

# CONSTITUTIONAL RIGHTS AND “PRIVATE” LEGAL RELATIONS: A NOTE ON A RAWLSIAN VIEW

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## **ABSTRACT**

Whether or how a constitution’s guarantees respecting basic right and liberties are to take effect in “horizontal” cases, those involving relations among persons and groups outside of government, has been and remains a matter of debate in liberal-democratic societies. The liberal political philosophy of John Rawls has sometimes been charged with a normative tilt against full extension of the guarantees to these “private” relations. I find the opposite to be true. Given Rawls’s conception of the constitution as a society’s higher-legal framework for assurance of fairness in its basic structure, along with the justificatory function that Rawls assigns to the guarantees in a constitution thus conceived and the idea of these guarantees comprising a unified “scheme of liberties” guaranteed equally to all, it follows that norms of private law allowing constriction of basic of liberties of some by acts of others in civil society should be subject to review for proportional justification. But not every liberty-hostile exercise of a protected basic liberty will come under the scope of such review. For those that do not, liberalism must find some other response.

## **KEYWORDS**

Basic liberties, basic structure, bill of rights, horizontal application, John Rawls, liberal principle of legitimacy, paradox of tolerance, private sphere.

## **THE “HORIZONTAL APPLICATION” QUESTION, ADDRESSED TO RAWLS**

Reading along in some country’s written constitution, you come to a ledger of clauses on basic rights or liberties—a “bill” or “charter” of rights. You know right off that these guarantees are meant at least for application to so-called “vertical” cases, where plain civilians on the social floor “down here” (you and I in our daily

lives, and various groups of us) stand exposed to exertions of force from the government “up there” through its agents, officials, and co-partners.<sup>1</sup> The hope, then, in constitutional democracies, will always be for the guarantees to take hold through motivational vectors occurrent outside of courtrooms: promptings of constitutional fidelity, as we may wishfully expect, girded by official oath-swearing, social pressures and movements, and electoral politics. We will assume here, though—as is more typically the case—that the guarantees are also to infuse the country’s positive law, to be carried out in part by the country’s courts through apt allowances of claims and defenses in civil and criminal proceedings.

Whether the guarantees are comparably to affect any of the “horizontal” legal relations among persons and groups on the level of plain society, and if so in what manner or form, has been and remains a topic of debate within and among the world’s constitutional democracies. Controversies take shape in legal-doctrinal discourses over “state action,” “color of law,” “third-party” or “radiating” effects, “protective functions,” “direct” versus “indirect” application, and so on, as those crop up in various countries in line with variations in constitutional verbiage, drafting history, and broader legal traditions. We do not enter that space here.<sup>2</sup> My interest is in the overall push or pull of one particular body of normative political theorizing—the liberal political philosophy of John Rawls—toward or against effectuation of the guarantees in “private” relations, among actors not plausibly labeled as “state,” under whatever doctrinal handles may be in play.<sup>3</sup>

I begin with what I take to be the deep arguments (here roughly stated) pro and con extension of the guarantees into the private field. The case in favor starts from a claim about a normal fact of life in liberal societies: to wit, the inevitable appearance in such societies, here and there and from time to time, of social powers

<sup>1</sup> For explanation of how that account applies as well to constitutional guarantees cast in “positive” terms, as rights (for example) to education or health care, see Frank I. Michelman, “Legitimacy, The Social Turn, and Constitutional Review: What Political Liberalism Suggests” [2015] *Critical Q for Legislation & Law* 183, 188-192.

<sup>2</sup> The literature is large and fine surveys can be found. See, e.g., Stephen Gardbaum, “The ‘Horizontal’ Effect of Constitutional Rights” (2003) 102 *Mich L Rev* 387; Stephen Gardbaum, “Where the (State) Action Is” (2006) 4 *Int=I J Const L* 4 760 (responding to a book-length collection of essays, András Sajó & Renáta Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing, 2005).

<sup>3</sup> I write “private” this first time in scare-quotes having mind the declaration of Rawls that “the principles defining the equal basic liberties and opportunities of citizens always hold in and through all so-called domains. . . . If the so-called private sphere is alleged to be a space exempt from [those principles], then there is no such thing.” John Rawls, “The Idea of Public Reason Revisited” (1997) 64 *U Chi L Rev* 765, 791.

*outside* government that are no less threatening to the basic liberties of those exposed to them than are those of the government itself. Now, that fact might or might not fit neatly into anyone’s liberal nirvana—it might be, as the saying goes, a “bug” and not a “feature” of a well-oiled liberal society—but the point of the claim is that it may not be *ex ante* preventable in liberalism. In something like the way John Rawls sees the emergence of a clashing plurality of moral, metaphysical, and religious orientations—what he names as a “fact of reasonable pluralism”—as the predictable result of the exercise of human intelligence in a social setting of free institutions,<sup>4</sup> so may we see the emergence of oppression-capable social powers as predictable from the exercise of human energies and pursuits in a setting of general freedom of action, presupposed and cherished in the culture of a liberal society.<sup>5</sup> We can put laws and policies in place to mitigate in advance the risks to liberty from any such potentially oppressive power-concentrations, but any attempt at a regulatory blanket sufficiently thick to level out completely the distribution of effective social powers could only come—or so it reasonably may be thought—at too great a cost to the liberally cherished idea of a general regime of freedom to act and to strive. Where that is the judgment that prevails, as apparently it has and does in most or all liberal societies, the argument is that the constitutional guarantees respecting basic liberties must then, in all liberal logic, come into play wherever potentially oppressive powers are found, not excluding in private/horizontal relations.

That claim meets opposition. The opposition starts from a claim that horizontal extension of constitutional guarantees immediately (and contradictorily) entails incursion on both the general freedom and basic liberties of those who are thus made answerable; and are made answerable, furthermore, to constitutional mandates entrenched and rigidified beyond the powers of politically accountable lawmakers to modify or adjust them as required to strike the necessary balances; and

<sup>4</sup> See John Rawls, *Political Liberalism* (first published in 1993) (with a new introduction and the “Reply to Habermas”) (Columbia U. Press 1996) (hereinafter cited as Rawls, *PL*).

<sup>5</sup> On the valuation of general freedom of action in the Rawlsian liberal philosophy, see Frank I. Michelman, “The Priority of Liberty: Rawls and “Tiers of Scrutiny”” in Thom Brooks and Martha Nussbaum (eds), *Rawls’s Political Liberalism* (Columbia U. Press, 2012) 175, 189-190. A statement from Rawls, that “no priority as assigned to liberty as such, as if the exercise of something called “liberty” has a preeminent value” (Rawls, *PL* 292), should not be read as disparagement of a general liberal leaning toward background freedom of action. See *ibid.*, 197-199.

that the correct answer, then, in a democracy, is to apply the *constitutional* guarantees only to the government (which otherwise would not be bound to any restriction of its powers to oppress), and leave the rest to parliamentary legislation as situationally called for by the people. With the major arguments in this posture, pushes for extension of the constitutional guarantees into the private field are liable to be tagged at times as a left-wing, collectivistic political cause out of synch with the liberal mainstream.

The liberal political philosophy of John Rawls has sometimes come in for charges of a normative tilt against such extension. Implicated in that charge is the Rawlsian philosophy's supposed support for the idea of a range personal and associational liberties to be kept mainly off-limits to intrusion from society or subjection to society's wishes. For example, a recent essay invokes a claim from liberal feminism that

by insisting that certain social structures, actions, and ideologies are part of an inviolable private sphere within which almost no state involvement should be tolerated, liberals have often been too quick to free themselves from the obligation to critique unjust and discriminatory aspects of [social] structures, actions, or ideologies, and to allow their unhindered existence and growth.<sup>6</sup>

Whatever plausibility such readings might have had in the immediate wake of the publication of *A Theory of Justice* (1971), they seem to me to run plainly against the grain of Rawls's conception of a written constitution's service to political good-ordering as set forth in multiple editions of *Political Liberalism* running from 1993 to the latest in 2005.<sup>7</sup> The guarantees there manifest as components in a framework law for a society's political and legal order, to regulate key parts of that society's "basic structure" for cooperation on fair terms among citizens all mutually recognized as free and equal. Rawls defines the basic structure as the society's "main political and social institutions [and the way] they fit together into one system of social cooperation [and] assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time."<sup>8</sup> Law governing private relations undoubtedly counts as part of that. So, to repeat: We

<sup>6</sup> Gila Stopler, "The Personal Is Political: The Feminist Critique of Liberalism and the Challenge of Right-Wing Populism" (2021) 19 Int'l J Const L 393, 395; see *ibid.*, 394 n.3 (attributing this error to Rawls).

<sup>7</sup> See John Rawls, *Political Liberalism* (first published 1993), expanded ed. (Columbia U. Press 2005).

<sup>8</sup> John Rawls, *Justice as Fairness: A Restatement* (ed. E. Kelly, Harvard U. Press 2001) 10 (hereinafter cited as Rawls, *JAF*).

have as premises (i) that the constitution, for Rawls, lays down a higher-legal framework for fair operation of the basic structure, and (ii) that the basic structure includes the society’s law governing private relations (which I will hereinafter, for convenience, denominate as “private law” regardless of its provenance in statutory enactment or common-law adjudication). From that brace of premises, imperviousness of the private law to control from the constitution’s basic-liberty guarantees may seem from the start a surprising, not to say impossible deduction.

It does not necessarily yet follow, though, that critics must be wrong to read in Rawlsian liberalism some sort of bias against subjection of the law of private relations to oversight from constitutional bill-of-rights inspection, out of a commitment to assurance, equally to all, of an effective umbrella of basic-liberty protections. Suppose (to take one possible case) that the development of private law on various topics is presumed already dedicated to the establishment and maintenance of a field of socially optimal freedom, competition, and consent and to parceling out accordingly its claim-rights, privileges, powers, and immunities (and correlative duties, no-rights, liabilities, and disabilities). Then the constitutional guarantees would have no net-improvement work to do in private law; their intrusion there could only have the effect of disturbing balances already responsibly struck.

Exactly so have argued some participants in the debates I have mentioned.<sup>9</sup> That argument cannot, however, correctly fit the liberal political philosophy of John Rawls. Such will be my contention in what follows. And yet, as we shall see, establishment of *that* claim will not yet fully defeat the concern about an excessive private-libertarian bent in the Rawlsian—or indeed (as I will suggest) any possible liberal—political philosophy.

To the best of my knowledge, John Rawls did not ever address himself expressly to the issue of the so-called horizontal application of constitutional basic-liberty guarantees. His philosophy’s response accordingly is left for us to infer from other features we find there. Four of those will figure saliently in the infer-

<sup>9</sup> See Frank I. Michelman, “The Bill of Rights, the Common Law, and the Freedom-Friendly State” (2003) 58 U. Miami L Rev 401, 431-433 (describing a strong attraction in some post-transition South African constitutional debates to this point of view).

ence I will be drawing. In addition to (i) a conception of the constitution as a society's higher-legal framework for assurance of fairness in its basic structure, these will be (ii) the *justificatory function* that Rawls assigns to the substantive constitutional law of a liberally well-ordered society; (iii) his conception of that law as comprising (not just a list of separate-standing guaranteed liberties but) a *scheme of liberties* each subject to adjustment of its outer extensions out of a due regard for the others; and (iv) his conception of that law as comprising a blanket guarantee *to each person equally* of "a fully adequate scheme of equal basic liberties compatible with a similar scheme for all."<sup>10</sup>

## THE RAWLSIAN-THEORETIC CONSTITUTIONAL BILL OF RIGHTS<sup>11</sup>

### *A. Justificatory Function*

A democracy, Rawls wrote, "necessarily requires that, as one equal citizen among others, each of us accept the obligations of legitimate law."<sup>12</sup> It was of the utmost importance, he thought, both practical and moral, that the coercions imposed by a positive legal order should all be such that reasonable and rational citizens could accept them as justified in the light of ends and values freely endorsed by them. That is a demanding condition. And here, you might think, would be one way to meet it. Come forth with a sufficiently robust conception of substantive principles of justice for political and legal ordering; show how and why an entire citizenry would endorse or could be brought to endorse those principles; and then show further how the society's major political and legal institutions are arranged in visible correspondence to those principles, with an aim to carry them out as completely as possible.

Now, that or something like it was the project of *A Theory of Justice* when published in 1971. The advance of Rawls's work in *Political Liberalism* (1993), beyond where he had left it in *Theory*, is explained by him, in his introduction to

<sup>10</sup> Rawls, *PL* 291.

<sup>11</sup> For a full and adequate account of the Rawlsian constitutional conception summarized here, see my forthcoming book-length treatment of the topic in Frank I. Michelman, *Constitutional Essentials: On the Constitutional Theory of Political Liberalism*. My treatment here is a truncated string of echoes from that work, overlooking countless complications and refinements—just enough, I hope, to support the argument I make in this paper.

<sup>12</sup> Rawls, "Public Reason Revisited" (n 3) 782.

*PL*, as his considered response to an intervening fuller appreciation of the political-moral implications of the social fact (as he names it and we as we noted above) of “reasonable pluralism.”<sup>13</sup> Then follows the complication. Political power being always, says Rawls, potentially coercive, is in a democracy a power by which citizens collectively impose on citizens severally—by which the citizens as a body “impose on themselves and one another as free and equal.”<sup>14</sup> But thence springs a question:

[I]f the fact of reasonable pluralism always characterizes democratic societies and if political power is indeed the power of free and equal citizens, in the light of what reasons and values . . . can citizens legitimately exercise that coercive power over one another?<sup>15</sup>

It is specifically in answer to that question that Rawls offers, in *PL*, the idea of a higher-normative prescript—a “constitution”—whose acceptability as an entrenched framework for all further political actions in that country any citizen might reasonably affirm, even as all would understand that some outcomes allowed by those terms will turn out repugnant to ideas of justice held by some fraction of citizens reasonably responding. The constitution thus is to serve as a table of terms for a procedural deflection of persisting substantive-moral disagreements over legislative policy, among citizens all judging reasonably.

Subject to variations of wording that do not reach to our concerns in this paper, Rawls’s constitution-centered “liberal principle of legitimacy” reads as follows:

Our exercise of political power is proper and hence justifiable [among citizens individually 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. This is the liberal principle of legitimacy.<sup>16</sup>

<sup>13</sup> See Rawls, *PL* xvi-xx.

<sup>14</sup> Rawls, *JAF* 40.

<sup>15</sup> *Ibid.*, 41.

<sup>16</sup> Rawls, *PL* 217. See *ibid.*, 237; Rawls, *JAF* 41.

The LPL (as we shall familiarly call it) thus would have justification ride on the back of an actual constitution-in-force that meets a certain test of universal reasonable acceptability. By hypothesis, in a well-ordered society, the constitution actually now in force in the country does meet the test; it is, as we shall say, a “justification-worthy” constitution. Majorities justify to protesting dissenters their exertions of political power by pointing to the constitution-in-force, while a supreme court acts as institutional arbiter of that extant constitutional pact and its applications, when disputed, to various cases that come up.<sup>17</sup>

We have here a proposal, as I have taken elsewhere to naming it, for justification-by-constitution.<sup>18</sup> I have also just called it above a proposal for a “procedural deflection” from ground-level disagreements over policy. Serving thus as a procedure does not mean the constitution’s terms deal only with political processes (we vote and the majority rules) as opposed to political outcomes (abridgements of the liberty of conscience are disallowed). Assurance of compliance with certain outcome-constraining terms can constitute a part of the procedural charter, to which resolution is deflected of divisive questions on which no further agreement can be found. So does it in the sight of Rawls. A political constitution cannot possibly be liberally justification-worthy, he maintains, if it does not incorporate guarantees respecting basic liberties.<sup>19</sup>

But then we see a challenge taking shape. In order to be justification-worthy, the constitution will have to guarantee certain liberties. Those guarantees, however, must still be cast in terms that avoid foreclosure of questions of fundamental import to some citizens, over which reasonable citizens divide. The terms must be set at accommodating levels of abstraction.<sup>20</sup> That strategy, though, comes with its price, or call it a puzzle. How does it not just kick the can of disagreement down the road? Sooner or later, after all, hard cases arrive, to the resolution of which the body of substantive constitutional guarantees, written sparsely enough to pass initially the test of universal-reasonable acceptability, cannot be decisively applied without exposure of divisive disagreement over the significations of the guarantees for the matter at hand. It seems that reasonability and rationality may here be coming apart. As reasonable, we may extend ourselves to the breaking point in

<sup>17</sup> See Rawls, *PL* 233.

<sup>18</sup> See, e.g., Frank I. Michelman, ““Constitution (Written or Unwritten)”: Legitimacy and Legality in the Thought of John Rawls” (2018) 31 *Ratio Juris* 379, 383.

<sup>19</sup> See John Rawls, “Reply to Habermas” (1995) 92 *J Phil* 132, 175.

<sup>20</sup> See Rawls, *PL* 232 (“The principled expression of higher law is to be widely supported,” and so “it is best not to burden it with many details and qualifications.”).



coming to terms with reciprocating fellow citizens for a project of social cooperation of the most urgent moral concern to all. As rational, the point remains, we cannot be buying pigs in pokes, certainly not when our most fundamental personal concerns and commitments are at stake.

*B. Scheme of Liberties With Central Ranges and Equality of Right*

Each person has an equal right to a fully adequate scheme of liberties which is compatible with a similar scheme for all.<sup>21</sup>

Rawls offers explanation for how this challenge can possibly be met. Among free and equal citizens, any justification-worthy constitution will include guarantees respecting certain liberties under abstract names such as "conscience" and "property." But since the liberties thus named can all without strain be extended in ways that will bring claims in their names sometimes into conflict, "the institutional rules which define these liberties must," as Rawls writes, "be adjusted so that they fit into a coherent scheme of liberties secured equally for all citizens."<sup>22</sup> The scheme, then, will require unification by some known, single, overall governing aim that can adequately guide the adjustments and curtailments (of which guarantees? in which particular respects?) as needs make themselves known in courses of events.

Rawls defends for this purpose a guiding aim to secure for each citizen the social conditions of a full and adequate development and exercise, over a complete life, of certain moral powers of the "reasonable" and the "rational."<sup>23</sup> We do not here take up what might be the warrant for this claim. The point to see for now is that the liberties listed in the underlying conception are never reasonably to be understood as (any one of them) "absolute."<sup>24</sup> It is *the scheme of them all in conjunction* that the justification-worthy constitution guarantees *to all equally*—from which it must follow that the extensions of the liberties all stand subject to

<sup>21</sup> Rawls, *PL* 291 (offering a final statement of the first of the two principles of justice as fairness).

<sup>22</sup> *Ibid.*, 295.

<sup>23</sup> See *ibid.*, 291, 333.

<sup>24</sup> *Ibid.*, 295.

institutional adjustment as experience may show is required to hold them together as a unified expression of political ends and values, equally assured to all.

The scheme retains its justification-supportive function in the society's political life, Rawls suggests, even under ongoing adjustment of the respective extensions of its component liberties, as long as we can assume that (i) there resides within each component guarantee some widely agreed, fixed core of meaning or "central range of application," and (ii) there is just about always "a practicable scheme of liberties . . . in which the central range of each is protected."<sup>25</sup> The justification-worthy constitution's guarantee, then, is for a basic structure in which institutional adjustments of the extensions of the liberties will so far as possible "preserve intact" the central range of application of each.<sup>26</sup> Rawls has offered historical experience as evidence of the possibility of satisfaction of those conditions, for at least some schemes of liberties he believes we would count as reasonably justification-bearing.<sup>27</sup>

I will take as illustrative Rawls's treatment of the right regarding property, which he includes in his list of basic liberties. As we have noted, the schematizing criterion advanced by Rawls for adjustment of the liberties is overall conduciveness to the development and exercise by citizens of certain powers of moral agency. The basic liberty to hold property accordingly will have as its core mission the assurance to each citizen of "a sufficient material basis for a sense of personal independence and self-respect" to allow for the development and exercise of these agency powers.<sup>28</sup> That liberty, then, will be open to possible institutional curtailments in respects deemed to fall outside that core. It would not encompass an absolute right to rule arbitrarily over any expanse whatever of space under individual or corporate proprietary title (think, just for starters, of shopping malls and industrial shop floors), where exercised so as to cramp excessively the expressive, associational, or conscientious liberties of others. Laws setting the rules for the exercise of power in such cases would have to be subject to some form of what is known these days as "proportionality" or "balancing" review for Rawlsian constitutional compliance.<sup>29</sup>

<sup>25</sup> Ibid., 297-98.

<sup>26</sup> Ibid., 296.

<sup>27</sup> See *ibid.*, 297-98.

<sup>28</sup> Ibid., 298.

<sup>29</sup> See generally Vicki C. Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge U. Press, 2017).

## IMPLICATIONS

Rawls thus lays out his conception for a scheme of guarantees such that a constitution containing it could be freely endorsable by all citizens as free and equal in the light of principles and ideals acceptable to them as reasonable and rational, and hence could fulfill the constitution-condition laid down by the LPL for a justifiable practice of democratic politics in conditions of reasonable pluralism. This conception may or may not strike you as possible of fulfillment in any modern even moderately free society. That’s of course a perfectly valid concern, and one that I pursue in other work.<sup>30</sup> Our question here, though, is whether, taking Rawls’s conception as he gives it, it contains or suggests any bias or resistance against horizontal application of constitutional substantive guarantees.

The answer must be exactly to the contrary. The Rawlsian conception requires bill-of-rights inspection whenever plausible claims arise that the private law (as currently construed by effective legal or social authority) is operating to authorize or allow suppression of someone’s real enjoyment of a guaranteed liberty, without intra-schematic justification in terms of due regard for another’s such enjoyment. That would cover cases (to take here just a few examples from recent U.S. constitutional-legal controversy) where it is more or less plausibly claimed that the private law of tort is being wielded by non-governmental suitors to suppress a basic freedom of expression,<sup>31</sup> or that the private law of families is being exercised by parents in contravention of children’s basic rights to education,<sup>32</sup> or by husbands or parents in contravention of basic procreational-freedom or bodily-security

<sup>30</sup> See Michelman, *Constitutional Essentials* (n 11); Alessandro Ferrara and Frank I. Michelman, *Legitimation by Constitution: A Dialogue on Political Liberalism* (Oxford U. Press, 2021) (forthcoming).

<sup>31</sup> See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Curtis Pub. Co. v. Butts; Assoc. Press v. Walker*, 388 U.S. 130 (1967).

<sup>32</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting) (insisting that “the right [under the Bill of Rights] of students to be masters of their own destiny” be taken into account in judging the constitutionality of a state’s legal mandate for required school attendance, as applied against the wishes of religiously motivated parents, because “it is the future of the student” that is at stake.

rights of wives or children.<sup>33</sup> Note that you don't stop these constitution-based objections against oppressive deployments of claimed private-law powers dead in their tracks by observing, truthfully as it may be, that the claimants in these cases to these powers are acting in response to genuine and respect-worthy calls of private conscience or religious faith. I have, for example, in the past explained at length and in detail how the Rawlsian liberal conception points the way to support of a legislative prohibition of certain surgeries on minor children, however much those surgeries might be demanded by truly caring parents and despite resulting impingements on those parents' liberties of conscience.<sup>34</sup>

No doubt we may find counter-considerations to these claims—of conscience, say, or consent, on one or the other side of the relation—which we may judge sufficient to sustain the constitutionally impugned private law. We (or the judiciary we authorize in such cases to speak for us) might find ourselves led to define the respective extensions of the rights (or their central ranges of application) so as to exclude the claim in this case of an encroachment on one of them.<sup>35</sup> Or we might find an encroachment but hold it on balance permissible in the context of the clash of rights-claims presented by the case and other resembling it. (I will not enter here the controversy over “proportionality” testing of basic-rights claims in constitutional law.) But what the Rawlsian principle of an equal right of everyone to a fully adequate scheme of liberties compatible with a similar scheme for all—taken, now, as a guarantee essential to any justification-worthy constitution—plainly cannot countenance is cursory dismissal of a claim to constitutional protection on the ground that the threat to basic liberty arises in a merely “horizontal” relation within the keeping of private law. Quite to the contrary, an obligation to see the claim through to a responsibly considered conclusion must fall, in due share or measure upon whoever would appeal to the Rawlsian principle of legitimacy to justify the force of democratic law upon dissenters. (I say “in due share” because

<sup>33</sup> See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (invalidating state-law requirements of spousal and (for women up to the age of eighteen) parental consent as prerequisite to lawful abortion); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) (upholding parental consent requirement but only on condition of full allowance for “judicial by-pass”).

<sup>34</sup> Michelman, “Priority of Liberty” (n 5) 192-196.

<sup>35</sup> We might then be following the advice of Ronald Dworkin to work always at trimming our conceptions of chief liberal values so that the conceptions dovetail and do not “conflict.” See Ronald Dworkin, “Do Liberal Values Conflict?” in Mark Lilla, Ronald Dworkin, and Robert Silvers (eds), *The Legacy of Isaiah Berlin* (New York Review of Books, 2001) 73, 77-80, 90.

Rawls would undoubtedly allow for a public assignment of the lion’s share of judgment in such matters to a court or other trusted authority.<sup>36</sup>)

## REMAINDERS

So that is where we have come so far. If the constitution’s office in a well-ordered society is to solemnize the assurances requisite to any justifiable practice of politics among free and equal citizens (as the LPL asserts); and if among those requisite assurances is one for a basic structure in which persons are secured against undue constriction of basic liberties; and if constriction of basic liberties can sometimes result from exertions of powers (rights, privileges, immunities) accrued by ordinary-level civil actors under law governing private legal relations; and if the possibility of such accruals cannot be anticipatorily foreclosed without negation of the general state of freedom cherished by liberalism, then some way must be found to bring the constitution’s guarantee against undue constriction to bear on that private law when and as occasion requires. And if, then, that guarantee’s standard of undue constriction is one for proportionality in the treatment of cases in which respectable claims to basic-liberty security come into conflict, then that is how the guarantee must extend itself into private-law adjudications.

Now, here is the rub. You could grant all of that, and still there might remain in your mind some concern about an excessive tolerance for oppression-in-private in the Rawlsian liberal philosophy. Two considerations might join to keep the concern alive. One might be suspicion or detection of a bias in striking the balances that a Rawlsian-style proportionality review for private law will have to strike. A second would arise with the observation that not every liberty-endangering exercise of a Rawlsian basic liberty will come under the scope of such review.

You might be concerned about an overall negative-libertarian, anti-protectionist bias—a bias for keeping the state as much as possible out of our lives—which experience shows just runs (you might say) in the historical liberal drinking water. I as American would be among the last to deny that such a bias can take hold, and

<sup>36</sup> See Frank I. Michelman, ““Constitution (Written or Unwritten)”: Legitimacy and Legality in the Thought of John Rawls” (2018) 31 *Ratio Juris* 379, 389.

sometimes has, in a broadly speaking liberal political culture or among its political or legal elites. That bias is not, however, as far as I can see, any part of a deep logic of liberalism—a point to the support of which this paper has been calling John Rawls as witness.

A second concern arises with the observation that not every exercise of a Rawlsian negative basic liberty can be deemed oppressive to someone else's enjoyment of the scheme of basic liberties, in such a way as to bring into play the Rawlsian liberal mandate for occasion-inspired, constitution-based revisitation to the rules and standards of the law of contract, tort, family, business and other civil associations, trade and competition, and so on. It takes an injured or dominated party to make that happen: a muzzled employee, discriminatorily excluded customer, dominated spouse or child. Those and others so positioned can raise the occasions for Rawlsian mandatory reinspection of private law. But consider a civil action seeking judicial orders of suppression of maximally public, loud and clear, expressive and associational activities in support of counter-liberal political causes, where it is alleged (and let us even say no one denies) that the political success of such causes would mean the effective reversal or extinction of a liberal basic-liberties regime. Who would bring the action? No one can credibly say that *their* freedom or capacity to talk back has been placed at risk. In such a case, the scheme of basic liberties weighs in on only one side, that of toleration for the speech some claim to be dangerous; no purchase there is found for the Rawlsian mandate for inter-schematic adjustment for the sake of equal right and political justification.

The case I have been describing is everywhere these days at our doorstep and beyond, and no doubt it gives cause for grave concern. It is not, however, a concern that implicates the question of horizontal application of constitutional guarantees respecting basic rights. What hobbles an all-out liberal-state quarantine of the propagation and spread of anti-liberal ideas and passions is not some hesitation to mess with the particular jural relations of parents with children, businesses with customers, publishers with news targets, bosses with workers, and so on. Those relations aren't at stake in the venues of street rallies, broadcasts, legislative sessions, election campaigns, and so on where much of the disfavored but nevertheless protected activity after all takes place. What gets in our way is plainly and simply the liberal commitment to respect, to the limit of safety, everyone's individual basic liberties of conscience, thought, expression, and association.

It is the old, old liberal paradox of tolerance, for which the only answer yet found has been the standard liberal make-do response: to tolerate on principle as

we must, but not beyond the point of endangerment of the regime itself of toleration, of equal basic liberties and the rest of liberal democracy. That is where John Rawls, too, has taken his stand.<sup>37</sup>

<sup>37</sup> See Rawls, *PL* 18-19, 64 & n 10; Frank I. Michelman, “The Bind of Tolerance and a Call to Feminist Thought: A Reply to Gila Stopler” (2021) 19 *Int’l J Const L* 408, 409-10.