental in preserving the other liberties. Then I say that "even if this view is correct, it is no bar to counting certain political liberties among the basic liberties and protecting them by the priority of liberty. For to assign priority to these liberties they need only be important enough as essential institutional means to secure the other basic liberties...." I do not say that the political liberties are solely instrumental, nor that they have no place in the lives of most people. Indeed, I would insist that the political liberties have intrinsic political value in at least two ways: first, in playing a significant or even a predominant role in the lives of many citizens engaged in one way or another in political life; and, second, they are, when honored, one of the social bases of citizens' self-respect and in this way, among others, a primary good. See PL v: 6, and also TJ 233f., where I say: "Of course, the grounds for self-government are not solely instrumental." Then, after noting briefly the role of the political liberties in promoting citizens' self-respect, the moral quality of civic life, the exercise of our moral and intellectual sensibilities, and the like, I conclude by remarking: "[These considerations] show that equal liberty is not solely a means." (In this passage I actually say 'self-esteem' and not 'self-respect' but I now realize, thanks to David Sachs, that self-esteem and self-respect are different ideas. I should have selected one term as appropriate and stuck with it, style be damned.) I meant to take no stand there on what the features of the public political space should be for the role of the people. This is a question that belongs to a constitutional convention, in the sense of the four-stage sequence, and I saw it not at issue.

rights on the basis of citizens' deliberations and judgments over time. Endorsing a constitution restricting majority rule need not, then, be prior to the will of the people and in this way it need not express an external constraint on popular sovereignty. It is the will of the people expressed in democratic procedures such as ratifications of a constitution and enacting amendments. So much is clear once we see the four-stage sequence as a framework in a device of representation to order our political judgments as citizens.

All this can be made clearer by the distinction between constitutional and normal politics as I surveyed it in *Political Liberalism* VI: 6.<sup>40</sup> We assume the idea of a dualist constitutional democracy found in John Locke: it distinguishes the people's constituent power to form, ratify, and amend a constitution from the ordinary power of legislators and executives in everyday politics; and it distinguishes also the higher law of the people from the ordinary law of legislative bodies (PL 231ff.). Parliamentary supremacy is rejected. The three most innovative periods in American constitutional history are, let us say, the founding of 1787-91, Reconstruction, and in a different way the New Deal.<sup>41</sup> In all these periods, fundamental political debates were widespread and they offer three examples of when the electorate confirmed or motivated the constitutional changes that were proposed and finally accepted. Surely these cases show that the constitutional protection of basic rights is not prior to what Habermas calls will formation. It suffices to mention James Madison's guiding the Bill of Rights through Congress in June to September of 1789, as the Anti-Federalists had been promised; and had they not been, the constitution might not have been ratified.<sup>42</sup>

<sup>40</sup> Here I draw upon Ackerman's instructive *We The People, Volume I: Foundations* (Cambridge: Harvard, 1991). A conception of constitutional democracy, however, can be dualist in the general sense of the text above without endorsing Ackerman's more specific sense of dualism that allows for "structural amendments" to the constitution outside of formal amending procedures of Article v. A political movement like the New Deal may be importantly influential in shifting the dominant interpretations that judges, say, give of the constitution, but amendments are something else again. I would also not accept his distinction between dualism and right foundationalism (as he understands them). He thinks that dualism requires, although rights foundationalism does not, that any amendment in accordance with the procedures of Article v be constitutionally valid. In PL 238f. I argue otherwise. I cannot discuss these matters and aim to say only what bears on Habermas's concern. See further Freeman, "Original Meaning, Democratic Interpretation, and the Constitution," *Philosophy and Public Affairs*, XXI (Winter 1992): 3-42; and Fleming, "Constructing the Substantive Constitution," *Texas Law Review*, LXXII (December 1993): 211-304; 287n380, 290n400. I am grateful to Fleming for valuable advice and correspondence clarifying these matters, from which I have learned much.

<sup>41</sup> Here I follow Ackerman.

<sup>42</sup> See Stanley Elkins and Eric McKittrick, *The Age of Federalism* (New York: Oxford, 1993), pp. 58-75.



The four-stage sequence fits, then, with idea that the liberties of the moderns are subject to the constituent will of the people. Put in terms of that sequence, the people—or better, those citizens if any who affirm justice as fairness—are making a judgment at the stage of a constitutional convention. I believe that Habermas thinks that in my view the liberties of the moderns are a kind of natural law, and therefore, as in the case of Kant on his interpretation, they are external substantive ideas and so impose restrictions on the public will of the people.<sup>43</sup> Rather, justice as fairness is a political conception of justice, and while of course a moral conception, it is not an instance of a natural law doctrine. It neither denies nor asserts any such view. In my reply I have simply observed that from within that political conception of justice, the liberties of the moderns do not impose the prior restrictions on the people's constituent will as Habermas objects.<sup>44</sup>

If this is right, then Habermas may have no objection to justice as fairness but may reject the constitution to which he thinks it leads, and which I think may secure both the ancient and modern liberties. He might suppose that since the illustrative ideas used in *A Theory of Justice*, chapter IV, are taken from the United States constitution, the constitution that justice as fairness would justify is similar; and so it must be open to the same objections. He and I are not, however, debating the justice of the United States constitution as it is; but, rather, whether justice as fairness allows and is consistent with the popular sovereignty he cherishes. I have urged that it is. And I would have, as he does, objections deriving (in my case) from the two principles of justice to our present constitution and society's basic structure as a system of social cooperation. To mention three: the present system woefully fails in public financing for political elections, leading to a grave imbalance in fair political liberties; it allows a widely disparate distribution of income and wealth that seriously

<sup>43</sup> He mentions me and Kant as natural law theorists, FG 110.

<sup>44</sup> This accords with Michelman's view in his essay "Law's Republic," *The Yale Law Journal*, xcvi (July 1988): 1493-1537, pp. 1499f., when he says: "I take American constitutionalism—as manifest in academic constitutional theory, in the professional practice of lawyers and judges, and in the ordinary self-understanding of Americans at large—to rest on two premises regarding political freedom: first, that the American people are politically free inasmuch as they are governed by themselves collectively, and second, that the American people are politically free in that they are governed by laws rather than men. I take it that no earnest, non-disruptive participant in American constitutional debate is quite free to reject either of these two professions of belief. I take them to be premises whose problematic relation to each other, and therefore whose meaning, are subject to an endless contestation...."



undermines fair opportunities in education and in chances of rewarding employment, all of which undermine economic and social equality; and absent also are provisions for important constitutional essentials such as health care for many who are uninsured. Yet these urgent matters do not concern the philosophical topics Habermas raises, such as the device of the original position and its relation to discourse theory, the two principles of justice and the four-stage sequence, and the connection between ancient and modern liberties.

Habermas may affirm ideas somewhat analogous to those of Jefferson, who seems to have been deeply troubled by this question. In his letter to Samuel Kercheval of 1816, Jefferson discusses his ideas for the reform of the constitution of Virginia and lays out the elements of his ward scheme, which divides counties into wards small enough so that all citizens can attend and voice their opinion on matters at the ward level up to the county and higher levels. These wards, together with presumably some kind of hierarchy of consultation, are to provide that necessary public space for the people to express themselves as equal citizens, a provision lacking in both the Virginian and American constitutions. Recall Jefferson's idea (also in this letter) of holding a constitutional convention every nineteen or twenty years, so that each generation could choose its own constitution, past generations having no rights in this respect.<sup>45</sup> I mention Jefferson's views only because they may cast light on Habermas's remark about reigniting the radical democratic embers in a just society.

I also hold that the most appropriate design of a constitution is not a question to be settled by considerations of political philosophy alone, but depends on understanding the scope and limits of political and social institutions and how they can be made to work effec-

<sup>45</sup> See *Thomas Jefferson: Writings*, Merrill Peterson, ed. (New York: Viking, 1984), pp. 1399f. and 1401f., respectively. See also his letter to James Madison, September 6, 1789, in which he says that "*the earth belongs in usufruct to the living*, and that the dead have neither rights or powers over it" (*ibid.*, p. 959). One generation of men cannot bind another. In this connection, Hannah Arendt refers to the seemingly insoluble perplexity of a revolutionary spirit that strives to establish a constitutional government. The perplexity is how to house a revolutionary spirit within a permanent regime. She also suggests that Jefferson's antagonism toward those who regard constitutions with sanctimonious reverence rests on a feeling of outrage about the injustice that his generation alone should be able "to begin the world over again," a phrase from Thomas Paine's *Common Sense*; see her *On Revolution* (New York: Viking, 1963), p. 235. Yet this feeling of injustice is entirely misplaced and cannot sensibly be entertained. (I might as well spend my life whining that I am not Kant, Shakespeare, or Mozart.) As for the perplexity of finding an appropriate public political space for giving scope to the political autonomy of the people, I believe, as the text above says, that the question is one of constitutional design; any feeling of insoluble perplexity is illusory, not that Arendt would disagree.

tively. These things depend on history and how institutions are arranged. Of course, here the concept of truth applies. I come back to the question of constitutional design in part IV.3.

#### IV. THE ROOTS OF THE LIBERTIES

(1) The first part of Habermas's objection about the liberties that I addressed in part III is connected with the short summary<sup>46</sup> near the end of his criticisms bearing on what he calls the dialectical relation between private and public autonomy (130-31). I complete my reply by discussing this summary, which includes statements from the central argument of FG,<sup>47</sup> the essential parts of which are given mainly in chapters 3-4 of that work. It is also returned to in chapter 9, as well as in the "Postscript."<sup>48</sup> For this reason, I begin by reviewing some remarks from the latter in completing my reply to his objection to what he refers to as liberalism as a historical doctrine.<sup>49</sup>

Habermas thinks that throughout the history of political philosophy, both liberal and civic republican writers have failed to understand the internal relation between public and private autonomy. For example, he claims that liberal writers typically regard the relation between these two forms of autonomy in such a way that private autonomy, as specified by the liberties of the moderns, is founded on human rights (for example, the rights to life, liberty, and (personal<sup>50</sup>) property) and on an "anonymous"<sup>51</sup> rule of law. On the other hand, the public (political) autonomy of citizens is derived from the principle of popular sovereignty and expressed in democratic law. In the philosophical tradition, he thinks the relations between the two kinds of autonomy are marked by "an unresolved competition" ("Postscript" III: 1).

<sup>46</sup> The summary begins with the words 'A theory of justice' (130) and ends with the words 'in the present context' (131).

<sup>47</sup> See David Rasmussen's review in *Philosophy and Social Criticism*, xx, 4 (1994): 21-44, p. 41.

<sup>48</sup> The "Postscript" (dated September 1993) was added to a later printing (*Auflage*) of FG 661-80. A translation by Rehg is now in *Philosophy and Social Criticism*, xx, 4 (October 1994): 135-50. I thank Rasmussen for sending me the page proofs of this.

<sup>49</sup> I refer to Rehg's translation of the *Postscript* by section and paragraph number. The main section summarizing the central argument is in III. It has eight paragraphs: the first four state the central argument, while the next four reply to two critics, Otfried Höffe and Larmore, each in two paragraphs.

<sup>50</sup> I insert this because justice as fairness does not include the right to ownership of the means of production; see TJ 270-74.

<sup>51</sup> The translator's term. The German is "eine anonyme *Herrschaft der Gesetze...*," by which I believe he means the rule of law as such. That is, it is anonymous or nameless (in economics it can mean goods lacking a brand name); it is not the law of a king or a legislative body.

This fault is seen in the fact that, since the nineteenth century, liberalism has invoked the great danger of the tyranny of majority rule and has simply postulated the priority of human rights as a constraint on popular sovereignty. For its part, civic republicanism in the tradition of Aristotle has all along granted the priority to the ancient over the modern liberties. Contrary to Locke and Kant, Habermas denies that the rights of the moderns are moral rights based either on natural law or a moral conception such as the categorical imperative. He claims that by basing those rights on morality, liberalism subjects the legal order to an external ground, thereby placing constraints on legitimate democratic law; whereas the view of Rousseau and civic republicanism bases ancient liberties on the ethical values of a specific community with its ethos of the common good, rooting those liberties on particular and parochial values.

Moving between what he views as these two errors, Habermas sees the liberties of public autonomy and the liberties of private autonomy as “co-original” and of “equal weight,” with neither being prior to or imposed on the other (FG 135). The point is that the internal connection between public and private autonomy, which even Kant and Rousseau wished to formulate but missed the crucial insight to express, removes the unresolved competition between the two forms of autonomy. For once the internal connection between them is understood, we see they mutually presuppose one another (130): since given that connection, if we have one form of autonomy, we have the other, and neither need be imposed. On the discourse-theoretic conception of democracy, harmony and balance reign and both are fully achieved.<sup>52</sup>

Habermas does not question that human rights can be justified as moral rights. His point is that once we think of them as belonging to positive law, which is always coercive and sanctioned by state power, they cannot be imposed by an external agency on the legislature of a democratic regime. This is surely correct: suppose (we wildly imagine) the Prussian chancellor with the support of the King of Kant’s day to ensure that all laws enacted accord with Kant’s principle of the social contract<sup>53</sup> so that free and equal citizens would, let us say, on due reflection, agree with them. Since citizens do not themselves freely discuss, vote on, and enact these laws, however, citizens are

<sup>52</sup> The preceding three paragraphs offer an interpretation of “Postscript,” III: 1. See also FG 129-35, 491ff.

<sup>53</sup> See *Metaphysics of Morals*, Doctrine of Right, sects. 47, 52, and Remark D in the general remarks after sect. 49; and “Theory and Practice,” Akademie Edition VIII: 289f., 297f.

not politically autonomous and cannot thus regard themselves. On the other hand, Habermas says that even a democratic people as sovereign legislator, and fully autonomous politically, must not enact anything that violates those human rights. Here he thinks liberalism faces a dilemma ("Postscript" III: 2), the resolution of which has long escaped political philosophy and puts the liberties in unresolved competition. The alleged dilemma, I think, is that while human rights cannot be externally imposed on the exercise of public autonomy in a democratic regime, that autonomy, however great, cannot legitimately violate those rights by its laws ("Postscript" III: 2).

(2) Against what Habermas seems to say here, I shall simply defend liberalism as I understand it. Thus, I deny, first, that liberalism leaves political and private autonomy in unresolved competition; second, that the alleged dilemma liberalism is said to face is not a true dilemma, since the two propositions are plainly correct; and I maintain, third, that in liberalism properly interpreted, as I hope it to be in justice as fairness, and in other liberal doctrines going back to Locke, public and private autonomy are also both co-original and of equal weight (to use Habermas's terms), with neither externally imposed on the other. I begin with the last.

I lay out three parallels between justice as fairness and Habermas's view in order to make clear that in liberalism properly interpreted, public and private autonomy are co-original and of equal weight. They show, I believe, that justice as fairness as well as other liberal views recognize what he calls the internal connection, or the mutual presupposition, between the ancient and modern liberties as much as he does by his discourse-theoretic view. I begin with the sentence that ends the first brief paragraph of the summary:<sup>54</sup>

The basic question then is: Which rights must free and equal persons mutually accord [*gegenseitig einräumen*] one another if they wish to regulate their coexistence by the legitimate means of positive and coercive law (130)?

Habermas takes this question as the starting point for his interpretation of the self-understanding democracy (FG 109).

Now, is this statement not parallel to, though not of course the same as, what is happening in civil society when citizens discuss and accept (for those who do) the merits of the original position and the

<sup>54</sup> This sentence is parallel to a sentence in "Postscript" II: 2.3: "The leading question of modern natural law can be reformulated under new discourse-theoretic premises: What rights must citizens mutually cede to one another if they decide to constitute themselves in as a voluntary association of legal consociates and legitimately to regulate their living together by means of positive law?"

principles presumptively selected there?<sup>55</sup> Are the parties as citizens' trustees not selecting principles of justice to specify the scheme of (basic) liberties which best protect and further citizens' fundamental interests and which they then concede to one another? Here, also, the ancient and the modern liberties are co-original and of equal weight with neither given pride of place over the other. The liberties of both public and private autonomy are given side by side and unranked in the first principle of justice. These liberties are co-original for the further reason that both kinds of liberty are rooted in one or both of the two moral powers, respectively in the capacity for a sense of justice and the capacity for a conception of the good. As before, the two powers themselves are not ranked and both are essential aspects of the political conception of the person, each power with its own higher-order interest.<sup>56</sup>

(3) A second parallel in justice as fairness is that it also has a two-stage construction much as does Habermas's view.<sup>57</sup> The parallel is that those in civil society who accept justice as fairness use the original position as a device of representation to determine the rights of citizens who recognize each other as equals and whose rights are to be secured by a democratic regime. Then with the two principles of justice on hand (with the emphasis on the first principle), we move (in accordance with the four-stage sequence (part III.2)) as delegates to a constitutional convention. At this point, just as in Habermas's view, we "advance to the constitutional disciplining of the presupposed state power" ("Postscript" III: 8). In justice as fairness, we adopt in thought and subsequent practice a constitution in which, as I have said, we may or may not embed the basic liberties, thereby subjecting parliamentary legislation to certain constitutional constraints as one of the ways to discipline and regulate the presupposed state power. This power is presupposed in justice as fairness, because from the start (part I) we are dealing with principles and ideals for the basic structure of society and its main political and social institutions, already taken to exist in some form.

<sup>55</sup> As we have seen, it is an important matter where these discussions take place. In justice as fairness, they take place among citizens in civil society—the point of view of you and me. I suppose the same holds in Habermas's case.

<sup>56</sup> There is a third higher-order interest given by the determinate conception of the good that people have at any given time. But since this interest is subject to the higher-order interests of the two moral powers in that determinate conception and must be both reasonable and rational, I do not discuss this interest further here.

<sup>57</sup> The idea of a two-stage construction is implicit in the summary argument (129–30) and it is briefly described using that phrase '*eine zweistufige Rekonstruktion*' ("Postscript" III: 8). I am unclear about how a construction differs from a reconstruction. Is it relevant here?

When Habermas says that liberal rights are not originary in his view but rather emerge from a transformation of the liberties reciprocally ceded (“Postscript” III: 8), the context shows that he is referring to rights against the state in the form of rights embedded in a constitution: say, the rights of the American Bill of Rights or of the German *Grundgesetz*. He is not discussing the individual rights persons initially cede to each other at his first step.<sup>58</sup> These latter rights are originary in the sense that it is there that we begin, just as we might say that the basic rights covered by the first principle of justice are originary. The basic liberties of these principles may be cited, along with a view about how legislatures and social institutions work, as reasons for embedding those liberties in a written constitution in a constitutional convention; or, in Habermas’s words, they may be so transformed. The basic liberties (parallel to his initially ceded rights) are original (in his sense), but the constraints on legislation are not. He does not question that those liberties may also be appropriately related to the order of moral rights. Rather, his view is (and I agree) that the obtaining of this relation of itself is not sufficient in a democratic society to make enforcing them legitimate as law. Nor would he question that the reasonable belief of citizens in there being that relation is among the good reasons for their arguing for enacting certain private rights in democratic debate.

If all this is right, Habermas is not differing with justice as fairness or with Frank Michelman, whom he counts as a civic republican; or indeed with many other liberalisms. Both his view and ours (along with much of American constitutional doctrine) agree that whether the modern liberties are incorporated into the constitution is a matter to be decided by the constituent power of a democratic people,<sup>59</sup> a familiar line of constitutional doctrine stemming from George Lawson via Locke.<sup>60</sup> I think Habermas’s view about liberalism is not accurate to this historical line.

Moreover, a question of real significance, as stated in part III, is whether these liberties are better secured and protected by their being incorporated into a constitution. The question is one of constitutional design. Of course, its answer presupposes principles of right and justice but it also requires historical study and a grasp of

<sup>58</sup> I am indebted to McCarthy for understanding of this point.

<sup>59</sup> For Locke’s view of the people’s constituent power, see *Second Treatise*: 134, 141. I might add that this fits the Federalist doctrine of the people. See Gordon Wood’s splendid account in *The Creation of the American Republic, 1776-1787* (New York: Norton, 1969); chs. VII–IX and XIII give a good part of the picture.

<sup>60</sup> On this see Julian Franklin, *Sovereignty of the People* (New York: Cambridge, 1978), tracing Locke’s view in the *Second Treatise* to Lawson’s treatise of the 1650s.



the workings of democratic institutions under particular patterns of historical, cultural, and social conditions. In justice as fairness, this is a judgment to be made in a constitutional convention, with the pros and cons assessed from that point of view. Differences of opinion here depend in good part on how we weigh the historical evidence for the effectiveness of constitutional protections and whether they have drawbacks of their own, such as debilitating effects on democracy itself. However attractive at first sight it may appear to be to constrain legislation, examination of the evidence, historical cases, and political and social thought may suggest otherwise. The point is that constitutional design is not a question to be settled only by a philosophical conception of democracy—liberal or discourse-theoretic or any other—nor by political and social study alone in the absence of a case by case examination of instances and taking into account the particular political history and the democratic culture of the society in question. So I maintain that in liberalism (and in Habermas's view as well) there is no unresolved competition between ancient and modern liberties but rather a matter of weighing the evidence one way or the other. The case is on all fours with the question (discussed in *A Theory of Justice*) of private-property democracy versus liberal socialism (TJ 270-74).

I deny, then, that liberalism leaves political and private autonomy in unresolved competition. That is my first claim. The second is that the dilemma liberalism supposedly faces is a true dilemma, since, as I have said, the two propositions are correct. One said: no moral law can be externally imposed on a sovereign democratic people; and the other said: the sovereign people may not justly (but it may legitimately<sup>61</sup>) enact any law violating those rights. These statements simply express the risk for political justice of all government, democratic or otherwise; for there is no human institution—political or social, judicial or ecclesiastical—that can guarantee that legitimate (or just) laws are always enacted and just rights always respected. To this add: certainly, and never to be questioned, a single person may stand alone and be right in saying that law and government are wrong and unjust. No special doctrine of the co-originality and equal weight of the two forms of autonomy is needed to explain this fact. It is hard to believe that all major liberal and civic republican writers did not understand this. It bears on the age-old question of how best to unite power with law to achieve justice.

(4) A third parallel between justice as fairness and the idea that public and private autonomy are both co-original and of equal

<sup>61</sup> Legitimacy allows leeway for this; see part v below.



weight is the following. I believe that for Habermas the internal connection between the two forms of autonomy lies in the way that the discourse theory reconstructs the legitimacy of democratic law. In justice as fairness, the two forms of autonomy are also internally connected in the sense that their connection lies in the way that conception is put together as an ideal. The source of its system of basic rights and liberties traces back to the idea of society as a fair system of social cooperation and of citizens' rational representatives selecting the terms of cooperation subject to reasonable conditions. As participants engaged in such cooperation, citizens are said to have the requisite two moral powers with the three higher-order interests that enable them to take part in a society so conceived. These powers are the capacities for a sense of justice and a conception of the good. The first is paired with the reasonable—the capacity to propose and act on fair terms of social cooperation assuming others do; the second with the rational<sup>62</sup>—the capacity to have a rational and coherent conception of the good to be pursued only within the bounds of those fair terms.

From here the idea is to connect the basic liberties into a fully adequate system of the two kinds of liberties. This is done in six steps, which I only indicate here:

- (a) Specify for all citizens the social conditions for the adequate development and the full and informed exercise of the two moral powers in the two fundamental cases (PL VIII: 332).<sup>63</sup>
- (b) Identify the rights and liberties required to protect and allow the exercise of those two powers in the two fundamental cases. The first case concerns the application of the principles of justice to the basic structure of society and its social policies. Political liberty and freedom of political speech and thought are essential here. The second case concerns the application of deliberative reason in guiding one's conduct over a complete life. Liberty of conscience and freedom of thought more generally enter here with freedom of association (PL VIII: 332).
- (c) Since the liberties are bound to conflict, and none is absolute with respect to the others, we must check whether the central range of each liberty can be simultaneously realized in a workable basic structure (PL 297f.). The point here is that we cannot simply say they can be: it must be shown by specifying the central range of

<sup>62</sup> I mention here that the concept of the rational here is wider and deeper than the concept of it used in the original position, where it has a narrower meaning. I cannot pursue the difference here.

<sup>63</sup> This refers to "Basic Liberties and Their Priority" (1982), included unchanged as PL VIII.

these liberties and how they can be reconciled in workable institutions satisfying the two principles of justice.<sup>64</sup>

- (d) Use two ways—one historical and the other theoretical—of drawing up the list of basic liberties. In the historical, we look to constitutions of democratic societies and make a list of the liberties normally protected and examine their role in democracies that historically have worked well. A second way is to consider which liberties are crucial for the adequate development and exercise of the two moral powers over a complete life (PL 292f.).
- (e) Introduce primary goods (which include the basic liberties and fair opportunities) in order to specify further the details of the principles of justice so as to render them workable under normal social conditions. The basic rights, liberties, and opportunities we know are equal, and citizens are to have sufficient all-purpose means to make effective use of them. But what are these rights and liberties and means more specifically for those principles to be usable? The primary goods answer this question (PL V: 3-4). With this done, the principles can direct us under reasonably favorable conditions to establish in due course, beginning from where society now is, a just system of political and social institutions that protects the central range of all the liberties, both ancient and modern.
- (f) Show finally that these principles would be adopted in the original position by the trustees of citizens in society regarded as free and equal and as having the two moral powers with a determinate conception of the good.

In this way, the family of each of the two forms of autonomy have been internally connected by means of the construction of justice as fairness as a political conception of justice. This form of liberalism, then, does not leave the liberties in unresolved competition. Actual cases often present conflicts among the liberties and no scheme of constitutional or other design can altogether avoid this, no more on Habermas's view than any other, not that he would deny this.

As for the question of what are the differences between Habermas's view and mine concerning the co-originality and equal weight of public and private autonomy, I am uncertain. While his view is comprehensive (part I), we both have a normative ideal of democracy that grounds an internal connection between the two

<sup>64</sup> The aim of TJ II, is to sketch these institutions. It says on p. 195 that the aim of part II (Institutions) is to illustrate the content of the principles of justice by describing a basic structure of institutions that satisfies them. They define, as the text says, a workable political conception, that is, one that can be set up in actual institutions and made to work given what citizens can be expected to know and how they can be expected to be motivated, with this last discussed in part III. I mention this because Habermas says in FG, ch. 2.2, that TJ is abstract and ignores these matters.

forms of autonomy, and these ideals are parallel in several ways. His ideal seems to me sketched too broadly to foresee to what family of liberties the ideal discourse procedure would lead. Indeed, it seems unclear whether it could lead to any very specific conclusion at all.<sup>65</sup>

(5) A final question. Taking Habermas at his literal word, he may think that the internal relation between the two forms of autonomy depends on “the normative content of the *mode of exercising political autonomy*” (FG 133). Now, why the emphasis on the political? Does he really mean to imply that political autonomy has the primary and basic role, having said the two kinds of autonomy are co-original and of equal weight? Why does it not go equally both ways in his conception?

In any case, justice as fairness holds that, even if the liberties of private autonomy can be internally connected with and grounded on political autonomy, those liberties are not grounded solely in that relation. This is because the liberties of the moderns in justice as fairness have their own distinctive basis in the second moral power with its determinate (though in the original position unknown) conception of the good. Moreover, the second moral power and the two higher-order interests associated with it express independently in the system of basic liberties the protections and freedoms of persons as members of civil society with its social, cultural, and spiritual life. This part of society contains institutions and associations of all kinds, cultural organizations and scientific societies, universities and churches, media of one form or another, all without end. The value and worth of these activities in the eyes of citizens whose activities they are constitute at least a sufficient, and indeed a vital basis for the rights of private autonomy. For as Habermas grants (FG 165), political democracy depends for its enduring life upon a liberal background culture that sustains it. This culture will not sustain it, however, unless the institutions of democracy are seen by reasonable citizens as supporting what they regard as appropriate forms of good as specified by their comprehensive doctrines and permitted by political justice. So even if the internal relation to the political liberties gave a sufficient discourse-theoretic derivation for the civic liberties, that would not prevent the latter from having another and at least equally sufficient justification, as I believe they do.

Habermas’s seeming emphasis on the political (if he does intend it) is at all plausible only if it is supposed that the idea of classical humanism is true: that is, the activity in which human beings achieve

<sup>65</sup> Admittedly, I have not done much of this myself, but certain basic liberties and the cases to which they applied were discussed a bit in PL VIII, “Basic Liberties.”

their fullest realization, their greatest good, is in the activities of political life. Plainly, engaging in political life can be a reasonable part of many people's conceptions of the good and for some it may indeed be a great good, as great statesman such as George Washington and Abraham Lincoln testify. Still, justice as fairness rejects any such declaration; and to make the good of civil society subordinate to that of public life it views as mistaken.

V. PROCEDURAL VERSUS SUBSTANTIVE JUSTICE

(1) In this section, I conclude my defense of liberalism (of political liberalism in my case) by replying to Habermas's objection that justice as fairness is substantive rather than procedural. Recall that he says that his procedural theory

...focuses exclusively on the procedural aspects of the public use of reason and derives the system of rights from the idea of its [legitimate<sup>66</sup>] legal institutionalization. It can leave more questions open [than justice as fairness] because it entrusts more to the *process* of rational opinion and will formation. Philosophy shoulders different theoretical burdens when, as on Rawls's conception, it claims to elaborate the ideal of a just society, while the citizens then use this idea as a platform from which to judge existing arrangements and policies (131).

I see my reply as a defense of liberalism since any liberal view must be substantive, and it is correct in being so. Moreover, I do not see why Habermas's view is not also substantive, even though the substantive elements may differ.

I begin by explaining that I take the distinction between procedural and substantive justice to be, respectively, the distinction between the justice (or fairness) of a procedure and the justice (or fairness) of its outcome.<sup>67</sup> Both kinds of justice exemplify certain values, of the procedure and the outcome, respectively; and both kinds of values go together in the sense that the justice of a procedure always depends (leaving aside the special case of gambling) on the justice of its likely outcome, or on substantive justice. Thus, procedural and substantive justice are connected and not separate. This still allows that fair procedures have values intrinsic to them—for example, a procedure having the value of impartiality by giving all an equal chance to present their case.<sup>68</sup>

<sup>66</sup> Do we not need legitimate here?

<sup>67</sup> Here I follow Hampshire's distinction in his review, p. 44, cited above in footnote 31.

<sup>68</sup> I am much indebted to Cohen's, "Pluralism and Proceduralism," *Chicago-Kent Law Review*, LXIX (1994): 589-618. This is a thorough and penetrating discussion of this question and I draw on it at many points. Its overall theme is that, since procedural justice depends on substantive justice, an overlapping consensus on

The connection between procedural and substantive justice may be illustrated by recalling briefly two clear cases involving procedural justice.<sup>69</sup> The first is perfect procedural justice as illustrated by the common-sense procedure of dividing a cake. The point is that the procedure illustrates perfect procedural justice only because it always gives the accepted fair outcome: equal division. If it failed to give a fair outcome, it would not be a procedure for justice, but for something else. The same is true of a criminal trial, which is a case of imperfect procedural justice. It is imperfect because no trial procedure, however just and effective the law arranges it—with its rules of evidence and the rights and duties of the parties, all reasonably laid out—can be guaranteed to convict the accused if and only if the accused has committed the crime. Yet in the same way as before, the procedure of a criminal trial would not be just—not a procedure for a fair trial—unless it was intelligently drawn up so that the procedure gives the correct decision, at least much of the time. We know there will be some errors, partly from setting a high standard for determining guilt and trying to avoid convicting innocent people; and partly from inevitable human fallibility and unlikely contingencies in the evidence. Yet these errors cannot be too frequent, otherwise the trial procedure ceases to be just.

Sometimes it may look as if the dispute is about procedural and substantive justice but it turns out not to be. Both sides agree that procedural justice depends on substantive justice and differ about something else. Consider pluralist democratic views urging some form of majority-rule democracy and rejecting constitutional democracy with its institutional devices, such as the separation of powers, supermajorities on certain matters, a bill of rights, or judicial review, as incompatible with democratic rule, or otherwise as unnecessary.

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substantive matters is, in general, no more utopian than agreement on procedural justice: a constitutional consensus already implies much agreement on substantive matters. Thus, Cohen rejects the objection to substantive justice that procedural justice is, in general, less demanding, since it is independent of substantive justice. This fits well with the view in PL IV: 6-7 that there are tendencies pushing a constitutional to an overlapping consensus. I did not use Cohen's argument there as it escaped me altogether. The topic of procedural justice is also nicely discussed by Charles Beitz in his *Political Equality* (Princeton: University Press, 1989), ch. 4. There he presents a thesis I follow here: that the justice of procedural justice depends in part on the justice of the outcomes. For critiques along these lines of John Hart Ely's *Democracy and Distrust* (Cambridge: Harvard, 1981), see Dworkin, *A Matter of Principle* (Cambridge: Harvard, 1985), ch. 2, pp. 57-69; and Laurence Tribe, *Constitutional Choices* (Cambridge: Harvard, 1985), ch. 2: "The Pointless Flight from Substance," pp. 9-20.

<sup>69</sup> I discussed these (including gambling) in TJ 84-87.

These views see majority rule as a fair procedure specified in public political institutions for resolving political and social conflicts. Some features of the procedure are definitive of democracy and specify aspects of the procedure itself: for example, the right to vote, majority rule, freedom of political speech, the right to run for and to hold political office. A democratic government to be democratic must incorporate these rights; they are essential elements that specify its institutions.<sup>70</sup>

The debate between majoritarians and constitutionalists arises importantly over basic rights and liberties that are not obviously part of the recognized procedure of government—for example, nonpolitical speech and freedom of religious, philosophical, and moral thought, and liberty of conscience and the free exercise of religion. None of these is definitive of the democratic procedure. Given the definition of majority rule, the issue between majoritarians and constitutionalists is whether it provides a fair procedure and protects these other rights and liberties.

Majoritarians say that majority rule is fair and includes all the rights necessary for it to yield just legislation and reasonable outcomes. Constitutionalists say that majority rule is not acceptable. Unless constitutionally recognized restrictions on majority legislation and other elements are in place, the basic liberties and other freedoms will not be properly protected. Nor will democracy be firmly supported and gain the willing consent of its people. To this the majoritarians reply that they fully accept the fundamental significance of nonpolitical speech, liberty of thought and conscience, and the free exercise of religion. They maintain rather that constitutional restrictions are unnecessary, and in a genuinely democratic society and culture those rights and liberties will be respected by the electorate. They say that for a people's honoring restrictions on the basic liberties, we must depend in any case on the spirit of the electorate, and that to rely on constitutional devices has debilitating effects on democracy itself.

The point is that both majoritarians and constitutionalists may<sup>71</sup> agree that the debate turns on whether majority democracy is just in its outcomes, or substantially just. Majoritarians do not claim that democracy is purely procedural: they know that they cannot defend it against constitutionalists without holding that it is not only just in its outcomes but that constitutional devices are unnecessary and

<sup>70</sup> See Robert Dahl, *Democracy and Its Critics* (New Haven: Yale, 1989), pp. 167ff.

<sup>71</sup> I say 'may' here because some may hold the majority-rule principle to be itself the final and governing norm. I am not considering that case.

would, if anything, make those outcomes worse.<sup>72</sup> The dispute hinges on fundamental questions about how political institutions actually work and rests on our rough knowledge of these things.

(2) After this detour, can Habermas say that his view is only procedural? To be sure, he thinks of the discourse-theoretic idea as restricted to an analysis of the moral point of view and the procedure of democratic legitimation. And he leaves substantial questions calling for answers “here and now” to be settled by the more or less enlightened discussions of citizens (131). But none of this means that he can avoid relying on substantive content.

He recognizes that once idealizations are attributed to the discourse procedure, elements of content are thereby embedded in it (FG 18). Moreover, the ideal procedure so formed is essential in his account of democracy, since a basic thought is that the process of public discussion can be guaranteed to have reasonable outcomes only to the extent that it realizes the conditions of ideal discourse. The more equal and impartial, the more open that process is and the less participants are coerced and ready to be guided by the force of the better argument, the more likely truly generalizable interests will be accepted by all persons relevantly affected. Here are five values that offhand seem to be values of the procedure—impartiality and equality, openness (no one and no relevant information is excluded) and lack of coercion, and unanimity—which in combination guide discussion to generalizable interests to the agreement of all participants. This outcome is certainly substantive, since it refers to a situation in which citizens’ generalizable interests are fulfilled. Moreover, any of the previous five values are related to substantive judgments once the reason those values are included as part of the procedure is that they are necessary to render the outcomes just or reasonable. In that case, we have shaped the procedure to accord with our judgment of those outcomes.

Further, Habermas holds that the outcomes of public reason working through democratic procedures are reasonable and legitimate. For example, he says that the equal distribution of the liberties can be fulfilled by a democratic procedure that supports the assumption that the “outcomes of political will formation are reasonable” (“Postscript” III: 3-4). Once he says this, he presupposes an idea of reasonableness to assess those outcomes and his view is substantive.

<sup>72</sup> I think this is the kind of argument Dahl intends to make in his *Democracy and Its Critics*. He is not denying the great significance of the nonpolitical rights and liberties; rather, he questions, as a general political view, the effectiveness and need for the familiar constitutional devices; see chs. 11-13.



It is a common oversight (which I do not say he makes) to think that procedural legitimacy (or justice) tries for less and can stand on its own without substantive justice: it cannot.<sup>73</sup>

In fact, I believe that Habermas recognizes that his view is substantive, since he only says it is more modest than mine; and that it leaves “more questions open because it entrusts more to the *process* of rational [reasonable] opinion and will formation.” He does not say that his view leaves all substantive questions open to discussion. In the final paragraph of *Between Facts and Norms* he grants that his account cannot be merely formal:<sup>74</sup>

...like the rule of law itself, [the procedural legal paradigm] retains a dogmatic core: the idea of autonomy according to which human beings act as free subjects only insofar as they obey just those statutes they give to themselves in accordance with their intersubjectively acquired insights. One must admit this is ‘dogmatic’ only in a harmless sense. For this idea expresses a tension between facticity and validity, a tension that is ‘given’ with the fact of the linguistic constitution of sociocultural forms of life, which is to say that *for us*, who have developed our identity in such a form of life, it cannot be circumvented (FG 536f.).

Some matters presumably have been settled by philosophical analysis of the moral point of view and the procedure of democratic legitimation. Since it is a matter of more or less, we need an intricate examination in which the substantive elements in both views are set out, compared, and in some way measured.<sup>75</sup> This calls for a comparison of exactly what questions each view leaves open for discussion and under what conditions. I cannot attempt such a comparison here.

Finally, as I pointed out in part I, citizens in civil society do not simply use the idea of justice as fairness “as a platform [handed to them by the philosopher as expert] from which to judge existing arrangements and policies.” In justice as fairness there are no philosophical experts. Heaven forbid! But citizens must, after all, have some ideas of right and justice in their thought and some basis for

<sup>73</sup> See Cohen’s discussion of Hampshire’s *Innocence and Experience* (Cambridge: Harvard, 1989) in his “Pluralism and Proceduralism,” pp. 589-94, 599f., 607-10.

<sup>74</sup> I thank Baynes for calling my attention to the importance of this final passage.

<sup>75</sup> This agrees with McCarthy who says, in comparing Habermas’s view and mine, that for Habermas the difference between procedural and substantive justice is a matter of degree. See his “Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue,” *Ethics*, cv, 1 (October 1994): 44-63, p. 59, fn. 13. I thank Baynes also for instructive correspondence including this point. In his discussion of FG for the Cambridge University Press *Companion to Habermas* (forthcoming) he has further comments on this question.

their reasoning. And students of philosophy take part in formulating these ideas but always as citizens among others.

(3) Before concluding, I mention a way in which Habermas's view can be seen as focusing "exclusively on the procedural aspects of the public use of reason" (131). It is suggested by his regular use of the idea of legitimacy rather than justice. I mention it here, not because it is his (I think it is not) but as having its own interest. Suppose we aim to lay out democratic political institutions so that they are legitimate and the political decisions taken and the laws enacted pursuant to them are also legitimate. This puts the focus on the idea of legitimacy and not justice.

To focus on legitimacy rather than justice may seem like a minor point, as we may think 'legitimate' and 'just' the same. A little reflection shows they are not. A legitimate king or queen may rule by just and effective government, but then they may not; and certainly not necessarily justly even though legitimately. Their being legitimate says something about their pedigree: how they came to their office. It refers to whether they were the legitimate heir to the throne in accordance with the established rules and traditions of, for example, the English or the French crown.

A significant aspect of the idea of legitimacy is that it allows a certain leeway in how well sovereigns may rule and how far they may be tolerated. The same holds under a democratic regime. It may be legitimate and in line with long tradition originating when its constitution was first endorsed by the electorate (the people) in a special ratifying convention. Yet it may not be very just, or hardly so; and similarly for its laws and policies. Laws passed by solid majorities are counted legitimate, even though many protest and correctly judge them unjust or otherwise wrong.

Thus, legitimacy is a weaker idea than justice and imposes weaker constraints on what can be done. It is also institutional, though there is of course an essential connection with justice. Note, first, that democratic decisions and laws are legitimate, not because they are just but because they are legitimately enacted in accordance with an accepted legitimate democratic procedure. It is of great importance that the constitution specifying the procedure be sufficiently just, even though not perfectly just, as no human institution can be that. But it may not be just and still be legitimate, provided it is just enough in view of the circumstances and social conditions. A legitimate procedure gives rise to legitimate laws and policies made in accordance with it; and legitimate procedures may be customary, long established, and accepted as such. Neither the procedures nor

the laws need be just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust. At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy, and so will the injustice of the political constitution itself. But before this point is reached, the outcomes of a legitimate procedure are legitimate whatever they are. This gives us purely procedural democratic legitimacy and distinguishes it from justice, even granting that justice is not specified procedurally. Legitimacy allows for an indeterminate range of injustice that justice does not.

While the idea of legitimacy is clearly related to justice, it is noteworthy that its special role in democratic institutions (noted briefly in part II) is to authorize an appropriate procedure for making decisions when the conflicts and disagreements in political life make unanimity impossible or rarely to be expected. Thus, it counts many different forms of procedure with different size pluralities as yielding legitimate decisions depending on the case: from various kinds of committees and legislative bodies to general elections and elaborate constitutional procedures for amending a constitution. A legitimate procedure is one that all may reasonably accept as free and equal when collective decisions must be made and agreement is normally lacking. The burdens of judgment lead to that even with reason and good will on all sides.<sup>76</sup>

(4) There are serious doubts, however, about this idea of procedural legitimacy. It is quite plausible for a reasonably well-ordered society; for with well-framed and decent democratic institutions, reasonable and rational citizens will enact laws and policies that would almost always be legitimate though not, of course, always just. Yet this assurance of legitimacy would gradually weaken to the extent the society ceased to be well-ordered. This is because, as we saw, legitimacy of legislative enactments depends on the justice of the constitution (of whatever form, written or not), and the greater its deviation from justice, the more likely the injustice of outcomes, and laws cannot be too unjust if they are to be legitimate. Constitutional political procedures may indeed be, under normal and decent circumstances, purely procedural with respect to legitimacy. In view of the imperfection of all human political procedures, there can be no such procedure with respect to political justice and no procedure

<sup>76</sup> I am indebted to Hinsch for valuable discussion about the meaning and role of legitimacy, and its distinction from the idea of justice; see his *Habilitationschrift* (1995) on democratic legitimacy. I am indebted also to David Estlund for his valuable unpublished paper on this concept as it appears in PL.

could determine its substantive content. Hence, we always depend on our substantive judgments of justice.<sup>77</sup>

Another serious doubt is that a constitutional democracy could never, in practice, arrange its political procedures and debates close enough to Habermas's communicative ideal of discourse to be confident that its legislation did not exceed the leeway legitimacy permits. Actual political conditions under which parliaments and other bodies conduct their business necessitate great departures from that ideal. One is the pressure of time: discussion must be regulated by rules of order, and must in due course come to an end and votes be taken. Not everyone can survey and evaluate all the evidence and often it is too much even to read and understand. Legislators not infrequently must decide and vote largely in the dark; or else in accordance with what their not always impartial party leaders and constituents want. Even when well-designed political procedures moderate these and other defects, we cannot sensibly expect any legislative procedure, even if normally procedural with respect to legitimacy, to be so with respect to justice. The distance must always be far too great.

Habermas's description of the procedure of reasoning and argument in ideal discourses is also incomplete. It is not clear what forms of argument may be used, yet these importantly determine the outcome. Are we to think, as he seems to suggest, that each person's interests are to be given equal consideration in ideal discourse? What are the relevant interests? Or are all interests to be counted, as is sometimes done in applying the principle of equal consideration? This might yield a utilitarian principle to satisfy the greatest balance of interests. On the other hand, the deliberative conception of democracy (to which Habermas shows much sympathy) restricts the reasons citizens may use in supporting legislation, namely, to reasons consistent with the recognition of other citizens as equals. Here lies

<sup>77</sup> I think Habermas would agree with this distinction between political justice and legitimacy, since at one point he discusses the legitimacy both of particular enactments and of the constitution itself, both of which depend on justice, or on justification. Or as he says in *The Theory of Communicative Action, Volume 2: System and Lifeworld*, McCarthy, trans. (Boston: Beacon, 1987), p. 178: "the principle of enactment and the principle of justification reciprocally require one another. The legal system as a whole needs to be anchored in the basic principles of legitimation." Habermas appears here to argue against Max Weber, who understood legitimacy as acceptance by a people of its political and social institutions. Acceptance alone without justification Habermas rightly holds is not enough, since alone acceptance allows for far too much. I would add only (Habermas I think would agree) that these institutions need not be perfectly just, and may, depending on the situation, be unjust and still be legitimate. I thank Peritz, whose understanding of Habermas has been invaluable, for pointing me to this reference.

the difficulty with arguments for laws supporting discrimination.<sup>78</sup> The essential idea is that deliberative democracy, and political liberalism also, limit relevant human interests to fundamental interests of certain kinds, or to primary goods, and require that reasons be consistent with citizens' mutual recognition as equals. The point is that no institutional procedure without such substantive guidelines for admissible reasons can cancel the maxim: garbage in, garbage out. While the conditions of a constitutional democracy tend to force groups to advocate more compromising and reasonable views if they are to be influential, the mix of views and reasons in a vote in which citizens lack awareness of such guidelines may easily lead to injustice even though the outcome of the procedure is legitimate.

Finally, the enactments and legislation of all institutional procedures should always be regarded by citizens as open to question. It is part of citizens' sense of themselves, not only collectively but also individually, to recognize political authority as deriving from them and that they are responsible for what it does in their name. Political authority is not mysterious or to be sanctified by symbols and rituals citizens cannot understand in terms of their common purposes. Habermas would, obviously, not disagree with this. It means, however, that our considered judgments with their fixed points—such as the condemned institutions of slavery and serfdom, religious persecution, the subjection of the working classes, the oppression of women, and the unlimited accumulation of vast fortunes, together with the hideousness of cruelty and torture, and the evil of the pleasures of exercising domination—stand in the background as substantive checks showing the illusory character of any allegedly purely procedural ideas of legitimacy and political justice.

I have gone into these matters in this section to explain why I am not ready to change my mind and feel unmoved by the objection that justice as fairness is substantive and not procedural. For as I understand these ideas, it could not be otherwise. I believe that Habermas's doctrine is also substantive in the sense that I have described, and indeed that he would not deny this. Therefore, his is procedural in a different way. I conjecture, looking back at part I where I cited two passages from *Between Facts and Norms*, that by the terms 'substantive' and 'substantial' he means either elements of religious and metaphysical doctrines, or those incorporated in the thought and culture of particular communities and traditions, or possibly both. His main idea, I surmise, is that once the form and

<sup>78</sup> See Cohen's review of Dahl's *Democracy and Its Critics*, in *Journal of Politics*, LIII,1 (October 1991): 221-25, p. 223f.

structure of the presuppositions of thought, reason, and action, both theoretical and practical, are properly laid out and analyzed by his theory of communicative action, then all the alleged substantial elements of those religious and metaphysical doctrines and the traditions of communities have been absorbed (or sublimated) into the form and structure of those presuppositions. This means that to the extent those elements have validity and force in moral justification in matters of right and justice,<sup>79</sup> their force is fully captured and can be defended by reasoning of that form and structure; for those presuppositions are formal and universal, the conditions of the kinds of reason in all thought and action.<sup>80</sup> Justice as fairness is substantive, not in the sense I described (though it is that), but in the sense that it springs from and belongs to the tradition of liberal thought and the larger community of political culture of democratic societies. It fails then to be properly formal and truly universal, and thus to be part of the quasi-transcendental presuppositions (as Habermas sometimes says) established by the theory of communicative action.

Justice as fairness as a political doctrine wants no part of any such comprehensive account of the form and structural presuppositions of thought and action. Rather, as I have said, it aims to leave these doctrines as they are and criticizes them only so far as they are unreasonable, politically speaking.<sup>81</sup> Otherwise, I have tried to defend the kind of liberalism found in justice as fairness against Habermas's acute criticisms. Thus, I have tried to show that in the liberalism of justice as fairness, the modern liberties are not prepolitical and prior to all will formation. I stated further that there is an internal connection in justice as fairness between the public and private autonomy and both are co-original.

I should likewise resist the tendency, also found in some American civic republican legal thought, to find as the basis of private autonomy (the liberties of the moderns) solely its (their) connection with public autonomy (the liberties of the ancients); as I indicated in part IV.3, private autonomy has a further sufficient basis in the second moral power. To keep the ancient and the modern liberties properly co-original and co-equal, we need to recognize that neither is deriva-

<sup>79</sup> Habermas is not speaking of ethics, or of the ethical values of individuals and groups. These may be pursued within the scope of legitimate and justified law.

<sup>80</sup> For example, in the first essay of *Justification and Application*, entitled "On the Pragmatic, the Ethical, and the Moral Employments of Practical Reason," he sets out the form of four kinds of practical reason; see pp. 1-17.

<sup>81</sup> A related objection is made by Larmore in a penetrating review of Habermas's FG in the *Deutsche Zeitschrift für Philosophie*, xLI (1993): 321-27. A longer English version is to appear in the *European Journal of Philosophy* (April 1995).



tive from or reducible to the other. Another possible difference with Habermas I mentioned is institutional, the question of constitutional design; though it is not an object of his criticism, I emphasize that it is not in any case to be settled by philosophy alone (I do not suppose he would say it is), which can only, as always, help to provide the political principles of critical and informed judgment.

## VI

There is one related question that I have not discussed in detail, and that is the question of how exactly the political institutions associated with constitutional democracy can be understood to be consistent with the idea of popular sovereignty. If we associate popular sovereignty with something like majority rule following free, open, and wide discussion, then there is at least an apparent difficulty. This difficulty may be an aspect of what Habermas is referring to when he says that “[t]he form of political autonomy...does not fully unfold in the heart of the justly constituted society” (128). The consistency of constitutional democracy with popular sovereignty I indicated with the idea of dualist democracy as discussed in part III.4, where a discussion of it could naturally arise. It is too great a question to have undertaken in my reply: it requires an account and explanation of the special features of the institutions for the exercise of the constituent power of a democratic people in making constitutional decisions as opposed to the institutions of ordinary democratic politics within the framework set up by those decisions. But I want to express recognition of the question here.<sup>82</sup>

In concluding his introductory remarks, Habermas says that since he shares the intentions of justice as fairness and sees its essential conclusions as correct, he wishes his dissent to remain within the bounds of a family quarrel. His doubts are confined to whether I state my view in the most compelling way; and so far as his criticisms are to present serious challenges, he means his intensifying of objections to be seen as offering an occasion in which justice as fairness can show its strengths. I heartily accept Habermas’s criticisms so graciously offered and I have attempted to meet the challenge they present. In formulating my replies, I repeat what I said at the beginning that I have been forced to think through and reexamine many aspects of my view and now believe I understand it better than I once did. For that I shall always be in Habermas’s debt.

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<sup>82</sup> I thank Dworkin, Thomas Nagel, and Lawrence Sager for pressing this question. I am grateful to Sager for instructive later discussion.