

CONSTITUTIONAL RIGHTS AND HUMAN RIGHTS

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Introductory Note

This offering comes in two parts. The main piece, following right after this introductory note, is an expanded but still unfinished text from a talk for which the assigned topic was relations between human rights and constitutional law. This introductory note places that “lecture” in the context of other current work of mine.

Common and central to the textual objects called constitutions is a prescriptive or “normative” function.¹ A constitution charts institutional and procedural forms for valid operations of the state. It may, in addition – and constitutions typically do – set substantive limits or requirements for the aims or outcomes of such operations. Institutional arrangements for effectuating such prescriptions present a distinct question, the answers to which obviously vary among countries and constitutions.

A constitution may furthermore – as a kind of extra-legal radiation from a primarily legal object – figure symbolically in processes by which a country’s population develop and sustain a communal spirit and collective identity. Alongside or as a part of the “integrative” function we may thus theorize for constitutions,² a function of *legitimation* perhaps deserves a focus of its own.³ No doubt these two effects, where both exist, would be closely intertwined. Both would operate on the level of the figurative and representational,⁴ even as the operations of both would also be parasitic on a public apprehension of the constitution’s actual, effective influence – its normative function – in the conduct of real-world affairs.⁵

Granting these close connections, isolation of a legitimation component from the rest of the integrative effect may still attract us as investigators of the play of constitutional consciousness in the social world. A special interest – I am suggesting – should attach to the fact, if and where it is one, of a population’s convergence on the constitution as a textual platform for legitimation of the state. Such a fact would point toward possible effects distinct from any we might foresee simply from a constitution’s representation to its constituents of their distinct and estimable collective identity as a self-standing, unified people or nation.

¹ Dieter Grimm, *Integration by constitution*, 3 INT’L J. CONST. L. 193-94 (2005) (“As the embodiment of the highest-ranking legal norms, the constitution is primarily intended to produce normative effects.”).

² *Id.* at 193.

³ Reference to a constitution’s “legitimizing function” appears in Grimm, *supra*, at 193 (noting social regard of the constitution as “a guarantee of the fundamental consensus that is necessary for social cohesion”), 195 (noting the constitution’s use as a long-term “standard of judgment” for official behavior, with sundry resulting benefits to social coordination and stability).

⁴ See *id.* at 195-96.

⁵ See *id.* at 194-95, 199-200 (noting the dependence of the integrative effect on the constitution’s observable “success” on the normative side).

By legitimation, I mean the social and communicative processes by which a country's people sustain among themselves a sense of assurance of the deservingness of their political regime of general and regular support. On the level of mundane political rhetoric, "it's constitutional, after all" (meaning it is at least constitutionally permitted but perhaps also positively constitutionally called for) can be meant to work as a strong riposte to those who demand to know why they should be expected to accept in good spirit the compulsion of some law that they (not crazily) have found to be outrageous and oppressive. Recall, for example, the *Casey* plurality's easy assumption of the Supreme Court's warrant to "call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."⁶

On the level of political philosophy, the idea of the constitution as a platform for legitimation finds expression in John Rawls's proposal that demands for compliance with enactments by political majorities can be sufficiently justified to dissenters in any given case (regardless of which side of the case you might think true justice and policy would favor) by a showing that the winners have acted within the terms of a good-enough constitution. In answer to the question of the possibility of a legal and political order with whose operations all citizens should be able to find good reasons of their own for a general posture of willing compliance, regardless of disagreements on the moral and prudential merits of particular laws, Rawls offered what he called "the liberal principle of legitimacy," to wit –

Our exercise of [coercive] political power is proper and hence justifiable [to others as free and equal] only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.⁷

Inspired by the lead of Justice Grimm, I will speak of the Rawlsian proposal – with whatever ironical tinge you may find the expression to carry – as one for "legitimation by constitution."⁸ Sometimes, for convenience, I may reduce that to "LBC." When I speak of LBC, I will always mean *the idea of* LBC. The reference will always be to the idea of the constitution's indispensable service as a platform of legitimation.

⁶ *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (plurality opinion) (speaking of the dimension of the Court's responsibility that comes into play "whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution").

⁷ John Rawls, *Political Liberalism* 217 (paper ed. 1996) (hereinafter cited as Rawls, *Liberalism*); see *id.* at 137 (same). Note that the question to which Rawls thus responded is subtly different from that of fixing a set of sufficient conditions for a moral duty of citizens to comply with one or another disagreeable law or for a moral license of the state to compel obedience.

Note also that the Rawlsian text, by its inclusion of the word "only," leaves open a question about whether Rawls meant to say that an observable good-faith effort of compliance with a legitimation-worthy constitution can always in itself suffice to confirm the legitimacy of a regime in force, or rather meant the weaker claim that such an observable good-faith effort is one among other necessary conditions for that result. I think the stronger reading is supported by Rawls's related discussions of "constitutional essentials" and the "four-stage sequence," but I will need to address this exegetical question frontally in future work.

⁸ See Grimm, *supra* note 1 ("integration by constitution").

In later work, Justice Grimm speaks further of a connection between constitutions and a legitimation function. “Constitutions bring legitimate government into existence,” he writes.⁹ “The function of constitutions is to legitimate and limit political power.”¹⁰ Such remarks posit the presence of a sufficiently well-formed constitution as a helpful, maybe even necessary contributor toward legitimation. They may or may not quite get at what I mean by a constitution’s serving – *procedurally*, so to speak – as a platform of legitimacy. They are not specifically directed to the matter of a population’s treating a regularity of observed or certified compliance with the constitution as a sufficient condition, the be-all and end-all, of legitimation – which is what I mean by the idea of LBC. (The lecture below includes a somewhat more expansive treatment of this idea.)

I have recently turned out a number of papers exploring possible implications and effects of the idea of LBC.¹¹ My lecture, which now follows, is the latest addition to the collection.

⁹ Dieter Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21 *European L.J.* 460, 462 (2015).

¹⁰ *Id.* at 464.

¹¹ See Frank I. Michelman, *Legitimacy, The Social Turn, and Constitutional Review: What Political Liberalism Suggests*, ---- (forthcoming, 2015); Frank I. Michelman, “RSB,” *the Social Contract, and a Bridge Across the Gap: Delgado Talks to Rawls*, 33 *Law & Ineq.* 417 (2015); Frank I. Michelman, *Legitimacy, Strict Scrutiny, and the Case Against the Supreme Court*, in Robert C. Post et al., *Citizens Divided: Campaign Finance Reform and the Constitution* 106 (2014); Frank I. Michelman, *Why Not Just Say No? An Essay on the Obduracy of Constitution Fixation*, 94 *B.U.L. Rev.* 1141 (2014); Frank I. Michelman, *Legitimacy and Autonomy: Values of the Speaking State*, 79 *Brook. L. Rev.* 986 (2014).

The Lecture: “Constitutional Rights and Human Rights”

On demandoit à Solon s’il avoit estably les meilleures loys qu’il avoit peu aux Atheniens: Ouy bien, respondit-il, de celles qu’ils eussent receues. — Montaigne, “De la vanité”¹

I. INTRODUCTION: SETTING UP THE QUESTION

Start with constitutional rights. People argue over what to do about them. We debate whether this or that putative constitutional right is or would be a desirable thing to have as a part of our laws. We do so without much of a doubt that we have something real there to argue about. That last is not so clearly the case with talk about “human” rights, where doubts can sometimes hang heavy about whether there actually are such things in the world at all. Of course, many people do quite firmly believe in a strong reality of human rights. In fact it’s a reality so strong that it precedes and transcends any mere facts you might report about a given society’s actual laws and practices in force. (The existence of a human right against torture, you will think, does not await the creation of state laws against torture; it rather demands their creation.)

Suppose you are a believer in human rights. And suppose you find yourself in a position where you can exert some measure of influence or control over what goes into the constitutional laws of your country. Would you not be morally bound, then, to conduct yourself toward the end of bringing those laws into the closest achievable alignment with the truth about human rights in which you committedly believe?

That is going to be my question here. I want to ask about reasons you might possible have for *rejecting* an aim of conforming your own constitution’s bill of rights, its chapter on rights, to the truth about human rights in which you believe. And by “reject” I don’t just mean setting that aim aside as too difficult or distracting to pursue in present conditions of knowledge or

¹ Michel Eyquem de Montaigne, *Les Essais* 957 (ed. P. Villey et Verdun L. Saulnier,) (<http://artflsrv02.uchicago.edu/cgi-bin/philologic/getobject.pl?c.0:4:8:0:13.montaigne.2962783>). See Michel de Montaigne, “Of Vanity,” in *The Complete Works*, 876, 887-88 (Donald Frame tr., Everyman ed. 2003). (“Solon was asked whether he had established the best laws he could for the Athenians. ‘Yes indeed,’ he answered, ‘the best they would have accepted.’”)

of politics. I mean repudiation of that aim as morally misguided, as antithetical to values that you rank ahead of it.²

A. “Pre-institutional” (Human) vs. “Institutional” (Constitutional) Rights

I plan soon to turn my question into a kind of a dialogue that readers can dial into vicariously. In order to set that up, I need first to lay down some definitional stipulations. First, I define a distinction between “institutional” rights and “pre-institutional” rights.³ A right is an institutional right when the ground of its recognition as a right is an observable action or declaration by some established institutional authority. (You see I am entirely skirting any further questions, much mooted in philosophy and jurisprudence, about the shapes and features of norms, claims, or relations that qualify them properly as “rights.”⁴) If I ask you whether I, as I stand here, have a right to Medicare, you – knowing my age and nationality – answer yes. If I ask you what you base that on, I am pretty sure you will refer to me to certain acts of the United States Congress. You instinctively think of my Medicare right as an institutional right. A right is a pre-institutional right when the ground of its recognition as a right *is not* any observable action or declaration by an institution. If I ask you whether I, as I stand here, have a right not to be tortured, you answer yes. If I ask you what you base that on, I’m not so sure your first answer will be to refer me to some statute or even some treaty.

So, to be clear: My concern in this lecture is with the case in which you will first and dominantly think of a “human” right against torture as something that people simply have, regardless of what any political authorities may or may not say or do about it. You thus think

² As you’ll soon see, my Lecture envisages, as the person of influence who might or might not aim at a convergence of constitutional rights with human rights, a constitutional conventioneer. That is obviously a different role, subject to a different role morality, from that of a judge of a national supreme or constitutional court. I do not in this lecture say much about a possible carryover to the judicial-interpretive role of various possible reasons for rejection I take up here. See Jan Komárek, “Why National Courts Should Not Embrace EU Fundamental Rights,” available at <http://ssrn.com/abstract=2510290>, p. 4 (doubting, in the special context of the EU, whether national constitutional courts should take guidance from decisions of the ECJ and ECtHR “when giving meaning to fundamental rights guaranteed formally by their respective constitutions”).

³ I draw from terminology introduced by Ronald Dworkin. See Ronald Dworkin, *Taking Rights Seriously* 101 (1977) (distinguishing “institutional” rights from “background” rights constructed from “general considerations of political morality”).

⁴ See, e.g., Judith J. Thomson, *The Realm of Rights* (1990).

of my right against torture as pre-institutional – a “moral” right, as it would often be called.⁵ In well-known treaty instruments, and in books of moral philosophy, we find lists of supposedly morally certified human rights, waiting (or not, as the case may be) to be enacted as national constitutional or other institutional rights.⁶ My question here is about grounds, or the lack of them, for taking these lists as a strong guide to the specification of rights in one’s own country’s constitution.

I will thus have occasion to bring into the picture the well-known array of international legal instruments on human rights: UDHR, ICCPR, ICSCR, various regional human-rights conventions. I want to be clear, though, that my topic here is not international law. It is not the field sometimes denominated as “international human rights,” which studies and debates the effects of human-rights recognition on the validity and legitimacy of international legal dispensations, or on the legal-normative assessment of nation-state conduct that arguably depends on such dispensations for its own validity as law. For my purposes here, the lists are to be treated only and strictly as (potentially) *pre-institutionally* prescriptive for state practices that could encompass a state’s constitutional law.⁷ (I am thus assiduously bypassing questions

⁵ For purposes of this lecture, it does not matter exactly how we further define or specify the concept of “human” (moral) rights – whether, for example, we precisely accept the “orthodox” proposal to conceive of human rights as “rights possessed by all human beings in virtue of their humanity” (John Tasioulas, *On the Foundations of Human Rights*, in *Philosophical Foundations of Human Rights* 45 (Rowan Cruft, S. Matthew Liao, & Massimo Renzo, eds., 2015)), or rather prefer, for example, a conception of human rights as rights that flow from an imperative to “act towards all human beings in a spirit of brotherhood.” Michael J. Perry, “Human Rights Theory, 1: What Are ‘Human Rights’? Against the ‘Orthodox’ View” (Emory University School of Law, Legal Studies Research Paper Series Research Paper No. 15-349), available at <http://ssrn.com/abstract=25974030>, pp. 4-5 (quoting from the Universal Declaration of Human Rights art. 1); see id. at 5-6 (pointing out that some items in major international human rights instruments are framed specifically as rights attributed to classes named “children” or “women” and not to the generality of human beings). Compare the more minimalist idea of human rights as the rights deemed necessary for any system of social cooperation, see John Rawls, *The Law of Peoples* 68 (1999) – which decidedly do not include “all the moral rights of persons as such.” Samuel Freeman, *Introduction: John Rawls – An Overview*, in *The Cambridge Companion to Rawls* 1, 47 (Samuel Freeman ed., 2003).

⁶ It is a contested question whether the treaty lists are supposed to represent the results of universalist moral reasoning, although I would guess that still is the dominant view. An alternative view would be that the lists represent a political response to a contingent historical situation deemed problematic in certain respects (say, the lists represent a set of pragmatic corrective responses to specific issues of oppression or instability supposedly resulting from distributions of sovereignty in the extant positive international-legal order). See Patrick Macklem, *The Sovereignty of Human Rights* 22 (2015).

⁷ See, e.g., Charles Beitz, *The Idea of Human Rights* 210 (2009). Beitz writes;

To say something is a human right is to say that social institutions that fail to protect the right are defective – they fall short of meeting conditions that anyone would reasonably expect them to satisfy – and that

about the status of the treaty instruments as *ipso facto* already positive law in signatory countries.)

Could encompass a state’s constitutional law, I said. Yes, but not necessarily: The content of a given state’s body of constitutional law is one question; that state’s compliance (or not) with human-rights norms of whatever provenance is another question; the two questions are entirely conceptually distinct; and the answer to the second question depends only loosely and contingently, if at all, on the answer to the first. On the one side, a state with no constitutional (or even statutory) bill of rights at all can be in the closest attainable approach to perfect compliance with any set of rights-norms whatever (except, I grant you, for norms specifically about what a state’s constitution should or should not contain⁸). On the other side, a state whose constitution contains matter contradictory of the rights-norms in question may or may not be in compliance, depending (partly) on whether or not the relevant state and non-state agents act unconstitutionally.

*B. Relation of My Query to Some Adjacent Discussions*⁹

An important paper by Gerald Neuman on “Human Rights and Constitutional Rights” starts out from the premise that the global discourse of human rights has as its chief aim the inducement of improved performance by national legal systems.¹⁰ Neuman provides analytical typologies differentiating among normative impulses (“consensual,” “suprapositive,” and “institutional”) and performative deviations.¹¹ The typologies are designed for use in appraisals both of deviations and of strategies of response. My question here is about possible grounds of objection – not to an overall ambition to close the gaps but to an aim to do so by the means

international efforts to aid or promote reform are legitimate and in some cases may be morally required.

⁸ My Lecture does get into norms of exactly that type. See below part III. These are not, however, what would usually be recognized as “human rights” norms.

⁹ {This section now exists only in token form. It will have to be either expanded or dropped.}

¹⁰ See Gerald Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 *Stan. L. Rev.* 1863, 1864 (2003) (speaking of “the central purpose of the human rights system—to prompt reform of national practices”).

¹¹ *Id.*

of a conformation of national constitutional law to a cognate normative array laid down by the global human-rights discourse.

A recent study by Michal Bobek focuses on differences of outcomes in fundamental-rights adjudications by European-level and various national-level courts in Europe, despite similarities in the applicable legal texts (treaties and constitutions) and a strong Europeanist “rhetoric of common standards, common values, and the presumption of [an] equal level of human rights protection.”¹² Bobek offers evidence to show how these variant courses of fundamental-rights adjudication have in fact been shaped by the “historically conditioned convictions” and “sensibilities”¹³ of their respective political constituencies, saliently including what I refer to below as their respective “never-agains.”¹⁴ Where Bobek treats these historical factors as explanatory for variations of adjudicative outcomes within an ostensibly standardized legal-textual environment, my lecture canvasses possible reasons for caution by idealized national constitutional framers about a rush to legal-textual standardization. Whatever such reasons there might be could of course carry normative implications for constitutional adjudicators, but those are not my focal concern in this lecture.¹⁵

C. Kinds of Possible Reasons for Following Suit

This brings us to my next set of definitions. In today’s world,” writes Martha Nussbaum, there is widespread agreement about the importance of a long list of human rights, including social and economic rights, and about associated ideas of human dignity and equality. . . . International agreements that realize these ideas have in fact been the object of an overlapping consensus ever since the Universal Declaration.¹⁶

¹² Michal Bobek, “Fundamental Rights and Fundamental Values in the Old and the New Europe,” in Edward Elgar Research Handbook on EU Human Rights Law Handbook __ (S. Douglas Scott & N. Hatzis, eds., forthcoming 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619652 .

¹³ Id at __, __.

¹⁴ See below part III.D.

¹⁵ See supra note 2.

¹⁶ Martha C. Nussbaum, *Introduction*, in Rawls’s Political Liberalism 1, 50 (Thom Brooks & Martha C. Nussbaum, eds., 2015).

I distinguish three types of grounds that national constitutional authors (and you should read the term “authors” as broadly as you like) might or might not have for taking the established lists of human-rights norms as strong guides for their work. I will call these three types, respectively, “moral-imperative,” “epistemic,” and “collaborative-pragmatic” grounds. (There may be some overlaps among them; never mind.) We have *moral-imperative* grounds insofar as we believe we stand under some kind of moral pressure to take in earnest, as guides for our country’s lawmaking, the norms picked out by the lists in question. It could be pressure flowing from a history of trans-national companionship or of a conscious sharing of a moral tradition. We have *epistemic* grounds insofar as we grant to the authors of the lists a more reliable grasp of relevant moral reasons that apply to us than we acting on our own would have – as, say, a child or novice might grant to a parent or expert.¹⁷ We have *collaborative-pragmatic* grounds when we think that morally important benefits – say, of friendship, peace, or coordination – will result from the sheer fact of a conformation of our local practice of rights to practices honored elsewhere.

II. THE DIALOGUE

We are about ready to set up our dialogue. Let us say a good friend of ours – and let’s call her by the name of Justitia – is about to begin a term of service as a member of a constitutional convention in her country. The convention (Sanford Levinson’s pipedream¹⁸) has been duly authorized to prepare, for eventual submission to a national plebiscite, as thoroughly revised a constitution for the country as the convention may see fit to submit. And let’s assume the country is solidly anchored as a broadly-speaking liberal constitutional democracy and is doubtless going to remain in that orbit.

We are a small circle of learned friends whom Justitia has invited to consult with her, over drinks and dinner, about how she ought to conduct her service at the convention. She starts out the conversation by stating it as her present firm intention to work as hard as she can to

¹⁷ See Joseph Raz, *The Morality of Freedom* 53 (1988) (on the “normal justification thesis”).

¹⁸ See Sanford Levinson, *Our Undemocratic Constitution* 173 (2006).

achieve as close a fit as possible between the new constitution's chapter on rights and the true roster of human rights. She seeks our responses to that idea.

Objections start to fly. Justitia starts waving them away. (We'll be marking points at which Justitia thus is forced to pick sides in a number of current live controversies in normative political and constitutional theory. We make no attempt, though, to resolve these in her favor. The strategy of the lecture is to let her have her way in all such instances, but then go on to maintain that, even so, she still has prevailing moral reason to back off from her announced intention.)

So let us finally now begin. A first counselor protests that a constitution for a democracy ought not to contain any declaration of rights at all. It ought to trust the democracy. It either ought not to lay down any advance constraints at all on the outcomes from democratic politics,¹⁹ or it ought to confine them to a very narrow set of political-participatory rights that would fall far short of any list of human rights in the sense he is sure Justitia has in mind.²⁰ Justitia bats that objection aside. She knows those debates, she says, and she comes out the other way. In order even to *be* a democracy, she says, a political regime must be committed to a due regard for the equal rights of persons as bearers of human dignity, as required to assure their independence, and so on. (Justitia, you see, is coming down in favor of what has been called a substantive or "constitutional" conception of democracy, as opposed to a purely procedural or "majoritarian" conception.²¹)

¹⁹ See Louis Michael Seidman, *On Constitutional Disobedience* 5, 10 (2012) (maintaining that appeals to the Constitution to block democratic majorities from pursuit of their all-things-considered best or preferred way to proceed are objectionably authoritarian, and accordingly proposing to Americans that they should "systematically ignore the Constitution").

²⁰ See, e.g., Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *Geo. L. Rev.* 491 (1997).

²¹ See Ronald Dworkin, *Freedom's Law* 17, 20 (1996) (drawing the named distinction). See generally Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 *Harv. C.R.-C.L. L. Rev.* 371 (2012) (mapping this distinction in relation to adjacent ones drawn by liberal-minded scholars concerned to explain the compatibility of constitutionalism with democracy).

“Okay,” says our first objector, “I get that. The problem, though, is about putting those rights into *a constitution*. When you do that, you thereby inevitably hand over too much power to judges sitting in law courts to run the country’s affairs.” “No,” answers Justitia,

that’s not necessarily so. We can lay down requirements as constitutional law, meaning thereby to place our lawmakers and officials under corresponding duties of fidelity and compliance, without necessarily making law courts the sole and final arbiters of compliance or the lack of it.²²

(Justitia thus takes a potentially supportive stance toward ideas of “weak-form” or “new commonwealth model” judicial review,²³ sometimes marching also under banners of “political” or “popular” constitutionalism.²⁴)

A second counselor now steps to the plate. She denounces as illicit any project of aligning our country’s constitutional laws with human rights as laid out in instruments such as, say, the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights. That’s out of order, this counselor says, because the authors of these wannabe directives to the world simply lack the kind of authority over us that would demand our compliance when making our own laws. She thus evidently means to deny to Justitia any positive-legal ground for trying to follow suit. Justitia is unfazed. “You haven’t quite understood me,” she replies. “When I speak of ‘human rights,’ I mean a body of rights that is pre-institutional. It is human rights as moral rights or ‘background’ rights²⁵ with which I want our constitution to correspond,” she says. “What could possibly be your problem with that?”

²² Compare Frank I. Michelman, *Socioeconomic rights in constitutional law: Explaining America away*, 6 Int’l J. Const. L. 666-67, 684 (2008) (describing a “minimal” view of “what it means for a right to exist in law – roughly, that those who inexcusably act in violation of the right thereby expose themselves to the special sort of public blame or censure that we would typically direct towards lawbreakers”).

²³ See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013); Mark Tushnet, *Weak Courts, Strong Rights, Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009).

²⁴ See, e.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

²⁵ See above part I.A.

(Notice that Justitia’s grounds for seeking the correspondence could still be any of moral-imperative, epistemic, or collaborative-pragmatic, as I defined those types above.²⁶)

But then of course Justitia gets hit from the opposite side. “In that case,” says the next counselor to speak,

your project of aligning constitutional rights with human rights is chimerical, because there are no such things in the world as pre-institutional rights. Talk of moral rights is nonsense. Rights are all and only what our institutions in force effectively and observably make them.²⁷

And he’d like to go on but she cuts him short. She knows those debates, too, she says, and she takes the side of what she calls moral realism. “I take the expression ‘human rights’ to refer to an existent real class of moral rights,” she says. “All I really mean by that, though,” she hastens to add, “is just to say that these rights are and remain what they are regardless of what any institutions say or do.”²⁸ “And then,” she finishes, “there’s nothing confused about an aim

²⁶ See above part I.C.

²⁷ See Jeremy Bentham, *Anarchical Fallacies*, in *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* 70, 72-73 (Jeremy Waldron ed., 1987) (“Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts”).

²⁸ So Justitia is not what we might call a “naïve” (or cartoon) moral realist. Perhaps she’d rather call herself a moral objectivist. She might subscribe to the (somewhat question-begging?) view of John Rawls as neatly portrayed by T.M. Scanlon, *Rawls on Justification*, in *The Cambridge Companion to Rawls* 139, 146-47 (Samuel Freeman ed., 2003):

The kind of objectivity that is appropriate to morality does not require that it should be about independent entities but rather that it should be a way of reasoning about what to do that is distinct from any individual’s point of view and yields determinate answers in many cases . . . [and is] a method of reasoning . . . that all reasonable individuals have good reason to regard as authoritative and normally overriding.

See Charles Larmore, *The Morals of Modernity* 147 (1996) (“Rawls’s claim is that we do not have to accept [the existence of an independent order of moral facts] to recognize that some moral beliefs are supported by good reasons and others are not.”).

It’s perhaps worth noting here a couple of other claims that Justitia does not make and has no need to make in defense of her position. She need not and does not claim that moral reasons are the only sorts of reasons there are or that they prevail unconditionally over any other countervailing reasons that a given situation may present. (She may, though, as we’ll see below in part III.C, be committed to the idea that human-rights claims prevail over certain other arguably moral claims that a given situation may present.) Nor need or does Justitia claim that responsiveness to the idea of a pre-institutional morality, which takes some kind or degree of presumptive precedence over other interests, is a culture-independent attribute either of herself or of (uncorrupted) humankind more broadly. She could perfectly well accede (say) to Charles Larmore’s propositions that “reason becomes capable of moral argumentation only within an already existing morality,” and “only through belonging to a moral tradition . . . can we find our moral bearings.” Charles Larmore, *The Morals of Modernity* 51 (1996); see id. at 58, 115 (“Historical context is not something that reason must transcend, but rather a condition of its possibility.”). See also Frank I. Michelman, *Morality, Identity, and “Constitutional Patriotism,”* 76 *Denv. U. L. Rev.* 1009, 1012-14 (1999) (on affirmation by Jürgen Habermas of the possibility of the experience of the unconditionally obligatory despite seemingly destructive implications of a

of having our own institutions say the things that will bring our constitutional rights into alignment with those pre-institutional human rights.”

Which of course just brings on the next objection. “It’s not confused,” says a fourth objector, “it’s just impossibly arrogant. You would not only have to know that these pre-institutional rights exist, you would have to know what they are, what is in them, or pretend that you do, in order to pursue that project. And how could you possibly claim knowledge of any such kind?”

Before she can answer, a fifth counselor jumps in to help her out. “Well, look,” this next speaker says,

Justitia has available the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and so on; she can take guidance from them. And that would not be arrogant. To the contrary, it would just be to suggest that our country has good reason to follow these leads from careful deliberations by highly competent thinkers from a diversity of backgrounds but dominantly from within the broad constitutional-democratic tradition to which we, too, belong.

(This current speaker, you see, is onto the epistemic ground, and maybe also the collaborative-pragmatic ground, for paying heed.)

But “no,” says the next counselor to speak,

that is too much of a good thing. In those three major international human rights instruments you mentioned I can count more than forty distinctly named rights.²⁹ What is worse, they are typically named as abstractions. Human dignity. Freedom of expression. Privacy. Fair trial. Free press. Property. Subsistence. Work.³⁰ Anyone can see that on the level of generality at which they are stated, these so-named rights are going to come into practical conflict. In order to support all of them at once, we would have to pare and qualify each one of them in some way or ways that allows for their mutual compatibility. Granted, those instruments that you cite do qualify and limit some of their abstractions, but they do ins ways that leave most of the real work of the concretization – or one might

“linguistic turn” in moral epistemology). Justitia may very well be, in those respects, a thoroughly modest moral objectivist about human rights.

²⁹ {I guess will eventually have to include a footnote listing apparently distinct items at least up to the number of forty-one. Of course there are lots of overlaps, too.}

³⁰ {This is not a certified verbatim list. I will have to check through to pick up exact phrasing and then place each named item inside quotation marks, with a citation.}

just as well speak of the completion – of a coherent and workable scheme of guarantees to future open-ended construction and reconstruction by lawmakers and courts. The so-called texts of “internal limitation” that these instruments attach to various items in their lists may provide a few more-or-less platitudinous starting points for that interminable future activity of norm completion, but they do little to answer the countless foreseeable kinds of potentially divisive conflicts of rights-claiming for which multiple reasonable responses inevitable will be brought forth.³¹

One can easily foresee a debate breaking out over the accuracy or force of that last observation.³² Before it can, though, Justitia re-enters the conversation. “I don’t mean I am going to enslave myself to those instruments and their itemizations,” she says. “There are widely discussed ways of reducing the items to a much smaller number, maybe even down to one – ways that are directed to achievement of a reasoned, ordered conciliation among items typically found in the more numerous listings.”³³ And here Justitia mentions suggestions that the ultimate or guiding human-rights norm is or comes down to human dignity,³⁴ or individual

³¹ The counselor has in mind, for example, ICCPR art. 18:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. * * *

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. * * *

As Sadurski remarks of the European Convention, the grounds for permitted restrictions of rights, as set forth in its various rights-naming clauses “read like a list of ‘public reasons’, including national security, public safety, prevention of crime, protection of public order, protection of health or morals, protection of the rights and freedoms of others, maintaining the authority and impartiality of the judiciary.” Wojciech Sadurski, “Is There Public Reason in Strasbourg?,” available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603473 p. 1. Perhaps that helps explain the observation of Cohen-Eliya and Porat that the European Court of Human Rights “has downplayed the importance of specific limitation clauses in determining specific goals and justification for each of the various rights and has instead interpreted them all under a much broader, general doctrine of justification.” Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* 120 (2013) (citation omitted).

³² Compare, e.g., Martha C. Nussbaum, *Introduction*, in Rawls’s Political Liberalism 1, 50 (Martha C. Nussbaum & Thom Brooks eds., 2015) (remarking on widespread agreement in today’s world on “a practical commitment to human rights” tracing back to the Universal Declaration) with Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* 165-67 (2009) (maintaining that, by reason of their resort to “open-ended formulations,” internal limitations clauses attached to itemizations of abstract rights still leave the bulk of the work of “completing the rights-project” to later generations of political authorities).

³³ For one example already introduced, see note 5, *supra* (describing the view of Michael Perry) (“to act . . . in a spirit of brotherhood”).

³⁴ See Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* 104-06 (2015) (“Human dignity is the central argument for the existence of human rights. . . . [A]ll of the rights in the constitutional bill of rights [] are interpreted in light of human dignity.”).

ethical independence,³⁵ or equal respect,³⁶ or liberty of conscience,³⁷ or fair shares,³⁸ or that (as some say) it is something called the right to justification.³⁹ and all the other named items then are to be pared and dovetailed so they can all jointly combine to do unified service to the one top-level, organizing value. When (say) free press and fair trial come into apparent conflict, we work it out, cutting back on one or both of the claims, in whatever way best serves the top-level value. That is a notion, Justitia adds, that these days is often conveyed under the heading of “proportionality.”⁴⁰ Each of the named rights, in each concrete case, is to be proportionately scaled to the claims and demands of the others, all under guidance and control from the top-level value of human dignity, or fair shares, or whatever we take that to be. (Justitia thus evinces confidence in the idea of a legal method that will sustain a consistency and indeed a unity – or call it an integrity – of law, across what must always also appear as an irreducible severalty of rights-norms that register as “basic” or “fundamental” for the subject population.⁴¹)

³⁵ See Ronald Dworkin, *Justice For Hedgehogs* 368-78 (2011) (positing a right or value of ethical independence as the key to deciding which aspects or exercises of individual freedom to act are parts of constitutionally protected “liberty,” and which state-imposed limitations on such exercise are constitutionally permitted).

³⁶ See Charles Larmore, *The Morals of Modernity* 221 (1997) (affirming an individual moral right “more fundamental than the political rights that tend to be the object of explicit constitutional guarantees. . . . [Those political rights] give concrete expression to the deepest individual right, that of equal respect, which itself underlies the ideal of democratic self-rule.”)

³⁷ See Frank I. Michelman, *The Priority of Liberty: Rawls and “Tiers of Scrutiny*, in Rawls’s Political Liberalism, supra note 15, at 189 (“When the question is one of the scope of negative protection for action-freedom . . . , liberty of conscience is the lodestar that attracts all compasses.”) (construing passages in works of John Rawls).

³⁸ See David Beatty, *The Ultimate Rule of Law* 144 (2004) (“The idea of fair shares and the principle of proportionality through which it is expressed are universals that . . . account for virtually every case in which courts have responded positively to protect people’s general welfare.”).

³⁹ See Rainer Forst, *The Right to Justification* 205 (“Preceding all demands for concrete human rights, there is one basic right being claimed: the right to justification.”) (emphasis omitted).

⁴⁰ See Kai Möller, *The Global Model of Constitutional Rights* 178 n. 3 (2012) (defiantly embracing Grégoire Webber’s wryly intended formulation that “the entire constitutional rights project could be simplified by replacing the entire catalogue of rights with a single proposition: The legislature shall comply with the principle of proportionality”) (quoting Webber, supra note 31, at 4 (2009)).

⁴¹ See Ronald Dworkin, *Law’s Empire* 65-66 (1986) (describing stages of constructive interpretation of a social practice (such as law is), pivoting on the “stage at which the interpreter settles on some general justification for the main elements of the practice,” as those elements would severally be identified at a “pre-interpretive stage”).

Again we should take care not to commit Justitia to more than she needs. She need not take sides on the question that divides Ronald Dworkin from Isaiah Berlin, about whether political choices for a society like hers can always avoid even the least sacrifice of genuine values (say, equality at a cost to liberty or vice-versa), if only we could get

“I don’t claim,” Justitia goes on to say,

to have all this worked out for myself just at this moment. I’m only asking you all what objection there could possibly be to my seeing it as my job at this convention to do my best to *get* it all worked out and then to bend my effort toward conforming the text of our coming constitution’s chapter on rights to whatever conclusions I might reach about the composition of the true roster of human rights.

“But that can’t possibly work in practice,” a sixth counselor objects,

because there’s no chance that the way *you* work it out will agree with the ways that other delegates would come to. You could never hope to get to agreement about all this at any punctual moment in real political time. So a house rule of the convention, requiring that the proposed new constitution’s list of constitutional rights is to conform to the true and ultimate conception of human rights, would paralyze the convention, prevent it from completing its task of proposing a new constitution for ratification.

“Not a problem,” Justitia responds. And she points out that the convention has adopted a good and workable set of voting rules, which will certainly avert any danger of paralysis.

“Someone makes a proposal, there is disagreement, we have a discussion, we take a vote, and we move along.”

“And anyway,” Justitia continues,

it’s not any kind of “house rule” I have in mind, but just a rule for myself to follow: a rule to regulate *my* actions at the convention by an aim of bringing our new constitution’s text on constitutional rights into as close a harmony as possible with my best understanding at the time of the true conception of human rights. I haven’t yet heard what I can find a cogent objection to that.

Let us now pause to take stock. Justitia has so far brushed aside the following objections to an aim on her part of bring national constitutional-rights texts into a state of conformation to (pre-institutional) human rights:

straight our conceptions of what those values are. See Frank I. Michelman, *Foxy Freedom?*, 90 B.U.L. Rev. 949, 954-58 (2010) (describing and analyzing the disagreement). Justitia relies, rather, on the looser idea that value conflicts and tradeoffs can be resolved on grounds accessible to reason. She might perhaps follow Charles Larmore in the belief that her society sufficiently sustains a common moral “perspective” to allow for reasonable “comparisons” of values that are not strictly “commensurable” on any “common denominator.” See Larmore, *supra* note 27, at 155-63.

- At least in a working democracy, it is wrong for an entrenched constitution to curb in advance the day-to-day deliberations and decisions of whoever currently is responsible and accountable for the pursuit of justice and the general welfare.
- Even passing the first objection, constitutionalization of rights is objectionable as a way of putting judicial officials in charge of matters that rightly fall within the province of the people’s elected representatives.
- Human-rights specifications emanate from self-appointed global elite discourses lacking justified authority for a national lawmaking process.
- Viewed as pre-institutional, the very idea human rights is a conceptual confusion.
- Abstractly stated lists of human rights are indeterminate owing to inevitable practical collisions among them.
- A constitutional assembly’s “house rule” of conforming constitutional rights to human rights would cause the constitutional project to founder in disagreement.⁴²

We have been noticing how Justitia’s rejections of these complaints take sides on a number of controverted questions. So let me say once again, before going on, that I do not mean here to be offering my own defense or support for any or all of the sides she has taken. I rather want to concede them *arguendo*, because the question I want to address is whether there could be any *further* sound moral objection against her self-instruction, her personal rule, to push as forcefully as she can toward a conformation of the coming list of constitutional rights to human rights, *after* we concede to her on all the issues posed so far. And what I now want to suggest is that the answer could depend on what sort of function the constitution is expected to fulfill in the life and affairs of the society whose constitution it will be.

⁴² To which we might have appended an objection based on second-best considerations. Owing to voting anomalies and other strategic causes – or so it might be argued to Justitia – a fixation by her and her friends on a goal of conforming constitutional rights to human rights might result in the assembly voting out an overall bill-of-rights package that is worse over-all, from their own human-rights-inspired standpoint, than a different and achievable package would have been. Justitia sets this concern aside by some combination of confidence in her ability to gauge the strategic hazards and a judgment that the risk of such a mishap is, in the circumstances, negligibly small.

III. LEGITIMATION TO CIVILITY

A. Legitimation as a Moral Concern

A country's constitution is typically meant to serve a legal-normative function. It lays down certain basic laws to control the subsequent operations of the state. We are all aware, too, of how constitutions can serve an expressive (or "integrative") function, representing to the country's people and to the world, by the ideals and commitments it contains, the grounds of this people's special identity and unity as a people. I see nothing in either of those functions that should stop anyone from aiming to have their country's constitution conform to whatever human rights there really and truly are.

I now introduce for consideration an additional sort of function or service we may expect from a country's constitution, that of providing a public platform for the legitimation of the country's regime of law. This will require a word of explanation.

By the term "legitimation," I mean the social, communicative processes by which a country's people sustain among themselves a sense of assurance of the overall deservingness of their political regime in force to continued general and regular support – even as they may also be confronting facts of widespread doubt or disagreement, some of it intense, about the justice or wisdom of this or that law or combination of laws. Legitimacy sets a kind of minimum floor of decency for a state by which the citizens, perceiving the state's operations to remain above the floor, can reasonably sustain their sense of a moral license to call upon each other to carry on with a willingness to support the state and abide by its laws.

At stake in this idea is the very possibility of a regularity-in-fact of people's willing submission to the state's authority. No less at stake is the possibility of sustaining across the society a web of reciprocated accreditations of the state's claim to an authority that is acceptable on terms and for reasons that "all citizens as free and equal may reasonably be expected to endorse."⁴³ Legitimation thus involves an indissoluble fusion of empirical-sociological with moral-justificational concerns. As a sociological matter, a matter of the facts

⁴³ Rawls, *Liberalism* at 137.

on the ground, a failure of legitimation threatens the practical and – to liberal sensibilities – moral catastrophe of political disintegration. A failure of legitimation moreover strips the country’s citizens of recourse to reasons that everyone supposedly can accept for a mutuality of expectations of a prevailing regularity of compliance with that country’s laws by everyone. That would not be a tolerable outcome for a people who claim to prize each person’s free development and exercise of his or her “moral powers,” and on that very ground to find a moral necessity in the support of civil government and the force of legitimate law.⁴⁴

B. “LBC”: The Constitution as Legitimation Platform

Citizens in a democracy know they are fated to disagree intractably over the ultimate rightness and goodness of many of the state’s policies as adopted and pursued from time to time by law. But then they see also that they, collectively, if they want to hold their common political project together on terms of mutual reasonability and civic reciprocity, have need for a commonly recognized standard of legitimacy, one that each can cite to the others in good conscience.⁴⁵ That is where the constitution comes in, on the theory of constitutional function I am just now expounding. The constitution is to figure as something like the country’s public charter on legitimacy, its public platform on legitimacy.

Now let me be clear. It is not necessarily the case that a country relies on its body of constitutional laws to supply this function of providing a public platform – a public testing ground – for political legitimacy in that country. Whether it does so or not is a question of social fact which can vary from country to country, and I leave it to you to consider whether it is true of whatever country or countries you may be most concerned about. But I do ask you to assume that this fact *is* true of some countries, because the rest of what I have to say applies only to countries where it is.

⁴⁴ John Rawls defines the “moral powers” to cover powers not only to “have, to revise, and rationally to pursue” a conception of the good or of one’s aims in life but also to “understand and . . . act from principles” of due regard for others likewise endowed and situated. See Rawls, *Liberalism* 74; John Rawls, *Justice as Fairness: A Restatement* 18-19 (Erin Kelly ed., 2001). On implications of the moral necessity of civil government, see Frank I. Michelman, *Ida’s Way: Constructing the Respect-Worthy Governmental System*, 42 *Fordham L. Rev.* 345-47 (2003) (laying out the argument).

⁴⁵ See *id.*

Speaking now of such countries: *If* the citizens find that they have in force a good-enough-looking constitution, then that is what allows them to feel justified in calling on everyone else for compliance with the state's laws that are found to be compliant with the terms of that constitution. "Constitutionality" becomes, so to speak, a procedural test or stand-in for legitimacy. Here is how it works: Doubts arise about whether some state law or policy really does conform to justice and human rights. I will take a current hot-button example: Shall we or shall we not have a law requiring service to all comers by commercial vendors of goods and services – florists and bakeshops not excepted – regardless of the vendors' faith-based aversions to complicity in the acts and events for which their services are sought? There is no escape from answering. We either will or will not have such a law. Not having it is no less a political choice than having it. In this country today, the pendency of the choice foments disagreement of such depth and tenacity that it will not be resolved, in real political time, by the force of the better argument (whatever you think that is). And I mean here disagreement not just over preference but over which side has the real truth about justice and human rights.

Where the constitution is serving as a platform of legitimation, the practice is to deflect such disagreements to questions of constitutionality. Appointed, presumably trusted arbiters will decide whether the choice made politically falls reasonably within the bounds set by the constitution in force. Note that is emphatically *not* the same thing as having them decide which choice is finally, in the last analysis, the one preferred by justice, morality, or "background" human rights.⁴⁶ They do not, these authorized and hopefully trusted arbiters – they *must* not, if the practice is to succeed with its moral mission – pretend to find who has the better side of *that* argument. They decide only what we can class in this context as a procedural question: whether the choice made politically is allowed by the constitution. Whichever way the decision goes, those in disagreement are then expected to carry on with their alliance to the political project as a whole.

⁴⁶ See above part I.A.

C. *“Goldilocks,” “Monkey-Wrench,” and a Religion Clause*

Now, obviously, not just any old constitution will be “good enough” for work of this kind. In order to be good enough – in order to be, as we might say, a “legitimation-worthy” constitution – it might have to include assurances that certain rights and freedoms will be respected, and indeed will be actively protected by the state against undue encroachment by others. In order to carry the weight of legitimation, then, the constitution would have to include a term to cover each and every one of these guarantees required for legitimacy. Referring to our prior example those might – or they might not – include one or both of a clause on the free exercise of religion and a clause on the protection of law-abiding people against harms of exclusion from daily public places and activities.⁴⁷

But note, then – as my example is meant to suggest – that a legitimation-worthy constitution must meet what I will call a Goldilocks condition: It must be good enough but also not too good. That is to say, it must not be so thickly stocked with rights as to defeat the wide acceptability befitting a purported public contract on legitimacy. Say, the constitution’s list of rights includes items on “dignity,” “equality,” “liberty,” “fair trial,” “expression,” “press,” “association,” “culture,” “religion,” “conscience,” “property,” “work,” “subsistence,” “education,” and “health” (all of those, by the way, being found in at least one of the major international human rights instruments). Avid supporters of some of those items will have reason to be wary or even hostile about the inclusion of some others. Those who place great store by culture may feel impelled to reject equality, and vice-versa (and I expect you may think of recent historical examples). How, then, do we hope to achieve the wide acceptability to everyone required for a viable public platform on legitimacy?

Conundrums of that sort have led some liberal thinkers to lower the legitimacy floor quite considerably below their own ideal conceptions of the rights to which any fully just political regime would have to be committed: lower it, say, to a point where the test is met as long as

⁴⁷ See Joseph William Singer, *Should We Call Ahead? Property, Democracy, & the Rule of Law*, 4 Brigham-Kanner Property Conference J. 1 (forthcoming, 2015), draft currently available at http://law.wm.edu/academics/intellectuallife/conferencesandlectures/propertyrights/registration/Panel%201/Singer_Online%20Version.pdf.

there is some core safeguard against arbitrary arrest and punishment and some core space allowed for political association and expression, and maybe there is also something that has been called “a decent consultation hierarchy”⁴⁸ – a list that does not come near satisfying anyone’s full conception of human rights who talks about human rights at all. We do not have to go that far, though, to see how your or my insistence on inclusion of what you or I most sincerely takes to be the true full roster of human rights could press a constitution beyond the Goldilocks-ian breaking point of legitimation-worthiness.

When I first, some months ago, began putting these thoughts together, I worked along for quite a while with the idea that *this* would be the danger with involving enthusiasts for human rights in the work of constitution writing: that they would feel impelled toward over-stuffing the legitimation platform with too many items – in disregard of the moral need of fellow citizens for a constitutional platform that all could reasonably call on all the rest, as free and equal, to endorse as giving everyone sufficient reason to take their chances on the policy choices that might issue from a politics conducted under this set of guarantees. But now, in the course of working through our exchanges with Justitia, I have come to see the matter as more complex than that. The problem, as I now see it, has another, an opposite side. The true believer in human rights that are pre-institutional – rights that are what they are regardless of what any country does or does not see fit to write into its positive laws – will stand opposed to inclusion in the constitution of any item whose presence there looks primed to be a cause of normative disorder in the resulting future political and legal practice. Justitia’s “personal” rule – her rule to work for conformity of the constitution’s chapter on rights to the normative order of human rights – can thus lead her to oppose inclusion of some items that arguably she ought morally to accept, in deference to the shared moral claim of everyone to a legitimation-worthy constitution.

So return with me now to Justitia’s response to the objection of intractable disagreement at the convention on the limitations on each of the named rights that would be needed in order to render them into a workably coherent normative totality. She answered by pointing to

⁴⁸ John Rawls, *The Law of Peoples* 61 (1999).

philosophical expositions of human-rights conceptions that are unified under master values such as dignity, or fairness, or equality of respect, or what have you – where all the other commonly listed items are then to be understood merely as reminders of human interests and needs to be held in view, all of which will remain open to proportional, reciprocal paring as the processes of application and learning proceed into the future. And what I now want to stress is that that’s how anyone would *have to* answer while professing belief in a *pre-institutional* order of human rights. Rights multiply named cannot *all* be pre-institutional – cannot *all* claim to be what they simply and truly are regardless of what anyone ever actually does or does not do about them – unless they do indeed compose together an order that will (at least eventually) be comprehensible as unified and consistent throughout.

The human-rights true believer, then, far from wanting to load up the constitution with forty listed items or so, may incline strongly toward keeping the items on rights few and abstract. She’d want to include, of course, an item to name any master ordering value she might have in mind – say, human dignity – and after that no larger a number of additional items than a future discourse of proportionality, aimed at completion of a unified and consistent doctrinal structure under the guidance of that master value, could hope to manage with confidence-sustaining credibility and transparency.⁴⁹ Justitia, then, at her constitutional convention, should be on the look-out for “monkey-wrench” items, as she might think of calling them, being tossed into the works.

Take now a clause on “liberty of conscience.” Seeing how much such a clause necessarily must leave as yet undecided, Justitia has no problem with it. Given the obvious fact that people can be moved by what they doubtless experience as conscience to all sorts of conduct that would collide with the equal freedoms of conscience of others, Justitia can confidently foresee that claims under an abstract constitutional rubric of “liberty of conscience” inevitably will be treated as matters of relative moral urgency, subject to proportional accommodation to co-

⁴⁹ Compare Rawls, *Liberalism* at 296 (remarking on the need to limit the list of basic liberties because by enlarging the list “we risk . . . recreating within the scheme of liberties the indeterminate and unguided balancing problems we had hoped to avoid by a suitably circumscribed notion of priority”); John Rawls, *Justice as Fairness: A Restatement* 112 (2001) (remarking that “if there are many basic liberties, their specification into a coherent scheme securing the central range of application of each may prove too cumbersome.”)..

ordinate moral demands coming from free and equal others.⁵⁰ That will hold, for example, in the case we've already mentioned, where a businessperson's claim of need to fulfill faith-based obligation runs up against the claims of members of an historically excluded social group to non-degraded access to the normal arenas of social and commercial life. What gives comfort to Justitia is not an expectation that the businessperson's claim of conscience will necessarily lose out (or that it will necessarily prevail), but rather that it will – under an abstract rubric of “liberty of conscience” – be treated as neither any less nor any more submissible than other claims of conscience to the demands of a continuing pursuit of a generalizable normative order of human rights.

Now, what about a proposed clause on “free exercise of religion?” Justitia quite possibly may think she has to oppose it. Such a clause will be headed for trouble, she may think, because in her society the term “religion” resounds with organizational, disciplinary, and outward performative demands that the more abstract notion of “conscience” does not immediately entail. As Andrew Koppelman, defending the inclusion of the “religion” clauses in the American constitutional bill of rights, nevertheless candidly observes, religious profession in our societies can demand of the faithful a socially visible conformity to ritual codes.⁵¹ It can demand a visible embrace of norms of behavior that might clash with those of civil society at large. Religions can be missionary and militant. Religious attachment can motivate demands and pressures for a supportive, like-minded social surrounding, to the detriment of the freedoms of other people living there; and all of these in ways that the simpler notion of “conscience” does not essentially signify. Of course Justitia would not suggest that all of these are aspects of any possible religion or of religion just as such. She does, however,

⁵⁰ Recall, now, our points from notes 28 and 41: that Justitia stands among those who believe that collisions of non-commensurable values can nevertheless be resolved on grounds accessible by forms of reason widely shared among the constituency.

⁵¹ See Andrew Koppelman, *Defending American Religious Neutrality* 134 (2013) (“Many and perhaps most people engage in religious practice out of habit, adherence to custom, [and other motives that] often have nothing to do with conscience.”).

perceive that these dimensions of many religions have distinct and positive values for many religious people in her society.⁵²

Justitia thus further perceives, or thinks she does, that these organizational and externalizing dimensions compose, at her convention, a part of the motivation for proposals for a constitutional clause on “religion.” These proposals come on top of – they come in addition to – the more abstract clauses on “liberty,” “conscience,” “belief,” “expression,” and “association” that everyone also is ready to accept. Justitia thinks that religion’s claim to due consideration is sufficiently covered by those other abstractions.⁵³ To the extent that the term “religion” might more concretely suggest some additional and special organizational and performative exemptions beyond what those others would provide – a kind of “extra” consideration for religion (as Justitia would be perceiving it) – she sees a religion clause in the bill of rights as primed to be a likely troublemaker for the future equipoise of the generalizable normative order of human rights in her country.⁵⁴

⁵² See Christopher J. Eberle, *Religious Convictions in Liberal Politics* 145 (Cambridge, 2002) (describing many people’s sense of religious calling or obligation as “overriding” and “totalizing”). Eberle quotes from Nicholas Wolterstorff, *The Role of Religion in Decision and Discussion of Political Issues*, in *Religion in the Public Square* 67, 105 (Robert Audi & Nicholas Wolterstorff, eds., 1997):

It belongs to the *religious conviction* of a good many religious people in our society that they *ought to base* their decisions concerning fundamental issues of justice *on* their religious convictions. . . . It is their conviction that they ought to strive for wholeness, integrity, integration in their lives; that they ought to allow the Word of God, the teachings of the Torah . . . to shape their existence as a whole, including, then, their social and political existence.”

⁵³ Justitia’s belief in this respect is controversial. See Koppelman, *supra* note 50, at 143-44 (suggesting that reduction of the goods or values of religion to any one of those bedrock liberal values – and by implication reduction to any combination of items on that list – inevitably will misconstrue the value of religion in the actual lives and experiences of citizens).

⁵⁴ Justitia’s view bears some kinship to Ronald Dworkin’s. Dworkin leans away from “a special right to religious freedom with its high hurdle of protection and therefore its . . . need for strict limits and careful definition,” in favor of

applying, to the traditional subject matter of that . . . right, only the more general right of ethical independence. . . . A special right . . . of religion declares that government may not constrain religious exercise in any way, absent an extraordinary emergency. . . . The general right to ethical independence . . . fixes on the relation between the government and citizens: it limits the reasons government may offer for any constraint on a citizen’s freedom at all.”

Ronald Dworkin, *Religion Without God* 132-33 (2013).

Abner Greene objects that Dworkin would thus reduce the question of protection for religious freedom to that of “limits on the state’s ability to treat us as children.” Abner S. Greene, *Religious Freedom and (Other) Civil*

D. *The Morality of Civility*

Now, these perceptions on Justitia's part regarding the motivations and effects of a proposed constitutional religion clause might be in error. The fact is, though, that she holds them and that they, combined with her personal rule to align the constitution's bill of rights with the true order of human rights, could lead her to oppose inclusion of a religion clause. And I want to finish these remarks with a suggestion of a moral objection to her taking up such a position.

Legitimation, we have to remember, is a matter of political morality and political sociology combined. What it takes to make a constitution legitimation-worthy cannot be learned by moral speculation alone. It has to be learned in part from the situated exercise of a political sensitivity informed by moral capabilities of civility and reciprocity.⁵⁵ Such an exercise could very well suggest the presence of a moral hazard in a demand to suppress religion from the constitution, leaving "conscience" unmodified to carry the load of legitimation.

It is not, after all, as if religion is *antithetical* to conscience. To the contrary, religion must be allowed, in a society like our own, to figure as a requisite materialization of the abstraction named as "conscience." Without some such concretization, drawn from people's own life experience and perhaps also from a people's historical recollections including its "never-gains," the abstraction could never gain or credibly claim a decisive weight in a here-and-now

Liberties: Is There a Middle Ground?, 9 Harv. L. & Pol. Rev. 161, 175 (2015). Justitia, while sharing Dworkin's instinct for avoidance of over-specification of "religion" as a constitutionally protected category, would not fall prey to that complaint. Where Dworkin says "ethical independence," Justitia would say "freedom of conscience." The only difference is that she could not plausibly be understood to limit cases of infringement to those of government presuming to decide what is good for us or is in our ethical interest.

⁵⁵ See Koppelman, *supra* note 50, at 149:

You can try to devise a social contract that all rational persons have conclusive reasons to enter into. That social contract will not in fact command the assent of actual persons, but you can console yourself with the knowledge that your interlocutors are being unreasonable. This is not a recipe for social unity.

deliberation over the basic terms of civic ordering.⁵⁶ Wonder not, then, if a substantial fraction of Justitia’s fellow citizens insist on a “religion” clause as an essential component of a legitimation-worthy constitution for their country. Wonder not if they refuse to scrub “religion” clean of those features of performativity and outward engagement that prompt Justitia to see an item on “religion” as potentially a distraction from the pursuit of the true pure conception of human rights, but which for substantial numbers of her fellow citizens are indissoluble from the rest of what places religion, for them, at the core of conscience.

We can assume that these are social facts comprising a part of Justitia’s historical situation. She cannot reasonably or credibly put them down as beyond the pale of civic reasonableness. It can be no surprise that John Rawls, explaining why rational and reasonable citizens (modeled as parties to an “original position”) must insist on a firm commitment to equal liberty of conscience, repeatedly and steadily keeps the case of religion at the forefront of his argument.⁵⁷ Rawls’s own work thus shows the civic attraction of a claim to a specified

⁵⁶ This point has been well presented by Andrew Koppelman, in commentary aimed at developing implications of Rawls’s idea of a notional “four-stage sequence” of increasingly concrete specifications and applications of the basic liberties in a legitimate state, beginning from highly abstract principles – like “liberty of conscience” – hypothetically adopted behind a thick veil of ignorance, at a first stage called “the original position.” See Andrew Koppelman, “Why Rawls Can’t Support Liberal Neutrality: The Case of Special Treatment for Religion,” draft of October 12, 2015, at 20 n. 74 (calling this work “a friendly amendment” to Rawls). Koppelman addresses himself to what is involved in fulfilling the abstract commitments of the first stage at a second or “constitutional” stage, where people having more information about some general facts of their society deliberate on the terms of a legitimation-worthy constitution for the society thus perceived. He writes as follows:

Fulfilling the commitments made in the original position, for people in the world here and now, requires taking account of the values those people hold. A Rawlsian position thus can support the American regime of religious accommodation. . . . At the constitutional stage, the deliberators must . . . consider what counts . . . in their society [as a good of conscience as to which it is especially urgent that access not be blocked] and take whatever steps are necessary to prevent [such blockage] from coming about. That means knowing which [such goods] happen to be . . . salient in their own societies. . . . By deciding to protect “liberty of conscience,” the parties in the original position must be presumed to have agreed to allow such local facts to enter into political deliberation at the constitutional or legislative stages: he who wills the end wills the means. . . . [The parties at the constitutional stage] can do this because they can cognize conceptions of the goods [of conscience] that are unavailable to parties in the original position. Thus they can legitimately treat religion as a [protected] good.

Id. at 2, 15-17.

⁵⁷ The parties, Rawls writes, regard themselves as having moral or religious obligations which they must keep themselves free to honor. . . . It seems evident that the parties must choose principles that secure the integrity of their religious and moral freedom. . . . They cannot take chances with their liberty by permitting the dominant religious or

safeguard for religion in the pursuit of a legitimation-worthy constitution for his own historical time and place. It stands as real evidence, so to speak, of its being (in a Rawlsian turn of phrase) “not unreasonable” within our civilization to “treat[] religion [and not just abstract conscience] as a [distinctive] human good.”⁵⁸ Rawls thus read confirms by his example that claim’s good standing as a part of a moral imperative, among free and equal citizens cohabiting a social world, to seek and to find, in the here and now, the terms of acceptance of the exercise of political power and the force of law. By presuming for herself a rule that could bar her from accreditation of such a claim on behalf of a “religion” clause, *Justitia pro tanto* demotes and disregards that moral imperative (supposing it now to be one). She violates the norm that Rawls called “civility,” the obligation to give to fellow citizens reasons that they, as supposedly rational and reasonable citizens, can find acceptable for laws that apply them coercively. As Charles Larmore explains that norm, “to respect another person as an end is to insist that coercive or political principles be as justifiable to that person as they are to us.”⁵⁹

You might feel moved to respond in the following way. “[T]he argument from civility,” you might say, along with Jeremy Waldron, “does not make the concern about truth and rationality go away.”⁶⁰ “Human” outranks “citizen.” The imperative always to strive toward the end that human beings are treated with the respect and regard due to human beings takes precedence over obligations to fellow citizens to treat them with the respect and regard due to

moral doctrine to persecute or suppress others if it wishes. . . . [T]o gamble in this way would show that one did not take one’s religious or moral convictions seriously.”

John Rawls, *A Theory of Justice* 180-81 (rev. ed. 1999). Wherever, without exception, the word “moral” appears in this passage to characterize obligations, beliefs, convictions, or freedom, it comes coupled to “religious.” Either, then, “religious” stands on its own beside “moral” obligation as (each one) a sufficient ground of necessitation for equal liberty of conscience, or Rawls is harping on religion as a salient and persuasive case in point for his readership. Rawls’s later restatement of this “main consideration” for equal liberty of conscience is similarly framed. See John Rawls, *Political Liberalism* 310-11 & n. 23 (rev. paper ed. 1996) (noting that the parties “cannot take chances by permitting a lesser liberty of conscience to minority religions, say, on the possibility that those they represent espouse a dominant or majority religions . . .”).

⁵⁸ Andrew Koppelman, *Defending American Religious Neutrality* 11 (2013).

⁵⁹ Charles Larmore, *The Morals of Modernity* 137 (1996).

⁶⁰ See Jeremy Waldron, *Isolating Public Reasons*, in Rawls’s *Political Liberalism* 113, 129-30 (Thom Brooks & Martha C. Nussbaum eds, 2015).

fellow citizens. Justitia, you might say, cannot be subjected to criticism for observing that priority, morally stressful and painful as that might be. Such a defense of her will not necessarily work, though, for any among us who might think that being a citizen – which already means being a *fellow* citizen – is integrally, within our form of life, a part of the truth of what it means to be a human being. We might rather say that yes, a “religion” clause in a constitution *could* turn out to be a monkey-wrench in the works of LBC, but still the faith of LBC in Rawlsian key must that the spreading *acquis* of social learning through the discursive processes of constitutional completion will reliably tilt us toward morally tolerable resolutions (always including in the assessments the moral weight of legitimation itself).⁶¹

We take another dictum of John Rawls and give it a perhaps unexpected twist. “The zeal to embody the whole truth in politics,” wrote Rawls, “is incompatible with an idea of public reasons that belongs to democratic citizenship.”⁶² If the point is a correct one, it holds as well if we add “and nothing but the truth.”

⁶¹ See Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 *Political Theory* 766,774 (2001) (urging that the discourses of constitutional completion should be ‘understood in the long run as a self-correcting learning process’); Cianin Cronin, *On the Possibility of a Democratic Constitutional Founding: Rawls and Michelman in Dialogue*, 19 *Ratio Juris* 343, 356 (2006) (explaining further this idea).

⁶² John Rawls, *The Law of Peoples* 132-33 (1999).