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## Cosmopolitanism and Constitutional Self-Government

Vlad Perju\*

### §1. Introduction

Speaking at the University of London in the early 1930s, Frederick Pollock predicted that no law student “who aimed at being an accomplished lawyer [would] do without making himself a citizen in the province of cosmopolitan jurisprudence.”<sup>1</sup> Like most predictions about the future, this statement said more about its author than it said about the future. In reality, accomplished jurists in the decades that followed continued to show lingering misgivings about cosmopolitan jurisprudence, and especially about perceived tensions between cosmopolitanism and constitutional self-government. Even now, in the early twenty-first century, it remains a common assumption, especially among American jurists, that collective self-rule must be confined within the cloisters of a given political community. As a result, openness towards the experiences in self-government of other peoples is said to undermine political legitimacy by loosing citizens’ control over their political fate. But is it possible that such openness might in fact render that control more effective? Could it actually enhance political and constitutional legitimacy?

My aim in this paper is to articulate the jurisprudential foundations that make or should make domestic constitutionalism a welcoming host to cosmopolitan attitudes and sensibilities in law. Traces of these foundations sometimes surface in constitutional adjudication. For instance, writing in *Lawrence v. Texas* about the right of adults to engage in intimate, consensual homosexual conduct, Justice Kennedy found that “(t)he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”<sup>2</sup> But references like this one, or myriad others by courts around the world, are drastically under-theorized. Critics

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\* Assistant Professor, Boston College Law School. This paper, which is **forthcoming in the International Journal of Constitutional Law (I-CON)**, was written for the 2010 Cardozo/NYU/I-CON Colloquium in Global and Comparative Public Law Theory. The paper was selected for presentation at the 2010 Yale/Stanford Junior Faculty Forum, at Yale Law School in June 2010. I thank Jed Rubenfeld and Bruce Ackerman for comments on that occasion. I am also thankful for comments on earlier versions to Paulo Barrozo, Frank Garcia, Dan Kanstroom, Mattias Kumm, Frank Michelman, Intisar Rabb, Diane Ring, Mark Tushnet and Katie Young. Comments are welcome. Email: [perju@bc.edu](mailto:perju@bc.edu).

<sup>1</sup> Frederick Pollock, *The Lawyer as a Citizen of the World*, *Law Quarterly Rev* vol.1932, 3

<sup>2</sup> *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

have argued that these practices lack normative foundations.<sup>3</sup> At least at the descriptive level, their observations are accurate to the extent that contemporary scholarship has yet to address fundamental questions of the political philosophy of constitutional law engendered by these practices.<sup>4</sup> How does the use of foreign law, and generally the refusal to cloister forms of political life, dovetail with the liberal constitutionalist commitment to “a free community of equals”<sup>5</sup>? What conception of legitimacy does it rest upon, and how defensible is that conception under conditions of cultural fragmentation? What are the jurisprudential steps by which self-government in a free community of equals leads the constitutional mind outside the boundaries of its political community?

I argue that underlying the outward-reaching constitutional practices is a conception of cosmopolitanism that recasts domestic constitutional systems as a set of fundamental frameworks within which different dimensions of constitutional claims and values are revealed and can be explored.<sup>6</sup> This approach assumes that constitutional systems, like the human species itself, are best understood when approached as a single subject, within which difference and diversity are acknowledged but analyzed as part of the substantive unity of all constitutional

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<sup>3</sup> Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 *Ohio St. L. J.* 1283, 1327 (“This ‘everyone’s doing it’ approach to constitutional interpretation requires justification and explanation. Yet, to date, neither the Court nor the academy has offered a justification that satisfies. Until they do, it seems we are better off to abandon this particular use of foreign and international law.”). See also Ernest Young, *The Trouble with Global Constitutionalism*, 38 *Tex. Int’l L. Rev.* 527 (2003).

<sup>4</sup> Defenses of the use of foreign law fall largely into two categories. Some are narrow and deep, such as Jeremy Waldron’s conception of foreign law as the new *jus gentium*. See Jeremy Waldron, *Foreign Law and the Modern Jus Gentium*, 119 *Harv. L. Rev.* 129 (2005). See also Eric Posner and Cass Sunstein, *The Law of Other States*, 69 *Stan. L. Rev.* 131 (2006). Other defenses are wide and shallow, as in the case of Justice Breyer’s pragmatic justification. See *The relevance of foreign materials in US constitutional cases: A Conversation between Justices Antonin Scalia and Stephen Breyer*, *International Journal of Constitutional Law (I-CON)* 3(4): 519-541 (2005). I discuss both categories, and more, in Vlad Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 *Utah L. Rev.* 167

<sup>5</sup> I borrow this formulation from Joshua Cohen, *Rousseau: A Free Community of Equals* (Oxford, 2010).

<sup>6</sup> I first formulated the issue in this way in Vlad Perju, *Comparative Constitutionalism and the Making of A New World Order*, *Constellations* 12 (4): 464-486 (2005).

systems. References to the experiences in self-government of other communities in the course of constitutional adjudication and beyond are meant to unveil dimensions of humanity and constitutional meaning that, during its historical evolution, a particular legal system has shunned. Since the success of a citizen's claim may depend on courts recognizing that concealed dimension, openness to the experiences of other political communities is legitimized by the ideal of democratic self-government itself provided that such openness can be shown to be consistent with the commitment to self-rule of a constitutional democracy.<sup>7</sup> Just as one discovers through other people dimensions of one's own humanity, so deep within the normative foundations of constitutional law there lies the entire kaleidoscope of experience in self-government across world communities.

Within the cosmopolitan tradition, this approach draws on the Stoic teachings that the unity of the world, as opposed to the separate communities, is the relevant category of philosophical analysis.<sup>8</sup> The approach also shares an affinity with Kant.<sup>9</sup> Kant conceived of a confederation of independent republics as a "negative substitute" for the impossibility of a *civitas gentium* (an international state).<sup>10</sup> "If all is not to be lost,"<sup>11</sup> Kant wrote, this world confederation would create the conditions for the cosmopolitan right of the universal

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<sup>7</sup> As I will argue, my approach allows - indeed, it assumes - a diversity of constitutional traditions and differences in constitutional cultures and doctrines. As such the approach is compatible with models of constitutional tolerance. See generally Joseph Weiler, *Fundamental rights and fundamental boundaries: on the conflict of standards and values in the protection of human rights in the European legal space in The Constitution for Europe 102-129* (Cambridge, 1999); Joseph Weiler, *Why Should Europe Be a Democracy: The Corruption of Political Culture and the Principle of Constitutional Tolerance*, in F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration* (2000).

<sup>8</sup> As Seneca wrote, "we look neither to this corner nor to that, but measure the boundaries of our nation by the sun." Cited in Martha Nussbaum, *Kant and Cosmopolitanism* in James Bohman and Matthias Lutz-Bachmann, *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* 29 (MIT, 1997).

<sup>9</sup> Martha Nussbaum has traced in her work Kant's debt to Stoic cosmopolitanism. See *Kant and Cosmopolitanism*, in James Bohman and Matthias Lutz-Bachmann, *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* 25-57 (MIT Press, 1997).

<sup>10</sup> See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in Kant, *Political Writings* 93-130 (H.S. Reiss ed., 1991). For a discussion, see Otfried Höffe, *Kant's Cosmopolitan Theory of Law and Practice* 189-203 (Cambridge, 2006).

<sup>11</sup> Kant, *Perpetual Peace*, at 105.

community.<sup>12</sup> Those conditions, on whose realization depends the fate of the cosmopolitan project, refer to the institutional configuration of the independent republics. The task of articulating the cosmopolitan dimension of constitutionalism is one to be completed in great part by turning inwards to revisit the normative foundations of domestic institutional arrangements.<sup>13</sup> This paper argues that the duty of institutional responsiveness is central to the foundations of political legitimacy within the independent republics.<sup>14</sup> Mechanisms for cross-constitutional openness enhance this responsiveness within each polity between citizens and their political and social institutions.<sup>15</sup> They expand the pool of normative references and add renewed pressure for justification and reflectiveness within the constitutional system.

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<sup>12</sup> In this famous passage, Kant writes that “the people of the world have entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere. The idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity.” See Kant, *Perpetual Peace*, at 107-108.

<sup>13</sup> For an argument about the existence of an “internal connection” between domestic and cosmopolitan jurisprudence, see also Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in Jeffrey L. Dunoff and Joel P. Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* 315 (2009) (“any conception of national constitutionalism that takes as basic the idea of free and equals governing themselves is internally connected to a cosmopolitan paradigm of constitutionalism. It is ultimately not possible to make sense of the idea of constitutional self-government of free and equals within the statist paradigm.”)

<sup>14</sup> See also James Bohman, *The Public Spheres of the World Citizen*, in James Bohman and Matthias Lutz-Bachmann, *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal* 188-193 (MIT Press, 1997) (discussing institutional responsiveness as a precondition for the creation of a cosmopolitan public sphere). For a discussion of cosmopolitanism and the state, see Friedrich Meinecke, *Cosmopolitanism and the Nation State* (Princeton, 1970).

<sup>15</sup> Placing the debate about foreign law in this broader perspective vindicates Fred Schauer’s view concerning the debate about the authority of foreign law teaches at least as much about what law is as it does about how law operates. See Frederick Schauer, *Authority and Authorities*, 94 *Va. L. Rev.* 1931 (2008). The conception of law that eventually derives from my argument aims to downplay neither the role of history, nor that of politics or morality. Harold Bermann labeled such an approach “integrative jurisprudence.” See Harold J. Berman, *Toward An Integrative Jurisprudence: Politics, Morality, History*, 76 *Cal. L. Rev.* 779 (1988)

It might help at this early stage to give a preliminary and schematic statement of my claims:

1. The legitimacy of a political order is a function of that order's responsiveness to the claims of citizens to institutional recognition and/or action (or inaction); judgments of legitimacy are, in part, judgments about normative responsiveness. In a democracy, citizens are reasonable sovereigns and "the source of valid claims"<sup>16</sup> on state institutions.<sup>17</sup>

2. Distortion effects occur when citizens formulate their claims and when institutions translate and process them; these effects threaten to undermine the legitimacy of the political order. Citizens translate their claims into the language of the institution on which, by right, they are entitled to press claims. Institutional responsiveness to a citizen's claim to recognition and/or action is a statement about that citizen's social standing. As Joel Feinberg wrote, "what is called 'human dignity' may be simply the recognizable capacity to assert claims."<sup>18</sup>

3. Salient features of modern law make inevitable some distortions of constitutional claims. However, distortion effects widen when impermissible social asymmetries of freedom and equality become ossified in constitutional doctrine and discourse. Constitutional legitimacy is partly a function of the constitutional system's high levels of responsiveness to citizens' claims. The unresponsiveness – or "glaciality", as Charles Black called it<sup>19</sup> - of the constitutional system threatens to undermine self-government.

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<sup>16</sup> John Rawls, *Political Liberalism* 32 (1996 ed.) (hereinafter "PL" in the body of the text) (arguing that in a constitutional democracy citizens "regard themselves as self-authenticating sources of valid claims.")

<sup>17</sup> I do not mean that only citizens can be the source of valid claims. Throughout this article, references to the claims of "citizens" should not be read to imply that political institutions have lesser duties towards resident non-citizens, or no duties whatsoever towards non-citizens. That is not the question of this paper, though it is no doubt an essential question for any comprehensive study of cosmopolitanism. I thank Dan Kanstroom for pressing me to clarify this important point.

<sup>18</sup> See Joel Feinberg, *Rights, Justice and the Bounds of Liberty*, cited in Paul Ricoeur, *The Course of Recognition* 201 (Harvard, 2005).

<sup>19</sup> Charles Black, *A New Birth of Freedom* 159 (Yale, 1997) (referring to "judicial glaciality").

4. Political legitimacy and the promise of self-government depend on the capacity of the constitutional system to build self-corrective mechanisms as means for retaining its responsiveness capacity. Constitutional systems minimize distortion effects by developing mechanisms for deprogramming impermissible social asymmetries from legal doctrine and discourse. Determinations about legitimacy are judgments of degree that can fine-tune to the existence and efficiency of such mechanisms.

5. Openness to the experiences in self-government of other political communities is part of the strategy for self-correction. Constitutional systems are fundamental frameworks within which different dimensions of constitutional claims and values are revealed and can be explored. This plurality of frameworks reveals what else, or what really, the undistorted claims of citizens mean for them, for the institutions before which they stand as claimants and for their entire political community.

I state below these claims in a more narrative fashion that reflects how the argument will unfold. To start, I do not travel this road alone. My companion is Rawls' Political Liberalism, which I engage in order to establish a connection between, on the one hand, legitimacy conditions for political ordering in a free community of equals and, on the other hand, the capacity of that order's constitutional system to internalize in its procedures and discourse the need for self-correction through heuristic appropriation of experiences of other constitutional democracies.<sup>20</sup> I start by building on Rawls' argument about the challenge that deep, reasonable and irreconcilable disagreement in society poses to the basic terms of citizens' interaction with one another and with public institutions, and ultimately on their experience of self-government. Citizens can neither establish nor retain a connectedness with the political world if their claims fail to engage the institutions to which they are addressed.<sup>21</sup> Institutions thus have a duty to

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<sup>20</sup> In keeping with Rawls, this approach emphasizes the centrality of institutions. For a critique of the institutional frame, see Amartya Sen, *The Idea of Justice* (Harvard, 2010).

<sup>21</sup> Regarding social unity, the aim is to understand the in-between social space of reason-giving. As Hannah Arendt wrote, "(w)henver people come together, the world thrusts itself between them, and it is in this in-between space

respond to the claims of a pluralist citizenry in ways that recognize and reinforce the social standing of each citizen claimant as free and equal. “Respond” is, in this context, a euphemism. At issue here are exercises of political power that coerce free and equal citizens into compliance with norms which they can - and often do - reasonably contest on substantive, fairness grounds. Liberal constitutionalism offers an answer to the question when such coercion is legitimate and establishes the duties that shape exchanges in the public space. I identify the duty of civility and the foundations of political responsibility as the grounds for a responsive posture of institutions. This posture is one of normative availability towards citizens.<sup>22</sup> It demands not just any response, but a particular kind of response – one that the claimant and his/her representatives will find intelligible, that shows appropriate respect to the claimant as a free and equal citizen and thoughtful consideration of the meaning of the claim and of the institution’s response on the life of the claimant and of the political community as a whole. Responsiveness signals the recognition, respect, and consideration that institutions give to citizens, and that citizens give to one another. My argument then bifurcates. In one direction, I show that responsiveness is an element of legitimacy and, conversely, that unresponsiveness (in the form of action/inaction/misrecognition/denial of recognition) undermines legitimacy. This is a dynamic approach to the question of legitimacy.<sup>23</sup> I then identify a number of limitations – some inherent,

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that all human affairs are conducted.” Hannah Arendt, Introduction into Politics in *The Promise of Politics* 106 (Jerome Kohn ed., 2005).

<sup>22</sup> My argument centers on citizens’ claims from the perspective of “liberal normative individualism.” See C. Edwin Baker, *Michelman on Constitutional Democracy*, 39 *Tulsa L. Rev.* 511, 511 (2004). It is of course possible to make related claims from other perspectives. For instance, Jack Balkin has gestured in the direction of responsiveness in the formation of legitimacy judgments in his discussion of the role of social feedback on legitimacy via mechanisms such as political parties or social movements. Balkin surmises that there must be “some kind of feedback mechanism that makes the dimension of constitutional change responsive to popular opinion about the Constitution. If such a feedback mechanism is missing, there is no guarantee that the constitution that was respect-worthy at one time will not lose that legitimacy.” See Jack Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 *Tulsa L. Rev.* 485, 503 (2004). See also Robert Post, *Forward: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 *Harv. L. Rev.* 4 (2003) (defining constitutional culture as the beliefs and values of nonjudicial actors and emphasizing the dialectical relationship between constitutional culture and constitutional law).

<sup>23</sup> However liberating a reliance on acceptability as rational hypothetical acceptance of the system of government has been to contemporary theories of political legitimacy, especially of the post-metaphysical kind, this approach



others contingent - in the responsiveness of institutions. Pursuing the analysis in the constitutional context, I trace these limitations to burdens of translation that produce distorting effects and undermine a system's responsiveness capabilities. Some distortion effects are benign, such as those rooted in the formalism of modern law; others, for instance distortions caused by the ossification into law of impermissible social asymmetries of freedom and equality, are malignant and have a corrosive effect on legitimacy. Yet because distortions are inevitable, their mere existence is insufficient ground to reach conclusions about the illegitimacy of a political order. Rather, I argue that legitimacy judgments turn on the existence and efficiency of self-correcting mechanisms for de-programming asymmetries of social status as free and equals from constitutional doctrine and discourse. Since legitimacy determinations are judgments of degree, they can fine-tune to the existence and effectiveness of such mechanisms. Openness to the experiences in self-government of other political communities, for instance in the use of foreign law in constitutional interpretation, is part of the strategy for self-correction.<sup>24</sup> When constitutional claims are understood as citizens' own interpretations of constitutional provisions that aspire to official status upon endorsement from courts as the institutions invested with the authority to interpret authoritatively the meaning of the constitutional text, then the heuristic appropriation of foreign constitutional practices enhances, rather than undermines, the democratic experience of a particular community to the extent it helps institutions to do justice to the claim presented by their own free and equal citizens.<sup>25</sup> Much can, and has been said in contemporary scholarship, about the mechanics of openness.<sup>26</sup> What remains missing is an

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has led many contemporary thinkers, Rawls included, to imply but rarely dwell on the theoretical implications of citizens' proactive stance in having an impact on their political world. By contrast, emphasizing the fair value of mechanisms that enhance the responsiveness of constitutional systems helps to articulate the citizenry's proactive stance in a dynamic conception of legitimacy.

<sup>24</sup> It is only one of myriad such mechanisms. In the last section, I mention other examples, including the proportionality method of constitutional analysis, the publication of separate opinions, judicial review itself etc.

<sup>25</sup> The distinction between top-down and bottom-up constitutional interpretation maps, with some approximation, onto Sanford Levinson's distinction between Catholic and Protestant readings of the constitution. See Sanford Levinson, *Constitutional Faith* (1988).

<sup>26</sup> See, e.g., Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 *Am. J. Comp. L.* 125 (2005); Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, *Constitutional Commentary* 26

argument about the normative foundations of these mechanisms. I argue that the authority of foreign law in constitutional interpretation is grounded in the liberal constitutionalist commitment to freedom and equality.

Before I begin, let me add a few words about my approaching the task at hand in dialogue with John Rawls.<sup>27</sup> I turn to Rawls for a few reasons. First, the centrality of the constitution in his conception of legitimacy is helpful in the effort to establish the constitutional relevance of a heuristic appropriation of experiences in self-government of other peoples. Second, Rawls' later work offers a comprehensive and helpful philosophical structure for thinking about the question of liberal legitimacy in modern constitutional democracies.<sup>28</sup> Whatever reservations I have about some parts of that structure are beside the point of this paper - with one exception. Built-in Rawls' political liberalism is the idea of society as a closed system. He writes that "at some level there must exist a closed background system, and it is this subject for which we want a theory." (PL, 272) I doubt it. Self-government, correctly understood, is about autonomy, not closedness. Even accepting Rawls' assumption that the domestic sphere could somehow be treated separately, it hardly follows that normative alertness to other-national experiences in self-

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(1): 59-74 (2009); Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in Sujit Choudhry, *The Migration of Constitutional Ideas* 67-83 (2006).

<sup>27</sup> Read as Rawlsian exegesis, my analysis expands his conception in a direction he did not explore directly. Specifically, the analysis draws on *Political Liberalism* to build theoretical pillars that support the openness to the experiences in self-government of other constitutional orders. But at a different level, this paper develops Rawls' philosophy as part of the reconfiguration of claims once the concern with 'struggle for life' is squared with the 'struggle for recognition'. Recognition might not be the first question of politics, to borrow Bernard Williams's formula, but it is certainly an indispensable part of what political philosophy, and by extension constitutional law, must address in order to speak to our modern condition. For a philosophical history of the idea of recognition as the transformation of the active "to recognize" to the passive "to be recognized", see Paul Ricoeur, *The Course of Recognition* (Harvard, 2005).

<sup>28</sup> While Rawls' contractarianism provides the framework for fleshing out this connection, the connection itself is not parasitic upon his version of contractarianism. Central elements of the argument - responsiveness, the burden of translation and distortion effects, self-corrective legal mechanisms - might also be interpreted into alternative conceptions of legitimacy. See, e.g., Ronald Dworkin, *Tanner Lectures on Human Values: The Foundations of Liberal Equality* (1990); Frank Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System* 72 *Fordham L. Rev.* 345 (2003).

government is an “abstracting detail.” (PL, \_\_\_) However distracting Rawls might have found it, this issue is no mere detail but an integral part a liberal theory of legitimacy – including his own.<sup>29</sup>

## § 2. Citizens and institutions under conditions of social pluralism

The fact of reasonable pluralism challenges the basic terms of the interaction between citizens and their institutions.<sup>30</sup> How can the free institutions of a constitutional democracy retain an appropriately high degree of responsiveness to the claims of a citizenry that holds deep, reasonable yet incompatible comprehensive doctrines of the good? Through what mechanisms can these institutions interpret and process claims originating in diverging life plans in ways that respect and reinforce the free and equal status of each claimant?

Recent political philosophy has shown a tendency towards the extremes when processing the fact of social pluralism into normative political thought. At one extreme, pluralism has been invoked to challenge the fundamentals of liberal political orders which, under the false guise of neutrality, deny to some citizens opportunities that they make available to others.<sup>31</sup> At the other extreme, scholars invoked the necessity of stable institutions and settled procedures for social ordering as a Procrustean bed to deny the ethical - and jurisprudential - relevance of the fact of

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<sup>29</sup> Read as Rawlsian exegesis, my analysis expands his conception in a direction that he did not explore directly. Specifically, the analysis draws on Political Liberalism to justify the openness to the experiences in self-government of other constitutional orders. But at a different level, this paper develops Rawls’ philosophy as part of the reconfiguration of claims once the concern with ‘struggle for life’ is squared with the ‘struggle for recognition’. Recognition might not be the first question of politics, to borrow Bernard Williams’s formula, but it is certainly an indispensable part of what political philosophy, and by extension constitutional law, must address in order to speak to our modern condition. For a philosophical history of the idea of recognition as the transformation of the active “to recognize” to the passive “to be recognized”, see Paul Ricoeur, *The Course of Recognition* (Harvard, 2005).

<sup>30</sup> See John Rawls, *The Law of Peoples* 124-125 (1999) (mentioning the fact of reasonable pluralism, alongside the fact of democratic unity in diversity, the fact of public reason and the fact of liberal democratic peace).

<sup>31</sup> See, e.g. Chantal Mouffe, *The Limits of John Rawls’ Pluralism*, *Politics, Philosophy and Economics*, vol. 4, 221-231 (2005)

social pluralism.<sup>32</sup> The outcomes at both extremes are wanting. Just as the cry of “pluralism” is by itself insufficient to unsettle political structures and practices, so the mere invocation of the goodness of political ordering will not make the challenge of pluralism fade away. Against this background, Rawls’ evenly calibrated approach to pluralism stands out. He explains the intensity of pluralism by reference to the very framework established by institutions whose claims to authority pluralism challenges: “Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.” (PL, xviii) Rawls approaches the challenge of pluralism for what it is: neither a disaster nor a blessing – just a challenge.<sup>33</sup> Is “a reasonably harmonious and stable pluralist society” (PL, xxvii) possible? “How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical and moral doctrines?” (PL, xx).

Note that these are ultimately questions about the terms of the interaction between citizens and public institutions. The continuing promise of self-government depends on the success of institutions to channel the exercise of political power fairly and effectively under conditions of pluralism without denying the equality and freedom of any of its members. Pluralism has a pervasive impact on those channels. It widens the pool of perspectives on social and political life from which claims are drawn while at the same time deepening the need for justification of specific institutional responses in way acceptable to a pluralist citizenry. It makes justification more difficult to the extent that claims may target entrenched institutional practices

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<sup>32</sup> This jurisprudential spectrum is particularly wide. It spans from Frederick Schauer, *Constitutional Positivism*, 25 *Conn. L. Rev.* 797 (1993) to Ronald Dworkin, *Rawls and the Law*, 72 *Fordham L. Rev.* 1387 (2004).

<sup>33</sup> John Rawls, *Political Liberalism*, at xxvi (“To see reasonable pluralism as a disaster is to see the exercise of reason under the conditions of freedom itself as a disaster.”). The force of the challenge from pluralism comes through even as one resists the temptation, to which many a sociologist have fallen prey, of demanding too thick a basis for social unity. See DENNIS WRONG, *THE PROBLEM OF ORDER* (1995): “The priority ascribed by normative functionalists to consensus as the source of social order resulted in their projecting an oversocialized conception of the individual and an overintegrated conception of society”, at 209. For a study of the relations between legal and political pluralism, see Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 *International Journal of Constitutional Law (I-CON)* 415 (2008).

whose legitimacy had been heretofore taken for granted. Pluralism also expands the social space that claims have to travel, heightening the risk that by the time a claim reaches its destination its representation of the claimant's original interests has become so distorted that the claimant can no longer assume ownership over the claim. To be sure, the construction of social space is identical across societies. The perception of that space, like the social experience of pluralism itself, differs across societies in substance, form and intensity. For instance, the constellation of concerns surrounding linguistic diversity is unknown historically to linguistically homogeneous societies. Similarly, the struggle for racial justice, and its traces in the dimensions of constitutional equality, does not find historical anchor in racially homogeneous political communities. Such variations are not surprising given that comprehensive and political doctrines are clustered partly according to the historical starting point and social circumstances of a society's journey towards freedom and equality for all.

Only some forms of pluralism pose challenges to legitimacy. Many of our disagreements are shallow and can be resolved intersubjectively. Others are rooted in deep and irreconcilable comprehensive conceptions of the good that are unreasonable, or irrational. A conception of equality that condones the practice of slavery is one such example. Yet other disagreements are deep, irreconcilable and reasonable, such as our disputes over whether constitutional equality should be interpreted to protect citizens' interests in access to adequate education or shelter. The facticity of all forms of pluralism must be acknowledged. And while they all pose practical challenges to the stability of constitutional democracy, only reasonable pluralism poses theoretical challenges to the legitimacy of a constitutional system.

One effect of reasonable pluralism is the shift from an exclusive concern with justice to an emphasis on legitimacy.<sup>34</sup> Pluralism becomes internal to the question of justice when the

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<sup>34</sup> The distinction between judgments of validity, legitimacy and justice is discussed at length in Frank Michelman's work. See e.g., Frank Michelman, *Constitutional Legitimation for Political Acts*, 66 *Modern L. Rev.* 1 ("it can no more be assumed that every valid law is legitimate than that every legitimate law is what it ought to be on the true and full moral and other practical merits", at 3); ("constitutional legitimation... offers a way of combining one's ethical impulse of allegiance owed to the decisions of procedurally fair majorities of fellow citizens with one's moral sense of there being limits on acceptable uses of the lawmaking and other coercive powers of the state. Constitutional legitimation offers an apparent place of refuge from the tug-of-war between our loyalties to majorities and to justice", at 5).

existence of a plurality of reasonable yet incompatible comprehensive conceptions of the good is taken as a given. Citizens of modern democracies disagree deeply and legitimately about what is just and fair. Since comprehensive conceptions cannot by definition be universalized to all members of a free community of equals - in the sense that not all members can be reasonably expected to endorse any given comprehensive conception - public institutions cannot condition citizens' access to their exercise of collective power on prior or subsequent endorsement of any particular comprehensive conception. Yet, the capacity of institutions to function remains indispensable to social ordering and stability. Since in a democracy "political power is ultimately the power of the public, that is, the power of the free and equal citizens as a collective body" (PL, 136), the question arises when can a collective political body coerce its members into compliance with rules whose fairness or wisdom they can reasonably contest, without denying their status as free and equal members of that political community.<sup>35</sup> What are the basic terms of the interaction between citizens and public institutions in pluralist societies?

### § 3. The demands of citizenship: personal and institutional

In a democracy, all citizens are and must act as reasonable sovereigns. Political space is normatively continuous and its continuity structures citizens' treatment of one another as well as how they treat, and are treated, by institutions – not surprisingly, since those institutions are theirs. Rawls traces this continuity to the shaping role of the basic structure of society: "citizens are to think of themselves and of one another in their political and social relationships as specified by the basic structure" (PL, at 300).<sup>36</sup> This continuity unveils the pervasive reach of the

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<sup>35</sup> Rawls' own answer to these questions is a post-metaphysical, political (re)construction of principles of liberal constitutionalism that inform contemporary practices of constitutional democracy. He describes liberal constitutionalism as almost an evolutionary achievement: its success "came as a discovery of a new social possibility: the possibility of a reasonably harmonious and stable pluralist society." (PL, at xxvii)

<sup>36</sup> John Rawls, *Political Liberalism*, at 269 ("the basic structure shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of the good."). Compare Hume's point that "the form of political society determines, causally, the form of political obligation and all political relations", cited in Wade Robison, *Hume and the Constitution*, in Alan S. Rosenbaum, *Constitutionalism: The Philosophical Dimension* 33 (1988).

duty of civility that underlies the basis of institutional responsiveness as well as, conversely, the moral ills of non-responsiveness in any of its forms (wrong action, inaction, refusal to recognize or misrecognition).<sup>37</sup> Citizens are under a moral duty not to desist from dialogue until or unless objective constraints - of time, space, energy, resources or social cohesion - bring their conversation to an end. As with individuals, so with institutions. Under conditions of reasonable pluralism, institutions have a duty to secure and preserve high levels of responsiveness to citizens' claims for recognition and action, which includes a duty to establish mechanisms for limiting the distortion effects involved in the interpretation and processing of those claims. That duty demands constitutional mechanisms for self-correction through heuristic appropriation of the experiences of other constitutional democracies.

Let us start with the duty of citizens not to desist from dialogue, and begin by recalling the distinction in the previous section between shallow and irreducible disagreements. How can citizens tell them apart? Considering that only the latter type are intractable, it seems that an efficient allocation of time and energy would be to devote ourselves to the kinds of disagreements that can be overcome. Such an approach would not be risk-free. Just as toleration can lose its normative edge and become mere social etiquette, so awareness of the irreducibility of disagreement can act as a disincentive for sustained social engagement. Rawls avoids this risk by making the irreducibility of pluralism a theoretical feature.<sup>38</sup> Because citizens disagree about the nature of their disagreements as much as they disagree about substance, the distinction between shallow and intractable disagreements is irrelevant from a practical-political standpoint. This becomes clear when we differentiate between two types of disputes.

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<sup>37</sup> For a discussion of different forms of recognition, see Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflict* (MIT, 1995); Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *The Inclusion of the Other* 203-236 (MIT press, 1998); Paul Ricoeur, *The Course of Recognition* (Harvard, 2005). References to recognition in the text are not signals of my taking sides in the debate recognition vs. redistribution. See generally Nancy Frazer and Axel Honneth, *Redistribution or Recognition: A political-philosophical exchange* (Verso, 2003).

<sup>38</sup> "Political liberalism starts by taking to heart the absolute depth of the irreconcilable latent conflict (between comprehensive doctrines)." (PL, xxviii) This form of latent disagreement stems from the nature of the issues we talk about, and is only reflected in how we talk about them. For a discussion about convergence in the ethical and scientific realms, see Bernard Williams, *Ethics and the Limits of Philosophy* 132 – 155 (1985).

The first type includes disputes where participants in dialogue are unburdened by energy or time constraints. In such cases, they must seek to solve their disagreements by way of persuasion. However unpleasant that effort might at times become, progress is sometimes possible since even disagreements that are ultimately irreducible may allow for relative convergence.<sup>39</sup> When, in that process of persuasion, the ethics of dialogue approaches a breaking point, as it will sooner or later, the specter of that looming breaking point will act as a constraint on citizens' deliberation and turn their dispute into the second type I mean to distinguish. Political deliberation in this second category is structured by constraints that arise either at some point in the process of deliberation or, as is the typical case, are present from the outset. In these situations, citizens' disagreements about the intractability of their disagreement are just another instance of failure to communicate persuasively to one another their respective normative experiences.<sup>40</sup> If their respective positions are rooted in reasonable comprehensive conceptions, then that failure is a typical example of intractable, yet legitimate, disagreement. In those situations, what brings deliberation to an end is the existence of objective constraints – not participants' views about the irreducibility of their disagreements with their peers. To repeat, the distinction between shallow and irreducible disagreements does not lead to social disengagement because, should the parties disagree about the nature of their dispute, they must treat the dispute as a shallow disagreement of the type they must pursue until and unless objective constraints - of time, space, energy, resources or social cohesion - bring their conversation to an end.

The relationship between citizens' moral duties and the political structure is one of mutual reinforcement. A well ordered constitutional democracy provides "a climate within which citizens acquire a sense of justice inclining them to meet their duty of civility" (PL, at 252). Rawls defines this duty, to which he refers specifically as a moral, not a legal, obligation incumbent upon all who occupy the office of citizenship in a democracy<sup>41</sup>, as the capacity "to

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<sup>39</sup> Rawls writes about the narrowing of disagreements might constitute as basis for objectivity (PL, at 119-200).

<sup>40</sup> See Frank Michelman, *Law's Republic*, 97 *Yale L. J.* 1493, 1507 (defining pluralism as "the deep mistrust of people's capacities to communicate persuasively to one another their diverse normative experiences: of needs and rights, values and interests, and, more broadly, interpretations of the world.")

<sup>41</sup> See PL at \_\_\_\_ (analogizing the duty of citizens with those of officials.) See also John Rawls, *The Idea of Public Reason Revisited* in *Law of Peoples* at 135 ("ideally citizens are to think of themselves as if they are legislators and



explain to one another [in matters regarding] fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.” (PL, at 217). Protracted social engagement is possible because participants adhere to rules that signal to one another their mutual recognition as free and equals. That is, citizens are to think of themselves and their peers not only as rational, in the sense of being capable to select means appropriate for achieving the goals they set for themselves, but also as reasonable - where reasonableness is the mark of their having internalized the existence of fellow human beings with whom, by no choice of their own, they share a political community and the world. Reciprocity is “the part of moral sensibility that connects with the idea of fair social cooperation” (PL, at 51) and a salient feature in the moral reasoning of citizens about political matters. If liberal constitutionalism comes as “a discovery of a new social possibility”, then reasonableness – the fact that the existence of others is a factor in how we reason about ourselves – is no less a remarkable societal achievement. It forms the basis of social unity - and a relatively stable basis at that.<sup>42</sup>

The moral duty of civility captures in the language of obligation the signposts of citizens’ reflection on the use of their political power in its myriad forms. That same duty shapes the moral reasoning of citizens over how they interact with one another as well as how they interact with institutions (and vice versa). Since “political power is ultimately the power of the public, that is, the power of the free and equal citizens as a collective body” (PL, 136), and, since political institutions exercise that political power, it follows that their interaction with citizens is implicitly the expression of how the public collectively interacts with one of its members. Civility forms the moral basis of responsiveness - a dimension of legitimacy. In that context,

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ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact.”)

<sup>42</sup> This is true to the extent that it cannot be unlearned within the framework that enshrined it. The reason is that there is no route back from reflectiveness in terms of moral reciprocity, at least not within that framework. As Bernard Williams writes about reflectiveness in general, it is not that “that nothing can lead to its reduction; both personally and socially, many things can. But there is no route back, no way in which we can consciously take ourselves back from it”. See Bernard Williams *supra* note \_\_\_\_\_. See also Jürgen Habermas, *Between Facts and Norms* 97 (1998) (“The intrusion of reflection into life histories and cultural traditions has fostered individualism in personal life projects and a pluralism of collective forms of life.”).

reciprocity makes it so that citizens register not only instances of institutional unresponsiveness to their own demands, but to unresponsiveness to the demands of their fellow citizens – whose claims to the same institutions they cannot reasonably expect to deserve a lesser treatment than their own.

This point is especially important. The opportunity to press claims on institutions and thus to impact on their trajectories is crucial if citizens are to regard themselves “as self-authenticating sources of valid claims.” (PL, at 32) Yet the right to shape the political world is not a mere formality; it has a fair value.<sup>43</sup> Conversely, institutional responsiveness to a citizen’s claim to recognition and/or action is a statement about that citizen’s social standing. Just as citizens are under a duty not to desist from argument with one another until and unless objective constraints require it, so social institutions must retain their capacity to respond to the claims of a pluralist citizenry. Exactly what responsiveness entails depends on the particular tenets of a political philosophical approach. As the next sections show, it may entail that institutions must grant access to citizens, interpret away distortion effects in their claims, reply in a timely fashion and with reasoned responses to those claims and other mechanisms, including those for deprogramming unresponsiveness. It is, of course, an important question of political philosophy whether responsiveness includes substantive satisfaction of specific needs. I return to these questions in the next sections. For now, we conclude that the basis for the duty of civility justified, and requires, measures of self-correction in the name of the commitment to freedom and equality.

#### § 4. Institutional responsiveness and constitutional legitimacy

In this section I argue that the legitimacy of a political order is partly a function of that order’s responsiveness to citizens’ claims for institutional recognition and/or action (or inaction). Judgments of legitimacy are, in part, judgments about responsiveness of this kind. Rawls’ work is relevant to our inquiry given the prominent role of the constitution in the conception of legitimacy. The legitimacy potential of a constitutional order increases to the degree that order

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<sup>43</sup> On the fair value of basic liberties, see John Rawls, *Political Liberalism* at, 324-331. Rawls developed this line of argument in answer to H.L.A Hart, "Rawls on Liberty and Its Priority," in Norman Daniels (ed.), *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice"* (1989), pp. 230-252.

has effective self-correcting mechanisms that preserve its responsiveness to the claims of individuals. Later sections will argue that openness to the experiences in self-government of other political communities is a self-correcting mechanism.<sup>44</sup> It reveals what else, or what really, the undistorted claims of citizens mean both for them and for the institutions before which they stand as claimants.

“Our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy” (PL, 217). According to this principle, free and equal citizens can be coerced into obeying laws whose wisdom they may legitimately contest so long as the acts of coercion conform to the essential parts of the constitution. Rawls distinguishes two kinds of constitutional essentials. The first includes fundamental principles that specify the general structure of government and of the political process; the powers of the legislative, executive and the judiciary; the scope of majority rule etc.<sup>45</sup> The second kind of constitutional essentials includes the equal basic rights and liberties of citizenship that legislative majorities

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<sup>44</sup> Reference to “openness” may signal to some a closer affinity between my approach and the autopoiesis of social systems theory than the Rawlsian approach in which I cast my argument. See generally Niklas Luhmann, *Social Systems* (1995); Günther Teubner, Richard Nobles, David Schiff, *The Autonomy of Law: An Introduction to Legal Autopoiesis*, in David Schiff and Richard Nobles (eds.), *Jurisprudence* (2003). Scholars have shown how social systems theory can contribute to a theoretical framework of comparative constitutionalism. See Vicki Jackson, *Constitutional Engagement in a Transnational Era* 84 (Oxford, 2010). However, the perspective I articulate in this paper differs from the “normatively closed but cognitively open” approach of social systems theory. I argue that constitutional systems are not only cognitively open, but also normatively open. Furthermore, in my view the cognitive openness and normative openness are connected, but I acknowledge that my conception of normativity is different from the objectivist conception deployed by social systems theory. I thank Mark Tushnet for helping me to clarify this point.

<sup>45</sup> There is thus limited flexibility within the framework of the separation of powers system for institutional experiments. Rawls notes that, with “relatively small variations, (constitutional essentials are) characterized in more or less the same manner in all free regimes.” (PL, 228) This does not mean that he shows no sensitivity to history or circumstance. For instance, he refers “the appropriate limits of public reason vary depending on historical and social circumstances.” (PL, 251) See also his discussion of property at p. 298 (the issues of society’s circumstances and political traditions). However, variations in social experience do not translate tale quale into the normative scheme of thought that is the political conception of justice.).

must respect: the right to vote and participate in politics, liberty of conscience, of thought and of association, freedom of movement and free choice of occupation and the protections of the rule of law. Academic commentary has dwelled on both the selection procedure of essential from non-essential constitutional provisions as well as on the specific content of each type of constitutional essentials.<sup>46</sup> These are important questions, but only tangential to my interest here. I assume *arguendo* that a tenable distinction between essential and non-essential constitutional provisions is possible and I focus on the former because of their role in the formation of legitimacy judgments. The turn to constitutional essentials, which are enforceable rights, brings into sharp focus the duty of responsiveness that institutions – in this case, courts – have towards citizens claimants.

Constitutional essentials have a stabilizing social function. Rawls sees them as a background normative and institutional framework that slows the pace of politics, lowers its stakes and allows social cooperation to become routine.<sup>47</sup> Settling issues of structure and basic rights generates a social rhythm that allows citizens “to live politically” as free and equals and as guided by the duty of civility. It is apparent that, for such social rhythm to develop, constitutional essentials must be difficult to change.<sup>48</sup> Technically, this outcome is fairly easy to accomplish, assuming the existence of the political will to entrench this set of constitutional provisions. But how about change through interpretation? This is an important question. One effect of formal entrenchment is to heighten the depth, frequency and stakes of interpretative battles over the meaning of the constitutional essentials – a centrally important realm for testing institutional responsiveness in a constitutional democracy. When the language of constitutional essentials is

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<sup>46</sup> See, e.g., Frank Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 *Fordham L Rev* 1407, 1412-1420 (2004). It has inquired, for instance, why are social and economic guarantees not part of the constitutional essentials, except to the extent they give basic liberties their fair value. Questions such as these are probing, especially considering that Rawls’ method for drawing up the list of basic rights did not involve a comparative survey of well-functioning constitutional democracies but rather an original-position analysis of which liberties are “essential social conditions to the adequate development and full exercise of the two powers of moral personality over a complete life” (PL, 293).

<sup>47</sup> Contrast this approach to Roberto Unger, *False Necessity* (Cambridge, 1987).

<sup>48</sup> Rawls mentions they constitutional essentials are agreed upon “once and for all” (PL, 232). While he identifies a alternative comparative method of identifying the essentials, his own account does not pursue that option.

not amendable, than the steam of social pressure, which pluralist societies produce aplenty, will be channeled towards interpreting the existing language. Students of the law are intensely aware how far-reaching the impact of legal interpretation can be. A cursory glance at the list of constitutional essentials gives sufficient reason to expect that interpretative struggles will “touch the nerve center of economic and social conflict.”<sup>49</sup> The open textured character of their language adds fuel to the fire. While such abstract formulations are themselves traces of attempts at the constitutional drafting stage to defer adjudication of social disagreements by reaching out to highest level of generality at which the parties involved could reach consensus<sup>50</sup>, at the interpretative stage, their broad language widens the horizon of the parties’ expectations and heightens the stakes of their interpretative battles. How can constitutional essentials fulfill their stabilizing social function when their meaning is in constant flux?

One possible answer would dispute the presuppositions that give the interpretative challenge its strength.<sup>51</sup> For instance, this answer would point out that social unity does not presuppose an inflexible normative and institutional framework. Constitutional essentials have a core of settled meaning that is surrounded by a periphery wherein difficult interpretative disputes occur. Interpretative challenges can, of course, be mounted against that core of settled meaning; but they are virtually always unsuccessful. Even for challenges that succeed, at the periphery of the essentials’ meaning, success is incremental. It thus follows, in this view, that however vigorous in nature interpretative challenges might be, their effect on constitutional essentials is bound to be limited. The meaning of constitutional essential is open to contestation but it is not in flux.

This is a good answer, but not good enough. Its main fault is to ignore how, *ex ante*, the odds of a claim’s success are irrelevant to the attention the claim deserves from the institution to

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<sup>49</sup> Felix Frankfurter, *Mr. Justice Holmes and The Supreme Court* 23 (1938) (Justice Frankfurter’s describing the Supreme Court’s task to adjudicate such disputes).

<sup>50</sup> PL at 46 (“We should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots.”) As Frank Michelman nicely points out, “the plasticity of the constitutional language turns out to be its saving grace”, in Frank Michelman, *Faith and Obligation, or What Makes Sandy Sweat?*, 38 *Tulsa L. Rev.* 101, 117 (2003).

<sup>51</sup> I do not believe this is Rawls’ answer although he sometimes gestures in that direction. For a discussion of core and periphery of legal provisions, see H.L.A. Hart, *The Concept of Law* 124-154 (2<sup>nd</sup> ed., 1994).

which it is addressed. Put differently, the institution has the same obligations of responsiveness to the claimant irrespective of the claim's likelihood of success as gauged from past experience or from any other factor exogenous to the claim itself. Thus, even the meaning of constitutional essentials must be up for grabs *ex ante* the submissions that seek to interpret it. Does that mean that everything is up for grabs and that any claim – slavery? - must have its day in court? The answer has to be affirmative to the extent institutions must respond even to claims rooted in unreasonable comprehensive conceptions. There are strong reasons why slavery is repugnant to constitutional equality and liberty, and it is good to air those reasons from time to time.<sup>52</sup> It also means that a wide array of interpretations will battle for the endorsement of the institution that has the authority to say what the law is. In those situations, only a vote in the apical decisional forum where such claims are adjudicated has the authority to settle the meaning, until the next claimant comes around. A decision that occurs before that vote is one reached by definition without deliberating on the substance of the proposed interpretation. That is evidence of an unresponsive institution. But isn't this demand too burdensome? Won't the fact that no issue is ever closed fuel unending disputes? Of course it will - and that is a consequence of what it means to live under free institutions. There are far-reaching implications of an understanding of pluralism as the natural outcome of the development of human reason under free institutions.

Since it is impossible to minimize the challenges of interpretation, let us instead attempt another answer to the problem of the impact of interpretation on the stabilizing social function of constitutional essentials. This answer will bring us closer to the common normative foundations of legitimacy and responsiveness. Recall that, since the constitutional essentials have a stabilizing social function, Rawls argues that they should not be easily changeable. However, should change ever be inevitable, the process by which change occurs must not be politicized, in the sense that it must not mirror shifts in the balance of political influence among comprehensive doctrines at a particular point in time (PL, \_\_\_\_). Rawls assumes here a kind of normative continuity between the original and subsequent formal processes of meaning-creation, which is

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<sup>52</sup> This point has methodological implications in constitutional law, for example with respect to the choice, if choice it is, between rules and standard. See Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. Colo. L. Rev. 293, 309 (“Rules lose vitality unless their reason for existing is reiterated. Even if they are simply the precipitate of an implicit prior balancing, better to redo the balancing every time. It takes longer but it's worth it.”) (footnote omitted)

similar in nature to the continuity of vertical and horizontal interaction in the context of the duty of civility. Yet, the same continuity extends to processes of informal meaning-creation, such as those at play in the process of interpretation. One need not assume that constitutional essentials have a settled meaning, but rather that the process by which their meaning is settled is normatively continuous with the reasons why this specific set of constitutional essentials was chosen - "once and for all" (PL, 161) - in the first place.<sup>53</sup> In good liberal tradition, the challenge of interpretation is not left to chance. Hobbes said it first, after noting that all laws are in need of interpretation: "the Interpretation of all Lawes dependeth on the Authority Sovereign; and the interpreters can be none but those, which the Sovereign (to whom only the Subject oweth obedience) shall appoint. For else, by the craft of an Interpreter, the law may made to beare a sense, contrary to that of the Sovereign; by which means the Interpreter becomes the Legislator."<sup>54</sup> Similarly with Rawls, only that in his case control turns on the selection of specific values as interpretative guidelines: "the parties in the original position, in adopting the principles of justice for the public structure, must also adopt guidelines and criteria of public reason for applying those norms." (PL, 225)<sup>55</sup> Normative continuity is essential: "constitutional consensus at the level of principles viewed apart from any underlying conception of society and citizen - each group having its own reasons - ... lacks the conceptual resources to guide how the constitution should be amended and interpreted... (,) it will be necessary for judges, or the officers in question, to develop a political conception of justice in the light of which the constitution, in their view, is to be interpreted and important cases decided." (PL, 165) These conceptual resources are necessary to secure the continuity between principle and its application. In a constitutional democracy, the essential provisions of a constitution and the principles of their interpretation have common roots in the foundational commitments to freedom and equality.

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<sup>53</sup> Rawls' discussion of public reason indicates his alertness to the need for guided interpretation: "The political values of public reason provide the Court's basis for interpretation." (PL, 234) These guidelines of inquiry are "principles of reasoning and rules of evidence in the light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them" (PL, 224).

<sup>54</sup> Thomas Hobbes, *The Leviathan*, Chapter XXVI (Richard Tuck ed., Cambridge 1996), at 190.

<sup>55</sup> He then continues: "The argument for those guidelines, and for the principles of legitimacy, is much the same as, and as strong as, the argument for the principles of justice themselves." (id.)

Mechanisms for institutional responsiveness are rooted in foundational constitutional commitments to freedom and equality.

## § 5. Constitutional imaginaries and constitutional law

I referred above to burdens of translation and it is time to define that concept. By burdens of translation I refer to obstacles in the processes by which a legal system interprets and processes the claims of its citizens, such as claims for enforcing constitutional essentials.<sup>56</sup> As already stated, these claims represent citizens' own interpretations of constitutional provisions that aspire to official status upon endorsement from courts as the institutions invested with the authority to interpret authoritatively the meaning of the constitutional text.<sup>57</sup> When citizens demand before legal decision-makers the recognition and enforcement of their rights, they are in effect appealing to law to arbitrate their relations with institutions that have been unresponsive to their claims. An important social function of judicial remedies is to restore the fair terms of social cooperation and, with them, the conditions for self-government. Given the state's monopoly over the legitimate use of violence, no other public institution can deliver the immediate satisfaction of a citizen's particular need, should the institutions of the legal system also prove unresponsive.<sup>58</sup>

I referred above to the social space that a constitutional claim travels from its initial framing to the moment when it receives an answer - a route marked by successive translation processes, more or less burdensome. Along this way, the claim might become so distorted from when it was first formulated that the claimant might no longer be able to recognize it as her own.

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<sup>56</sup> I build here on an analogy with Rawls' concept of burdens of judgments. See PL at \_\_\_\_.

<sup>57</sup> The distinction between top-down and bottom-up constitutional interpretation maps, with some approximation, onto Sanford Levinson's distinction between Catholic and Protestant readings of the constitution. See Sanford Levinson, *Constitutional Faith* (1988).

<sup>58</sup> The justifications of judicial review in American law center around the role of courts in the protection of citizens neglected interests and social recognition. See Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *Yale L.J.* 1287; John Hart Ely, *Democracy and Distrust* (Harvard, 1980). For inclusion as the broader narrative of American citizenship, see Judith Shklar's 1989 Tanner Lectures on Human Values, published under the title *American Citizenship* (Harvard, 1991).



When that happens, the claimant is bound to perceive the institutional answer as an answer not to her claim - and hence to conclude that the institution is unresponsive. It helps to develop a vocabulary to identify the origins and the destination of a constitutional claim. Specifically, I introduce the concept of constitutional imaginary to refer to the origins of a constitutional claim to institutional action and/or recognition.

I adapt the concept of the constitutional imaginary from Charles Taylor's work on the "social imaginary."<sup>59</sup> Taylor refers to the social imaginary as "a largely unstructured and inarticulate understanding of our whole situation... (.) an implicit map of the social space."<sup>60</sup> He distinguishes social imaginary from social theory, and writes that "for most of human history and for most of social life, we function through the grasp we have of the common repertory, without benefit of theoretical overview. Humans operated with a social imaginary well before they ever got in the business of theorizing about themselves."<sup>61</sup> The constitutional imaginary is an implicit map of the constitutional space as it appears from an individual citizen's perspective. This under-theorized set of reasonable constitutional expectations is the source of citizens' interpretations of constitutional meaning and of their claims to institutional action and/or recognition. To be sure, citizens might not routinely think of interpretations of freedom, equality, dignity as specifically constitutional interpretations, at least in contexts that do not involve their violation. They appear constitutional once they are reconstructed within the discourse that constitutional democracy reserves for political approaches to freedom and equality. In a modern society, there is a plurality of constitutional imaginaries. They are different from the plurality of conceptions of the good. Constitutional imaginaries do not map the elements of a good or righteous life, but rather the meaning of political commitments to freedom and equality, as reasonable and equal sovereigns interpret them.

Constitutional imaginaries do not fully overlap with constitutional law. For instance, citizens do not share concerns such as the administrability of constitutional norms that have a shaping role on constitutional doctrine. Moreover, imaginaries are not confined within the formal ambit of their authors' particular political community. Citizens can reach out freely to how

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<sup>59</sup> Charles Taylor, *Modern Social Imaginaries* (Duke, 2007).

<sup>60</sup> *Id.* at 25.

<sup>61</sup> *Id.* at 26 (footnotes omitted).

equality and freedom have been interpreted in other political communities. When the historical development of their own societies fails to recognize a dimension of a freedom and equality which they see as central to their standing as free and equals, they might be able to find that dimension articulated in other democratic polities. The experiences in self-government of other communities can expand a citizen's normative vocabulary by framing aspects of his own self that had found as yet no expression in his political order. For instance, claims of religious discrimination must overcome the burden of novelty in societies that are largely homogeneous from a religious standpoint; the same is not true in communities of thriving religious diversity. Similarly, the dimensions of the constitutional right to property in Eastern European countries coming out of half a century of communist rule will be inevitably different from its meaning in older democracies.

While not identical, the spheres of citizens' constitutional imaginaries and constitutional law do not perfectly overlap but are or should be synchronized. Synchronization is a guarantee against citizens' political and social alienation.<sup>62</sup> The survival of certain elements of the constitutional imaginary might depend on his peers' endorsement through institutional action. "What does not live in reality dies in the imagination", as one author put it.<sup>63</sup> Some interpretations of constitutional values will subside if the interests and visions that support them are not sufficiently strong to live for long enough without public validation. From society's perspective, this might appear unimportant; after all such interpretations routinely fade away and others rise to take their place. But society's perspective is the wrong perspective here. The dissolution of un-validated constitutional interpretations must be approached from the perspective of the individual whose interpretation is denied recognition. This perspective is critical because the legitimacy of the system turns on that individual's judgment and on the judgment of her peers. It helps to recall in this context that "legitimacy ... is, from the standpoint

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<sup>62</sup> This synchronization is one aspect of what Jed Rubenfeld referred to as the "anti-totalitarian" principle in constitutional law. See Jed Rubenfeld, *Freedom and Time* (Yale, 2001). See also Thomas Pogge, *Politics as Usual* 200 (Polity, 2010) ("I understand the fundamental idea of democracy as the moral imperative that political institutions should maximize and equalize citizens' ability to shape the social context in which they live.")

<sup>63</sup> Robert Unger, *What Should Legal Analysis Become* 21 (1996).

of a reciprocity-minded liberal, an insuperably and irreducibly decentralized, personal judgment.”<sup>64</sup>

## § 6. Distortion effects in constitutional doctrine and discourse

This section introduces the claim that some distortion effects are inevitable in advanced constitutional systems and therefore that judgments of constitutional legitimacy do not turn on the existence of these effects but rather on the availability of efficient mechanisms for self-correction built into constitutional systems. I distinguish distortion effects in the translation of claims originating in individuals’ constitutional imaginaries. I classify them into malign and benign. My analysis is illustrative - there are other distortion effects that I do not discuss here. Of those I discuss, I classify effects resulting from ossification of impermissible social asymmetries as malignant. Benign effects can be traced back to the formalism of modern law or the strategic efforts of individuals to meet court’s demands. Since both types of distortion effects could turn out to be irreducible, their existence is not immediately determinative of constitutional illegitimacy. Rather, judgments of legitimacy turn on the extent to which a constitutional system sets in place mechanisms for correcting such effects. Because legitimacy judgments are judgments of degree, they can be fine-tuned to take into account the existence and effectiveness of self-correcting mechanisms. The heuristic appropriation of experiences of other constitutional democracies is one such mechanism.

Let us start with distortion effects caused by the formalism of modern law. Translation into legal “code” is seldom without residue. The formal structure of legal categories into which claims are translated explains the loss of original nuance and complexity. For instance, when parties disagree whether nude dancing or movies exhibiting despicable cruelty towards animals are constitutionally protected “speech”, it falls on courts to interpret the meaning of “speech” and/or decide on the extent of its constitutional protection. Of course, citizens’ claims do not reach courts as “raw” demands to institutional action or recognition for the satisfaction of particular needs. Rather, these claims are the outcome of a process of translation into legal code of the parties’ original demands: the lawfulness of burning a flag is constitutionally protected

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<sup>64</sup> Frank I. Michelman, A Reply to Baker and Balkin, 39 *Tulsa L. Rev.* 649, 661 (2004).

“speech”; the right to buy contraceptives is an instance of their “privacy.”<sup>65</sup> Weber explained why “the expectations of parties will often be disappointed by the results of a strictly professional legal logic”:

“Such disappointments are inevitable...where the facts of life are juridically ‘constructed’ in order to make them fit the abstract propositions of law and in accordance with the maxim that nothing can exist in the realm of law unless it can be ‘conceived’ by the jurist in conformity with those ‘principles’ which are revealed to him by juristic science.... To a large extent such conflicts are the inevitable consequence of the incompatibility that exists between the intrinsic necessities of logically consistent formal legal thinking and the fact that the legally relevant agreements and activities of private parties are aimed at economic results and oriented towards economically determined expectations... a ‘lawyers’ law’ has never been and will never be brought into conformity with lay expectations unless it totally renounce that formal character which is immanent in it.”<sup>66</sup>

A second category of distortion effects are caused not by institutions but by claimants themselves when strategizing about the expectations of institutions and failing to articulate their claim in sufficiently undistorted ways. In my work on disability law<sup>67</sup>, I showed how the (transnational) disability rights movement strategized, ultimately unsuccessfully, that leaving the concept of medical impairment under-theorized would help courts move away from the medical model of disability and towards the social model which they supported, for very good reason. However, claimants do not forfeit their rights to institutional responsiveness when they deploy strategies that end up distorting their claims. Conversely, the duty of institutions is no

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<sup>65</sup> See, e.g., Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 *UCLA Law Review* 1747 (2007).

<sup>66</sup> Max Weber, *Economy and Society* 885 (vol. 2). See also pp. 812-813 (on the tension between form and substance in the law). For commentary, see Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality*, or *Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 *Hastings L. J.* 1031 (2004).

<sup>67</sup> Vlad Perju, *Struggles for Recognition in Modern Law: The Case of Disability Rights in the United States and the Europe* (Hauser Law Program at NYU working paper - forthcoming, *Cornell International Law Journal*).

less demanding in such cases. The justification is that institutions and claimants are not on equal footing. It is incumbent upon courts to go the extra mile to interpret and process citizens' claims. In my view, this is the correct key for understanding Habermas' assertion that the legal system has remained the only medium through which normative messages can penetrate what might already be or would otherwise become structurally autonomous social systems.<sup>68</sup> His point is not descriptive, but rather an argument about the obligations of legal institutions in relating to individuals whose freedom and equality depends on those normative messages being carried across society.

A third type of distortion effects are caused by the ossification in legal discourse and doctrine of impermissible social asymmetries. As Iris Marion Young defined them, they are "structural inequalities – for example, inequalities of wealth, social and economic power, access to knowledge, status, work expectations. These structural inequalities are unjust to the extent that they help produce and perpetuate institutional conditions which support domination or inhibit self-development."<sup>69</sup> Consider by way of example the most perverse form of ossification, that of legal discourse, in the specific case of asymmetries among cultural groups. In his 1994 Seerly lectures at the University of Cambridge, entitled 'Constitutionalism in an Age of Diversity'<sup>70</sup>, James Tully argued that "the language of modern constitutionalism which has come to be

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<sup>68</sup> See Jürgen Habermas, *Between Facts and Norms* 56 (1998). For the argument put forth by social system theorists of society as a set of socially autonomous social spheres, see Niklas Luhmann, *Social Systems* (1995); Gunther Teubner, Richard Nobles, David Schiff, *The Autonomy of Law: An Introduction to Legal Autopoiesis*, in David Schiff and Richard Nobles (eds.), *Jurisprudence* (2003). For a perspective on constitutionalism, see Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory* (2003 Storrs Lecture, Yale Law School). But see Harvey Wheeler, *The Foundations of Constitutionalism*, 8 *Loy. L. A. L. Rev.* 507, 511 (1975) ("One problem facing 20<sup>th</sup> century constitutionalism is to adjust its aims to cope with a society in which the individual has little political significance except as a member of a monstrous techno-organizational group; a society which in the process of pressing its characteristic drive for power and control upon its members has left them desensitized with regard to the common aims and general interests that a proper constitutional order ought to elicit from its citizens.").

<sup>69</sup> These asymmetries are forms of structural inequality. See Iris Marion Young, *Inclusion and Democracy* 34 (2000). I use the concept of structural inequalities more broadly than Young.

<sup>70</sup> James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995).

authoritative was designed to exclude or assimilate diversity and justify uniformity.”<sup>71</sup> The “masculine, European and imperial”<sup>72</sup> discourse of modern law has silenced Aboriginal cultures within liberal states. Tully’s argument is about cultural asymmetries ossified not (only) in legal doctrine but in legal discourse. The voices of silenced cultures will be heard only after we ask “what is it in what they are saying, and in the way they say it, that is not said, and perhaps cannot be said”<sup>73</sup> in the established discourse of liberal tradition. The point is that in rejecting alternative forms of discourse, liberal law denied a way of structuring the world that had a claim to equal standing in society.

Tully’s analysis is helpful not only as an example of an argument about ossification of impermissible asymmetries into constitutional discourse but also as an example of failure to see that mere ossification does not automatically determine its illegitimacy. Legitimacy judgments should not reflect solely the existence of impermissible social asymmetries in constitutional systems but also the mechanisms by which those systems are attempting to de-program the asymmetries from their doctrinal and discursive structures. Tully fails to account for these mechanisms that are indispensable to the standpoint from which he mounts his critique. On the one hand, he chastises liberal discourse for advancing uniformity over diversity and imposes a liberal-friendly conception of the good under the guise of formal neutrality. On the other hand, struggles for cultural recognition in the modern state, most of which have been fought within the institutional settings of liberal states, have the language in which to challenge the adequacy of the liberal model. But if the liberal model worked as Tully describes it, there would be no normatively defensible -and legally protected- standpoint from which he could mount his attack against it. The fact that he has some ammunition – in the demonstrable need to accommodate cultural diversity within liberal constitutionalism- against the liberal model shows that his critique of liberal constitutionalism glosses over the features that have made the legal system a

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<sup>71</sup> Id. at 58. From this perspective, struggles for recognition become struggles for cultural recognition, where such struggles are understood “as aspirations for appropriate forms of self-government (...), a longing for self-rule: to rule [oneself] in accordance with [one’s] customs and ways”. Id at 4.

<sup>72</sup> Id. at 34.

<sup>73</sup> Id. at 51.

locus for struggles for recognition in the modern state.<sup>74</sup> The mistake is to assume the illegitimacy of the constitutional system from the mere existence of distortion effects. In fact, legitimacy judgments turn on the existence of mechanisms that correct distortion effects. The existence of such mechanisms in the tradition of the liberal constitutional discourse provides the normative space from which critics of the tradition's past, such as Tully himself, can mount his arguments.

It is possible to interpret many developments in modern law, at least in liberal constitutional democracies, as self-corrective mechanisms for the enhancement of responsiveness. Previous sections have mentioned the idea of rights unattached to social standing and relatively immune to considerations of expediency, as the seventeenth century founders of modern political thought developed it to address the challenges of pluralism.<sup>75</sup> Moreover, vigorous interpretative debates to fill in the meaning of open-ended formulation of rights have become forms of political self-knowledge in modern constitutional democracies. The success of the proportionality method over the past half a century can be understood as a responsiveness mechanism that structures how institutions meet their duties of responsiveness.<sup>76</sup> Proportionality enables judges to break the institutional shell that encases constitutional rights, identify and reconstruct the interests protected by the rights and decide the extent of the reach of their constitutional protection in particular contexts. Ossification is less likely to occur when these interests are put to the unrelenting scrutiny of reason. Proportionality is thus a demanding way of testing legislative responsiveness, appropriately so in liberal democracies "accustomed to the privileges of individual conscience."<sup>77</sup> A similar case can be made about other features of modern law, from the development of an institutional framework for reviewing the

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<sup>74</sup> But see Jeremy Waldron, *Kant's Legal Positivism*, 1535 *Harvard Law Review* 1535, 1540 (1996) ("law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law's function to supersede.")

<sup>75</sup> See Richard Tuck, *Rights and Pluralism*, in James Tully (ed.) *Philosophy in the Age of Pluralism* 159-170 (Cambridge, 1994).

<sup>76</sup> See Matthias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 *Int'l J. Const. L.* 574, 595 (2003) (referring to proportionality as the "most successful legal transplant of the second half of the twentieth century.")

<sup>77</sup> This is Jeremy Waldron's formulation. See Jeremy Waldron, *The Primacy of Justice*, 9 *Legal Theory* 269 (2003).

constitutionality of legislation to changes in the standing doctrine to the use of separate judicial opinions as reflection of law's polyphony and others.

## § 7. Foreign law as a self-correcting mechanism

This final section argues that the use of foreign law in constitutional interpretation can be a mechanism that corrects distortion effects of the kind identified above, when such use is a tool for a political community's heuristic appropriation of the experiences in self-government of other polities. Its authority grounded in the constitutional democratic commitment to freedom and equality, the use of foreign law enhances institutional responsiveness within the confederation of independent republics.

I suggested in the introduction an approach to domestic constitutional systems as a set of fundamental frameworks in which different dimensions of constitutional claims and values – equality, dignity, privacy – are revealed and can be explored. The historical evolution of legal systems gives institutional recognition to some dimensions of constitutional meaning over others. However, due to the channels available between citizens and public institutions in constitutional democracies, citizens have available a variety of tools to challenge settled constitutional meaning. References to the constitutional experiences in self-government of other political communities are one such tool that can be invoked to obtain recognition for dimensions of values which claimants deem to be essential for the constitutional protection of their fundamental interests. Consider Justice Kennedy's opinion in *Lawrence* on the right of adults to engage in intimate, consensual homosexual conduct, as having been accepted "as an integral part of human freedom in many other countries"- specifically, in European countries.<sup>78</sup> As we will see, the recognition of that part of human freedom does not have any self-standing authority. Rather, its authority stems from its heuristic use for educing new meaning in the claim presented by a member of the political community such as *Lawrence* to the courts of his political system.

At issue in *Lawrence* was the interpretation of constitutional privacy. While American law has traditionally recognized the autonomy aspect of privacy, European law has cast light on

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<sup>78</sup> *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).



a different, dignity dimension of the same constitutional value.<sup>79</sup> The Lawrence Court's dignity-speak, a rare occurrence by comparison to the centrality of dignity in other constitutional systems, was thus no coincidence.<sup>80</sup> In the view of the claimants, which the Court endorsed, the dignity dimension of the constitutional privacy was essential for understanding the nature and content of the liberty claim at issue in the case. Rooted in the claimant's own interpretation of liberty in his constitutional imaginary, that claim sought recognition and protection for the right of adults to engage in intimate, consensual homosexual conduct. Reference to foreign law played the role of a mechanism for correcting the non-responsiveness that the court's commending precedent - *Bowers v. Hardwick*<sup>81</sup> - had entrenched in the law via the doctrine of stare decisis. Bowers' particular form of non-responsiveness was not the effect of the court's answer that constitutional liberty does not protect the right to homosexual sodomy or perhaps not even - or not entirely - of the methodology that the majority deployed to answer that question, specifically by seeking that right in history and tradition. Rather, the source of non-responsiveness was the very question the Bowers Court chose to answer, the way it framed the legal question raised by the claim. In the retrospective approach of the Lawrence Court, interpreting the claim in Bowers as one to the recognition of a right to engage in homosexual sodomy "misapprehended the claim of liberty presented to (the court)" and "demeaned the claim the individual put forward."<sup>82</sup> At issue in that case was not the right to have a particular kind of sex, but rather the right of adults to establish intimate relationships with other adults. As the Lawrence Court put it, the right to engage in intimate relationship with another person is "but one element in a personal bond that is more enduring."<sup>83</sup> Personal bonds such as these give life meaning and allow people to make the world their home. Given the (mis)framing of the liberty interest in Bowers, the claimants in Lawrence sought and found additional normative weight for their claim in constitutional systems whose alternative development recognized the dignity aspects involved in the formation of

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<sup>79</sup> Scholars of comparative law have shown how, in the course of its development, American law has downplayed the dignity aspects of privacy. See James Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 *Yale L. J.* 1151 (2004).

<sup>80</sup> See 539 U.S., at 567.

<sup>81</sup> 478 U.S. 186 (1986).

<sup>82</sup> See *supra* at \_\_\_\_.

<sup>83</sup> *Id.*

intimate relationships.<sup>84</sup> Hence the heuristic undertone in the Lawrence Court's statement that "(t)he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."<sup>85</sup> The point here is that differences in how constitutional systems interpret values -such as privacy in this particular instance- are not only culturally interesting; they are normatively relevant. Such differences become part of the expanded pool of normative references and enable citizens to challenge the meaning of values within their own legal system. In a constitutional democracy, the duty of institutional responsiveness guarantees citizens a say in processes of constitutional-meaning formation. That meaning is open to contestation in the form of interpretative challenges rooted in the constitutional imaginaries of citizens. But it is inadequate as a matter of normative theory to conclude with the observation that constitutional values have taken a different shape in different constitutional systems. That is the starting point, not the conclusion, of constitutional argument.

However, the argument I have presented seems firmly rooted in the assumption of similarity between constitutional values across jurisdictions, an assumption that seems at least counterintuitive and most likely wrong. Is constitutional privacy or equality the same in the US, Germany, Japan and Brazil? And if it is not, on what basis could the approach of foreign systems be invoked as authoritative in the process of constitutional interpretation of systems that do not share the same values? At the descriptive level, this objection raises the daunting specter of the nominalist fallacy of assuming identity of content (the meaning of privacy) from similarity in form (the right to privacy).<sup>86</sup> At the normative level, the objection draws attention to the possibility of convergence. Will the demands of institutional responsiveness and the mechanisms for securing political legitimacy lead to converge in the meaning of constitutional values within the confederation of independent republics? That would pose a problem for the approach I defended, which recognizes difference and diversity in constitutional practices and doctrine even

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<sup>84</sup> Lawrence is only one of many examples. For instance, different approaches to the simple wrongness of classification by race in the antidiscrimination law of the United States and South Africa show different aspect of commitment to constitutional equality. See Frank I. Michelman, Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa, 117 HARV. L. REV. 1378 (2004).

<sup>85</sup> Lawrence v. Texas, 539 U.S. 558, 576 (2003).

<sup>86</sup> The danger of nominalism is mentioned in Bruce Ackerman, The Rise of World Constitutionalism, 83 Virginia L. Rev. (1997); Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L. J. (1999).

as it proposes to analyze them as part of the substantive unity of all constitutional systems. The implication of convergence is particularly troubling given the dark legacy of using liberal cosmopolitanism as a universalistic façade for particular interests.<sup>87</sup>

These are important objections but I want to show that they do not undercut the approach to the use of foreign law as a form of heuristic appropriation of the experiences in self-government of other political communities.<sup>88</sup> This approach remains consistent with the most balanced theories that emphasize toleration among forms of constitutional self-understanding where dissonant interpretations of constitutional values are not examples of mistakes but rather the expression of proud and legitimate affirmations of difference.<sup>89</sup>

My approach averts the trap of nominalism because it neither claims nor assumes identify in the meaning of constitutional values. What it does assume is sufficient overlap in the normative core of these values to make them a medium of heuristic exchanges across jurisdictional boundaries. There is enough in constitutional privacy in German law to reveal to

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<sup>87</sup> See Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 35 *NYU Journal of International Law and Politics* 471, 486 (2003) ("the great danger of cosmopolitan thought: (that of) showing itself to be false - a facade for particular interests."). Historical experience also shapes the space for collective normative self-understanding in ways that drastically limit cosmopolitanism's appeal. See Michel Ignatieff, *Blood and Belonging: Journey into the New Nationalism* 13 (1993) ("[i]t is only too apparent that cosmopolitanism is the privilege of those who can take a secure nation-state for granted. Though we have passed into a post-imperial age, we have not moved to a post-nationalist age.").

<sup>88</sup> It might look as if tying the authority of foreign law to its *heuristic* value recognizes normative weight to virtually anything that can have such heuristic value (novels, movies etc.). However, a closer look will show that the experience of other free communities of equals, as encapsulated in the outcomes of similarly positioned institutional actors, is different from philosophy books or movies. Decisions of constitutional democracies about dimensions of freedom or equality are committed to meeting the challenges of feasibility. In other words, moral insight about equality or freedom that emerges from the experience of self government testifies not only about ethical commitment but also about the hope for or proved reality of implementation. Of course the conditions of implementation differ across societies - but the need for implementation shapes the process of reflection, which is where the heuristic value ultimately resides.

<sup>89</sup> See Joseph Weiler's work, *supra* note \_\_\_\_\_. See also Joseph Weiler, *Fundamental rights and fundamental boundaries: on the conflict of standards and values in the protection of human rights in the European legal space in The Constitution for Europe* 102-129 (Cambridge, 1999).

American claimants in American courts dimensions of constitutional values that are relevant to how courts respond to the claim brought forth by a member of the political community.<sup>90</sup> However naïve this might sound to our post-modern sensibilities, constitutional adjudication remains at bottom a process in which courts interpret and apply the constitutional text. And as one turns to the text of modern constitutions, one finds references to similarly worded constitutional provisions especially in the bill of rights to privacy, liberty, speech, equality and others. Even without disputing the conditional nature of constitutional meaning, one should resist the radical relativism which denies any normative family resemblance among these constitutional provisions.<sup>91</sup>

Yet this answer would be insufficient were it not for an emphasis on constitutional claims. Foreign law, in my account, is not a general device for the construction of constitutional values in ways unrelated to the claims of citizens or generally to the internal workings of the domestic constitutional system.<sup>92</sup> As a heuristic device, the use of foreign law becomes a mechanism for accessing dimensions of constitutional meaning that are central to claims brought by free and equal citizens, but which for whatever reasons the evolution of the constitutional

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<sup>90</sup> Ronald Dworkin has argued that values do not have a “normative DNA” and thus their meaning is a matter of construction. See Ronald Dworkin, *Justice in Robes* 153 (2006). For an argument about the limits of normative construction, see Bernard Williams, *Liberalism and Loss* in Mark Lilla, Ronald Dworkin & Robert Silvers eds, *The Legacy of Isaiah Berlin* 91-105 (1991).

<sup>91</sup> Moreover, history and subsequent interpretative practices show trans-systemic influences in the enactment and the interpretation of Bills of Rights. See generally Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford, 2010); Ran Hirschl, *Towards Juristocracy* (Harvard, 2007). For a recent example of this approach in judicial decisions, see *McDonald v. Chicago*, 561 U.S. \_\_\_ (2010) (Stevens, J., dissenting) (“Admittedly, these other countries differ from ours in many relevant aspects... But they are not so different from the United States that we ought to dismiss their experiences entirely... While the ‘American perspective’ must always be our focus, it is silly – indeed, arrogant – to think we have nothing to learn about liberty from the billions of people beyond our borders.” (slip op. 40-41).

<sup>92</sup> If that case relied solely on arguments about constitutional values as they are enshrined in the constitutional text or interpreted by courts or other public institutions, it would in my view be a considerably weaker case. For instance, an argument that focused exclusively on the relation between a value (such as dignity) and a right (such as speech or equality) would be normatively deficient without is insufficient without the emphasis on the constitutional claim. For an illuminating discussion, see in Frederick Schauer, *Speaking of Dignity*, in Michael J. Meyer & William A. Parent, *The Constitution of Rights* 178 – 191 (1992).

system has concealed.<sup>93</sup> Recovering that concealed normative dimension is an indispensable element in how institutions meet their duty of responsiveness. The filter of the domestic legal system is thus never abandoned. The entire constitutional mechanism, and the relevance of foreign law as a mechanism for the correction of distortion effects, remains centered on the duty of domestic institutions to respond to the claims of their free and equal citizens.

One final point is necessary regarding the issue of convergence. I have argued that foreign law helps to recover unseen dimensions of constitutional meaning. But recovery does not mean that the new meanings automatically trump the more entrenched dimensions. The most that can be achieved by expanding the pool of normative references, in the way I have suggested, is to inject a degree of reflectiveness into the constitutional discourse at the specific request of citizens, or of other constitutional actors, including *sua sponte* the decision-makers themselves. This does not guarantee specific outcomes, and endorsement of some dimensions of constitutional values is sometimes denied for good reason. For instance, the way that foreign courts, from Hungary to South Africa, have used American death penalty jurisprudence as an anti-model to be considered and rejected is a reminder that an assumption of convergence is not implied in the argument about the use of foreign law.<sup>94</sup> Foreign law is only a mechanism for the correction of distortion effects. Having responded to the claims of citizens, courts might decide to reject the claim on the merits. In a pluralist society, citizens would not be acting as reasonable sovereigns if they were to interpret the duty of institutional responsiveness as requiring the substantive satisfaction, rather than due consideration, of their claims.

Difficult questions of course remain about the mechanics of using foreign law. But awareness of the normative foundations on which this practice rests can shape its future evolution, including the answers about its mechanics. To make good on its promise, it helps to see the use of foreign law, together with the other mechanisms I have mentioned, as part of the

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<sup>93</sup> For an applied argument that points out democratic responsiveness in the context of comparative constitutionalism, see Rosalind Dixon, *A Democratic Theory of Constitutional Comparisons*, 56 *Am. J. Comp. L.* 947 (2008).

<sup>94</sup> See Carol Steiker, *Capital Punishment and American Exceptionalism*, in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton, 2005); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models.* 1(2) *I-CON* (International Journal of Constitutional Law) 296-324 (2003).

deep liberal constitutionalist committed to constant self-correction in the name of equality, recognition and freedom for all. These mechanisms are part of the institutional implications of that commitment. Their role in the internal structure of the confederation of independent republics brings to light the cosmopolitan dimension of constitutional self-government.