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Rawlsian Jurisprudence and the Limits of Democracy

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ABSTRACT

The present article analyses John Rawls's advocacy of judicial review via a close reading of Rawls's discussions of his "principles of paternalism" and his "four-stage sequence" in *A Theory of Justice* (1971). The article surveys Rawls's political "principles of paternalism," the limits, checks, and constraints he imposes on majority rule and civic participation, and finally the role Rawls assigns to courts, judges, and judicial review within his political conception of justice. Following upon this survey, this article contends that the particular relations of supremacy and domination (*Herrschafts-Verhältnisse*) at which Rawls's political thought aims are judicial or juridical—the supremacy of judges over citizens, of courts over legislatures, and of the judiciary over participatory politics.

In the first part of his 1886 work, *Beyond Good and Evil*, Friedrich Nietzsche suggests a question worth posing to philosophers or writers who erect metaphysical and philosophic systems with the aim of generating a set list of categorical and hypothetical imperatives or a set list of principles of justice—that question is: At what morality does the author of a philosophical or metaphysical system aim?[1] The question is sharpened when one notes that morality is here understood *politically* as designating not only a code or set of precepts, imperatives, and "Thou shalts," but also as designating a set of relations of domination, subordination, hierarchy and supremacy which supervene upon those imperatives, precepts, commandments, and principles of justice.[2] Thus, to any philosophical system of metaphysics or morality, Nietzsche would have us ask, "Where is this going?" by which he means "Who ends up on top?"[3]

It is this question which we would like to put to the political thought of John Rawls as expressed in *A Theory of Justice* (1971) and reiterated and redeveloped in his *Political Liberalism* (1993). Who, according to Rawls, is to decide on questions of legislation, order, morality, and hierarchy? Who is, in Rawls's view, to have final say on questions of the execution, administration, and interpretation of law? For Rawls, who is to judge and who is to finally decide the questions of politics and shared common life?[4]

This question faces an immediate difficulty: it may appear at first blush that within Rawls's political thought no one person or set of persons is to decide with finality—all citizens appear to be equal, they appear to be free, to be democratic citizens, and they appear to be subordinated only to their internal senses of justice—to their notions of reasonableness and rationality.

It is the aim of this article to dispel that appearance through a survey of Rawls's political "principles of paternalism," the limits, checks, and constraints he imposes on majority rule and civic participation, and finally on the role he assigns to courts, judges, and judicial review within his political conception of justice. Following upon this survey, this article contends that the particular relations of supremacy and domination (*Herrschafts-Verhältnisse*)[5] at which Rawls's political thought aims are judicial or juridical—the supremacy of judges over citizens, of courts over legislatures, and of the judiciary over participatory politics.

1. The principles of paternalism (*A Theory of Justice* (1971), section 39)

In the presentation of the original position in *A Theory of Justice* (1971), the principles of justice are not the

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only principles which the parties to the original position adopt.[6] In addition to principles of justice and priority rules for the implementation of those principles, the parties in the original position also adopt what Rawls terms "the principles of paternalism."[7] Less commented and interpreted than the famed principles of justice,[8] Rawls's argumentation for "the principles of paternalism" runs as follows:

> The parties adopt principles stipulating when others are authorized to act in their behalf and to override their present wishes if necessary; and this they do recognizing that sometimes their capacity to act rationally for their good may fail, or be lacking altogether.
>
> Thus the principles of paternalism are those that the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society. Others are authorized and sometimes required to act on our behalf and to do what we would do for ourselves if we were rational, this authorization coming into effect only when we cannot look after our own good. Paternalistic decisions are to be guided by the individual's own settled preferences and interests insofar as they are not irrational, or failing a knowledge of these, by the theory of primary goods. As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position. We try to get for him the things he presumably wants whatever else he wants.[9]

Failures of reasonableness and rationality on the part of citizens, according to Rawls, include failures to believe in rights and liberties, basic liberties, equalities, and certain notions of Kantian subjectivity (such as the moral powers of reasonableness and rationality—meant to model Kant's conceptions of the pure and empirical types of practical reason[10]). All of these, for Rawls, are grounds to govern others without their consent, without their participation in institutions of majority-rule—the parties to the original position explicitly sanction the submission of all those outside the ambit of "reason" and "rationality" to the expert decision-making of those with "appropriately" developed "moral powers." The "principles of paternalism" sanction the non-democratic authority of a single person or of nine persons, provided that such persons can be certified as appropriately "reasonable," appropriately "rational," and therewith, appropriately "moral," in the senses in which Rawls himself understands those terms.

2. Socialist critiques of Rawls and the "fair value of the political liberties" (*Political Liberalism* (1993), lecture VIII, section 7; *A Theory of Justice* (1971), sections 36 and 37)

In the same chapter in which Rawls elaborates his jurisprudential views and voices support for judicial review, he acknowledges "radical democrats and socialists" who have criticized Rawlsian justice-as-fairness for the inegalitarian and non-democratic procedures and outcomes it instantiates and justifies. "Many have argued, particularly radical democrats and socialists," Rawls notes, "that while it may appear that citizens are effectively equal, the social and economic inequalities likely to arise if the basic structure includes the basic liberties and fair equality of opportunity are too large."[11] In response to this critique, Rawls offers a conceptual distinction between basic liberties and the worth which citizens derive from the bundle of equal liberties which the first principle of justice ("the principle of greatest equal liberty"[12]) allots to them. While the formal basic liberties to freedom of conscience, freedom of thought, freedom of expression are guaranteed to be equal under a legal regime consistent with the first principle of justice, the worth or value which citizens derive from their equal liberties might be quite unevenly distributed and highly unequal.[13] This distinction can be depicted as follows:

> Basic liberties under justice-as-fairness (formally, juridically, equal)
>
> ≠ worth of basic liberties under justice-as-fairness (unequal, inegalitarian, in everyday social and political life)

By this conceptual crafting, or legislation of terms, Rawls has restricted terminological usage such that within Rawls's political vocabulary, one cannot sensibly assert that justice as fairness generates unequal liberties or unequal freedoms—one can only say that that those equal freedoms have unequal *worth* to different citizens on the basis of their social position or access to material wealth and political prerogative—they remain "equally free" even if they cannot equally exercise their freedoms. Within Rawls's view, equal basic liberties are not necessarily equally valuable to all equal citizens.[14] Some equal citizens extract more value from their equal freedoms than others.

To counter his socialist and radical democrat critics on the unequal worth of liberty to Rawlsian citizens and subjects, Rawls recurs to a notion of

guaranteeing "the fair value of the political liberties" above and on top of his two principles of justice.[15] While other basic liberties, such as income and wealth or the social bases of self-respect, may accrue radically unevenly to different Rawlsian subjects, political liberties are to be fixed at something closer to equality.[16] This fixing of access to political liberties at a rough equality, which Rawls associates with the public financing of elections,[17] Rawls terms the "guarantee of the fair value of political liberties." The fair value of the political liberties is cashed out slightly differently in *Political Liberalism*[18] and in *A Theory of Justice*.[19] In *A Theory of Justice,* the "fair value of political liberties" is "a fair opportunity to take part in and to influence the political process"[20] such that "those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class."[21] In *Political Liberalism*, the notion of each person similarly motivated having "the same chance"[22] to get in positions of authority is dropped, but in the later presentation, the "fair value of political liberties" is described as meaning that "everyone has a fair opportunity to hold public office and to influence the outcome of political decisions."[23]

Rawls suggests two policy strategies for securing the "fair value of political liberties"—the first strategy is regime-specific, and the second strategy is general. The first policy strategy for securing the "fair value of political liberties" is "to keep political parties independent of large concentrations of private economic and social power in a private-property democracy, and of government control and bureaucratic power in a liberal socialist regime."[24] This strategy specifies regime-specific aims for preserving the "fair value of political liberties," but seems to say preciously little about how to achieve these aims—how precisely "to keep political parties independent of large concentrations of private economic and social power"[25] in the face of the income inequality which the difference principle may sanction or how precisely "to keep political parties independent of… government control and bureaucratic power" in the face of prerogative and arbitrary powers which both the principles of justice and the principles of paternalism may sanction in establishing institutions of governance. Rawls's second policy strategy for securing the "fair value of political liberties" is not regime-relative or regime-specific: "in either case, society must bear at least a large part of the cost of organizing and carrying out the political process and must regulate the conduct of elections."[26]

3. The Four-Stage sequence and judicial finality

Rawls's political conception, which he labels "justice as fairness,"[27] in each of the myriad major presentations of that conception, lays out not only two principles of justice which are to regulate "the basic structure of society" but also a staged sequence of political institutions whereby societal structures, a constitution, laws, and public policy are to be framed, enacted, and administered. The sequence of political institutions through which the constitution and subsequent laws are framed, enacted and administered is termed "the four-stage sequence."[28] The final stage, in the 1971, 1993, and 1995 presentations of "justice as fairness" is reserved, at least in part, for judicial enactments—the supervision, interpretation, reinterpretation, administration, and potential rejection and reformulation of laws by judges.[29] In the 1971 presentation of this facet of his political thought, Rawls labeled the final stage of legislation "the stage of particular cases"[30]: "The last stage is that of the application of rules to particular cases by judges and administrators, and the following of rules by citizens generally."[31] In later presentations of his political thought, in his *Political Liberalism* and his "Reply to Habermas," the role Rawls assigned to citizens and administrators in the fourth and final stage is diminished or dropped entirely—and the fourth stage itself is redescribed: the "the stage of particular cases"[32] becomes "the judicial stage."[33] The shift in Rawls's own description of his fourth stage may be seen as an expansion of court control at the expense of both legislative decision-making and directly participatory politics; Rawls's terminological shift, redescribing the final "stage of particular cases"[34] as the "judicial stage,"[35] might be described as instantiating a process of judicialization or juridification[36] within Rawls's political thought post-1971. Juridification is a process whereby courts and judges, through judicial review, play an ever greater role in forming, shaping, and implementing legal rules, to the detriment of the scope of democratic or popularly participatory decision-making.[37] Juridification is a process whereby courts and judges usurp legislatures and directly elected officials in framing and formulating public policy.[38] Juridification might be a term for what Rawls understands political processes generally to be about. Describing the progression or process of the four-stage sequence in the eighth lecture of *Political Liberalism*, Rawls writes:

> [T]he parties in the original position are rationally autonomous representatives constrained by the

> reasonable conditions incorporated into the original position; and their task is to adopt principles of justice for the basic structure. Whereas delegates to a constitutional convention have far less leeway, since they are to apply the principles of justice adopted in the original position in selecting a constitution. Legislators in a parliamentary body have less leeway still, because any laws they enact must accord both with the constitution and the two principles of justice. As the stages follow one another and as the task changes and becomes less general and more specific, the constraints of the reasonable become stronger and the veil of ignorance becomes thinner.[39]

In each of the specifically *legislative* stages, legislators and parliamentary representatives are presented as having "far less leeway" in framing constitutional provisions and as having "less leeway still" in shaping actual legislation.[40] The structure of this passage, both argumentative and rhetorical, maps the constraints which Rawls would have his conception of justice impose upon legislation and participatory methods of shaping the rules and regulations of shared political and social life. Were this ideal to be enacted in actuality, it might well serve as an apt description of the process which other contemporary theorists (albeit with different evaluative valences) have described as juridification—the process by which legislative, participatory and democratic processes are constrained, inhibited, and undone by judicial oversight, interpretation, and administration.[41]

In *A Theory of Justice*, Rawls writes, "Clearly the political process is importantly one of enacting and revising rules and of trying to control the legislative and executive branches of government."[42] Here no mention is made of controlling a judiciary or of the political process being one in which women and men make collective decisions *for themselves*. By contrast, for Rawls, "the legislative and executive branches" are to be controlled, but *by whom* are these branches to be controlled?

This four-stage sequence raises many questions, not all of which can find satisfactory elucidation or response within the frame of this article: On what basis are we, as citizens, consenting to enter into the four-stage sequence? Even if we assent to precisely these two principles of justice, does it necessarily follow that we would know which laws would follow from them? Is there not a range of potential laws which might follow from the two principles of justice which the constructed and constrained choice situation of the original position generates?[43]

As citizens, we may not be involved in the constitutional convention; and, as citizens, unless we happen to have ascended to the judicial bench, we certainly are not involved in judicial review. Each of the four stages—the original position, the constitutional convention, the legislative stage, and the judicial stage—would perhaps be better classified (if the judiciary can be so classified) as depicting *representative* rather than *participatory* institutions.[44] The driving concern of the four-stage sequence appears, at least at first blush, to be something more like stability or assuredness of implementation, rather than democratic procedures or democratic outcomes.

However these questions may be answered, Rawls's presentation of the four-stage sequence in *Political Liberalism* aims at showing each successive stage as constrained both by the enactments (of principles, constitutional provisions, and legislation) that preceded it and by the increasing demands of reasonableness (understood as acceptance of conditions of mutuality and reciprocity in framing and executing social policy). With each successive stage, representative persons know more factual information about their society, but simultaneously they are more constrained by the moral demands of mutual reciprocity and by the enactments and principles adopted in prior stages. As the veil of ignorance thins, the demands, obligations, and ties of reason rise. "While the constraints of the reasonable are weakest and the veil of ignorance thickest in the original position," Rawls writes, "at the judicial stage these constraints are strongest and the veil of ignorance thinnest."[45]

On this view, the judicial stage, which finds itself at the terminal end of the four-stage sequence, is ostensibly the most constrained and putatively the least ignorant. The judges who sit at the end of Rawls's legislative ideal are presented as most wise (with respect to prior legislators, constitutional delegates, and parties to the original position) and most reasonable.

Rawls's view of the constrained place of judges set at the end of his legislative sequence might be questioned by the jurisprudential decisions and practices which he praises in the sections of *Political Liberalism* which follow immediately upon this presentation. Rawls not only praises and endorses the holdings of Supreme Court cases that redefine particular acts of legislation,[46] but also praises and endorses the holdings of Supreme Court cases which redefine what *legislatures* are, in praising *Wesberry v. Sanders* (1964) and *Reynolds v. Sims* (1964) in the eighth lecture of *Political Liberalism* (1993).[47]

In *Reynolds v. Sims* (1964), the Supreme Court applied a principle of one person, one vote to reapportion upper houses of state legislatures (some of which were territorially delimited) to reflect

egalitarian considerations in voting. The principle of one person, one vote, which the Court derived to reapportion upper houses of state legislatures (in *Reynolds v. Sims*) and to reapportion US House of Representatives districts (in *Wesberry v. Sanders*) was not applied by the Court generally or consistently. Had the principle been consistently applied, what would have been the fate of the United States Senate (which gives a voter in Wyoming roughly a hundred-fold representation over a California voter) or the Electoral College (which represents voters in Delaware and North Dakota as more than equal to voters in California and New York)? A consistent or general application of the principle of "one person, one vote" would require a reformation or abolition of the Electoral College and the US Senate, but these are key components of the US Constitution, explicitly mentioned in it (as the principle of "one person, one vote" is not).

If "one person, one vote" is part of the content of "the fair value of the political liberties,"[48] and if the fair value of the political liberties is a component part of what the first principle of justice is understood to define and protect[49]—intrinsic, on Rawls's understanding to what political justice consists in, then if the schemes of representation and voting of the Electoral College and the United States Senate violate the principle of "one person, one vote," then these institutions are, in Rawls's understanding, unjust. Institutions which are unjust must, *pace* Rawls, be either reformed or abolished.[50] Who is to abolish them and who to reform them? Pausing before this question, the reader might note that the Supreme Court is in a position, on Rawls's understanding, to either abolish or sweepingly reform the very institutions which regulate who is to be a member of the Court (the Presidency, whose occupant is selected by the Electoral College, *nominates* potential justices and the Senate advises and consents to the *confirmation* of justices). Rawlsian judges and justices are in a position not only to reform or abolish all legislative and constitutional structures beneath them, they are in a position to unilaterally determine the agencies which shall appoint future justices, effectively holding the sovereign attribute of decision over succession as well as the final power over legislation and constitutional interpretation. If sovereign is the last instance of political decision, then in "justice as fairness," which assigns "final" political judgment to judicial reviewers, the judiciary is sovereign.

The prominence that Rawls accords to judgeships as administrative positions and to judicial review more generally can be seen from the prominence Rawls accords to courts as the paradigmatic settings for "public reason" and from the definitional relation which Rawls constructs between judges and citizens.

First, for Rawls, courts of law are the characteristic setting of public reason. In the sixth lecture of his *Political Liberalism* (1993), Rawls differentiates public reason from nonpublic reasons.[51] Public reason, Rawls claims, has a particularly *democratic* character: "Public reason is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizenship."[52] Nonpublic reasons need not, *pace* Rawls, share in this democratic character—nonpublic reasons may be the kinds of reasons which are articulated in institutions which need not be structured in a democratic fashion (e.g., "churches"): "Among the nonpublic reasons are those of associations of all kinds: churches and universities, scientific societies and professional groups."[53]

Public reason is further differentiated from nonpublic reasons in part by the *setting* in which such reasons are uttered or articulated. While Rawls's illustrative examples for the various settings of nonpublic reasons are churches, universities, and scientific societies,[54] the illustrative setting and locus of Rawls's public reason is a court of law: rules of evidence in a court of law need not be identical to rules of evidence in scientific experiments. Whilst the latter are nonpublic reasons, the former, according to Rawls are instantiations of public reason.[55] Being settings of public reason and *fora* for its articulation "are suited to the special role of courts."[56] In his 1995 "Reply to Habermas" in the *Journal of Philosophy*, reprinted in the 1996 paperback edition of *Political Liberalism*,[57] Rawls elaborated upon and re-emphasized this point: public reason is paradigmatically the reasoning of judges, especially those judges seated in a court supreme and vested with the powers of judicial review: "Public reason in this text is the reasoning of legislators, executives (presidents, for example), and judges (especially those of a supreme court, if there is one)."[58] Consistent with the image of courts as the characteristic setting of public reason—the "exemplar" of public reason is a supreme court with powers of judicial review where such a court exists.[59] Rawls claims both that a sovereign tribunal or supreme court's "special role makes it the exemplar of public reason"[60] and goes further, stating what could appear to be a relation of identity, in asserting that "in a constitutional regime with judicial review, public reason is the reason of its supreme court."[61]

Second, within Rawls's political conception of justice, judges are definitionally and analytically prior to citizens. For Rawls, judicial decisions are political

decisions.[62] In the 1996 "Introduction to the Paperback Edition" to his *Political Liberalism*, Rawls cites "judges deciding cases" as an instance of situations "in which some political decision must be made."[63] While public reason is characteristically "the reason of citizens,"[64] Rawls defines citizenship in terms of judgeship. Writing in the 1996 "Introduction to the Paperback Edition" to his *Political Liberalism*, Rawls claims that "Public reason sees the office of citizen with its duty of civility as analogous to that for judgeship with its duty of deciding cases. Just as judges are to decide them by legal grounds of precedent and recognized canons of statutory interpretation and other relevant grounds, so citizens are to reason by public reason and to be guided by the criterion of reciprocity, whenever constitutional essentials and matters of basic justice are at stake."[65] Here, Rawls has defined "the office of citizen" in terms of judgeship—the specification of citizenship requires the prior specification of judgeship. On this view of citizenship, the citizen is conceptually modeled on the judge. It is with a view to "the judge" that Rawls's reader comes to know "the citizen" and not with a view to "the citizen" that Rawls's reader comes to know "the judge." For Rawls, the judge is analytically prior to the citizen.

4. Democratic and judicial harmony—a potential Rawlsian response

Having surveyed Rawls's view of the four-stage sequence, his principles of paternalism, and his claims on behalf of judicial review and juridical governance, one might ask: Why does Rawls see it quite this way? In his *Political Liberalism*, Rawls claims of his constitutional apparatus that "Such a constitution conforms to the traditional idea of democratic government while at the same time it allows a place for the institution of judicial review."[66] Why does Rawls not think of institutions of judicial review and democratic processes as potentially in tension with one another and, therefore, as potential sources of social and political strife? Why does Rawls think that there is likely to be little (if any) conflict between the two principles of justice and democratic procedures and decision-making? What makes Rawls so sanguine that his four-stage sequence is not to be a threat to democracy?

Rawls's moral theory is explicitly rooted both in a moral anthropology and in an assessment of how democratic institutions work and their relative stability and fragility. As Rawls claims in the eighth lecture of *Political Liberalism*, "a conception of justice for a democratic society presupposes a theory of human nature."[67] The "theory of human nature" on which Rawls's conception of justice for a democratic society is based consists principally in two moral powers (reasonableness and rationality) and a set of three laws of moral psychology. If a "theory of human nature" which reduces the messiness, historicity, contingency, and specificity of human life to two powers and three psychological laws (to hold at all times and to be true in all places[68]) may be described as minimalist and reductionist, then Rawls's moral anthropology may be so described. Rawls's theory of moral personhood (of the reasonableness and rationality of persons and citizens as agents) is both *normative* and *descriptive*. Rawls thinks that he is both unpacking intuitions that we all have and unpacking notions which, were we to give it full consideration, we would find that we do or ought to have.

Thus, one reason that Rawls does not think that his conception of a staged-legislative sequence over which judges make the final decisions is a threat to democratic processes and outcomes is that he sees judges, legislators, and constitutional delegates as "equal moral persons" as he understands moral personhood. Moral persons, for Rawls, have two basic powers or capacities. The first power is a capacity for a sense of justice or a sense of fairness, which Rawls calls "reasonableness"—roughly, the ability to legislate those and only those laws and social policies on others which one would have legislated and promulgated upon oneself. The second power is a capacity for framing, revising, and pursuing a conception of the good over a complete human life, which includes the subordinate capacity of making plans, setting goals, and making ancillary calculations to fulfill them. This second power, which Rawls associates with means-end reasoning and an ability to calculate and foresee consequences and risks, he terms "rationality." Equal moral persons are persons who have pursued, cultivated, and actualized their two moral powers (reasonableness and rationality) to a roughly equal degree and to a sufficient extent that they can govern themselves in matters moral and legislate for themselves and others on terms of reciprocity in a constitutional democracy. Equal moral persons are, in these respects, understood to be both morally and politically autonomous. Being "equal moral persons" in Rawls's view, legislators, constitutional delegates, and judges are similarly conceptualized at the level of moral cognition (they are all (equally) rational) and at the level of moral motivation (they are (equally) willing to abide fair (reciprocal and mutual) terms of social cooperation), their *intentions* for social policy, legislation, and constitutional arrangements are roughly

(if not exactly) the same. They think in the same manner, their desires overlap, and if one party (say, a group of legislators or an association of citizens) errs, then when judges correct this error in justice-seeking, the legislators or citizens should be able to see or to reason that what the judges were doing is just what they themselves had intended all along. If judges "correct" legislators, then they are doing so in the same reasonable and rational (and justice-seeking) spirit in which the legislators had intended to act.

A second reason that Rawls does not think that his conception of a staged-legislative sequence over which judges make the final decisions is a threat to democratic processes and outcomes is that Rawls combines his moral anthropology with a view of the robustness of democratic institutions. Rawls bases this view partially on a view of the history of democratic institutions in contexts with which he is familiar and partially on a view of the psychological relation between subjects of a just scheme of social cooperation and the ever-increasing stability of such a scheme. The historical view of the stability of democratic institutions is that constitutional crises in which free institutions cannot operate or take the requisite steps to preserve themselves seldom, if ever, arise in societies with a tradition of democratic governance.[69] To this end, Rawls claims that "in a country with a vigorous tradition of democratic institutions, a constitutional crisis need never arise unless its people and institutions are simply overwhelmed from the outside."[70] To this view, one might respond that Rawls generalizes or universalizes with a near-exclusive or excessive reliance on an idiosyncratic view of the history of American democratic institutions. In the eighth lecture of *Political Liberalism*, Rawls thinks that the closest American democracy came to a constitutional crisis in which free institutions could not operate or take the requisite steps to preserve themselves was in the middle period of the American civil war, but that even then, such a constitutional crisis had *not* arisen.[71] Setting aside the factual suspension of *habeas corpus* during precisely the period Rawls refers to, Rawls takes this historical moment as cause for offering a broader generalization: "Such a crisis did not exist in 1862–1864; and if not then, surely at no other time before or since."[72] While Rawls is here partially referring to what he calls "our history,"[73] he is deriving from a single case rather broader implications for "liberal democratic societies" and "constitutional regimes" as such. As historical assertions about the American case, I think that Rawls's assertions about constitutional crises are dubious; the more dubious the more these assertions are deployed to apply to democratic arrangements generally.

The second facet of Rawls's faith in the stability of democratic institutions derives from his moral psychology, most fully elaborated in the seventh and eighth chapters of *A Theory of Justice*. Rawls's "principles of moral psychology" are codified into what he terms "the three psychological laws."[74] These laws relate reciprocal affection and reciprocal fair treatment to support for the social arrangements which generate and secure that affection and fair treatment—they relate the acquisition of feelings of love to the receipt of loving treatment; the acquisition of feelings of friendship to the receipt of friendly treatment; the acquisition of a sense of justice on the part of citizens to the receipt of just treatment and fair terms of social cooperation. Rawls's "three psychological laws" are postulated as follows:

> First law: given that family institutions are just, and that the parents love the child and manifestly express their love by caring for his good, then the child, recognizing their evident love of him, comes to love them.
>
> Second law: given that a person's capacity for fellow feeling has been realized by acquiring attachments in accordance with the first law, and given that a social arrangement is just and publicly known by all to be just, then this person develops ties of friendly feeling and trust toward others in the association as they with evident intention comply with their duties and obligations, and live up to the ideals of their station.
>
> Third law: given that a person's capacity for fellow feeling has been realized by his forming attachments in accordance with the first two laws, and given that a society's institutions are just and are publicly known by all to be just, then this person acquires the corresponding sense of justice as he recognizes that he and those for whom he cares are the beneficiaries of these arrangements.[75]

Rawls thinks that his three laws of moral psychology generate strong and mutually supporting reasons for the stability of just institutions and institutions that secure fair terms of social cooperation. Just arrangements, on this view, generate psychological attachments to precisely those arrangements, which in turn enhance just behavior on the part of citizens both toward one another and toward the social institutions which structure their interactions.[76]

A third and final reason that Rawls does not think that his conception of a staged-legislative sequence over which judges make the final decisions is a threat to democratic processes and outcomes is that he has a moralist's instrumental view of the *significance* of liberties and of freedom more broadly. Liberties, on

Rawls's view, are significant to the extent that they give room for the development and cultivation of the aforementioned moral powers or capacities of reasonableness (acceptance of terms of reciprocity and mutuality—legislating unto others only as one would have legislated upon oneself) and rationality (ability to engage in means-end calculation to a sufficient degree such that one can frame, revise, and pursue a conception of the good over the course of a complete human life). Rawls asserts that "a liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed and effective exercise of the moral powers."[77]

Against this view that liberties are significant insofar as they tend to enable or enhance the cultivation of our moral powers, one might with equipollence assert that morality is significant only if and only to the extent that it enables us to preserve our liberty. The priority of morality to freedom, asserted by Rawls, is no more plausible than a counter-claim of the priority of freedom to morality. One might strengthen this counter-claim by the appeal to a *status* conception of freedom,[78] whereby freedom is not one implement in the chest of means for the cultivation of the Kantian moral powers of reasonableness and rationality, but rather the status opposite to slavery—submission to and dependence upon the arbitrary will of a master. Such a conception of freedom might induce citizens to worry more about the usurping erection of unelected masters (e.g., justices furnished with the power to upend democratic processes and procedures) than to fret about whether they have fully and appropriately cultivated their Kantian moral personhood.

5. Conclusion

This article was framed at the outset with Nietzsche and, having surveyed Rawls's accounts of the four-stage sequence, his principles of paternalism, and his preference for judicial review, it might be tempting to close with some reflection on the will to power, both as manifested in the judiciary itself and within the systems of moral and political thought which buttress the power of judicial supremacy. However tempting this may be,[79] in reading Rawls, we find a pronounced rhetoric of "democracy," "constitutional democracy," and "democratic traditions" de-coupled from any reference to participatory political practices. Reading Rawls, we find legislatures constrained from below by a written constitution which they are loathe to transgress or alter and constrained from above by a judiciary which is placed in the final, or sovereign, position in the sequence of legislative enactment. In each of these respects, Rawls's political thought might be thought to mirror certain salient facets of contemporary American (and increasingly, Anglo-American[80]) political life. In this paradigmatic contemporary political theory, we as readers may see something symptomatic of contemporary political life.

In the "Introduction" to his posthumously published *Lectures on the History of Political Philosophy* (2007), Rawls sets out a series of four roles which political philosophy might serve—both intellectually and practically.[81] The third role which he lays out in the "Introduction" to these *Lectures* is that of reconciling the reader or student of political philosophy to existing social institutions, which is a role of political philosophy that Rawls credits to Hegel's *Grundlinien der Philosophie des Rechts* (1820/1821):

> A third role [of political philosophy], stressed by Hegel in his *Philosophy of Right* (1821), is that of *reconciliation*: political philosophy may try to calm our frustration and rage against our society and its history by showing us the way in which its institutions, when properly understood, from a philosophical point of view, are rational, and developed over time as they did to attain their present, rational form.[82]

A charitable reader of Rawls might see him as working to perform precisely this function in the eighth (originally the final) lecture of his *Political Liberalism*—reconciling his American readership to the Supreme Court placed above them by removing all manner of social and political decisions from participatory politics. But a less charitable reader might draw attention to the characteristic danger of this form of conciliatory and reconciling political thought, which Rawls himself identifies: "When political philosophy acts in this role [of reconciliation], it must guard against the danger of being simply a defense of an unjust and unworthy status quo. This would make it an ideology (a false scheme of thought), in Marx's sense."[83] If one regards Rawls's claims for judicial review and for judges as the final arbiters of legislation as forms of ideological support for the status quo, then the status quo which this political conception buttresses is that contraction of the space of democratic contestation, legislative action, and civic participation which goes by the name of juridification.[84]

Notes

1. Nietzsche (1967), p. 203, *Beyond Good and Evil,* section 6: "Indeed, if one would explain how the abstrusest metaphysical claims of a philosopher really came

about, it is always well (and wise) to ask first: at what morality does all this (does *he*) aim?" Nietzsche (1999), *Jenseits von Gut und Böse*, 6, p. 20: "In der That, man thut gut (und klug), zur Erklärung davon, wie eigentlich die entlegensten metaphysischen Behauptungen eines Philosophen zu Stande gekommen sind, sich immer erst zu fragen: auf welche Moral will es (will *er*—) hinaus?"

2. Nietzsche (1967), p. 217, *Beyond Good and Evil*, section 19: "a philosopher should claim the right to include willing as such within the sphere of morals—morals being understood as the doctrine of relations of supremacy under which the phenomenon of 'life' comes to be." Nietzsche (1999), *Jenseits von Gut und Böse*, 19, pp. 33–34: "ein Philosoph das Recht nehmen sollte, Wollen an sich schon unter den Gesichtskreis der Moral zu fassen: Moral nämlich als Lehre von den Herrschafts-Verhältnissen verstanden, unter denen das Phänomen „Leben" entsteht."
3. Meier (2009), in a different context and for study of a different thinker, uses this question as a frame.
4. Waldron (1999), Bellamy (2007), Schaefer (2007) and Foss (2016) advance arguments and critiques similar to those advanced in this essay.
5. Nietzsche (1967), p. 217, *Beyond Good and Evil*, section 19; Nietzsche (1999), *Jenseits von Gut und Böse*, section 19, pp. 33–34.
6. Rawls (1971), pp. 248–249.
7. Rawls (1971), p. 249.
8. Hart (1973), p. 537 and p. 537n13, draws attention to these principles and Rawls's treatment (and endorsement) of paternalism.
9. Rawls (1971), p. 249.
10. Rawls (2000), p. 165: "It is useful, then, to use 'reasonable' and 'rational' as handy terms to mark the distinction that Kant makes between the two forms of practical reason, pure and empirical. Pure practical reason is expressed in the categorical imperative, empirical practical reason in the hypothetical imperative…The terms 'reasonable' and 'rational' remind us of the fullness of Kant's conception of practical reason and of the two forms of reason it comprehends." These lectures were first given in 1977 and revised and redelivered in 1979, 1987, and 1991. See Herman (2000), p. xiii: "In spring 1977, Rawls delivered the first series of his 'Kant lectures.'…The lectures in this volume are from the last offering of the course, in 1991. The lectures went through major revisions in 1979, 1987, and 1991."
11. Rawls (1993), p. 325.
12. Rawls (1971), p. 124; Hart (1973), p. 535; p. 535n3.
13. Rawls (1993), pp. 325–326.
14. Rawls (1993), pp. 325–326.
15. Rawls (1993), p. 328: "The guarantee of fair value for the political liberties is one way in which justice as fairness tries to meet the objection that the basic liberties are merely formal."
16. Rawls (1993), pp. 328–329: "When we also consider the distinctive role of the political process in determining the laws and policies to regulate the basic structure, it is not implausible that these liberties alone should receive the special guarantee of fair value. This guarantee is a natural focal point between merely formal liberty on the one side and some kind of wider guarantee for all basic liberties on the other."
17. Rawls (1996), p. lvi; Rawls (1993), p. 328, pp. 359–363.
18. Rawls (1993), pp. 327–329.
19. Rawls (1971), pp. 224–225; pp. 233–234.
20. Rawls (1971), p. 224.
21. Rawls (1971), p. 225.
22. Rawls (1971), p. 225.
23. Rawls (1993), p. 327.
24. Rawls (1993), p. 328.
25. Rawls (1993), p. 328.
26. Rawls (1993), p. 328.
27. Rawls (1971), p. 201; Rawls (1995), p. 397.
28. Rawls (1971), p. 195; Rawls (1993), pp. 336–340; Rawls (1995), pp. 397–398; Rawls (2001), p. 48; pp. 112–114; pp. 172–174.
29. Rawls (1971), pp. 199–200; Rawls (1993), pp. 339–340; Rawls (1995), pp. 397–398.
30. Rawls (1971), p. 595. This is the label the reader finds in Rawls's 1971 Index to *A Theory of Justice*, when one searches for the fourth stage under "Four-stage sequence."
31. Rawls (1971), p. 199. It is perhaps for this reason (as a result perhaps of labeling the last stage "the stage of particular cases") that the Harvard Law Professor Frank Michelman offered a critique of Rawls as giving *insufficient* attention to judicial review in a 1973 law review article on *A Theory of Justice*, claiming that "consistent with the assumption, arguendo, of a society well-ordered with regard to the principles of justice, and with the fully argued position that those principles are stable, it appears that ideal legislators must tend to act in such a way as to make judicial review superfluous." Michelman (1973), p. 993. Rawls cites Michelman's review on p. 339 of *Political Liberalism*, noting that "a constitution" consonant with justice as fairness "conforms to the traditional idea of democratic government while at the same time it allows a place for the institution of judicial review." Rawls (1993), p. 339 and p. 339n47; see also Rawls (2001), p. 148.
32. Rawls (1971), p. 595.
33. Rawls (1993), p. 340; Rawls (1995), pp. 397–398.
34. Rawls (1971), p. 595 and p. 199.
35. Rawls (1993), p. 340.
36. Bevir (2009), p. 494.
37. Bevir (2009), p. 494. "These changes, most notably judicial review, have contributed to a process of juridification. The judiciary now plays a greater role in formulating and regulating legal standards, so the range of decisions that can be made democratically has necessarily been reduced."
38. Bevir (2008), p. 559: "Juridification can be defined provisionally as the increasing role of the courts in processes of collective decision-making." Bevir (2008), p. 565: "A broader concept of juridification might refer to all the ways in which an expanded role for law narrows the scope for democratic processes within civil society or within governmental institutions themselves. Juridification thus captures not only the expanding range of laws but also the growing

reliance on judges and courts to interpret and apply laws."

39. Rawls (1993), p. 340.
40. Rawls (1993), p. 340.
41. Bevir (2008), p. 565; Bevir (2009), p. 494.
42. Rawls (1971), p. 493.
43. For a fuller treatment of some of these questions, see Schaefer (2007) and Foss (2016).
44. Bevir (2009), p. 493.
45. Rawls (1993), p. 340.
46. Rawls (1993), pp. 343–345.
47. Rawls (1993), p. 361.
48. Rawls (1993), p. 361.
49. Rawls (1993), p. 337. cf. Rawls (1971), p. 199.
50. Rawls (1971), p. 3: "laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."
51. Rawls (1993), p. 213.
52. Rawls (1993), p. 213.
53. Rawls (1993), p. 220.
54. Rawls (1993), p. 221.
55. Rawls (1993), p. 221.
56. Rawls (1993), p. 221.
57. Rawls (1995), pp. 372–434.
58. Rawls (1995), p. 382n13
59. Rawls (1993), p. 216. Here, Rawls claims that public reason "applies also in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review. This is because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents. Since acts of the legislative and the executive need not be justified in this way, the court's special role makes it the exemplar of public reason."
60. Rawls (1993), p. 216.
61. Rawls (1993), p. 231.
62. Rawls (1996), pp. lii–liii.
63. Rawls (1996), pp. lii–liii.
64. Rawls (1993), p. 213.
65. Rawls (1996), p. liii.
66. Rawls (1993), p. 339.
67. Rawls (1993), p. 346; For a thoughtful account of Rawls's intellectual development in relation to these themes, see Bok (2017).
68. Rawls (1971), p. 587: "Thus to see our place in society from the perspective of this position is to see it *sub specie aeternitatis*: it is to regard the human situation not only from all social but also from all temporal points of view. The perspective of eternity is not a perspective from a certain place beyond the world, nor the point of view of a transcendent being; rather it is a certain form of thought and feeling that rational persons can adopt within the world."
69. Rawls (1993), pp. 354–356.
70. Rawls (1993), p. 355.
71. Rawls (1993), p. 355: "Wasn't it dangerous to hold free elections in 1862-1864 in the midst of a civil war? Focusing on the danger of political speech flawed the clear and present danger rule from the start. It failed to recognize that for free political speech to be restricted, a constitutional crisis must exist requiring the more or less temporary suspension of democratic political institutions, solely for the sake of preserving these institutions and other basic liberties. Such a crisis did not exist in 1862–1864; and if not then, surely at no other time before or since."
72. Rawls (1993), p. 355.
73. Rawls (1993), p. 355. For alternate historical pictures of political fragility, see Zeitlin (2020) and Zeitlin (2021).
74. Rawls (1971), p. 490.
75. Rawls (1971), pp. 490–491.
76. Rawls (1971), p. 498: "The more effective operation of one law strengthens that of the other two. For example, when the second law leads to stronger attachments, the sense of justice acquired by the third law is reinforced because of the greater concern for the beneficiaries of just institutions. And going the other way, a more effective sense of justice leads to a more secure intention to do one's share, and the recognition of this fact arouses more intense feelings of friendship and trust…[P]ersons who have developed a regulative sense of justice and are confident in their self-esteem are more likely to care for their children with manifest intention. Thus all three psychological principles conspire together to support the institutions of a well-ordered society."
77. Rawls (1993), p. 335.
78. Skinner (1990), pp. 121–151; Skinner (1998), esp. ch. 1; Pettit (2014).
79. How might one assess the claim that a writer or thinker is motivated by the will to power? What would count as demonstrative historical or philosophic evidence that a writer or author was so motivated? Would letters, diaries, daybooks, or correspondence meet a threshold of evidentiary proof? Would the explicit statements of an author qualify? Or would one have to resort to intimations, hints, or suggestions of another sort? However these questions, which seem to fall beyond the ambit of the present article, may be resolved, the author is grateful to an anonymous reader for *Perspectives on Political Science* for urging a conclusion framed by Nietzschean reflections on the presence of the will to power in Rawls's own work and thought.
80. Bevir (2009), pp. 493ff.; Schaefer (2007), esp. pp. 180-186; Foss (2016); Tuck (2020).
81. Rawls (2007), pp. 10-11.
82. Rawls (2007), p. 10. It might also reasonably be asked whether Rawls is engaged in the fourth role of political philosophy as he conceives it, namely, "probing the limits of practicable political possibility", yet Rawls sometimes presents this fourth role of political philosophy as a variant of the third role, and thus the two are treated under the heading of the third role of political philosophy in what follows above. See Rawls (2001), p. 4: "The fourth role is a variation of the previous one. We view political philosophy as realistically utopian: that is, as probing the limits of practicable political possibility. Our hope for the future of our society rests on the belief that the social world allows at least a decent political order, so that a reasonably just, though not perfect, democratic regime is possible." The author is thankful to an anonymous

reader for *Perspectives on Political Science* for drawing attention to this fourth role of political philosophy as Rawls understands it. See also Foss (2016).

83. Rawls (2007), p. 10.
84. Bevir (2009), pp. 493ff and Bevir (2008), p. 564ff.

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