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MORALITY, IDENTITY AND "CONSTITUTIONAL PATRIOTISM"

FRANK I. MICHELMAN*

I. CLAIMS

Among the aims that Habermasian political philosophy shares with other, contemporary, liberal-minded political philosophy is the justification of politics. More specifically, the aim is the justification of democracy, which is, after all, a kind of political rule.

People wake up each day to find in place effectively compulsory regulations of social life, "laws" with which the publicly supported authorities in the land predictably will demand their compliance. None of these people, as individuals, chose these laws for themselves. In a democratic country, the laws normally will have been decided by voting procedures in which majorities rule over dissenters. These might be simple or "super" or compound majorities. They might be majorities of the citizens, or of some class or classes of them, or of some class or classes of their representatives and officials. Whatever may be the precise history of how a democratic country's laws came to be what they are, it will not be that they were effectively made that way by the actions of any single one, much less every single one, of the individuals who are called upon to abide by them.¹

From one standpoint, the question of political justification is that of how and on what conditions it might be possible that individual members of a modern society, each one sensitive to both political equality and political differences, could all come willingly to comply with various laws that none chose, and many would not have chosen, for themselves. From another standpoint, the question is how it possibly can be right for members of society at large to mobilize force (or the threat of it) as a way to bring a population of presumptively free and equal individuals into average compliance with laws that none of them individually chose and many do not now approve. The challenge is to supply a moral warrant for the application of collective force in support of laws produced by non-consensual means, against individual members of a population of presumptively free and equal persons. For countries under democratic rule, this means, as John Rawls has expressed it, to explain how "citizens [may] by their vote properly exercise their coercive political power over

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1. See FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 14–16, 31–33 (1999).

one another"—to explain how your or my exercises of our shares of political power may be rendered "justifiable to others as free and equal."²

In Part III, I show how the idea of the constitution plays a pivotal and indispensable part in contemporary, liberal-minded political justification. I do mean the idea of the constitution as opposed to the thing itself. It must be the idea that is doing the work, I shall maintain, because there can be no settled agreement among a modern country's people on a description of the actual thing in all its concrete specificity. In support of this claim, I call upon the recent political philosophy of Jürgen Habermas. In his essay, *Struggles for Recognition in the Democratic Constitutional State*, Habermas shows the dependency of political justification on something he calls "constitutional patriotism."³ I do not find that he means by that expression either a devotion to any specific choice of constitutional content—for example, choice of a strictly "formal" as opposed to a "material" or "compensatory" norm of equality (or vice-versa)—or a devotion to any country in view of that country's specific constitutional choices.

Neither, however, can Habermas be speaking only of people's attachment to some purely abstract, ideal notion of a constitution. To be sure, constitutional patriotism does, for Habermas, have its aspect of transcendental insight, of recognition of what a constitution unconditionally and counterfactually has to be in order to fulfill its pivotal role in the moral justification of legal force. But what Habermas further shows is that political justification depends, as well, on a population's conscious sharing of sentiments of attachment to a concrete *community* (although not, I shall insist, to any concrete *constitution*). Habermasian constitutional patriotism, in fact, is a confection of counterfactual constitutional idea and empirical communitarian sentiment. It consists in a conscious sharing of sentiments of attachment to the community, inspired by the community's perceived attachment to the counterfactual idea. Habermasian constitutional patriots feel devotion to their country just because they perceive their country's concrete ethical character to be such as to make possible the credible pursuit in practice of a certain regulative political idea. I pick a small fight with Habermas by putting the matter exactly in terms of the community's concrete ethical character. Yet I do believe he will agree that there is, in this instance, no prying apart *die morale* from *das ethische*, no real-life disentangling of the call of unconditional rightness from the call of integrity or self-consistency, of loyalty to the best one can make of one's own and one's community's life history and self-understanding.

2. JOHN RAWLS, *POLITICAL LIBERALISM* 217 (1993).

3. Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 225–26, 203–36 (Ciarrin Cronin & Pablo DeGrieff, eds., Ciarrin Cronin, trans., 1998) [hereinafter HABERMAS, *THE INCLUSION OF THE OTHER*].

II. CULTURES AND THE MAKING OF THE WORLD

A. *The Linguistic Turn*

Thus had I imagined the claims I would offer as a panelist, on the occasion, as I supposed it would be, of delivery by Habermas of a paper on legal theory, only to discover that what we would in fact be hearing from Habermas on that occasion was his paper, *Hermeneutic and Analytic Philosophy: Two Complementary Versions of the Linguistic Turn*.⁴ Bracing as that paper is, legal theory is not its concern. Yet it does shed a helpful light on what Habermas does with the notion of constitutional patriotism.

The *Complementary Versions* paper is concerned with the philosophical aftermath of an early-nineteenth-century "linguistic turn" in metaphysics and epistemology, which Habermas traces to works of Wilhelm von Humboldt. As Habermas sees matters, the linguistic turn has required all of social theory ever since to cope with the idea that language "constitutes the world." According to this world-constructing view of language, its "lexicon and syntax"

shape the totality of concepts and ways of apprehension by which first a conceptual space is articulated for everything the members of the community may come upon in the world. . . . [E]ach language articulates a certain "view" of the world as a whole. Thus the formula of language being the "formative organ of thought" may be understood in the transcendental sense of spontaneous world-constitution. Through this linguistic pre-understanding of the world, a language simultaneously structures the form of life of the community. . . . Language is no longer primarily seen as a [transparent medium for] representing objects or facts, but as the medium for shaping a people's spirit.⁵

Thus language, by preordaining the grid of conceptual possibilities on which facts can be spread, is said to assume a priority over the representation of the world, whether by oneself to oneself or by oneself to others; just as it is said to take priority over intention by limiting what it is possible to think or say regarding the categories—objectives, purposes, motives, values, sensations, sentiments, beliefs, likes, dislikes, hopes, and fears—by which one represents to oneself and to others the state of one's own mind.

At no point does Habermas offer denial of this "transcendental" position of language, meaning its decisive, irresistible, and limiting control over the construction of all possible objects and categories of experience and observation. But he does have a problem with it. Every natural

4. Jürgen Habermas, *Hermeneutic and Analytic Philosophy: Two Complementary Versions of the Linguistic Turn* (paper presented at the Annual Meeting of the Society for Phenomenology and Existential Philosophy, Denver, Colorado 1999) (on file with the *Denver University Law Review*).

5. *Id.*

language is both a historically contingent matter and an indissolubly social one. If a people's language decisively shapes and limits both the "spirit" of that people and the ways in which it is possible for that people to perceive and to judge, then there are in the history of the world, and on our planet today, an indefinite but certainly plural number of mutually non-translatable, indissolubly collective spirits and ways of seeing and judging, a plurality of "semantically closed universes" from which any possible escape could only—since no one has conscious experience at all outside of language and society—be tantamount to immediate entry into another, comparably limiting "world view."

The linguistic turn thus calls into question the notions of moral experience and moral obligation, as Habermas and many others would understand those terms. It does so by seeming to preclude the possibility of there being any trans-culturally or even trans-ethically accessible concepts, any concepts that remain the same, invariant, in the eyes of beholders from different "comprehensive views," as John Rawls might call them, of the world and of the good. Any such preclusion must, it seems, extend to motivational sorts of concepts, such as values, reasons, maxims, norms, and obligations. But if a value, reason, maxim, norm, or obligation cannot retain its identity under regard by persons speaking different languages, how can it be one that is unconditionally binding on every individual human agent, just as human? If the answer is that it cannot, then an apparent result of the linguistic turn has been to preclude there being anything to which Habermas would concede the title of a moral value, reason, maxim, norm, or obligation.

B. *The Retrieval of "Universalistic Tendencies": The Moral Experience Localized*

Or so it might seem. In fact, Habermas believes that the possibility of the universal and unconditional bindingness of the class of maxims and reasons for action we call moral can be salvaged from the linguistic turn. He aims to retrieve "universalistic tendencies" from the linguistic turn as rendered by Humboldt, and his *Complementary Versions* paper is in considerable part the story of a salvage operation in which his own philosophy has played a major part, although he gives others a generous share of the credit.

Those universalist tendencies, Habermas explains in his *Complementary Versions* paper, lie in the "communicative" function that Humboldt was the first to attribute to language, along with its informative and expressive functions. They lie in the perception that when parties to a disagreement or misunderstanding enter into verbal exchange about it, both parties—as Habermas puts the matter—"must, from their own point of view, share the assumption of a point of convergence."⁶ That is, nei-

6. *Id.*

ther can make sense of what they are doing together, absent a working assumption in the mind of each of there being a single object at hand, of which the parties are giving competing accounts. That alone can explain the parties' expenditures of effort to "learn to understand" each other's reports (descriptions, analyses, assessments) of the object.

Thus does Habermas recover from the seeming devastation of the linguistic turn the possibility of the experience of objectivity, and thus of moral reasons and moral experience. But the recovery, as we now go on to notice, is not a completely clean one.

Habermas finds in Humboldt the idea that a conviction of the standpoint-independent, identical reality of objects under discussion—a reality that it's worth getting truly to know—is what keeps disagreeing observers committed to the work of coming to understand one another. But notice a circularity of motivation here. The parties' sense of there being some single object they are all perceiving, the truth about which they are trying to resolve, is supposed to support their loyalty to their shared or public enterprise of dialogue. But then what would have instilled in them this sense of objectivity? We could say that the experience of the dialogic engagement itself creates it. But then we would have to ask what in the first place could have drawn the parties into the engagement, or made the engagement seem possible to them. What possibly, except an antecedently existing expectation, among the parties to the conversation, of a pressure felt by each to strive for a successful result? But then what in their world and in their lives could prompt and sustain such an expectation? Only, it would seem (if we accept the linguistic turn), a *language*. Anticipating an argument of Habermas to be reviewed in Part IV(B), it would be a language in which the categories exist for recognition of the freedom and equality of persons and of resulting reciprocal obligations of persons to treat each other as such.

Must *every* human language necessarily be like that? If so—if there are categories that a human language necessarily must have—what is really left of the linguistic turn? But if not, then what Habermas has done is something rather beyond a simple retrieval from the linguistic turn of the possibility of moral experience and moral obligation. What he has done is to show how human beings can, and some of us do, maintain in our lives the category of the unconditionally obligatory (the moral), even as we, accepting the linguistic turn, know that moral reasons and experience are reasons and experience into which we must always enter not in entire forgetfulness but trailing clouds of consciousness from our particular linguistic home.⁷ In other words, what Habermas has done (at least it seems so to me) is to make clear how there can be a wholly valid

7. Wordsworthians may see in what I just wrote an implicit equation of language with God, but isn't that, after all, one way of describing the linguistic turn? In the beginning was . . .

experience of the unconditionally obligatory *that is not necessarily accessible from within every human form of life.*

That observation will figure in my analysis of "constitutional patriotism" in Part V(B) of this essay. Before we can come to that, however, we must pause for a closer look at some problems and solutions in liberal-minded political justification.

III. CONSTITUTIONAL CONTRACTARIANISM: THREE KEY COMPONENTS

Recall the aim of a liberal-minded justification of democratic politics: in Rawls's words, to explain how "citizens [may] by their vote properly exercise their coercive political power over one another"—to explain how your or my exercises of political power may be rendered "justifiable to others as free and equal."⁸

Currently on offer from Habermas, Rawls, and others is what we may call a *constitutional contractarian* model of political justification.⁹ The Rawlsian version is probably most familiar:

[O]ur exercise of political power is . . . justifiable . . . when it is in accordance with a constitution, the essentials of which all citizens may be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.¹⁰

This text helps us distinguish a chain of three key components in constitutional contractarian justification, as follows:

First key component: rational universalism ("all citizens [as rational] may be expected to endorse"). Constitutional contractarianism begins with a proposition of very roughly the following form (specific versions differing among philosophers): Exercises of coercive political power can be justified, on the condition that every individual affected has reason to accept them in the light of his or her interests. In the philosophy of Habermas, the more specific version of the rational-universalist standard of justification takes on a decidedly intersubjectivist inflection. It is that everyone, each judging from his or her own standpoint and with due regard for his or her own interests, should be able to see how everyone else, each judging similarly, could find prevailing reason to accept the political act or arrangement in question. "A law," proposes Habermas, "is valid in the moral sense when it could be accepted by everybody from the perspective of each individual."¹¹

8. RAWLS, *supra* note 2, at 217.

9. I should report that I feel a strong tug of attachment to the constitutional contractarian model, although my aim in this essay is to cause it trouble.

10. RAWLS, *supra* note 2, at 217.

11. Jürgen Habermas, *A Genealogical Analysis of the Cognitive Content of Morality*, in HABERMAS, *THE INCLUSION OF THE OTHER*, *supra* note 3, at 31 [hereinafter Habermas, *Cognitive Content of Morality*]; See also Jürgen Habermas, "Reasonable" Versus "True," or the Morality of

At the core of the rational-universalist type of justificational standard for political coercion that both Rawls and Habermas have in mind, what we find is a demand for consonance between potentially coercive political acts and the reasons of *each* (not "all," in some collectivized sense of "all") of countless persons among whom rational conflicts of interests abound. It is this uncompromisingly individualistic sensibility—this apparent taking to extremes of insistence on the severalty and singularity of persons or their interests or their worths, this refusal in the last analysis to let "the good of society" decide—that leads me to label "liberal-minded" the constitutional contractarian family as a whole.

Second key component: constitutional essentialism ("in accordance with a constitution, the essentials of which all . . . may be expected to endorse"). Now, no one seriously suggests application of such a universalistic standard of justification (consonance with the reasons of everyone) to each and every political act taken one by one, each and every discrete lawmaking event or other exercise of political power in a country. In the modern free countries marked by what Rawls calls a reasonable pluralism of comprehensive views and ideas of the good and, correspondingly, by true conflicts among the politically relevant projects and interests of sundry persons,¹² it would be an obviously hopeless undertaking to apply such a standard to each and every discrete political act issuing from a country's established lawmaking system.

Inevitably, what we find is that the rational-universalist standard of political justification really is not meant for application on an act-by-act or law-by-law basis. It is rather meant for application to *the system of lawmaking*—that is, to *constitutional* laws, the special set of basic laws, including bills of rights, that fundamentally shape, organize, limit, and direct the country's lawmaking operations. As a normative doctrine, constitutional contractarianism thus pivots crucially on the idea of the constitution. It absolutely depends on the idea that your acceptance as right—as fair, as worthy of your respect—of a lawmaking system (or constitution) commits you to acceptance of the daily run of lawmaking events that issue from the system.¹³ That, after all, is the point of Rawls's claim that exercises of political coercion are justifiable insofar as they accord "with a constitution, the essentials of which all citizens may be expected to endorse."¹⁴

Worldviews, in HABERMAS, *THE INCLUSION OF THE OTHER*, *supra* note 3, at 89–90 [hereinafter Habermas, "Reasonable" Versus "True"].

12. See RAWLS, *supra* note 2, at 36–37.

13. To be clear, the idea is that your acceptance of the system means that your finding particular laws unjust gives you no ground for resort to illegal force, not that it gives you no ground for denunciation, bounded civil disobedience, or bounded conscientious refusal. See JOHN RAWLS, *A THEORY OF JUSTICE* 363–91 (1971).

14. RAWLS, *supra* note 2, at 217 (emphasis added).

But why does Rawls say "the essentials of which?" The deep and interesting answer lies in a perceived need for objective certainty in the application of basic systemic legal norms ("constitutional law") to specific controversies—a need apparently entailed in the pivotal role we've just now assigned to constitutions in contractarian justificatory argument.¹⁵

Suppose there is firmly established in a certain country's political and legal practice a publicly recognized set of basic laws, called "the Constitution," that are seen to shape, organize, limit, and direct the country's lawmaking operations. Everyone agrees that this Constitution consists of twenty-six clauses, A-Z, the wording of which is canonical and undisputed. But everyone also honestly believes that is impossible to say with confidence, of many enacted laws, whether they do or do not truly comply with clauses T-Z, because those clauses just don't have objectively certain applications, one way or the other, to the kinds of laws that are being enacted. (For example, clause T provides that everyone must be guaranteed a "minimally decent standard of living" and the Parliament has just replaced welfare with workfare, reduced the minimum wage by half, lifted rent control, and budgeted an annual sum of three billion crowns for housing allowances and job training.) Those clauses, then, cannot be regarded as a part of the *essential* constitution, the constitution that is supposed to be playing the pivotal role assigned to constitutions in contractarian political justification.

The general idea is that I can freely accept the daily run of coercive acts from a constituted political regime, including those I judge to be pernicious or unjust, because and only because (i) I regard this regime *qua* regime as consonant with the rational interests of everyone including me and (ii) I see the government and my fellow citizens abiding by this regime. Such a conjunction of perceptions may be possible for me, but only if at all times I can see confidently that (ii) is really satisfied. And I can't if clause T is part of the regime in question. So even if T is a part of the *documentary* "Constitution," it cannot be deemed a part of the *essential* constitution, the constitution that does the pivotal work that constitutions have to do in contractarian justification.

15. There is also a shallow answer, which is that any practically serviceable "constitution," in the sense of a law that prevails over other laws and is not itself alterable except by following its own (perhaps quite onerous) provisions for constitutional amendment, inevitably contains a certain amount of arbitrary and even irrational matter that could not possibly be said to respond to reasons attributable to everyone. It seems plain that the presence of some such matter in a given constitution need not disqualify that constitution from playing its pivotal role in contractarian justification. For example, the U.S. Constitution unalterably guarantees equal representation in the Senate to every state regardless of population. See U.S. CONST. art. V. The idea is that a constitution may play the pivotal role in contractarian justification as long as all of its "essential" parts can be seen to satisfy rational universalism.

The sum of it is that constitutional contractarianism is a ticklish business indeed. It requires the existence in a country—the being-in-force there—of an essential constitution that satisfies two potentially contradictory demands. First, the essential constitution has to include every systemic norm or guarantee that would be required in order for it to give everyone reason for willing compliance with laws enacted under the regime it constitutes. But, second, the essential constitution cannot include any systemic norm or guarantee that, singly or in combination with others, lacks the trait of more-or-less objectively certain application to more-or-less all of the specific cases arguably falling under them.

Third key component: moral responsiveness ("in the light of principles and ideals acceptable to them as reasonable"). Why and how can sensible people allow themselves even to hope that there is any way at all to satisfy both demands at once? It seems to me that all practitioners of constitutional contractarian justification, Habermas included, pin our hopes on a certain kind of favorable motivational attribution to persons in general. Rawls imports as much by his stipulation that political acts are justified when fairly found to accord with constitutional essentials reflecting principles that should be rationally acceptable to every "reasonable" person.

If I am right, a full, rough statement of the constitutional contractarian model of political justification would go something like this:

Specific exercises of coercive political power are justified when [CONSTITUTIONAL ESSENTIALISM] they are validated by a set of constitutional essentials [RATIONAL UNIVERSALISM] that everyone can see that everyone affected has reason to accept in the light of his or her interests, [MORAL RESPONSIVISM] considering himself or herself to be one among a company of presumptively free and equal co-inhabitants, all of whom are under moral motivational pressure to find agreement on fair terms of cooperation within their necessarily shared social space.

By calling the attributed pressure a "moral" one, I mean it is conceived as lacking any ulterior instrumental content, as being purely a motivation to find and abide by fair or universally acceptable terms of social cooperation just for the sake of the respect that one thereby pays to oneself and others as free and equal. I am hazarding the view that every contemporary philosopher who posits the possibility of the universal rational acceptability of a political constitution does so on the stipulation of the experience by all concerned of the moral motivation to find a fair agreement.¹⁶ This may be a highly controversial suggestion. Habermasians

16. I am not saying that every contemporary philosophical defense of democratic-liberal constitutionalism does in fact base itself on a showing of the possibility of universal acceptability. I am only making a claim regarding those that do, a class in which I include the defenses recently advanced by Rawls and Habermas. I am currently uncertain about whether to extend the claim to defenses advanced by advocates of "ethical" or "perfectionist" (as opposed to "political") liberalism,

may feel prompted to resist by the worry that it makes justification depend on an empirical contingency—the contingency, that is, of the persons concerned really having a specific motivation that no person, just as a person, need have. That particular worry would be needless, however, and explaining why will help set the stage for succeeding discussion of a rather different sort of Habermasian worry.

IV. HABERMAS AND MORAL MOTIVATION

A. Hypothetical "Acceptability"

Making justification depend on everyone in fact being moved by desires to find a fair agreement (or perhaps by second-order desires to be the kind of person who is thus moved) would apparently violate the unconditionality that Habermas appropriately requires of a justification of politics. What, after all, is the point of justification? It is to establish the possibility of a just political regime, and of everyone's moral warrant for joining in the collective maintenance of the threat of force and punishment to secure compliance with the positive law of a political regime. The nub of such a warrant must consist in reasons that everyone as free and equal—everyone as capable like anyone else of arriving at his or her own conception of the good—may be considered to have for accepting the regime. So these have to be reasons that we can say apply to everyone regardless of particulars of situation, identity, and ethical view. (Their nature seemingly must be that of what we call moral reasons.¹⁷) That doesn't rule desires as such out of consideration, because desires surely can give people perfectly good reasons for action. Ruled out, however, are all desires except for those (if there are any) that we can say every person as free and equal must have. And maybe it doesn't seem that anything like a desire to find and live by fair terms of social cooperation, or a desire to have such a desire, would be one that we can say every person as free and equal must have.¹⁸

Rather, it seems that in some countries at some times desires of that sort might be common among the people, whereas in other countries or at other times they would not be. In a Habermasian view (which is in this respect a Kantian view), a set of constitutional essentials that is just and morally supportable in a country where such desires prevail cannot be unjust and morally insupportable in a country where they do not. The question of justice cannot depend in that way on what desires a country's people do and do not contingently happen to have.

such as Ronald Dworkin, *Foundations of Liberal Equality*, in THE TANNER LECTURES ON HUMAN VALUES at xi (1990), and JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

17. See, e.g., Habermas, *Cognitive Content of Morality*, *supra* note 11, at 21–22, 27–28, 32; Habermas, "Reasonable" Versus "True," *supra* note 11, at 86–87.

18. See Habermas, *Cognitive Content of Morality*, *supra* note 11, at 15.

What have we found out? That Habermasians cannot be constitutional contractarians, if or insofar as constitutional contractarianism makes justice, or the possibility of justice, depend in that way on the prevalence of "moral responsiveness," or anything like it, among a country's people. However, it doesn't, not at all. The constitutional contractarian proposition is that a set of constitutional essentials is morally justified, and so is your or my complicity in the imposition of it and its legislative issue on the recalcitrant, so long as the set would be acceptable in all reason to everyone who is *imagined as* a morally responsive person, meaning (to repeat it) one who understands himself or herself to be one among a company of presumptively free and equal co-inhabitants, all of whom are under moral motivational pressure to find agreement on fair terms of social cooperation.

The point is, the contractarian test of justification is one of *hypothetical* not *actual* acceptance of the constitutional essentials in question. It is, as Habermas would have it, a test of "acceptability."¹⁹ Contractarian justification, therefore, does not depend on whether moral responsiveness is in fact true of everyone or, for that matter, of anyone. (There don't have to *be* any morally responsive people as long as some of the rest of us can understand them well enough to judge whether or not a given set of constitutional essentials would be acceptable to all of them if there were any.)

B. *A Short Genealogy of Political Morals*

As constitutional contractarians, Habermasians seek to establish the possibility and general characteristics (at least) of a political regime that is rationally acceptable—acceptable considering one's interests—to everyone who is (hypothetically) reasonable. They furthermore seek to do so without supposing any substantive-ethical commonality among the people concerned. Can they succeed?

Consider the following genealogical exposition, as one might call it, of the moral necessity of democratic constitutionalism. The exposition starts with an empirical proposition about general human needs and desires, but one that no one is expected to question.²⁰ The founding proposition is that, in modern, plural societies, there is no alternative to the ruin of everyone's life by social conflict and disorder but resort to the always potentially coercive medium of positive, institutionally enacted law. Thomas Hobbes, we suppose, has explained convincingly and for-

19. See *id.* at 95–96. Habermas maintains that only the actual conduct of properly structured, democratic debate can provide an adequate basis for belief that the arrangements in question do satisfy a test of (hypothetical) universal acceptability, but that is another matter. See *id.*; see also JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 296, 448 (William Rehg, trans., 1996) [hereinafter HABERMAS, *BETWEEN FACTS AND NORMS*].

20. The scenario, writes Habermas, is "an ideal-typical development that could have taken place under real conditions." Habermas, "*Reasonable*" Versus "*True*", *supra* note 11, at 39.

evermore why, in posttraditional societies, everyone has reason to support *some* practice of positive legal ordering. Equally inescapable, however, is the certainty in such societies of profound, intractable disagreement over what the positive laws should be made to provide in substance and over what should be the institutional arrangements for deciding from time to time what the laws shall provide. From which it follows, Habermasians say, that the concerned persons have somehow to *work out together* their disagreements over these matters of basic positive legal content and basic arrangements and procedures for further positive law-making.

Before going on to why they say that, and what they are driving at when they do, it is well to notice how we have already established a nice little beachhead in the campaign to justify a democratic constitution, regarded as a particular set of arrangements for the production of positive law, without the slightest hint of reliance on anyone's actually being moved by any special substantive-ethical interests, motivations, or outlooks (such as "moral responsiveness" might easily be considered to be). Habermasians say that no such reliance is needed, either, to finish up the campaign. Logic, of a sort, is all that will be needed.

The logic runs as follows. As itself a positive law prescribing the society's set of arrangements for the production of (other) positive laws, the constitution sits in a delicate position. Inevitably, many of its provisions are themselves objects of reasonable disagreement, and yet these provisions must at any given moment be fixed, decided, because in them lies the institutional program for debating and deciding disputed specifications or proposed modifications of any and all positive legal prescriptions, including constitutional provisions themselves. How, then, can contested constitutional provisions be justified? What can possibly provide a standard of rightness for the institutional program for deciding all other politically decidable matters? Nothing other, Habermasians say, than norms already implicit in a certain "point of view," the one that "members of posttraditional societies . . . intuitively adopt when they find they must appeal to reasons" to justify something.²¹ As Habermas has recently summarized these norms, they are:

- (i) that nobody who could make a relevant contribution [to the discussion] may be excluded; (ii) that all participants are granted an equal opportunity to make contributions; (iii) that the participants must mean what they say; and (iv) that communication must be freed from external and internal coercion so that the "yes" or "no" stances that

21. See Habermas, *Cognitive Content of Morality*, *supra* note 11, at 7; Ciaran Cronin & Pablo DeGreiff, *Editors' Introduction to HABERMAS, THE INCLUSION OF THE OTHER*, *supra* note 3, at vii-ix.

participants adopt on criticizable validity claims are motivated solely by the rational force of the better reasons.²²

Habermas makes a strong case. There being in posttraditional societies no normative authority "higher" than "the good will and insight" of those who must abide by basic terms of social cooperation, it may well be said that the standard for deciding such terms and judging them, as *propositions of moral obligation*, "must be derived exclusively from the situation in which the participants seek to *convince* one another" regarding them.²³

But why must we judge these terms of cooperation as matters of *moral* obligation? Why not as matters of *legal* obligation, which is how we usually judge the validity of laws? When a warrant is demanded for a law, a legal warrant is usually what we feel we are expected to produce. But consider where we find this legal warrant. We find it, ultimately, in the concrete constitution in force. (In the United States, for example, one shows that the law was enacted by constitutional majorities in both houses of Congress and signed by the President, that it deals with a subject-matter assigned by the Constitution to the national government, that it is not a bill of attainder and does not abridge the freedom of speech, etc.) But the aim of the justification of politics is to provide a warrant for complicity in coercive support of *the constitution itself*, and *that* warrant cannot be a legal one. It can only be a moral warrant, and the Habermasian argument is that nothing can provide the constitution with such a warrant except its conformity, in both a substantive and a procedural sense—with regard, that is, both to its prescriptive programmatic content and the processes by which it came to have that content—to certain practical principles implicit in a certain "point of view." Namely, the *moral* point of view, the "the point of view that members of posttraditional societies intuitively adopt" when they run into a need to convince one another about some question of the rightness, goodness, or fitness of something, because they see that the resolution of that something will have to bind all of them and *they can't help regarding one another as free and equal*. (As the linguistic turn would have it, their language won't let them.)

In other words, when Habermasians say that the justification of a package of constitutional essentials is and can only be that it "*could* meet with the acceptance of all those concerned in their capacity as participants in a practical discourse,"²⁴ or that it *could* "win the agreement of all concerned, on the condition that they jointly examine in a practical discourse" whether the package "is in the equal interest of all,"²⁵ they are incorporating into that conditional "could" a hypothetical supposition of

22. Habermas, *Cognitive Content of Morality*, *supra* note 11, at 127.

23. *Id.* at 24.

24. *Id.* at 34 (emphasis added).

25. *Id.* at 36.

moral responsiveness, or reasonableness, on the parts of "all concerned." Their specific claim on behalf of democracy is that a constitutional practice cannot conceivably meet the standard of universal rational acceptability to the reasonable unless it makes its own content always open to revision by processes meeting the same standard—unless it subjects all further determinations of constitutional content to a certain, normative conception of political democracy drawn from the ideal of a practical discourse.²⁶

You can now check through the whole argument, and you will see that the abstract Habermasian moral justification of democratic constitutionalism has reached its completion without any empirical attribution to anyone of moral responsiveness or any kind of motivational disposition.

V. TOWARDS CONSTITUTIONAL PATRIOTISM

A. *The Threat from Interpretation*

Consider, now, that "constitutional patriotism" surely seems to name some sort of motivational disposition. It names, I believe, a disposition of attachment to one's country, specifically in view of a certain spirit sustained by the country's people and their leaders in debating and deciding disagreements of essential constitutional import.

What can such an empirical notion be doing in Habermasian constitutional theory? The answer, I believe, lies in Habermas's sensitivity to a claim I promised earlier to redeem: that it must be the *idea* of the constitution that does the crucial work in a constitutional contractarian justification of politics, because there can be no settled agreement among a country's people on a description of the actual thing in all its concrete specificity.

A country's disagreements of essential constitutional import can never be restricted to disagreements about the wording of canonical constitutional provisions, the constitution's "clauses." There will also, inevitably, be disagreements about how the clauses are to be applied to specific cases and disputes. Consider American constitutional experience. Again and again we have found that our constitution's canonical provisions for constitutional essentials cannot be applied decisively to

26. In Habermas's text, the first of the quoted formulas in this paragraph is preceded by the following:

... [Kant] tacitly assumes that in making moral judgments each individual can project himself sufficiently into the situation of everyone else *through his own imagination*. But when the participants can no longer rely on a transcendental preunderstanding grounded in more or less homogeneous conditions of life and interests, the moral point of view can only be realized under conditions of communication that ensure that *everyone* tests the acceptability of a norm, implemented in a general practice, also from the perspective of his own understanding of himself and of the world. In this way, the categorical imperative receives a discourse-theoretical interpretation

Id. at 33–34.

real, live social controversies without undergoing momentous interpretations that will themselves inevitably be open to reasonable disagreement. Think about substantive due process. Think about free exercise of religion. And think about equal protection: a principle of equal governmental concern and respect for every individual is doubtless an American constitutional essential. Few will question that such a principle is canonically ensconced, and rightly so, in the American Constitution. Disagreement nevertheless breaks out over whether, in the United States today, that principle prohibits, permits, or requires race-conscious government action in any circumstances. Someone, let's say a majority of a doubtless divided Supreme Court, is going to have to decide the question, and to decide it over persisting, heartfelt—and who is to say not reasonable?—disagreement.²⁷

Remember, now, how it is that constitutional essentialism becomes a key component in contractarian political justification. Realizing the futility of a rational-universalist standard applied on an act-by-act or law-by-law basis, we hope instead that such a standard might be satisfiable if applied only to a set of relatively removed, framing principles and ideals for a lawmaking system. But now the difficulty, obnoxiously, seems to reappear at the point where the relatively abstract framing principles have to be applied to decide the legal validity of major, morally freighted policy choices. (Let it be clearly understood that, throughout this discussion, my assumption is that the disagreements are over how to answer the proper normative question; namely, under which of the competing interpretations will the set of constitutional essentials in question be one that could meet with the acceptance of all concerned in a practical discourse.) To state the problem another way: It is not clear how we can say that a constitutional norm such as "equality of concern and respect" remains invariant—remains one and the same norm—under reasonably contesting major interpretations of it ("color-blindness" versus "anti-caste"). And that threatens disaster to the proposed constitutional contractarian justification of politics. For, obviously, the justification cannot succeed if it turns out that the constitutional "principles and ideals" to which everyone, as reasonable, hypothetically agrees are just forms of words papering over unresolved and deeply divisive political-moral disagreements among the reasonable.

B. *Constitutional Patriotism to the Rescue*

The point is one that Habermas has grasped and confronted. And his way of perceiving and dealing with it, I now want to suggest, directly echoes the explanation we earlier found in his "retrieval" of the possibil-

27. The point here is not simply that the requisite interpretative act will often be reasonably contestable as conducted under any given method for constitutional interpretation. It is also that among the country's people there are ongoing, reasonable disagreements about exactly what method of constitutional interpretation is to be employed.

ity of moral experience from the linguistic turn, of how there can be a wholly valid experience of the unconditionally obligatory that is not necessarily accessible from within every human form of life.

Habermas, as I understand him, argues that citizens, moved by unshakeable recognition of each others' claims to consideration as free and equal, may attribute overriding importance to upholding the idea of existent agreement on a single set of principles for their country's essential constitution, and their sense of the urgency of affirming agreement *on the principles* can keep citizens committed to the idea that their disagreements *over the applications* does not—cannot be allowed to—impeach the invariance of the principles themselves. Major, disputed applications of constitutional principles, Habermas avers, “cannot be ethically neutral.” Nevertheless, he insists, “the debates are always about the best interpretation of the same constitutional rights and principles.”²⁸

They *have* to be conceived thus, Habermas appears to argue, because only on this perception of the persisting “sameness” of the constitutional essentials—their invariance under contesting major interpretations—can the constitutional essentials play their pivotal role in constitutional contractarian political justification. From that standpoint, a debate or disagreement over the interpretation of constitutional essentials is a special kind of normative debate or disagreement, in which something special is at stake, namely, the possibility of a form of political association that is *just* in the sense of rationally and reasonably acceptable to all. The parties to such debates accordingly have, whether they know it or not, a special reason for understanding the debates in a particular way.

From the standpoint of justification, there are always two alternative ways to describe debates over constitutional interpretation involving constitutional essentials. We can see them as debates over the meanings or applications of a set canonical items, already securely certified as acceptable to everyone as reasonable, come what may in disputes over how to apply them. Or we can see them as debates over *which* of the contesting meanings or applications *will render* these items acceptable to everyone as reasonable. An obvious problem with the first view is its puzzling implication that a nominal constitutional essential's rational acceptability to the reasonable can somehow be independent of what that nominal essential is going to turn out in practice to mean when push comes to shove. And yet it is *only* by adopting the first view that anyone could purport to judge that any given political regime is justified, without having to wait forever to see how every one of a never-ending succession of interpretive disputes is going to be resolved by the supreme court or other powers that be.²⁹ It thus appears that the possibility of constitutional

28. HABERMAS, *THE INCLUSION OF THE OTHER*, *supra* note 3, at 225.

29. See Frank I. Michelman, *Always Under Law?*, 12 CONST. COMMENTARY 227, 235–38 (1995).

contractarian justification depends on citizens being able credibly to see debates over constitutional interpretation according to the first view, the one that allows a constitutional-essential item to be judged rationally acceptable to the reasonable before anyone knows how that item is going to be construed and applied in hard, morally disputable cases.

So the question becomes: How can intelligent citizens possibly decide to approve, as rationally acceptable to the reasonable, an essential constitutional item *the content of which at the business end they do not yet fully know*?

The only possible answer to the question put in that form is that they cannot. The fate of constitutional contractarian justification must hang on a different possibility. There will have to be some way in which citizens can perceive even their most intractable and divisive disagreements over the *application* of constitutional norms to be directed to something other than the *content* of the norms. But what else, then, might the applicational disagreements be about? What is there besides a norm's content that can decide or help decide the norm's application? An apparent answer is: The context of application.

Now, one dimension of the context of application of an essential constitutional norm is what some have called a country's "constitutional identity."³⁰ Given disagreements over applications of essential constitutional norms, citizens don't have to ascribe them to ambiguity or vagrancy of meaning in the norms themselves. We might rather ascribe our applicational disagreements to uncertainty or disagreement about exactly who we think we are and aim to be as a politically constituted people, where we think we have come from and where we think we are headed. In a Habermasian view, it is indeed easier to see how citizens might differ over such "ethical" matters than how they could differ over the core demands on constitutional practice exerted by the moral ideal of respect for everyone as free and equal—an ideal, if Habermas is right, that is transcendently immanent in the practice of constitutional argument itself. Those invariant core demands, then, always figure as a "fixed point of reference for [a] constitutional patriotism that situates the system of rights within the historical context of a legal community."

Thus, for example, in the United States today constitutional law strongly protects freedom to utter racist hate speech³¹ while in Canada it does not.³² In a Habermasian view, the difference is not evidence that different basic principles of freedom and equality prevail in the two

30. For identitarian views of constitutional interpretation (as we may call them), see Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1519–36 (1997); George P. Fletcher, *Constitutional Identity*, 14 *CARDOZO L. REV.* 737, 737–46 (1993); ROBERT POST, *CONSTITUTIONAL DOMAINS* (1997) (discussed in Frank I. Michelman, *Must Constitutional Democracy Be "Responsive"?*, 107 *ETHICS* 706, 706–23 (1997)).

31. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

32. See, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697.

countries, but rather that the two countries have somewhat differing constitutional identities.³³

We are close, now, to the core of "constitutional patriotism." "Constitutional patriotism," it appears, is the morally necessitated readiness of a country's people to accept disagreement over the *application* of core constitutional principles of respect for everyone as free and equal, without loss of confidence in the *univocal content* of the principles, because and as long as they can understand the disagreement as strictly tied to struggles over constitutional identity. And what explains *that* readiness, when and where it is found? The answer to that must be that conditions then and there warrant a level of confidence that the struggle *over* corporate identity occurs *within* a corporate identity that is already incompletely, but to a sufficient degree, known and fixed. The answer is, in other words, a cultural contingency—the cultural contingency, when and where it exists, that the corporate identity in question, however contested it may be in other respects, is already perceived by all concerned to fall within the class of *morally conscientious* (hence democratic-proceduralist) constitutional identities. Listen to Habermas:

[I]n complex societies the citizenry as a whole can no longer be held together by a substantive consensus on values but only by a consensus on the procedure for the legitimate enactment of laws and the legitimate exercise of power. Citizens who are politically integrated in this way share the rationally based conviction that unrestrained freedom of communication in the political public sphere, a democratic process for settling conflicts, and the constitutional channeling of power together provide a basis for checking illegitimate power and ensuring that administrative power is used in the equal interest of all. The universalism of legal principles manifests itself in a procedural

33. Several passages in the main judgment in the leading Canadian case suggest that such was view of the Chief Justice of Canada:

The question that concerns us in this appeal is not, of course, what the law is or should be in the United States. * * * Though I . . . by no means reject the whole of the First Amendment doctrine, in a number of respects I am . . . dubious as to the applicability of this doctrine in the context of a challenge to hate propaganda legislation [in Canada]. * * * [A]pplying the Charter to the legislation challenged in this appeal reveals important differences between Canadian and American constitutional perspectives. . . . [I]n my view . . . the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression. * * * Section 27 states that: "27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

This Court has where possible taken account of s. 27 and its recognition that Canada possesses a multicultural society in which the diversity and richness of various cultural groups is a value to be protected and enhanced. . . . I am of the belief that s. 27 and the commitment to a multicultural vision of our nation bear notice in emphasizing the acute importance of the objective of eradicating hate propaganda from society. . . .

Id. at 740–41, 743–44, 757 (Dickson, C.J.).

consensus, which must be embedded through a kind of constitutional patriotism in the context of a historically specific political culture.³⁴

There, in that text, there is no ambiguity about what is and is not empirical and contingent. Political integration, a sharing of rationally based conviction, historically specific political culture: all these expressions refer to something that can only be empirical and contingent, namely, an intersubjective cognitive convergence experienced by the people of a particular country.

Habermas says it is not a "substantive" convergence on "values" but a convergence only on procedure. Of course, discussion cannot end there. We shall need to consider what these provisos mean, and how they matter. Habermasian procedure, it appears, is very much a matter of what we sometimes call substance. For example, Habermas observes, I believe correctly, that "human rights" are a part of what it takes to "satisfy the requirement that a civic practice of the public use of communicative freedom be legally institutionalized."³⁵ As for that discourse ideal that is "implicit in the point of view" of morally responsive citizens who accept the obligation to convince one another of the acceptability of the regime to all concerned—is not that ideal a value?³⁶ How about a "form of social integration" consisting in "an abstract, legally mediated solidarity between strangers?"³⁷ Not a value? And are these not *ethical* values, at that, concerned with and reflecting a particular way or form of life? A way of life, I mean, that prefers honest reasoning with each other to force and manipulation—or one that features a language (as I put it earlier) in which the categories exist for recognition of the freedom and equality of persons and of resulting reciprocal obligations of persons to treat each other such.

I am not sure what is left, at this point, of the distinction between substance and procedure. What does seem clear is that the fact of the convergence of a country's people upon the discourse ideal—procedural

34. HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 225–26.

35. Compare Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, in HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 259–61 with Michelman, *supra* note 1, at 16–18, 33–34.

36. Habermas differentiates "values" from "norms" along four dimensions. First, norms obligate, whereas values attract; the fulfillment of a norm consists in its non-violation, whereas the fulfillment of a value consists in the successful pursuit of it by purposive action. Second, that which is proposed as a norm either obligates (is valid as a norm) or it does not (is not valid as a norm), whereas values fix relations or orderings of preference among various, perhaps alternative or competing, states or outcomes. Third, norms are unconditionally binding on everyone, whereas values are relative to culture and belief. Fourth, norms within a system of norms cannot point in conflicting directions, whereas values can be competitive. See Jürgen Habermas, *Reconciliation Through the Public Use of Reason*, in HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 55. It is not clear to me that, by those criteria, the interpersonal-relational ideal implicit in the point of view of whoever sets out to convince another is unambiguously a norm and not a value.

37. Jürgen Habermas, *Does Europe Need a Constitution? Response to Dieter Grimm*, in HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 159.

and abstract as that ideal may be—is an empirical, contingent matter. That point holds regardless of Habermas's persuasive suggestion that the appearance of such a convergence among the people of a country need not precede the establishment in that country of democratic-discursive institutions, but rather can be expected to arise from those institutions.³⁸ "The ethical-political self-understanding of citizens in a democratic community," he writes, "must not be taken as a historical-cultural a priori that makes democratic will-formation possible." Such a national self-understanding is rather to be understood as "the fluid content of a circulatory process that is generated through the legal institutionalization of citizens' communication."³⁹ It is—the point seems to be—within the power of the inhabitants of a country to create the convergence, "given" their "political will" to do it.⁴⁰ That "given" seems to me to name an empirical contingency, and I do not see what is not ethical about it.

38. *See id.* at 159–60.

39. *Id.* at 161.

40. *Id.*