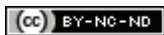


ARTICLES

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ARTICLES

CONSTITUTIONAL CONSTRUCTIVISM: POSSIBILITIES AND PROSPECTS

R. George Wright*

I. INTRODUCTION

In the fields of ethics, politics, and law, various forms of what is called “constructivism”¹ have recently risen to prominence.² Professor Sharon Street has,

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¹ The varieties of constructivism prevent us from offering a simple definition, or even a broad overview, of the concept until some further context has been provided. But we can say that constructivism often tries to retain the best features of fundamentally different approaches to whatever ethical, political, or constitutional problem is being addressed. Constructivism typically focuses on developing some sort of multi-step decision-making procedure that can result in a supposedly justified solution to, say, constitutional issues. Crucially, most forms of constructivism try to avoid relying on the now controversial idea that some moral, political, or constitutional principles are genuinely better than others, mostly independent of our preferring them. Constructivism thus sets aside what is called moral realism. But constructivism typically does not also set aside the less ambitious idea that some moral or constitutional principles can, within limits, in some sense be meaningfully justified. Constructivism thus seeks a middle ground between classical moral realism and sheer arbitrariness in moral judgments.

Unfortunately, the term “constructivism,” in an even broader sense, is used in a wide variety of unrelated fields, with none of which we shall herein have anything to do. Mention should briefly be made, however, of broad constructivist views of reality itself, and of constructivist views of the nature of facts. *See, e.g.*, JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 1 (1995) (referring to the constructed, yet in a sense objective, character of “things like money, property, government, and marriages”); *id.* at 191 (“a socially constructed reality presupposes a nonsocially constructed [underlying] reality”); PAUL BOGHOSSIAN, *FEAR OF KNOWLEDGE: AGAINST RELATIVISM AND CONSTRUCTIVISM* 22 (2006) (constructivism about facts as holding that “[t]he world . . . we seek to . . . know about is not what it is independently of us and our social context; rather all facts are socially constructed in a way that reflects our contingent needs and interests”). Whether even our most basic needs and interests are entirely constructed may be left unclear.

for example, written that “[c]onstructivist positions in ethics have inspired a great deal of both enthusiasm and skepticism in recent years. Most agree that when it comes to . . . normative ethics and political philosophy, constructivist views are a powerful family of positions.”³ For years the preeminent work of John Rawls on justice, ethics, politics, law, and even constitutional law in particular—loosely allied with that of other prominent scholars⁴—has been a leading form of constructivism.

Beyond the evolving Rawlsian versions, constructivism comes in a number of varieties,⁵ and is applied in various contexts.⁶ But the potential for constructivism has thus far been explored far more prominently in ethics,⁷ and even in political justice,⁸ than in the more specific but vital context of constitutional law itself. This Article seeks to remedy this inattention to constitutional constructivism. Constitutional constructivism indeed seems very promising. In the end, though, the value of constructivism when applied to constitutional law turns out to be surprisingly limited.⁹

Unfortunately, the most prominent forms of constructivism, as adapted to constitutional theory and adjudication, would realistically fail to live up to the hopes of their advocates. In the constitutional context, even the most promising forms of constructivism, including especially that of John Rawls, would in particular fail to sufficiently promote the stability and sustainability of a reasonably just constitution. This unfortunate outcome would arise even if no citizen took extremist, intolerant, or illiberal broad views of politics, morality, or religion. Constitutional constructivism would in practice require a major and permanent transfusion of basically unconstructed, real, uninvented, and objectively valid

² See the mere sampling of the literature referred to below, along with the more explicit assessment of Professor Sharon Street, *What is Constructivism in Ethics and Metaethics?*, 5 *PHIL. COMPASS* 363, 363 (2010).

³ *Id.*

⁴ See *infra* Section III.

⁵ See *infra* Section III.

⁶ See *infra* Section III.

⁷ See *infra* Section III.

⁸ See *infra* Section III.

⁹ See *infra* Sections IV–V.

ethics, including more specifically a more substantial reliance on morally real, unconstructed, basic virtues.¹⁰

The crucial problem is that the most prominent forms of ethical and constitutional constructivism explicitly seek to set aside and minimize any reliance on any form of moral realism. We may take moral realism to be roughly the view that sound moral principles or virtues are “real,” or largely discovered, rather than merely somehow adopted or invented to “solve” practical problems. But in the end, various basic virtues, as largely discovered—and thus “real”—are indispensable for a stable just constitutional regime, as Rawls and others envision it. Constitutional constructivism’s setting aside of moral realism and downplaying of the role of morally real basic virtues in promoting the stability of a reasonably just regime thus crucially undermines constitutional constructivism.

The ideas of constructivism, and of constitutional constructivism in particular, quickly display complexity.¹¹ This Article offers some understanding of basic constructivist ideas below.¹² But first, the Article lays the groundwork for the potential importance of constitutional constructivism by presenting a major problem in constitutional adjudication to which it would seem that constitutional constructivism could present an attractive solution.¹³ The clearest way to present the problem that constitutional construction might resolve involves a brief consideration of some famous language in the classic United States Supreme Court case of *Calder v. Bull*.¹⁴

II. A MAJOR PROBLEM POSED BY THE CASE OF *CALDER V. BULL*

The narrowly technical legal issues involved in *Calder v. Bull*, involving the Supreme Court’s application of the prohibition of *ex post facto* laws¹⁵ in a state court civil probate case,¹⁶ can for our purposes be safely set aside. We shall instead

¹⁰ See *infra* Section IV.

¹¹ See *infra* Section IV.

¹² See *infra* Section III.

¹³ See *infra* Section II.

¹⁴ 3 U.S. 386 (1798).

¹⁵ See U.S. CONST. art. I, § 9, cl. 3. For discussion of the *ex post facto* law issue, see, for example, HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS 28–33 (2010).

¹⁶ See *Calder*, 3 U.S. at 386–87 (opinion of Chase, J.).

focus on the famous, much broader language of Justices Chase and Iredell respectively. Chase and Iredell, whatever their intent, raised a jurisprudential problem that nicely motivates an interest in constitutional constructivism, as we shall further define that approach below.¹⁷

The conflicting language of Justices Chase and Iredell¹⁸ deserves quotation at some length. Consider first the language of Justice Chase:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it.¹⁹

The conclusion of Justice Chase's argument then takes the following memorable terms: "An ACT of Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."²⁰

By way of contrast, though, consider the language of Justice Iredell:

If . . . the Legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are

¹⁷ See *infra* Section IV.

¹⁸ Their opinions appear *seriatim*.

¹⁹ *Calder*, 3 U.S. at 387–88 (opinion of Chase, J.).

²⁰ *Id.* at 388 (capitalizations in the original). Justice Chase's language does not suggest that the analysis of federal congressional legislation should be fundamentally different. See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 66 (2012) (quoting the language of Justice Chase).

regulated by no fixed standard: the ablest and the purest men have differed upon the subject²¹

The precise intent of both Chase and Iredell remain contested even today.²² But it does seem that “most observers . . . assume that Chase believed that the judiciary could invalidate state law on the basis of principles of ‘reason’ not embodied in the text of the United States Constitution,”²³ whether this “natural law”²⁴ interpretation is ultimately sound or not.²⁵ Correspondingly, “Justice Iredell’s opinion . . . is usually understood as a legal positivist argument against the idea that the Constitution incorporates principles of natural law or rights.”²⁶

²¹ *Calder*, 3 U.S. at 399 (opinion of Iredell, J.). Actually, Iredell’s language places no special limits on judicial creativity. As long as a judge does not rely on natural law thinking, the Iredellian judge can reach any desired plausible result in any case, perhaps by broader or narrower readings of, say, Equal Protection, substantive Due Process, or the First Amendment. There is thus little realistic practical difference in judicial constraining power between Chase’s language and that of Iredell.

²² For a brief survey of several possibilities, see Mike Rappaport, *Lash, Tushnet, Chapman, and McConnell on Justice Chase’s Opinion*, in *Calder v. Bull*, LIBRARY OF LAW AND LIBERTY (June 5, 2012), <http://www.libertylawsite.org/2012/06/05/lash-tushnet> (recognizing three possible interpretations of Justice Chase’s opinion while briefly recounting the contemporary debate).

²³ Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 116 YALE L.J. 1672, 1745 (2012).

²⁴ *Id.*

²⁵ *See id.* at 1746 (presenting a dissenting view).

²⁶ James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 FORDHAM L. REV. 2285, 2286 (2001). For further interpretation of Chase’s and Iredell’s opinions in *Calder*, see, for example, AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 521 n.15 (2012) (“Chase declared that American governments must honor not only the ‘express’ limitations on their own power found in the state and federal constitutions, but also ‘great first principles of the social compact.’”); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 46 (1992) (referring to “the famous controversy between Chase and Iredell over the role of natural law in constitutional adjudication”); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 211 n.41 (1981) (“*Calder*, far from being authority for the view that natural law is enforceable in the name of the Constitution, appears on close reading as strong authority against it.”); Edward B. Foley, *The Bicentennial of Calder v. Bull: In Defense of a Democratic Middle Ground*, 59 OHIO ST. L.J. 1599, 1599 (1998) (perceiving a debate over the role, if any, of “essential terms of a fair social contract”).

Within the constitutional case law, the influence of Justice Chase’s language is at least arguably reflected in, for example, *Fletcher v. Peck*, 10 U.S. 87, 143, 143 (1810) (Johnson, J., concurring) (“I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the

In any event, the above-quoted language of Justices Chase²⁷ and Iredell²⁸ naturally prompts broad reflection on the bases of constitutional law and legitimacy. Particularly relevant to our purposes herein is the tendency to read Justice Chase's consistent references to a "social compact"²⁹ or social contract as equivalent to, or better expressed in terms of, "natural law."³⁰ Certainly, though, social contract theory and natural law theory are not even close to equivalent. The broad tradition of natural law theory need not invoke the idea of a social compact or contract, hypothetical or otherwise.³¹ Rightly or wrongly, contemporary natural law and contemporary contractualist or, for that matter, constructivist theories³² often explicitly seek to develop largely independently of each other.

Consider, from the contemporary natural law side, the basic formulation of Professor John Finnis' leading natural law view, according to which:

[t]here is (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which

deity." See also *Kelo v. City of New London*, 545 U.S. 469, 494, 494 (2005) (O'Connor, J., dissenting) (referring to Justice Chase's "great first principles of the social compact" language in the constitutional takings context).

²⁷ See *supra* text accompanying notes 20–21.

²⁸ See *supra* text accompanying note 22.

²⁹ See *supra* text accompanying notes 20–21.

³⁰ See several of the contributions cited *supra* note 26; see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 65–69 (7th ed. 2013); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.1(a), at 794 (5th ed. 2012) ("In the case of *Calder v. Bull* the Justices for the first time engaged in a debate concerning their ability to override legislation on the basis of natural law."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 8.2.1, at 584–85 (3d ed. 2006) (characterizing Justice Chase as permitting the violation of neither the Constitution nor of "rights that are part of the natural law").

³¹ The classic source of natural law theory, in the work of Thomas Aquinas, bears a closer relationship to a general theory of virtue and vice than to any recognizable voluntary social compact theory. For an entry into the basic theory, see THOMAS AQUINAS, SUMMA THEOLOGICA I–II, question 90; question 91, art. 2; question 94 (Fathers of English Dominican Province rev. ed. 1920). Note as well the absence of any necessary social contract element in John Finnis's basic statement of a contemporary natural law theory, as elaborated in JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23 (2d ed. 2011).

³² See *infra* Section III.

distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances) are reasonable-all-things-considered, . . . i.e., between ways of acting that are morally right or morally wrong—thus enabling one to formulate (iii) a set of general moral standards.³³

Let us now ask a rhetorical question: would the natural law theorist above somehow be bound to argue that the various basic ways of human flourishing are to be determined by some sort of actual or idealized popular agreement or contract on such a question? Suppose we were to agree, freely, fairly, unanimously, and after long debate, that watching gratuitous animal abuse videos³⁴ is central to a basic form of human flourishing. Would that agreement make it so? Would such an agreement require a corresponding adjustment in Finnis' natural law theory?³⁵

Presumably not. And the most obvious explanation is that for many natural law theorists, among a much wider range of moral theorists, some moral, legal, and particularly constitutional principles can be more or less true or false basically independent of any consensus, contract, or compact of interested parties. Such contracting parties can sometimes be, in this sense, genuinely mistaken about matters of ethics, social justice, and the moral element embodied in constitutional law. For convenience, we shall thus call this natural law view a form, among many other forms, of moral realism.³⁶

We can see some advantages for a society if there were a form of moral realism that clearly worked, crucially at a specific decisional level, or at the level of reasonably specific, meaningful moral rules or principles. We would then have available, if we chose to use it, a functioning moral compass, or even a moral Global Positioning Satellite (GPS) system, to guide us typically to morally right, or

³³ FINNIS, *supra* note 31, at 23.

³⁴ For some broader general background, see the animal cruelty video free speech case of *United States v. Stevens*, 559 U.S. 460 (2010).

³⁵ For another approach to human flourishing and human goods, drawing in part upon the Aristotelian tradition, see PHILIPPA FOOT, *NATURAL GOODNESS* (2006).

³⁶ For background, see Geoffrey Sayre-McCord, *Moral Realism*, STANFORD ENCYCLOPEDIA PHIL. (Oct. 3, 2005), <http://plato.stanford.edu/entries/moral-realism/>; DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* (1989); DAVID ENOCH, *TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM* (2011); Michael Huemer, *An Ontological Proof of Moral Realism*, 30 SOC. PHIL. & POL'Y 259 (2013); Peter Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986); ROBERT AUDI, *THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE* (2005).

at least morally permissible, positions, along with a satisfactory reason to be at that moral position. Justice Iredell's broader problem—that natural law, natural right, or similar views typically leave us with a spinning or otherwise unreliable moral compass dial³⁷—would then be minimized.³⁸

For our purposes, though, the major problem at this point is that many thoughtful writers today do not find any form of moral realism to be convincing, whatever the advantages of a viable moral realism might have been. Those who reject moral realism, or largely “discoverable” moral truths, do so on a wide variety of grounds, and so we refer to such writers generally as moral non-realists.³⁹ Thus for many of our best thinkers, no form of natural law, or of moral realism in general, is credible, despite any advantages that might attend some form of moral realism.

This state of affairs—a common rejection of any form of moral realism, while appreciating the advantages that could flow from a valid and accepted moral realism—provides much of the motivation for many versions of moral, political, justice-oriented, and constitutional constructivism. Constructivism thus typically seeks first to set aside moral realism, as far as possible. Section III immediately below thus introduces⁴⁰ some forms of constructivism, and crucially explores the constructivist desire to set moral realism, including natural law theories, aside, while typically trying, as well, to retain some of the advantages of moral realism. After all, to its credit, moral realism at least aims at a meaningful form of legitimacy and seeks to avoid more or less arbitrary or under-justified moral decisions.

³⁷ See *supra* text accompanying note 22.

³⁸ This is not to suggest that the world is largely solving our moral or constitutional problems for us, without our invitation to do so, nor that this would be universally welcomed.

³⁹ Setting aside all sorts of complications, a reasonable sense of the various moral non-realisms can be drawn from Richard Joyce, *Moral Anti-Realism*, STANFORD ENCYCLOPEDIA PHIL. (July 30, 2007), <http://plato.stanford.edu/entries/moral-anti-realism/>, and Walter Sinnott-Armstrong, *Moral Skepticism*, STANFORD ENCYCLOPEDIA PHIL. (Sept. 5, 2011), <http://plato.stanford.edu/entries/skepticism-moral/>. An extremely selective bibliography, beyond the various works of these two authors, could include: SIMON BLACKBURN, *RULING PASSIONS: A THEORY OF PRACTICAL REASONING* (1998); RICHARD GARNER, *BEYOND MORALITY* (1994); ALLAN GIBBARD, *THINKING HOW TO LIVE* (2003); MARK ELI KALDERON, *MORAL FICTIONALISM* (2007); JOHN MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977); JESSE PRINZ, *THE EMOTIONAL CONSTRUCTION OF MORALS* (2011); CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944).

⁴⁰ That is, beyond the brief summary presented *supra* note 1.

III. A BRIEF TOUR OF CONSTRUCTIVISM FOR CONSTITUTIONAL PURPOSES

In general, the main driving force behind constructivism is thus the desire to combine the best of two incompatible broad world views, in part through adopting procedures that result in the answers to practical problems of ethics and law, rather than trying to find the bases of those answers somehow already etched into nature or the universe. One recent reviewer crucially characterizes constructivism “as trying to ‘split the difference’ between robust realism about morality . . . and realism’s [non-realist] opponents.”⁴¹ As the reviewer observes, though, “[e]ating your cake and having it too is a great thing when you can pull it off, but trying to do so exposes such positions to the problems of both alternatives.”⁴² Seeking the best elements of two worlds does not guarantee success in doing so.

Thus constructivists about morality, unlike moral realists, “doubt or deny that there are distinctively moral facts or properties . . . which can be *discovered* or *intuited* and will provide foundations for ethics.”⁴³ To this extent, constructivists thus seek to avoid the problems associated with moral realist theories.⁴⁴ But constructivists also do not entirely abandon the idea of distinctively justifying constructivism in general, or its practical application in ethics, social justice, constitutional law, or other fields.⁴⁵ Some constructivists even talk in terms of “objectively” justified outcomes of constructivist procedures.⁴⁶ One could thus say

⁴¹ Mark LeBar, *Review of Constructivism in Practical Philosophy*, 122 MIND 1135, 1135 (2013) (book review).

⁴² *Id.*

⁴³ Onora O’Neill, *Constructivism in Rawls and Kant*, in THE CAMBRIDGE COMPANION TO RAWLS 347, 348 (Samuel Freeman ed., 2002) [hereinafter O’Neill, *Constructivism*]; see, e.g., Laura Papish, *The Changing Shape of Korsgaard’s Understanding of Constructivism*, 45 J. VALUE INQUIRY 451, 451 (2011) (discussing the work of Christine Korsgaard) (constructivism as seeking to solve practical problems rather than to answer theoretical questions); see also Christine Korsgaard, *Realism and Constructivism in Twentieth Century Moral Philosophy*, 28 J. PHIL. RES. 99, 99–122 (2003); ONORA O’NEILL, TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING 39 (1996) [hereinafter O’NEILL, TOWARDS JUSTICE AND VIRTUES]; James Stieb, *Rorty on Realism and Constructivism*, 36 METAPHILOSOPHY 272, 272 (2005).

⁴⁴ For some important critiques of moral realism, see the sources cited *supra* note 39. For one prominent moral realist’s description of a form of anti-realist constructivism, see David O. Brink, *Rawlsian Constructivism in Moral Theory*, 17 CAN. J. PHIL. 71, 72–73 (1987).

⁴⁵ See O’Neill, *Constructivism*, *supra* note 43, at 348; Onora O’Neill, *Constructivism vs. Contractualism*, 16 RATIO 319, 321 (2003).

⁴⁶ See sources cited *supra* note 45; see also ROBERT S. TAYLOR, RECONSTRUCTING RAWLS: THE KANTIAN FOUNDATIONS OF JUSTICE AS FAIRNESS 6 (2011); Michael Buckley, *The Structure of*

that constructivism sets aside the idea of discovering largely independently preexisting moral or constitutional “truths,” focusing instead on practical solutions to perceived practical problems, and on the process-based construction or creation of moral or constitutional “truths.”⁴⁷

Constructivism thus typically seeks to bypass both the possible overambitiousness of any form of moral realism, and the unambitiousness of an insufficiently justified or even ultimately arbitrary ethical or constitutional perspective. Constructivism instead seeks what is thought to be a more appealing third way, or middle ground solution. Whether any such desirable third way can actually be marked out, consistently adhered to, and rendered reasonably stable⁴⁸ over time is of course an open question.

Justification in Political Constructivism, 41 METAPHILOSOPHY 669, 672 (2010) (arguing that constructivist political principles as potentially balancing the unavoidable dependence of moral principles on our own conceptions with those principles’ objective validity in solving practical problems); Ben Laurence, *Review of Constructivism in Practical Philosophy*, NOTRE DAME PHIL. REVIEWS (Mar. 11, 2013), <http://ndpr.nd.edu/news/38207-constructivism-in-practical-philosophy/>.

John Rawls characterizes what he calls Kantian moral constructivism in similar terms: “Apart from the procedure of constructing the principles of justice, there are no moral facts,” but “moral objectivity” can still in a limited sense be reached if “understood in terms of a suitably constructed social point of view that we can all accept” as free and equal moral persons. John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 519 (1980).

“Objectivity” in this limited sense is not a matter of detecting a moral truth written into human nature, society, or nature itself, but is instead internal to the overall moral constructivist process, including our collective sense of what is reasonable for us. *See id.*; *see also* Stephen Darwall, Allan Gibbard & Peter Railton, *Toward Fin de Siècle Ethics: Some Trends*, 101 PHIL. REV. 115, 138 (1992); *but cf.* Carla Bagnoli, *Introduction to CONSTRUCTIVISM IN ETHICS* 3–4 (Carla Bagnoli ed., 2013) (distinguishing between “objectivist” and “subjectivist” versions of moral and other normative forms of constructivism); Carla Bagnoli, *Constructivism in Metaethics*, STANFORD ENCYCLOPEDIA PHIL. (Sept. 27, 2011), <http://plato.stanford.edu/entries/constructivism-metaethics/>; Carla Bagnoli, *Starting Points: Kantian Constructivism Reassessed*, 27 RATIO JURIS 311 (2014).

⁴⁷ *See* Bagnoli, *Constructivism in Metaethics*, *supra* note 46, at 1; Buckley, *supra* note 46, at 672. Additionally, see Professor Ronald Dworkin on moral constructivism, to the effect that “[o]n this view, moral judgments are constructed, not discovered: they issue from an intellectual device adapted to confront practical, not theoretical problems.” RONALD DWORIN, JUSTICE FOR HEDGEHOGS 63 (2011) (referring to the Kantian Categorical Imperative “universalization” technique as well as to John Rawls’ “original position” and “veil of ignorance” device).

⁴⁸ *See* LeBar, *supra* note 41; ONORA O’NEILL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT’S PRACTICAL PHILOSOPHY 206 (1989) (referring to critiques, in this respect, of Rawlsian constructivism at an early stage, and aspiring to avoid this problem in her own version of moral constructivism).

Thinking about constructivism in general, however, can carry us only so far. It is possible that what we can rightly say about one version or level of constructivism may not be true of another. In particular, constructivism as applied, in one way or another, at the constitutional level⁴⁹ may, for all we yet know, have distinctive advantages or disadvantages over related levels of constructivist theory.⁵⁰

Constructivism can, as we have already begun to see, take many forms.⁵¹ The forms may vary as to their scope or focus. Thus “we may distinguish between *local* and *global* constructivist views.”⁵² Contractual elements of constructivism may be either emphasized,⁵³ or else severely downplayed.⁵⁴ The crucial proceduralist elements of constructivism may also be supplemented, to a greater or lesser degree,

⁴⁹ See, e.g., James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993); Heidi Li Feldman, *Rawls’s Political Constructivism as a Judicial Heuristic: A Response to Professor Allen*, 51 FLA. L. REV. 67 (1999); Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

⁵⁰ See Fleming, *supra* note 49, at 281–83 (distinguishing Rawlsian constitutional constructivism from a broader Rawlsian political constructivism); *id.* at 297 (“The idea is that the Constitution, conceived as an embodiment of fair terms of social cooperation on the basis of mutual respect and trust among free and equal citizens, provides a shared public basis for reasonable political agreement in our morally pluralistic constitutional democracy.”).

⁵¹ For some sources on the evolution of Rawls’ interest and focus, see *supra* note 5. For merely one alternative constructivist approach among many, see T.M. SCANLON, BEING REALISTIC ABOUT REASONS 90–92 (2014) [hereinafter SCANLON, BEING REALISTIC]; T.M. SCANLON, WHAT WE OWE TO EACH OTHER 4 (2000) (articulating the basic Scanlon moral test of being “permitted by principles that could not reasonably be rejected” by appropriately motivated persons); and T.M. Scanlon, *Precis of What We Owe to Each Other*, 66 PHIL. & PHENOMENOLOGICAL RES. 159, 160 (2003) (“An action is wrong just in case any principle that permitted it would be one that someone could reasonably reject.”). *But see* SCANLON, BEING REALISTIC, *supra* at 98 (“Although I think that constructivist accounts of justice and morality have considerable plausibility, I do not believe that a plausible constructivist account for actions in general can be given.”). For a critique of Scanlon’s approach, see Mark Timmons, *The Limits of Moral Constructivism*, 16 RATIO 391 (2003).

⁵² Debbie Roberts, *Constructivism in Practical Philosophy*, 73 ANALYSIS 814, 814 (2013) (reviewing JAMES LENMAN & YONATAN SHEMMER, *CONSTRUCTIVISM IN PRACTICAL PHILOSOPHY* (2012)) (distinguishing among constructivist approaches based on the breadth or scope of the domain being addressed); see also Laurence, *supra* note 46 (construing Scanlon’s and Rawls’ constructivism as relatively “local” in their scope or domain).

⁵³ See, e.g., Timmons, *supra* note 51, at 391 (characterizing Scanlon’s approach); Ronald Milo, *Contractarian Constructivism*, 92 J. PHIL. 181, 184 (1995).

⁵⁴ See, e.g., O’Neill, *Constructivism*, *supra* note 43. There may be some tendency for those relying heavily on contractualism to introduce (additional) non-contractualist elements to fend off criticisms of their approach.

with nonprocedural substantive assumptions and considerations.⁵⁵ The degree to which constructivism in general may require supplementation with non-constructivist elements will be controversial.

We can also attempt specifically to distinguish, say, ethical or moral constructivism from political constructivism.⁵⁶ The idea of applying constructivism to the political realm is certainly popular.⁵⁷ Attempts are sometimes made, as well, to focus constructivist methods not so much on ethics, or even on politics, but on some understanding of an idea of justice,⁵⁸ or of social justice.⁵⁹ Most important for our purposes, constructivism can also be applied in narrower and distinctly institutional contexts, as at the constitutional or judicial levels.⁶⁰ John Rawls himself refers to an overall “four stage sequence,”⁶¹ with complex relationships between and among the stages. The four stages, whatever their internal complications, begin with the classic Rawlsian veil of ignorance-shrouded⁶² original position⁶³ in which basic principles of justice are selected,⁶⁴ followed

⁵⁵ See Fleming, *supra* note 49, at 281–97.

⁵⁶ See, e.g., 3 TERENCE IRWIN, THE DEVELOPMENT OF ETHICS § 1443, at 959 (2011 ed. 2009).

⁵⁷ See, e.g., CATRIONA MCKINNON, LIBERALISM AND THE DEFENSE OF POLITICAL CONSTRUCTIVISM (2002); PERI ROBERTS, POLITICAL CONSTRUCTIVISM (2007); Buckley, *supra* note 46; ADAM CURETON, POLITICAL CONSTRUCTIVISM AND THE LIMITS OF POLITICAL PHILOSOPHY (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642860; George Klosko, *Political Constructivism in Rawls's Political Liberalism*, 91 AM. POL. SCI. REV. 635 (1997); Jody S. Kraus, *Political Liberalism and Truth*, 5 LEGAL THEORY 45, 51 (1999); Nicholas Tampio, *A Defense of Political Constructivism*, 11 CONTEMP. POL. THEORY 305, 305 (2012) (distinguishing the methods of moral and of political constructivists).

⁵⁸ See, e.g., O'NEILL, TOWARDS JUSTICE AND VIRTUES, *supra* note 43, at 45 (Rawls' constructivism as centered on “justice”); Kraus, *supra* note 57, at 51 (Rawlsian political constructivism as constructing “principles of justice”); Andrew Williams, *Justice, Incentives and Constructivism*, 21 RATIO 476, 484 (2008) (Rawlsian “justice as fairness” as a version of constructivism).

⁵⁹ See G.A. COHEN, RESCUING JUSTICE AND EQUALITY 274–75 (2008) (addressing “the constructivist approach to social justice”).

⁶⁰ See sources cited *supra* note 50.

⁶¹ JOHN RAWLS, POLITICAL LIBERALISM 397 (expanded ed. 2005) [hereinafter RAWLS, POLITICAL LIBERALISM].

⁶² See *id.* at 397–98; JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT § 6 (Erin Kelly ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS].

⁶³ See RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 397; RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at § 6.

⁶⁴ See RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 397; RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at § 13.

successively by a constitutional convention stage,⁶⁵ a legislative stage,⁶⁶ and finally an adjudicative stage,⁶⁷ with the Rawlsian veil of ignorance being partially and progressively lifted at each of the latter stages.⁶⁸ Let us now turn to Rawls' version of constructivism.

IV. SOME ELEMENTS OF RAWLS' DOMINANT VERSION OF GENERAL AND SPECIFICALLY CONSTITUTIONAL CONSTRUCTIVISM

A. *Introductory Background*

The most sensible approach to constitutional constructivism in particular involves a focus on John Rawls' dominant approach. As Rawls adapted to critical commentary over the years, Rawlsian constructivism in general increased in both subtlety and in sheer complexity. No brief account can, at this point, do it justice. Herein, we address only as much of Rawls' approach as is necessary to develop a responsible critique thereof, with an eye secondarily toward the possibility of other, non-Rawlsian forms of constitutional constructivism.

Rawls, as we saw above,⁶⁹ seeks to distinguish the "first stage" basic principles of justice from the "later stage" provisions of the constitution of a reasonably just society.⁷⁰ In turn, the constitution itself, or the fruits of a constitutional convention,⁷¹ are then to be specifically distinguished from the separate stage of the processes and outcomes of constitutional adjudication.⁷² Crucially for our purposes, the outcomes reached at each separate Rawlsian stage are intended to be not merely abstractly appealing, but to be reasonably stable in practice over generations.⁷³

⁶⁵ See RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 397.

⁶⁶ See *id.*

⁶⁷ See *id.* at 397–98.

⁶⁸ See *id.* at 398. For a brief summary of this Rawlsian four stage constructivist process, see Leif Werner, *John Rawls* § 4.9, <http://stanford.library.usyd.edu.au/entries/rawls/>.

⁶⁹ See *supra* notes 62–69 and accompanying text.

⁷⁰ See *supra* notes 65–66 and accompanying text.

⁷¹ See *supra* note 66 and accompanying text.

⁷² See *supra* notes 66, 68 and accompanying text.

⁷³ See, e.g., RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 140–44; RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at 180–202.

Without providing a detailed description of Rawls' constructivism at any of the four stages, we can nonetheless start with Rawls' famous two principles of justice, as they are thought to emerge from the "first stage" original position.⁷⁴ These principles, in their order of ethical priority, hold that

- (a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be of the greatest benefit to the least-advantaged members of society (the difference principle).⁷⁵

In turn, the later constitutional, legislative, and adjudicative stages are then to have a complex and subtle relation to these two basic principles, and among one another.⁷⁶

A broad critique of even these two basic "first stage" principles of justice would be a treatise in itself.⁷⁷ Our focus herein is instead primarily on Rawlsian constructivism at the constitutional level, and then only to make a few key points of general interest. The other stages of Rawlsian constructivism will be referred to only for limited purposes. We begin to explore some inescapable problems for Rawlsian constructivism below.

B. The Key Rawlsian Ideas as Unfortunately "Essentially Contested"

The first problem begins with the fact that at every stage of Rawlsian constructivism, concrete meanings for the basic ideas of freedom, liberty, and equality must be constructed. Rawls has complex, multifaceted purposes for choosing from among the various possible meanings of these and other crucial

⁷⁴ For the original formulation, see JOHN RAWLS, A THEORY OF JUSTICE §§ 11–14 (1972).

⁷⁵ RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, § 13, at 42–43.

⁷⁶ See *supra* notes 62–74 and accompanying text.

⁷⁷ For an example of broader studies, see PAUL WEITHMAN, WHY POLITICAL LIBERALISM? ON JOHN RAWLS'S POLITICAL TURN (Oxford Univ. Press 2013); see also SAMUEL FREEMAN, RAWLS (2007); G.A. COHEN, RESCUING JUSTICE AND EQUALITY (2009).

terms.⁷⁸ But even if we assume that Rawls' constructive methodology itself drives his understanding of these key terms, the meaning of each of these terms for every decision maker unfortunately remains "essentially contested."⁷⁹

The problem is that once Rawls provides the choice-makers, at any of the four stages, with enough information to make a meaningful choice regarding, say, questions of liberty or equality, a classic "essential contestability" problem unavoidably arises. Roughly, the essential contestability problem is that even if we all choose to adopt Rawls' most basic aims, there will arise unresolvable basic disputes as to the practical meaning and implications of the terms at issue. Those disputes as to meaning cannot be resolved by thinking harder about those terms, or by further good faith discussions.

As merely one concrete "essential contestability" example, consider the views not of a libertarian, of a classical liberal, or of any sort of conservative, but of the basically politically sympathetic Professor Ronald Dworkin. Dworkin, quite unlike Rawls,⁸⁰ denies that there are any basic conflicts between the values of freedom and equality in their highest and best senses.⁸¹ Specifically, Dworkin argues that "liberty isn't the freedom to do whatever you might want to do; it's freedom to do whatever you like so long as you respect the moral rights of others."⁸² On this view, liberty thus cannot possibly involve violating the moral rights of another person. Clearly, whether Rawls can, in contrast, define liberty completely independently of any moral rights of others or not, there is no neutral, objectively right answer to the conflict between Rawls and Dworkin on this crucial point.⁸³

⁷⁸ For a mere beginning to this task, see RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 62, at §§ 7.1, 13.4.

⁷⁹ See generally W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y 167 (1956); see also WILLIAM CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10–44 (2d ed. 1984); John Gray, *On Liberty, Liberalism, and Essential Contestability*, 8 BRIT. J. POL. SCI. 385 (1978); Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1 (1973); David-Hillel Ruben, *W.B. Gallie and Essentially Contested Concepts*, 39 PHIL. PAPERS 259 (2010); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002); but cf. Christine Swanton, *On the "Essential Contestedness" of Political Concepts*, 95 ETHICS 811, 811 (1985) (entertaining some doubts in this regard). Loosely relatedly, see the discussion of Rawls' idea of "public reason" in FRED D'AGOSTINO, *FREE PUBLIC REASON: MARKING IT UP AS WE GO* ch. 2 (1996).

⁸⁰ See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 62, at 2.

⁸¹ RONALD DWORKIN, *Do Liberal Values Conflict?*, in *THE LEGACY OF ISAAH BERLIN* 73, 83–84 (Mark Lilla et al. eds., 2001).

⁸² *Id.*

This inherent lack of closure as to meaning plagues Rawlsian constructivism on the similarly essentially contested ideas of equality of opportunity, of the value of liberty, and elsewhere.

C. Some Incoherence Among the Four Constructed Rawlsian Stages

A second and related problem is that Rawls' attempts at moderate, realistic, pragmatic, restrained, and stability-inducing constructivist arguments actually create problems of incoherence within his overall account of the four stages as severe as some of his bolder constructivist steps.

Consider, for example, Rawls' insistence that the first principle of justice mentioned above, that of protecting equal liberties and their worth,⁸⁴ must be enshrined and entrenched at the later stage of constitution-making,⁸⁵ but that for various reasons,⁸⁶ the second principle of justice,⁸⁷ addressing social and economic opportunities and inequalities, need not be similarly written into the constitution.⁸⁸ What may initially seem like a Rawlsian nod to pragmatism, moderation, consensus-building, or stability actually dissolves, however, into incoherence.

There is initial plausibility to this Rawlsian arrangement, since the first principle of justice does explicitly take moral precedence over the second.⁸⁹ As

⁸³ For background on this enduring, irresolvable basic conflict over the meaning of liberty, see Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* 166 (Henry Hardy ed., 2d ed. 2002). For evidence of the similarly unresolvable dispute over the meaning and implications of equality, contrast Rawls' views with the (non-metaphysical) views of JOHN KEKES, *THE ILLUSIONS OF EGALITARIANISM* 46–48 (2007) (Rawls' minimizing the roles of desert, responsibility, praiseworthiness, and blameworthiness as ultimately leading to unattractive logical conclusions); FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION* ch. 6 (Ronald Hamowy ed., 2011). Appealing to a process of "reflective equilibrium," as in RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 62, at § 10, largely just reconfirms the essential contestability of crucial Rawlsian concepts. On the proper role, or lack thereof, of moral deservingness, see GEORGE SHER, *DESERT* ch. 2 (1989) (discussing Rawls).

⁸⁴ See *supra* text passage (a) accompanying note 76.

⁸⁵ See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 62, at 42–49; RAWLS, *POLITICAL LIBERALISM*, *supra* note 61, at 227–29, 336–37.

⁸⁶ See sources cited *supra* note 86.

⁸⁷ See *supra* text passage (b) accompanying note 76.

⁸⁸ See the sources cited *supra* note 86.

⁸⁹ See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 62, at 43.

constructed, Rawls' theory is in the position of constitutionally protecting equal basic liberties and their value for all, along a publicly provided social minimum for all persons, and the equal protection of rights under the law, or equal protection.

But Rawls then very explicitly does not necessarily protect, at the same constitutional stage, "fair equality of opportunity"⁹⁰ as embodied in the second principle of justice.⁹¹ Fair equality of opportunity, but not equal liberties and their value or the equal protection of rights under the law, is thus left vulnerable to the contingencies of possible legislative, sub-constitutional level enactments.⁹²

While there is a formalistic rigor about these Rawlsian constructivist moves, their overall practical coherence is extremely doubtful at best. What would it look like, on Rawls' constructivist approach, to constitutionally guarantee the equal provision of basic liberties and their value, and the equal protection of the laws, but at the same time to deny constitutional protection to fair equality of opportunity? On almost any sensible set of definitions of the key terms, this combination of constitutional guarantees and their lack makes little sense. What would it look like to arbitrarily bar a group from, say, some important work, or from some important educational option, while at the same time supposedly upholding that group's equal protection rights, along with the fair value of their basic liberties? This combination of rights, and lack of rights, is meaningless. If this incoherent state of affairs were even imaginable, how likely is it that fair-minded legislators, citizens, or judges could, under any set any procedures, remotely approach free agreement on whether this curious combination of rights had been met in various cases?⁹³

D. The Realistic Inseparability of the Four Supposedly Distinct Rawlsian Constructivist Stages

A third, and again closely related, problem is illustrated by Rawls' attempt to distinguish between, and assign different constructed functions to, the four different

⁹⁰ See *id.* at 42, 43.

⁹¹ See sources cited *supra* note 86; see also Fleming, *supra* note 49, at 286.

⁹² See Fleming, *supra* note 49, at 286.

⁹³ For general background, see the various opinions, especially that of Justice Sotomayor, dissenting, in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014). We might also wonder whether this odd implication of Rawls' constructivism would add to the prospects of genuine social stability as much as to subtract therefrom.

sequential stages of public decision making referred to above.⁹⁴ The four Rawlsian constructivist stages are, inescapably, inseparable.

Of most direct relevance for our purposes is the distinction Rawls seeks to draw between a hypothetical idealized constitutional convention or a constitutional drafting stage⁹⁵ on the one hand, and then a separate later stage of more or less idealized judicial interpretation of the previously adopted constitution.⁹⁶ For some purposes, certainly there is little harm in drawing this thoroughly familiar distinction. Problems arise, however, when Rawls invests too heavily in this distinction between the constitution itself and constitutional case adjudication, as a substantive or genuinely functional, rather than a largely formal, distinction.⁹⁷

The meaningfulness of any clear, functional distinction between the Constitution itself and a court's adjudication of a constitutional case, on whatever theory, has rightly been implicitly called into question by a number of scholars.⁹⁸ There is thus little point in Rawls' explicitly constructing one set of informational limits, constraints and tasks for one stage, and another set for the another "later" stage,⁹⁹ if in the most interesting cases the two stages cannot realistically be disentangled.¹⁰⁰

For the sake of clarity, let us briefly consider this stage-inseparability problem at the level of constitutional case law adjudication. Do the major historical constitutional cases consistently reflect a practical distinction between either the product of a constitution or a constitutional convention on the one hand, and constitutional case adjudication on the other? Would this distinction really become substantially clearer if all of Rawls' constructivist constraints, including the

⁹⁴ See *supra* notes 62–77 and accompanying text.

⁹⁵ See RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 397.

⁹⁶ See *id.* at 398.

⁹⁷ See *id.*

⁹⁸ See, e.g., JACK M. BALKIN, LIVING ORIGINALISM (2011); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1984) (six types of recognized constitutional argument); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION (1997); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

⁹⁹ See RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 398.

¹⁰⁰ See sources cited *supra* note 99.

varying and limited roles at each stage¹⁰¹ for the two principles of justice, were imposed?

We might well ask, then, at the level of historical, admittedly non-Rawlsian practice, about significant particular pairs of actual judicial cases. Can we detect, for example, a relevant, clear distinction between, say, the Constitution itself on the one hand, and the constitutional adjudication, on the other hand, of the racial segregation cases of both *Plessy v. Ferguson*¹⁰² and *Brown v. Board of Education*?¹⁰³ Did neither case seek, on its own lights, to develop, build, or give substance to, rather than to follow or somehow respect, a preexisting Constitution? How about the scope of the Commerce Clause power, as delimited in both *Carter v. Carter Coal*¹⁰⁴ and, a year later, in the *Jones & Laughlin Steel* case?¹⁰⁵ Or economic substantive Due Process as addressed, in opposing fashions, in *Lochner*¹⁰⁶ and in *West Coast Hotel v. Parrish*?¹⁰⁷ Or consider the Equal Protection and substantive Due Process cases of *Bowers v. Hardwick*¹⁰⁸ and *Lawrence v. Texas*.¹⁰⁹ In the Religion Clause area, there are *Wisconsin v. Yoder*¹¹⁰ and the sacramental peyote-ingestion *Smith*¹¹¹ case. And in the area of freedom of speech, we might jointly consider the *Debs*¹¹² and *Brandenburg*¹¹³ subversive advocacy cases. Any drafted constitution and its associated case law are, realistically, inseparable. This will be true even where case law addresses vague provisions or

¹⁰¹ See *supra* notes 62–77 and accompanying text.

¹⁰² 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁰³ 347 U.S. 483 (1954).

¹⁰⁴ 298 U.S. 238 (1936).

¹⁰⁵ *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937).

¹⁰⁶ *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955).

¹⁰⁷ 300 U.S. 379 (1937).

¹⁰⁸ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰⁹ 539 U.S. 558 (2003) (*overruling Bowers*).

¹¹⁰ 406 U.S. 205 (1972).

¹¹¹ *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (seeking to distinguish *Yoder*).

¹¹² *Debs v. United States*, 249 U.S. 211 (1919).

¹¹³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (radically expanding the limited First Amendment rights accorded in *Debs*).

makes a “dead letter” of some particular constitutional provision, thereby establishing or changing the realistic meaning of the constitution itself.

In some or all of these cases, the Supreme Court may have failed to justify the outcome through the use of what is called Rawlsian “public reason.”¹¹⁴ But if so, this would not rescue the Rawlsian supposed functional distinction between the constitution itself and the courts. It is difficult to imagine all of the great issues of the day being candidly and meaningfully judicially addressed, let alone justly resolved, without even implicit judicial reliance on metaphysical views that are not universally shared among reasonable persons. Nor is it easy to imagine an adopted constitutional text with no implied reliance on metaphysics unshared among reasonable persons. But even a constitution and a series of constitutional adjudications in strict accordance with shared metaphysical views, held on identical grounds, would inevitably merge in ways sufficient to render unrealistic the idea of different Rawlsian constructivist standards for a constitutional stage and a constitutional adjudication stage.

E. The Crucial Problem of Constructed Constitutional Stability and the Role of Broad Basic Virtues

A fourth, and for our purposes most important, problem focuses on whether Rawls’ constitutional constructivism in particular has the resources to sustain itself in practice over a substantial period of time. Our focus here is not on the destabilizing possibility of some external threat, natural disaster, or on uncompromising political or religious extremists, but on ordinary constitutional and related governmental processes and outcomes. We refer here to matters such as constitutional regime performance, regime legitimacy, regime authority, and public trust over the course of time, as such matters in practice might play out. Briefly put, this is a problem of constitutional constructivist regime stability over time. To loosely paraphrase Rousseau, we shall, for purposes of investigating regime

¹¹⁴ For our purposes, “public reason” would exclude political outcomes justified only through some comprehensive metaphysical, religious, or other such perspectives not generally shared by, or agreed with on any grounds by, the conscientious citizenry. For broad discussion, see RAWLS, POLITICAL LIBERALISM, *supra* note 61, at Part II, Lecture VI & Part IV. In the specific context of Supreme Court adjudication, see *id.* at 231–40. See also RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at § 26; John Rawls, *Justice as Fairness: Political, Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 223 (1985), available at <http://philosophyfaculty.ucsd.edu/faculty/rarneson/Philosophy%20167/Rawlsjusticeasfairness.pdf/> (“[I]n a constitutional democracy the public conception of justice should be, so far as possible, independent of controversial philosophical and religious doctrines.”).

stability, rather largely take persons as they are, and the laws as Rawls would have them.¹¹⁵

The temptation for the constitutional constructivist, especially given the underlying Rawlsian vision of justice as fairness, is to assume that constitutional and regime legitimacy, authority, public trust, and stability should follow readily from the constructed justice of the system, at least if the citizenry displays a sufficient commitment to public reasonableness, and a certain measure of Rawlsian civic virtue.¹¹⁶

The basic problem, though, is that over the long term, the stability of any form of constructivist constitutionalism is likely to depend, parasitically, on a largely unacknowledged, deeper, and more extensive role for a number of inescapably vital and familiar broad basic virtues, whose status as broad virtues is far more “real” and deeply objective than merely consensual or constructed.

This concern does not depend upon any unusual definitions of a regime or constitutional legitimacy, authority, public trust, or stability.¹¹⁷ Any standard definitions will suffice. Almost at random, we could say that legitimacy involves “the widespread public belief that the society’s governing institutions and political authorities are worthy of support,”¹¹⁸ in ways arguably bearing on broad political

¹¹⁵ See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 49 (Maurice Cranston trans., 1968) (1762). Rawls adopts a rather similar approach, in another context, in JOHN RAWLS, *THE LAW OF PEOPLES* 7 (2001).

¹¹⁶ See, e.g., RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 62, at 116–18 (referring to “a spirit of compromise and a readiness to meet others halfway”); RAWLS, *POLITICAL LIBERALISM*, *supra* note 61, at 194 (“[J]ustice as fairness includes an account of certain political virtues—virtues of fair social cooperation such as the virtues of civility and tolerance, of reasonableness and the sense of fairness.”).

¹¹⁷ For brief overviews of the ideas of political legitimacy and of political authority respectively, see Fabienne Peter, *Political Legitimacy*, STAN. ENCYCLOPEDIA PHIL. (Apr. 29, 2010), available at <http://plato.stanford.edu/entries/legitimacy/> (distinguishing between procedural and substantive or outcome-focused elements of legitimacy), and Tom Christiano, *Authority*, STAN. ENCYCLOPEDIA PHIL. (rev. ed., Jan. 11, 2012), available at <http://plato.stanford.edu/entries/authority/>. For the classic discussion of forms of authority and legitimacy, see MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 130, 325 (A.M. Henderson & Talcott Parsons trans., 1947); see also LESLIE GREEN, *THE AUTHORITY OF THE STATE* 1 (1990) (explaining Weber’s view that a widespread belief in a regime’s legitimacy tends to enhance regime effectiveness and stability). On some relevant conceptions of (public) trust, see FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1996) (explaining the cultural and economic productivity effects of social trust and its role as social capital).

¹¹⁸ Bert Useem & Michael Useem, *Governmental Legitimacy and Political Stability*, 57 *SOCIAL FORCES* 840, 840 (1979).

stability.¹¹⁹ In a basic sociological sense, the current United States Constitution in particular “is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience. . . .”¹²⁰ And even in this sociological sense, “there can be no doubt that legitimacy is a vital thing to have, and illegitimacy a condition devoutly to be avoided.”¹²¹

For our purposes, we can simply assume that a form of Rawlsian constructivism, at the constitutional and other levels,¹²² has somehow been duly adopted with the broad initial approval of the public, whatever their personal philosophical or religious views might be. No regime, of course, is guaranteed high and continuing levels of general endorsement or broad confidence. Constitutional and other governmental legitimacy,¹²³ general public optimism about the future,¹²⁴ and social and intergenerational¹²⁵ trust¹²⁶ cannot be taken for granted, for example, by elected governments under current conditions.

¹¹⁹ *See id.*

¹²⁰ Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005).

¹²¹ Robert W. Tucker & David C. Hendrickson, *The Sources of American Legitimacy*, 83 FOREIGN AFF. 18, 18 (2004); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 62 (2006) (“Citizens who view legal authority as legitimate are generally more likely to obey the law.”).

¹²² *See supra* notes 62–69 and accompanying text.

¹²³ *See, e.g.*, DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 315 (20th anniv. ed. 1996) (referring to a “loss of *civitas*, which makes respect for the law possible”).

¹²⁴ *See*, for example, the widespread sense that the nation is headed “off on the wrong track” as opposed to “the right direction,” with at best limited public confidence levels in most major institutions, including the Supreme Court. HART RESEARCH ASSOCIATES/PUBLIC OPINION STRATEGIES, STUDY #15028, at 2 (Jan. 14–17, 2015), <http://online.wsj.com/public/resources/documents/WSJNBCpoll01192014.pdf>.

¹²⁵ *See, e.g.*, BELL, *supra* note 123, at 318 (“Every generation of Americans had expected that they would build a better life for their children than they themselves had. This may no longer be the case.”); Chris Cilizza, *Is the American Dream Dead?*, WASH. POST, June 5, 2014, available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/05/is-the-american-dream-dead/> (the majority, believing that the next generation will not be as well off as the previous generation, reduced public confidence in the Supreme Court and other institutions); David Davenport, *Honey, I Shrank the Deficit (But Grew the National Debt)*, FORBES.COM (Apr. 20, 2014), available at <http://forbes.com/sites/daviddavenport/2014/04/24/honey-i-shrank-the-deficit-but-grew-the-national-debt-2/>; Philip Klein, *Trustees Say Long-Run Medicare, Social Security Deficit Is \$66 Trillion*, WASH. EXAMINER (May 31, 2013), available at <http://washingtonexaminer.com/trustees-say-long-run-medicare-social-security-deficit-is-66-trillion/article/2530908/>; Rick Lyman & Mary Williams Walsh, *Public Pension Tabs Multiply as States Defer Costs and Hard Choices*, N.Y. TIMES (Feb. 24, 2014), available at http://www.nytimes.com/2014/02/25/us/efforts-to-rein-in-public-sector-pension-costs-are-falling-short-experts-say.html?_r=0/ (noting the widespread and resilient tendency to defer costs of pension underfunding to the future).

The main concern is not that a Rawlsian constitutional or broadly political constructivism would inherit any preexisting public pessimism, or either generalized or specifically intergenerational distrust. We can assume that Rawlsian constructivism, in practice, could inherit a clean slate, indeed universal popularity, in every respect. Our focus is instead on whether a Rawlsian constitutional constructivist regime would likely retain its integrity, coherence, and the assumed initial public support, in reasonably stable fashion, in the long term.

Rawls recognizes that even if we metaphorically assume away any citizens who fundamentally reject the most basic assumptions of Rawlsian justice, the principles of justice are not automatically self-implementing or self-sustaining over time. Rawls appreciates that a constitutionally and otherwise just and stable society requires certain sorts of public or civic virtue among public officials and the citizenry. Thus there must be “a spirit of compromise and a readiness to meet others halfway.”¹²⁷ Rawls also emphasizes “the virtues of fair social cooperation such as the virtues of civility and tolerance, of reasonableness and the sense of fairness.”¹²⁸ Each comprehensive or metaphysically-motivated philosophical or religious group may emphasize particular virtues,¹²⁹ and various associations, organizations, and groups may also emphasize particular virtues,¹³⁰ but beyond the above “officially endorsed” Rawlsian civic virtues focusing on cooperative mutual tolerance¹³¹ and mutual civic trust,¹³² the risk looms, according to Rawls, of

¹²⁶ See, e.g., BELL, *supra* note 123, at 315 (referring to “a rising distrust of politics—and even of the political system”); PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 1–17 (2014) (on various dimensions of diminishing public trust in federal government); ROBERT NISBET, TWILIGHT OF AUTHORITY 2–16 (1975) (arguing to similar effect); JAMES S. SCOTT, SEEING LIKE A STATE 351 (1989) (noting the importance of levels of social and interpersonal bonds of trust, apart from legally enforceable contracts); *Trust in Institutions and the Political Process*, HARV. UNIV. INST. POLS. (Apr. 29, 2014), available at <http://www.iop.harvard.edu/trust> (“[C]ompared to one year ago, the level of trust that young Americans between 18 and 29 years old have in most American institutions tested in our survey has dissipated compared even to last year’s historically low numbers.”).

¹²⁷ RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at 116–18. Rawls would seem to implicitly require us to display the virtue of practical wisdom in deciding who is and who is not to be met “halfway” or even part of the way, or fully accommodated, on which issues, and in deciding what constitutes “halfway,” statically or over time. It is important that such decisions not be impaired by unnecessarily poor judgment or by the vice of public cowardice.

¹²⁸ RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 194; see also *id.* at 195 n.29 (referring to the political or civic virtues as necessary for “a just and stable constitutional regime”).

¹²⁹ See *id.* at 195.

¹³⁰ See *id.*

¹³¹ See *id.*

establishing what is called a “perfectionist”¹³³ state, in which some particular controversial view or views of a life well-lived is imposed on the citizenry.¹³⁴

Rawls thus seeks what he takes to be a middle ground between two extremes: a just society that refuses to sustain itself even by socializing the citizenry to its own most basic principles¹³⁵ and that ignores the potential for the principles of justice to themselves further promote the sustaining civic virtues,¹³⁶ and, at the other extreme, a society that risks illiberal “perfectionism” by building certain more or less controversial purported virtues into the governmental basic structure.¹³⁷

The crucial question is thus whether Rawls’ “thin” conception of, and corresponding role for, his civic virtues sufficiently promotes the long-term stability of the constitutionally and otherwise just society. Rawls sees the basic principles of justice, and a proper socialization to the “thin” civic virtues above, as mutually supportive.¹³⁸ And he again seeks to avoid an otherwise just society that builds controversial “thicker” conceptions of virtue—perhaps like that of the martialized honor-based Sparta of Socrates’ time¹³⁹—into its governing structure. All else equal, though, is this really a sufficient role for virtues and virtue-thinking in a stable, just society?

There is good reason to suspect not. And this is a central problem not only for Rawlsian constitutional constructivism, but for any constitutional constructivism that seeks as far as possible to set moral realism aside.¹⁴⁰ Over the long term, the “thin” civic virtues referred to by Rawls, even if widely inculcated, are not enough for the reasonable stability of a just society. The Rawlsian just constitution, in particular, would instead require the widespread, active support of a range of

¹³² See *id.*; RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at 117.

¹³³ RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 195.

¹³⁴ See *id.*

¹³⁵ See RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at 124–25.

¹³⁶ See *id.* at 126.

¹³⁷ See RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 195.

¹³⁸ See *supra* note 137 and accompanying text.

¹³⁹ See PLATO, THE REPUBLIC 265–73 (Francis M. Cornford trans., 1967) (c. 370 B.C.E.) (Socrates discussing the character of the person, and the corresponding character of the society, dominated for a time by a conception of honor (timocracy)).

¹⁴⁰ See *supra* notes 1, 42–48 and accompanying text.

familiar basic virtues that rely upon just the sort of moral realism that constitutional constructivism seeks to set aside or bypass.¹⁴¹

The moral realism and deep moral objectivity of the basic virtues that constructivism disastrously underplays requires brief further discussion below.¹⁴² But first, let us consider how the very process of recognizing and applying the “thin” Rawlsian civic virtues itself actually depends, in unacknowledged ways, on more deeply moral objective underlying basic virtues.

Consider, for example, the Rawlsian civic virtues of a willingness, where justice itself is not put at risk, to compromise,¹⁴³ to meet others halfway,¹⁴⁴ or to display tolerance.¹⁴⁵ We will here simply assume these qualities to be virtues, in their proper place and proper measure. But once we make this concession, the deeper problem then comes into view: Knowing when and how, or how far, to carry these thin Rawlsian civic virtues inescapably requires other, more deeply objective virtues that unavoidably carry us back into moral realism. The proper role and implementation of the Rawlsian civic virtues in actual practice will not be self-evident, especially where claims to arguable constitutional rights come into conflict, or where the scope of constitutional rights is far from clear.¹⁴⁶ There may well be some role for merely constructed principles in deciding such inherently inexact matters. But the crucial role in deciding all such matters must be played by classic broad objective virtues, including, in particular, the classic general virtue of practical wisdom.¹⁴⁷ And the crucial role of practical wisdom or broad prudence not

¹⁴¹ See *supra* notes 1, 42–48.

¹⁴² See *infra* notes 158–62.

¹⁴³ See *supra* notes 117, 128 and accompanying text.

¹⁴⁴ See *supra* notes 117, 128 and accompanying text.

¹⁴⁵ See *supra* notes 117, 129 and accompanying text.

¹⁴⁶ See, for example, the arguments on protection of religious and secular conscience in RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* (Jane Marie Todd trans., 2011); Michael J. Perry, *Freedom of Conscience as Religious and Moral Freedom*, 29 *J.L. & RELIG.* 124 (2014).

¹⁴⁷ See, for background, the discussion of practical wisdom, or phronesis, in PLATO, *supra* note 139, at 121–22 (wisdom as a key virtue of, not coincidentally, both individual persons and the city-state itself); ARISTOTLE, *THE NICOMACHEAN ETHICS* bk. V1, at 150–51 (J.A.K. Thomson trans., rev. ed. 2004) (c. 350 B.C.E.) (practical wisdom, preserved by the virtue of temperance, as allowing insight into what is good for the city-state); RAYMOND J. DEVETTERE, *INTRODUCTION TO VIRTUE ETHICS: INSIGHTS OF THE ANCIENT GREEKS* 122 (2002) (prudence as the crucial virtue for sound legislation and public rule-making); JOSEPH PIEPER, *THE FOUR CARDINAL VIRTUES* xii, 32 (Richard & Clara Winston trans., 1966)

surprisingly extends beyond constitution drafters and legislators to the courts and judges.¹⁴⁸

Constructed rules or principles and the thin Rawlsian civic virtues commonly do not interpret and apply themselves. Instead, politicians, constitutional judges,¹⁴⁹ and administrative officials are all subject to the truth that “[o]ccasion by occasion, one knows what to do, if one does, not by applying universal principles, but by being a certain kind of person: one who sees situations in a certain distinctive way.”¹⁵⁰ More controversially, it has even been urged in particular that “the bourgeois virtues . . . have been the causes . . . of modern economic growth and of modern political freedom.”¹⁵¹

Suppose, though, that constructivists—who again typically set aside questions of moral realism¹⁵²—could be persuaded to expand the role, at the constitutional and other levels, of the various basic classic virtues. After all, Rawls himself

(1959); ROBERT C. ROBERTS & W. JAY WOOD, *INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY* 306 (2009) (the virtue of practical wisdom as necessary in order to translate abstract general principles into well-tailored responses to particular circumstances and contexts); Philip Bricker, *Prudence*, 77 *J. PHIL.* 381 (1980); H.J.N. Horsburgh, *Prudence*, 36 *PROC. ARISTOTELIAN SOC'Y* 51, 66 (Supp. vol. 1962); Richard Kraut, *The Rationality of Prudence*, 81 *PHIL. REV.* 351, 351 (1972); Nathan Rotenstreich, *Prudence and Folly*, 22 *AM. PHIL. Q.* 93, 93 (1985). For a useful mainstream definition of virtue in general, see MARK TIMMONS, *MORAL THEORY: AN INTRODUCTION* 270 (2d ed. 2013).

¹⁴⁸ See in particular the discussion by Yale Law School Dean Anthony Kronman of the widely respected Professor Alexander Bickel: “It was Bickel’s view that prudence is an indispensable condition for success in the activities of both the politician and the judge; indeed, Bickel believed prudence to be the defining excellence of their respective crafts.” Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 *YALE L.J.* 1567, 1569 (1985). For further perspective on the role of the virtue of prudence in the constitutional process, see Edward F. McClennen, *Prudence and Constitutional Rights*, 63 *AM. J. ECON. & SOC.* 213 (2004).

¹⁴⁹ For discussion of the role of classic virtues in constitutional adjudication, regardless of the text of the Constitution, see R. George Wright, *Constitutional Cases and the Four Cardinal Virtues*, 60 *CLEV. ST. L. REV.* 195 (2012) [hereinafter Wright, *Constitutional Cases*].

¹⁵⁰ Roger Crisp, *Particularizing Particularism*, in *MORAL PARTICULARISM* 23, 23 (Brad Hooker & Margaret Little eds., 2003) (quoting John McDowell, *Virtue and Reason*, in *VIRTUE ETHICS* 141, 162 (Roger Crisp & Michael Slote eds., 1997)); see also JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* ch. 1 (2004); David Bakhurst, *Ethical Particularism in Context*, in *MORAL PARTICULARISM* 157 (Brad Hooker & Margaret Little eds., 2003); R. George Wright, *Dreams and Formulas: The Roles of Particularism and Principlism in the Law*, 37 *HOFSTRA L. REV.* 195 (2008).

¹⁵¹ DEIDRE N. MCCLOSKEY, *THE BOURGEOISE VIRTUES: ETHICS FOR AN AGE OF COMMERCE* 22 (2007).

¹⁵² See *supra* notes 1, 42–50 and accompanying text.

focuses on justice,¹⁵³ and justice in one sense is actually among the classic personal virtues.¹⁵⁴ Let us notice, though, the monumental difference between, say, Rawls' two basic rules or principles of justice,¹⁵⁵ and the classic virtue-based account of justice as, instead, a personal disposition to accord to every other person neither more nor less than what is due to that person.¹⁵⁶

But let us now suppose that Rawlsian constitutional constructivism were modified in such a way as to provide a more substantial role for one or more of the classic basic virtues, as appropriately broadly defined. What would then be the cost of doing so, in specifically constructivist terms?

Importantly, it would then become very difficult for the constitutional constructivist to continue to claim to be largely declining to take sides on questions of moral realism and non-realism.¹⁵⁷ In the sense in which we intend them, broad virtues¹⁵⁸ such as prudence or practical wisdom, fortitude, temperance as a reasonable degree of self-restraint over time, and justice as defined above¹⁵⁹ seem more recognizable than merely invented, and thus understood best in terms of moral realism. It may well be that one or more of even the "thin" Rawlsian civic virtues¹⁶⁰ should also best be thought of in moral realist, non-constructed terms.

The main point is instead that classic virtues such as, say, fortitude or practical wisdom at basic levels seem most naturally understood on some inescapably moral realist approach. Any society could, technically, choose to define fortitude, as a supposed virtue, in terms of panicking before any obstacle, or as denying the reality of any obstacle, or in any other obviously self-defeating way. Practical wisdom could similarly be defined in terms of adopting popular but self-

¹⁵³ See much of the overall Rawlsian normative work, beginning with JOHN RAWLS, *A THEORY OF JUSTICE* (1972).

¹⁵⁴ See, e.g., ARISTOTLE, *THE NICOMACHEAN ETHICS* (David Ross trans., 1925) (J.L. Ackrill & J.O. Urmson rev. trans., 1980) (c. 350 B.C.E.); PLATO, *THE REPUBLIC* (Francis M. Cornford trans., 1967) (c. 370 B.C.E.).

¹⁵⁵ See *supra* text accompanying note 76.

¹⁵⁶ See, e.g., sources cited *supra* note 155.

¹⁵⁷ See *supra* notes 1, 42–50 and accompanying text, and notes 37, 40 and their accompanying text (discussing forms of moral non-realism).

¹⁵⁸ See *supra* notes 148–50 and accompanying text.

¹⁵⁹ See *supra* notes 155, 157 and accompanying text.

¹⁶⁰ See *supra* text accompanying notes 128–29.

destructive illusion, or as a purely arbitrary conventional notion, or in terms almost entirely of emotion or attitudes rather than belief, or even in terms of beliefs inescapably relying on obvious fiction.¹⁶¹

And there is obviously some role for cultural variation, at some level, in the concrete meanings of the virtues. But when the chips are down, we think of the basic virtues as more or less genuinely recognizable, given our nature, our basic aims, our basic capacities and vulnerabilities, and our basic circumstances, rather than as largely subjective or ultimately arbitrary. They are recognized, far more than invented, at a broad level, even though they relativistically vary across different cultures.

Moral realism regarding basic virtues is thus much more difficult to set aside than constructivists typically assume. But do constructivists, including Rawls, really sacrifice much, particularly in terms of the stability of the constitutionally just society, by downplaying the role of various classic, objective basic virtues? Practical wisdom, for example, inescapably does seem to be among the virtues to be valued in a just government official, as well as in the citizenry. But let us focus, more narrowly, as a specific test, on merely one important and long-standing element of Rawlsian justice, the question of a just saving rate across generations.¹⁶²

The Rawlsian principle of a just saving rate unavoidably has significant equal protection and other constitutional implications.¹⁶³ On Rawls' theory, the initial choosers are to select a principle establishing a rate of real societal saving, for the sake of justice, but without those choosers knowing their own historical position, and thus without an incentive to free-ride or to exploit earlier or later generations unjustly.¹⁶⁴ What is chosen is not a particular numerical saving rate, applicable for all relevant generations, forward and backward in time, but a broader principle to determine a just saving rate under relevant circumstances.¹⁶⁵

¹⁶¹ See some possible lines of development suggested, loosely, by the sources cited *supra* note 40.

¹⁶² See, e.g., RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 274; RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at 159–61. For a recent broader treatment of various related issues, see INTERGENERATIONAL JUSTICE (Axel Grosserries & Lucas Meyer eds., 2009).

¹⁶³ For background, see Wright, *Constitutional Cases*, *supra* note 149, at 207–09.

¹⁶⁴ See RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at 159–60.

¹⁶⁵ Thus Rawls indicates that,

[t]he correct principle . . . is one the members of any generation (and so all generations) would adopt as the principle they would want preceding

A just saving rate itself is thus, as the term suggests, a matter of a just principle, as then applied under variant historical and economic circumstances. The rate itself may thus vary across generations. As Rawls expresses the point, “[r]eal saving is required only for reasons of justice: that is, to make possible the conditions needed to establish and to preserve a just basic structure over time.”¹⁶⁶ The aim is thus at justice, rather than at even modest economic development beyond or independent of justice,¹⁶⁷ whatever additional savings a society may choose for other reasons.¹⁶⁸

Thus on Rawls’ approach, once just institutions have been established, and provision has been made for financially sustaining those just institutions, “net real savings may fall to zero.”¹⁶⁹ Rawls explicitly notes in particular that “[w]e do not want to rule out Mill’s idea of a society in a just stationary state where (real) capital accumulation may cease.”¹⁷⁰

We have no serious objection here to Rawls’ just saving doctrine itself, or to anything like it.¹⁷¹ The problem is instead that the just saving doctrine, like every other Rawlsian principle, must be rendered concrete, refined, implemented, and administered at all relevant stages and levels, under circumstances of inevitable complexity, temptation to subconscious bias, and uncertainty. Under just such

generations to have followed, no matter how far back in time. Since no generation knows its place among the generations, this implies that all later generations, including the present one, are to follow it.

Id. at 160.

¹⁶⁶ *Id.* at 159.

¹⁶⁷ *See id.*

¹⁶⁸ *See id.* Imagine, for example, a society on the verge of a unique technological breakthrough, or of some preventable catastrophe.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Someone who thinks of either personal or civilizational development as linked to justice could endorse a saving principle oriented more toward genuine, humane, egalitarian, environmentally-friendly growth, perhaps to enhance the options for genuine self-realization for a greater number of persons, without exploiting those persons who find themselves in an early generation. The idea of saving on behalf of future generations can be seen as a vital opportunity, deeply fulfilling in itself, rather than as a burden to be borne. For some complications, however, see Andrew Caplin & John Leahy, *The Social Discount Rate* (Jan. 2004), available at <http://www.econ.nyu.edu/user/caplina/sdr.pdf>.

circumstances, the role of the largely objective basic virtues, beyond those thin civic virtues emphasized by Rawls,¹⁷² becomes especially important.

The adoption and complex implementation of a just saving rate for the sake of future generations will often require not only the thin Rawlsian civic virtues, but substantial measures of what we might call Aristotelian or simply classic practical wisdom,¹⁷³ along with the classic virtue of temperance, in the broad sense of a sustained disposition to exercise a reasonable degree of self-restraint, individually and collectively.¹⁷⁴

The heart of the practical problem is this: we can genuinely agree on a particular saving rate for the future, but then more or less innocently adopt systematically biased implementing policies and technical calculations¹⁷⁵ that make the actual achievement of anything like the targeted saving rate highly unlikely.¹⁷⁶ The Rawlsian thin civic virtues, against the likely background socialization, thus cannot carry an agreed saving rate into actual practice with any real assurance.¹⁷⁷

¹⁷² See *supra* notes 128–29 and accompanying text. Of course, citizens in their private capacities may hold “comprehensive” views on virtues and vices ranging from various forms of nihilism and self-indulgence, to a focus on intermediary groups, to personal altruism, to substantial collective sacrifice on behalf of future generations. For discussion, see RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at 186–87.

¹⁷³ See sources cited *supra* note 148.

¹⁷⁴ See generally ARISTOTLE, *supra* note 147; DANIEL AKST, WE HAVE MET THE ENEMY: SELF-CONTROL IN AN AGE OF EXCESS (2011); JEAN M. TWENGE & W. KEITH CAMPBELL, THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT (2009); Charles M. Young, *Aristotle on Temperance*, 97 PHIL. REV. 521 (1988). The basic Rawlsian choice situation assumes heads of continuing, multi-generational families, rather than isolated individuals, but concern for one’s own possible offspring hardly translates into a concern for future generational cohorts in general. See JOHN RAWLS, A THEORY OF JUSTICE §§ 33 & 44 (1972).

¹⁷⁵ Consider the assumptions as to likely future annual rates of return on investment made by managers of public retirement pension funds, or of various federal programs. But see the sources cited *infra* note 177 and *supra* notes 126–27.

¹⁷⁶ In the contemporary British context, see generally ED HOWKER & SHIV MALIK, JILTED GENERATION: HOW BRITAIN HAS BANKRUPTED ITS YOUTH (2010). In the contemporary American context, see, controversially, CARMEN M. REINHART & KENNETH ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2011); DAVID A. STOCKMAN, THE GREAT DEFORMATION (2013); NIALL FERGUSON, THE GREAT DEGENERATION (2013). Of course, each of these sources describes much behavior that is radically inconsistent even with the relatively “thin” Rawlsian civic virtues.

¹⁷⁷ For some contemporary considerations, see generally the sources cited *supra* notes 126–27, 175, 177.

We see some hints of the problem, even under clearly unjust principles and circumstances, in the important constitutional case of *Bowsher v. Synar*.¹⁷⁸ We may assume that all the key *Bowsher* participants, including the Justices, acted in good faith. In the *Bowsher* case, Congress had, largely from a responsible concern for the fiscal future, adopted an unusual self-constraining statutory¹⁷⁹ mechanism to limit its own politically motivated tendency to incur large future federal budgetary deficits and public indebtedness for the sake largely of short-term electoral benefits.¹⁸⁰

The *Bowsher* Court majority, however, interpreted the relevant statutory mechanism formalistically, viewing the fiscally self-restraining statute instead as a congressional attempt to improperly aggrandize its own authority by both legislating and then seeking also to indirectly execute its own legislation.¹⁸¹ Lacking the virtue, in this case, of practical wisdom,¹⁸² the Court majority thus prevented Congress from attempting to limit the seriously harmful long-term effects of the congressional vices of private and public budgetary intemperance, lack of fortitude, and long-term imprudence.¹⁸³

The virtues and vices that were displayed, and then judicially undermined, in the *Bowsher* constitutional case cannot plausibly be viewed as merely constructed, according to some favored procedure, with moral realism and non-realism being largely set aside. We need not suggest that our current levels of federal public indebtedness¹⁸⁴ are largely the result of the constitutional decision in *Bowsher*. That would trivialize the problem, and miss the point. Rather, the idea is that irresponsible public indebtedness is obviously tempting and easily rationalized in the moment, given the uncertainties involved. But such a policy really amounts to a

¹⁷⁸ 478 U.S. 714 (1986).

¹⁷⁹ In particular, the Gramm-Rudman-Hollings Act, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified as amended variously in U.S.C. titles 2, 31 & 42).

¹⁸⁰ See *Bowsher*, 478 U.S. at 717–18; R. George Wright, *The Modern Separation of Powers: Would James Madison Have Untied Ulysses?*, 18 CUMB. L. REV. 69 (1987).

¹⁸¹ See *Bowsher*, 478 U.S. at 732, 734.

¹⁸² *But cf. id.* at 759 (White, J., dissenting) (displaying a more realistic, less formalistic understanding of the broader case circumstances).

¹⁸³ For discussion, see generally Wright, *Constitutional Cases*, *supra* note 149, at 207–09.

¹⁸⁴ See, e.g., the authorities cited *supra* note 126. For the current federal debt level apart from the Social Security and Medicare, etc., programs, <http://www.usdebtclock.org> (providing various real time numbers) (last visited June 10, 2014).

negative saving rate, with the benefits largely accruing to current generations, and the costs borne largely by future generations.

Someone might say that “indebtedness” is merely a social construct, just as money and credit themselves are social constructs.¹⁸⁵ But the major consequences of such social constructs are nonetheless robustly real and deeply objective. The virtues and vices that discourage or encourage the creation of such social constructs are similarly morally real in their nature and status, and not merely invented, arbitrarily or emotionally chosen, or basically different for each culture.

Now, it seems highly unlikely that routinely running up enormous—realistically, not genuinely and fully repayable—public debt in the absence of any genuine emergency could meet Rawlsian requirements for a fair saving rate¹⁸⁶ with regard to the most directly affected future generations. The point is certainly not that Rawlsian constitutional constructivism would on its own explicit theory endorse the fiscal and budgeting policies irresponsibly adopted in practice over the past generation or two.

Instead, the point is that adopting and implementing a just saving rate inevitably involves many systematic unconscious biases and exploitable uncertainties that must be responded to, at the constitutional and other levels, with or without practical wisdom and other genuine, unconstructed virtues.¹⁸⁷ These are genuine, objective virtues upon which Rawls cannot meaningfully rely without abandoning his constitutional constructivism.¹⁸⁸ But if such virtues were properly manifested, they might discipline our conscious or sub-conscious temptations, at all levels, to self-indulgence in implementing a just saving rate. And, even more importantly, a parallel story could be told about nearly every other constitutionally relevant feature of Rawlsian justice, including inequalities of opportunity, or

¹⁸⁵ See SEARLE, *supra* note 1.

¹⁸⁶ See *supra* notes 163–71 and accompanying text.

¹⁸⁷ We need take no position on how practical wisdom may be related to any of the other genuine, deeply objective, basically unconstructed virtues.

¹⁸⁸ Rawls does presume what he refers to as the “moral power” to devise, apply, and comply with the basic principles of justice. See, e.g., RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 103, 315–16. But Rawls clearly does not intend to thereby casually wave away problems of implementation and stability. See *id.* at 140–44.

inequalities of access to the Rawlsian basic goods.¹⁸⁹ Real and stable just results require real, non-constructed basic virtues.

In the end, Rawls' account of the stability of a just society unfortunately relies largely on his thin civic virtues, and on the assumed socializing effects of growing up and living one's life under a regime of just rules, principles, and institutions.¹⁹⁰ It is certainly fair to imagine that living much of one's life under a regime that meets Rawls' criteria for justice would indeed tend to "normalize" and win allegiance toward¹⁹¹ such a regime. But Rawls offers us no reason why familiar subconscious biases, cognitive and emotional,¹⁹² in favor of those we most closely identify with would not be systematically manifested even in good faith attempts to stably implement Rawlsian justice. The basic virtues, morally real at their fundamental level, would have to play some stabilizing role.

What we might call the Rawlsian "transitional problem" is this: there will inevitably be a distinct need for the morally real virtue of practical wisdom, along with allied real virtues, during the extended process of historically transitioning from an unjust to a stable just society in the first place. And there are crucial limits to any society's ability, in such a context, to culturally redefine or revalue what counts as practical wisdom, or its lack. During any such transition from an unjust to a just society, and to the latter's stability, the existing socialization processes and allegiances may hinder as much as help. Especially throughout this transitional period, as policy implementation options and uncertainties are initially confronted at every level, reliance on the classic, fundamentally non-constructed virtues will be indispensable for Rawlsian constitutional regime stability.¹⁹³

¹⁸⁹ See, e.g., RAWLS, JUSTICE AS FAIRNESS, *supra* note 62, at §§ 13, 17, 19. For critique of these elements of Rawlsian justice, beyond their constructivist features, see, for example, G.A. COHEN, RESCUING JUSTICE AND EQUALITY (2009); BRIAN FELTHAM JUSTICE, EQUALITY AND CONSTRUCTIVISM (2009); see also R. George Wright, *The High Cost of Rawls's Inegalitarianism*, 30 WESTERN POL. Q. 73 (1977). For a broader response, with some attention to Rawls' downplaying of metaphysics, see Jean Hampton, *Should Political Philosophy be Done Without Metaphysics?*, 99 ETHICS 791 (1989).

¹⁹⁰ See, e.g., RAWLS, POLITICAL LIBERALISM, *supra* note 61, at 142.

¹⁹¹ See *id.*

¹⁹² See, for example, the deeply humane and practically wise DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2013); GERD GIGERENZER, GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS (2008); THOMAS GILOVICH, DALE GRIFFIN & DANIEL KAHNEMAN, HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (2002).

¹⁹³ For a broad, treasury-like background, see CHRISTOPHER PETERSON & MARTIN SELIGMAN, CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION (2004); and see the leading ethical classicist T.H. IRWIN, ARISTOTLE'S FIRST PRINCIPLES 460 (1988) ("Aristotle recommends the

V. CONCLUSION: CONSTITUTIONAL CONSTRUCTIVISM AS REALISTICALLY UNSUSTAINABLE

In light of the dominance, complexity, and sophistication of John Rawls' path-breaking work over a period of decades, a negative verdict on his leading version constitutional constructivism should not be lightly reached. Still, Rawlsian constitutional constructivism should not be immune from the kinds of critique Rawls' overall theory continues to undergo.

We have particularly emphasized the important but unacknowledged role of deeply real, and not merely thin or constructed, virtues in implementing, nurturing, and stabilizing a just Rawlsian regime over time. The problem for constitutional constructivism would persist even if no one held an extremist, intolerant, or illiberal comprehensive view of politics, morality, or religion.

The importance of the genuine, basically unconstructed classic virtues in sustaining a Rawlsian just society begins with common sense observations. Consider, for example, the observations of a well-respected virtue-oriented theorist, Professor Michael Slote, who analogizes "the laws, customs, and institutions of a given society"¹⁹⁴ to the less enduring actions of a particular person, where both sorts of actions reflect motivations¹⁹⁵ with one combination or another of virtues and vices.¹⁹⁶ Laws and institutions, including those of Rawlsian constructivism, reflect not merely thin civic virtues and knowledge, or the lack thereof, but basic and real virtues, or, unfortunately, the lack thereof.¹⁹⁷

Professor Slote then argues that "[w]here the writing and implementation of a constitution . . . is motivated by greed or indifference to others, the constitution is not a just one."¹⁹⁸ Thus for Professor Slote, "the justice of a given society cannot

virtues as sources of *stability* and of other benefits for a state") (emphasis added). For a mere introduction to some relations among virtues, institutional instability, and crucial unrecognized collective action problems, see Garrett Hardin, *Tragedy of the Commons*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (June 26, 2014), <http://www.econlib.org/library/Enc>.

¹⁹⁴ MICHAEL SLOTE, MORALS FROM MOTIVES 99 (2001).

¹⁹⁵ *See id.*

¹⁹⁶ *See id.* at 99–100.

¹⁹⁷ *See id.* at 99–101; *see also* WERNER JAEGER, PAIDEIA: THE IDEALS OF GREEK CULTURE: IN SEARCH OF THE DIVINE CENTRE 323 (Gilbert Highet trans., 1986) (1943) ("We speak of the 'spirit of the constitution' . . . but the spirit has been created and given its special character by the type of [persons] who have made the state that suits them.").

¹⁹⁸ SLOTE, *supra* note 194, at 101.

simply be ‘read off’ from the way institutions (or laws) are at a given time. . . .”¹⁹⁹
A deeper examination is required.

Rawls’ constitutional constructivism, as we have seen,²⁰⁰ clearly does not entirely ignore the role of certain limited virtues, whether this is in the end really consistent with a thorough constructivism²⁰¹ or not. And we do not claim that any set of genuine, basically unconstructed virtues is somehow more important for constitutional and other dimensions of justice than are principles of justice, or the assumptions underlying those principles.²⁰²

Instead, the argument herein has held that a thorough constitutional constructivism, after the fashion of Rawls’ or any related version inevitably undervalues the role of genuine, morally real, unconstructed basic virtues in promoting and realistically sustaining the establishment of a just constitution and a just society.

¹⁹⁹ *Id.* at 109.

²⁰⁰ See, e.g., *supra* notes 128–29 and accompanying text.

²⁰¹ We have largely taken Rawls’ constitutional constructivism on its own terms and have asked whether that constructivism is actually parasitic, in practice, on real or basically non-constructed classic virtues, even if all citizens are reasonable Rawlsian liberals. We have largely set aside the further question of whether the civic virtues and the moral socialization on which Rawls explicitly relies are actually best understood in morally realist terms. *But see supra* notes 144–48, 161 and accompanying text. For background, see, for example, RAWLS, POLITICAL LIBERALISM, *supra* note 61, at Lecture III: Political Constructivism. Of course, if Rawls’ own theory implicitly embodies substantial elements of moral realism or deep moral objectivity, constitutional constructivism is in even more serious trouble as a coherent approach.

²⁰² Many mainstream writers on constitutional, political, and moral theory obviously choose not to make virtues and vices central to their approach; it would thus hardly be helpful merely to accuse Rawls of unduly emphasizing rules or principles rather than virtues in general. For an interesting general comparison of broad moral approaches, see generally MARCIA W. BARON, PHILIP PETIT & MICHAEL SLOTE, THREE METHODS OF ETHICS: A DEBATE (1997).