

# The Legacy of Rawls's Political Liberalism and Its Future

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It is always a pleasure and a privilege to see one's work becoming the object of critical consideration on the part of fellow travelers along the road of philosophical reflection. The philosopher's paradise – if it exists somewhere – must be one in which others engage in earnest, not necessarily agree, with the thoughts one has only tentatively ventured to make public. For this pleasure and privilege, I am very thankful to David Owen, Matthew Festenstein, Luca Baccelli, David Álvarez, Marco Solinas, Italo Testa and especially to Leonardo Marchettoni for also having shouldered the burden of editing and of organizing of a seminar at which some of these contributions were presented. I owe a debt of gratitude to all these colleagues for having generously invested time and attention in unraveling all the argumentative threads that are intertwined in *The Democratic Horizon*. The result is a challenging set of objections and critical remarks, all quite on the mark and difficult to do full justice to. Undergirding them is an unfailing grasp of the general thrust of my attempt to rethink and expand the paradigm of “political liberalism” – which I take (for reasons elucidated in my response to Baccelli) as the most innovative and promising framework available for understanding contemporary constitutional democracy – in order to improve its potential for meeting the new challenge of hyperpluralism, not really confronted by Rawls in the 1990's.

Some of the contributors, mainly Owen and Festenstein, probe my general strategy of grafting notions like exemplarity and judgment onto political liberalism's greater openness, relative to other competing frameworks, to “the aesthetic sources of normativity”. They probe the internal consistency and the compatibility of the use I make of such notions with the central aspects of the Rawlsian paradigm. Others, like Baccelli, invite me to reflect on the overall import of my endeavor: does it really add new substance to the promise of political liberalism or does it amount to a kind of immunization? Other contributors focus on more specific but very significant junctures of *The Democratic Horizon. Conjecture* – a form of public argument that in hyperpluralist contexts, where public reason ends up idling, may generate convergence by hermeneutically engaging the



other's comprehensive conception – is at the center of Álvarez's and Marchettoni's comments. While Álvarez explores how conjecture could play a fruitful role also beyond that domestic realm to which I have mainly confined its significance, Marchettoni calls for a more adequate account of the nexus of conjecture and recognition than I have provided. Solinas critically engages the view of affects and emotions underlying my account of the democratic ethos, takes issue with my preponderant cognitive emphasis, but also charitably unearths countervailing considerations in my text, where the texture and immediacy of emotional response receive priority. Finally, the *multivariate democratic polity* – the last resort, when conjectures fail to generate consensus, for avoiding “liberal oppression” or the imposition of constitutional essentials that fail to be endorsed by *all* the citizens – is put to test by Testa in terms of its normative credentials as well as of its applicability beyond the domestic context. Like Álvarez argued about conjecture, so Testa finds that the dualistic approach underlying the multivariate polity incurs important difficulties if we try to apply it to supranational structures of governance, best exemplified by the European Union's current arrangements.

Taken together these contributions shed a new critical light on the four adjustments to the Rawlsian paradigm that in my book are meant to enable political liberalism to meet the challenge of hyperpluralism – namely, a new emphasis on conjecture as a supplement to public reason, an expanded reconstruction of the democratic ethos, its pluralization in the guise of a typology of equally legitimate forms of ethos, and the multivariate democratic polity. The reservations expressed by Owen, Festenstein, Baccelli, Álvarez, Solinas, Marchettoni and Testa, on the other hand, will be a stimulus for my future research and at the same time testify how vital and thought-provoking the Rawlsian legacy still is, especially in the new troubled times that now confront *liberal*-democracy. The challenge posed by hyperpluralism in a world where instability and rampant inequality fuel unprecedented migratory tides may indeed pale when compared with the *indigenous unreasonability* underlying the response of nativist majorities to these phenomena. But that will be a discussion for a future occasion.



### **Patterns of exemplarity in battle for the soul of “the normal”**

To David Owen I am grateful for having correctly identified the nexus of democratic politics at its best and *exemplary normativity* as the center of my political philosophy. Like the work of art that creates a new style, innovative politics on the scale of the “large picture” – the consent of the governed as the standard for legitimacy, democratic self-government, the abolition of slavery and the equal dignity of all citizens, universal suffrage, human rights – discloses new possibilities for our living politically together and this disclosure, in turn, arouses the perception of an enrichment of our life. The appeal of “politics at its best” rests on nothing else – be it continuity with tradition or some transcendental Archimedean points. Owen likens my attempt to Rancière’s and credits me for at least partially avoiding Rancière’s mistake of equating “politics at its best” only with *emancipatory politics* that breaks “with the existing political grammar of liberal democratic societies” (p. 13)<sup>1</sup> and pushes us “beyond our current political order to a less unjust political condition” (p. 13). Why only partially?

On Owen’s view, my drawing on Kuhn’s distinction of “normal” science and science at the time of a paradigm revolution – call it “revolutionary science” – commits me to a softer version of the same mistake. While acknowledging that for me “politics at its best need not necessarily be transformative at the constitutional level” and “can amount to the exemplary realization of norms and principles that are long established but rarely put into practice”,<sup>2</sup> Owen contends that somehow I continue to identify politics at its best with the *exceptional*, even if it is not the transformative-exceptional but what I will call the “applicationaly”-exceptional. More generally, Owen suggests that excellence in a practice comes in two versions: in accordance with the “grammar of a practice” or in subversion of it. Mozart, Haydn and Beethoven all represent “exemplars of ‘music at its best’ that move our imaginations” (p. 15). However, while Mozart and Haydn composed in accordance with the expressive resources of the so-called “classical style”, adding different nuances respectively of “sensuality” and “cheerfulness” to it, Beethoven transformed that style in order to express a Romantic sensibility attuned to another way

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<sup>1</sup> Numbers in brackets with no further indication refer to the pages of this issue.

<sup>2</sup> A. Ferrara, *The Democratic Horizon. Hyperpluralism and the Renewal of Political Liberalism*, New York, Cambridge University Press, 2014, hereinafter abbreviated as *DH*, p. 40.



of seeing the world (see p. 14). When we transpose this teaching to the realm of politics, Owen suggests, we may well imagine exemplars of politics at its best that “disclose with particular force and salience” the importance of political values that are part of practices so familiar as to often escape our attention: “a legal judgment, a political debate, a piece of legislation, a popular protest” that do cast in relief valuable political practices that we often take for granted, such as “respect for the rule of law, [...] electoral participation, [...] solidarity in times of crisis” (p. 15).

What in my opinion is at stake in this desirable reconciliation of politics at its best with familiar, non-innovative practices is the “pluralization of exemplars” in a hyperpluralist context. As Owen aptly points out, “a political act may serve as an exemplar for those who have reached an overlapping consensus on a political conception of justice but not for those who stand in *modus vivendi* relations to the state”: the same political act may count as exemplary in “normal” mode for the insiders to the overlapping consensus and as “revolutionary” for those in the *modus vivendi* mode. Consequently, the same act may exert the twofold function of *reminding* outsiders of shared political values and of *recruiting* those who support those values only prudentially (see p. 16).

I fully agree with the substance of Owen’s intimation and do not see where the divergence lies. The key phrase, in his account of “normal” political exemplars, is that disclosure, when it reveals political values that are part of practices so familiar as to make them almost unnoticed, does so “with particular force and salience”. Thus, these “legal judgments, political debates, pieces of legislation, etc.” are far from *average*: they stand out, in fact, “with particular force and salience”. In Owen’s example from music, it is Mozart and Haydn whom he picks out as exemplary of excellence within the classical tradition, not Pietro Nardini and Ignazio Fiorillo, also quite respectable composers. Thus “normal” and “within the canon of a tradition” mean something different than “average”. This is all I need in my argument. In sum, there is no way around construing the non-revolutionary exemplary as “applicationally”-exceptional (as opposed to the “creatively” or “innovatively” exceptional).

Having said this, one could observe that the exemplarity of application has a larger role in politics than in art. The reason is that political and legal exemplarity are forms of exemplarity that suffer less from iteration, certainly much less than exemplarity in the



artistic realm, which quickly wears out by imitative repetition. Nothing kills the provocative punch of the avant-garde installation more than its becoming what the average visitor expects and pays her entrance fee for. On the contrary, if one recalls the vivid emotions aroused a few years ago by the Arab Spring, the perceived opening up of political life in an entire region hitherto run by semi-dictatorial rulers or elective oligarchies, then it becomes apparent how the *n-th* process of democratization that in contextually unique forms promises to bring about the *n-th* instantiation of the “government by the governed”, to use Lincoln’s phrase, is no less capable of arousing the response typically associated with witnessing exemplarity – namely, the Kantian sense of a “furtherance of life”, in this case *political* life. The same occurred with the fall of the Berlin Wall, the fall of the apartheid regime in South Africa, or the demise of the Latin American dictatorships of the 1970’s and 1980’s. One of the tasks that awaits completion and to which I hope to contribute in the near future is the charting of a typology of forms of exemplarity in the public realm: within that framework “non-revolutionary”, “normal”-exemplarity (if one can use such an oxymoronic expression), could best be addressed.

Concerning the “pluralization of exemplars” – i.e. exemplary acts appearing under a different light to citizens within the overlapping consensus and to those who support the constitutional essentials only out of prudence, and exerting a dual function of *reminding* and *recruiting* – it would have been desirable to discuss the issue in the light of specific and concrete instances. Articulated in such general terms, I find the suggestion quite reasonable and worth integrating within the picture of the democratic multivariate polity. It is easy to imagine that exemplary practices of gender equality may count as *reminders* for one group of citizens and carry *recruiting* appeal for others, just like perhaps lifeworld practices of solidarity with the elderly may work as *reminders* of a moral habitus to some and exert *recruiting* appeal on those who are less influenced by those traditions.

Furthermore, Owen points out that the actual recognition of an exemplary act as such depends on constructions of meaning that in turn are affected by the working of media of communication, old and “new”. This dependency on media has produced a beneficial enlargement of the potential audience and addressees of a political act to the global public but also, conversely, a segmentation and polarization of such audiences “in ways that fail to support and plausibly undermine the modest forms of ‘enlarged



mentality’ and the ‘common world’ that democratic politics at its best requires” (p. 17): symptoms of such fragmentation is the frequent “demonization of political opponents” and “negative affective register” that distinguishes politics in the 21<sup>st</sup> century. Owen concludes urging that reflection on democracy include also reflection on the need to publicly fund trustworthy quality media and to foster a kind of citizens’ “media education” as part of a broader “civic education”.

While I have briefly addressed the erosion of quality media as one of the inhospitable conditions (*DH*, p. 11) and I find the idea of including a sort of “media education” within a larger project of “civic education” an excellent suggestion for future discussions of the democratic ethos, Owen’s point about the segmentation and polarization of the audiences – due, among other factors, also to the contribution that social media, and generally the Internet, give to licensing what in other venues would be labelled hate-speech and to insulating micro-publics of like-minded zealots from any open confrontation across divides – signals a lacuna in need of urgent filling. Not only there cannot be any recognition of exemplarity without an “enlarged mentality”, but even the public sphere is in jeopardy. When it stops being the locus of the exchange of reasons it deteriorates into a mere “public space” (on the model of the stadium) where opposed cheering crowds exchange invectives, not reasons, and exit the event just of the same mind as they were before. The most dangerous threat represented by populism is not so much the prospect of its carrying the electoral day – risky and disquieting though this may be – but the prospect of its permanently infecting the democratic public sphere with a demonization of all that is politically adversarial to one’s own parochial viewpoint. It is one of the challenges for democracy in our century – the four Berlusconi governments in Italy and the Trump campaign in the US testify to this imminent danger – which I think could be addressed through a rethinking of the separation of powers. One of the ideas to put to test is that because the integrity of the public sphere is vital to the survival of a democratic polity, then its safeguarding constitutes a function specific enough (and yet differentiated in a number of distinct areas, such as the equitable assignment of frequency bands, the regulation of the market of advertising, ensuring the survival of quality media,



ensuring media-pluralism, etc.) to warrant the creation of a separate branch of power, alongside the traditional ones.<sup>3</sup>

### **Is political liberalism really hospitable to exemplarity and openness?**

Also Matthew Festenstein centers his thoughtful comments on my attempt to rethink the normativity of political liberalism, indeed of politics as such, along exemplary lines and probes the overall consistency of such project in an interesting and challenging way. He ascribes me the merit of coming some way toward bridging the yawning gap between Rawls's political liberalism and the judgment paradigm. According to Festenstein, while political liberalism is committed to offering "theoretical constraints on legitimate political action which must be applied to political practice", the judgment paradigm instead "seems to reject a priori theoretical constraints in favor of the primacy of practice in determining how we orient ourselves to particular concrete situations" (p. 19). Much as I am pleased to receive such recognition, I must protest that it is somewhat undeserved, because the gap between political liberalism and judgment is much less than "ominous" and my task has been accordingly simpler. The break of political liberalism from the lingering foundationalism of *A Theory of Justice* consists precisely of the rejection of "theoretical constraints". On the one hand, the normative credentials of "justice as fairness" qua political conception of justice of a well-ordered society do not rest on the free-standing cogency of the argument in the original position – now demoted to an "expository device" – but on the contingent materialization of at least a constitutional consensus, if not a full-fledged overlapping one, on its merit on the part of a majority of the citizenry. On the other hand, the newly introduced concepts of public reason and of reasonability can only be made sense in terms of the normativity of judgment and exemplarity, especially when we consider that peculiar predicate, never fully elucidated by Rawls – namely, "most reasonable for us" as applied to justice as fairness or to some other ideal object. In fact, if "most reasonable for us" is conservatively equated with "what is mandated by practical

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<sup>3</sup> On the general point of rethinking the separation of powers and introducing new ones, see B. Ackerman, "The New Separation of Powers", *Harvard Law Review*, 113 (2000), 3, pp. 634-729. On the specific argument for a branch of power in charge of regulating the whole sphere of *communication* (from the physical frequencies for broadcasting, to ensuring "media pluralism", to regulating hate speech and political propaganda), see A. Ferrara, *Democrazia e apertura*, Milano, Bruno Mondadori, 2011, pp. 94-95.





reason” (as Habermas in his famous exchange with Rawls suggests) then “the reasonable” forfeits its specificity relative to the moral, and “public reason” forfeits its groundbreaking originality, to become a somewhat uninspiring mouthpiece of practical reason in the public realm. If instead “the reasonable” is understood, like Rorty suggests, as synonymous with the “awareness of the partiality of one’s position”, the very possibility of grasping what it could possibly mean for one conception of justice, one political position, or one interpretation of the constitution to be “*most reasonable* for us” vanishes.

Furthermore, Festenstein correctly points out the convergence of Rawls and Arendt on envisaging a kind of politics freed not just from the spell of moralism but also from the lure of “epistocracy”, or the priority of truth over the standard of political “rightness”. Their view of politics is inextricably bound up with the acceptance of pluralism. He credits me for opening up an original path to the appropriation of the Arendtian legacy within the framework of political liberalism, distinct from the radical contextualism of Geuss and from the agonistic emphases of Honig and Zerilli.

Finally, he very concisely recaps my view of the exemplary normativity presupposed by “the reasonable” as consisting of four main aspects. First, exemplarity

consists in the congruence of the exemplar with the collective or shared identity of those for whom it has normative force. This claim to exemplarity is not a claim that this policy is congruent with just how we think we are now but with “our shared sense of who we could be at our best”.<sup>4</sup> [...] A claim to be the most reasonable is a claim that a policy or institution commands our consent because it fits in the most exemplary way with this shared sense of who we are at our best. Second, exemplarity also consists in a policy or institution’s itself having what is referred to as “exceptional self-congruency”, a “law unto itself”, expressive of a particular moral tradition but not confined to it (*DH*, p. 64).<sup>5</sup> The normative force of an exemplary policy or institution follows from its being a part of and cohering with the “singular normativity of a symbolic whole” (*DH*, p. 65).<sup>6</sup> Third,

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<sup>4</sup> A. Ferrara, “Public Reason and the Normativity of the Reasonable”, *Philosophy & Social Criticism*, 30 (2004), p. 593.

<sup>5</sup> A. Ferrara, *The Force of the Example: Explorations in the Paradigm of Judgment*, New York, Columbia University Press, 2008, p. 78.

<sup>6</sup> Ferrara, “Public Reason and the Normativity of the Reasonable”, cit., p. 590.





exemplarity has an affective component and “sets the public imagination in motion”.<sup>7</sup> Fourth, exemplarity is context-transcending. The claim for exemplarity derives its validity from an appeal to a *sensus communis* and a [Kantian] concept of the furtherance of life that should be viewed as a universal capacity to sense what promotes human flourishing. (pp. 22-23)

Judgment is the human ability that tracks exemplarity and, consequently, “most-reasonableness”. Festenstein in the final section questions whether judgment so conceived can indeed function as the source of normativity that I claim it to be and, at the same time, be consistent with the premises of political liberalism. Festenstein’s doubt comes from the difficulty of reconciling the quality of personal reasonableness required of the subject of judgment, the developmental-psychological rootedness of this required reasonableness in the possession of specific civic virtues, “including a commitment to enlarging one’s imagination and affective instincts”, with the premises of political liberalism. The required possession of these civic virtues (tolerance, the acceptance of pluralism or epistemic humility, civility) is not *per se* problematic. What is problematic, in Festenstein’s opinion, “is the thought that the virtues required by this specific conception of judgment come trailing contentious philosophical and ethical commitments that are meant *ex ante* to be excluded from the domain of the political” (p. 25) – for example, the commitment to submit “our affective responses and imaginative projections [...] to scrutiny in the space of reasons” (p. 25) or a preclusion against “the Aristotelian conception of emotion” which could instead be part and parcel of a model of judgment and exemplary normativity.

Be that as it may, Festenstein detects this kind of inner tension in my discussion of openness as a democratic virtue. On the one hand, my conception of openness draws on the comprehensive views of liberals like Mill and Dewey; on the other hand, in articulating my notion of openness, I strive to stay clear of the comprehensiveness of

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<sup>7</sup> “Democracy cannot afford leaving political imagination theoretically unattended. The suggestion has been put forward to understand democratic politics at its best – that is, when it brings existing normative principles and practices on the ground into an exemplary congruence or when through exemplary practices it articulates new normative standards and political values – as a way of promoting the public priority of certain ends through good reasons that set the political imagination in motion” (*DH*, p. 212). See A. Ferrara, *The Force of the Example*, cit., p. 79.



Taylor's *agape* and Derrida's *hospitality*<sup>8</sup>. The tension, however, is more general and deep-seated. In Festenstein's words,

An ethos of openness is part of any reasonable conception of political value, and, in this sense, is part of a citizen's possessing and exercising the capacity of reflective judgment in a reasonable way. At the societal level, the ethos of openness allows and promotes any reasonable "great transformation" and so can be integrated in a modular way into a variety of reasonable comprehensive conceptions. Yet to say that any reasonable person *must* be moved by a passion for openness defines the scope of reasonableness in a rather peculiar way. On the face of it, the motivation for political liberalism is that there are reasonable citizens who are not moved by this passion and reasonable political doctrines that do not include it. But if the claim is only that reasonable doctrines must *tolerate* this passion in others that seems to fall short of Ferrara's vision of a democratic society: it would allow for a society entirely composed of citizens who subscribe to mere tolerance of openness. But this is exactly what Ferrara wants to avoid, although it seems quite compatible with Rawlsian political liberalism. (p. 28)

In response, I must clarify that for me openness is not coextensive with the democratic ethos but only a very specific ingredient of it, which came into being in response to certain historical challenges – indeed a composite aggregate of inauspicious conditions – faced by democracy in the second half of the 20<sup>th</sup> century. Thus, I would wish neither to claim that openness is a constitutive ingredient of the democratic ethos on a par with the orientation toward the common good, the passion for equality and that for individuality, nor to claim that "any reasonable person *must* be moved by a passion for openness". The democratic polities of the first half of the 20<sup>th</sup> century could very well do without it, indeed openness was only a disposition of certain segments of the democratic elites, not quite a mainstream disposition. It makes little sense, in my opinion, to think of the democratic ethos as a fixed constellation that remains the same in the fledgling democracies of the 19<sup>th</sup> century and in those immersed in the globalized world, in those with a relatively simple social structure and in the complex societies of the 21<sup>st</sup> century, in those with burgeoning national markets and in those immersed in a global economy

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<sup>8</sup> Festenstein attributes me a critique of the "comprehensiveness" of White's *presumptive generosity*, which is not entirely accurate. I do acknowledge the "political" quality of presumptive generosity, see *DH*, pp. 61-63, and my exchange with White, in "Democracy in the Age of Hyperpluralism. Special Section on Alessandro Ferrara's *The Democratic Horizon: Hyperpluralism and the renewal of political liberalism*", in *Philosophy & Social Criticism*, 42 (2016), pp. 657-664 and 693-697.



dominated by disembedded financial markets, in those coalescing around one nation and in those characterized by multiethnic constituencies and hyperpluralist societal cultures. Openness came into being as a disposition included in the democratic ethos only when democracy turned into a horizon – the one and only one fully legitimate form of government – much in the same way as “reasonability” can be understood as having become a democratic virtue only after the limitations of comprehensive liberalism have become evident.

However, one side of Festenstein’s question remains in need of an answer. Can openness disappear from the picture just as it once entered it, in the wake of momentous historical transformations? While the philosophical answer cannot but be positive – who needs yet another iteration of the *geschichtsphilosophisch* narrative of irreversible progress, this time harnessed to the enrichment of the democratic ethos? – the *zeitdiagnostische* dimension of the question still remains undetermined for me at the moment. Brexit and especially the election of Trump send to us powerful reminders of the “fragility of openness”: even powerful democratic societies with an imperial past and present ambitions of global influence can react with a spirit of backward-looking *closure* to the upcoming challenges of globalization. Only the reaction of surprise on the part of the pro-tempore winners and that of gloomy dispiritedness within the progressive constituencies indicate the extent to which a public culture of openness has thus far become integral to the democratic ethos. Whether these important episodes will coalesce in a new enduring trend – as the elections of Thatcher and Reagan did almost four decades ago – or will turn out to be ephemeral flashes in the electoral pan is too early to say, though prudence suggests to prepare for the former.

### **Enriching or immunizing political liberalism?**

Luca Baccelli’s very articulate comments raise a radical question. Does the expansion of political liberalism pursued in *DH* represent an innovative reworking of the Rawlsian paradigm or should it rather be considered an attempt at immunizing the paradigm against several anomalies, in the footsteps of those “astronomers who added hemicycles to the Ptolemaic model as they waited for a new paradigm” (p. 44)? Before addressing such



question, however, let me respond to the more detailed objections formulated by Baccelli in his highly detailed reconstruction of my argument.

Baccelli credits me for offering a picture of the inhospitable conditions for the functioning of democracy in the 21<sup>st</sup> century that “goes to the heart of the matter” (a picture drawn before Brexit and the election of Trump, to wit). However, he attributes me a “farewell to the ‘procedural strategy’” as my intended remedy for those conditions – a phrase that prompts me to emphasize once again that my pointing to the democratic ethos as the key to the difference between real democracy and the elective oligarchies that usurp its name is meant as an *addition* to the reflection on the procedural traits of democracy, not as a *substitute*. My argument is that proceduralist considerations about the rule of law, party pluralism, majority rule, regularity of elections, freedom of the press, the separation of powers *only reach to a point* in helping us distinguishing democracy from its imitations, not that they are to be cast aside as irrelevant.

Furthermore, throughout his commentary Baccelli manifests a wholehearted appreciation of my attempt to graft references to the aesthetic sources of normativity (exemplarity, judgment, authenticity) onto the Rawlsian paradigm of political liberalism (especially when it comes to the definition of reasonableness and the normative predicate “most reasonable for us”), correctly identifies (and reasonably disagrees with) my deflationary consideration of power as “political noise”, as it were, but in the end attributes me a hasty and unjustified dismissal of Chantal Mouffe’s twofold intimation that “the political” pierces through the illusory veil of an overlapping consensus designed to rid us of all but trivial conflict and that Rawls “moralizes” the rejection of radical dissenters by labelling them “unreasonable”.

In fact, I see no problem in “acknowledging the peculiarity of the political”, except perhaps a kind of superfluity of such emphasis. Rawls never succumbed to the fascination with the formal and the procedural that from Kant through Kelsen and up to Habermas permeates German thought about the rule of law and legitimacy. Therefore the Schmittian mantra of the political – the political as antidote against the veil of the false neutrality of liberal proceduralism – only applies to Kant, Kelsen and Habermas, but entirely misses its target with Rawls. The contents of the overlapping consensus, and of the constitutional essentials inspired by them, never raise a claim to pure formality: they *are* “the political”,



recast as what is *most reasonable for us*. Rawls even uses the term himself, in an article entitled “The Domain of the Political and Overlapping Consensus”.<sup>9</sup> As to my claim that Mouffe forfeits all possibility of adopting a normative stance and confines political reflection to the *description* of empirical conflicts and their outcomes, it is actually she who denounces “the very possibility of a non-exclusive public sphere of rational argument where a non-coercive consensus could be attained”.<sup>10</sup> Given her presuming the impossibility of a public sphere of rational argument, where conflicts are settled – or regulated if not solvable in principle – according to reasons accessible to all, how should we imagine conflicts to end, if not by the empirical exercise of force, or the threat of its use, by the pro-tempore strongest party? There is no awareness, in Mouffe’s theorizing, of the difference between a) claiming that all consensus is imperfect – but then again, which human accomplishment is ever perfect? – and b) claiming that because every actual consensus is imperfect, consensus should be renounced as a normative lodestar. The second claim, if embraced, reduces political theory to a mere explanation of why the more powerful contender came to prevail without ever questioning the merit of that domination.

While Baccelli praises the program of charting “multiple democracies” (discussed in chapter 5 of *DH*), as opening “a new, highly relevant and vital research field” (p. 40) and formulates the welcome suggestion to look at the priority of rights over duties not just as a point of friction, but also as a vocabulary embraced by many grassroots movements of the global South, he finds my account of the democratic legitimacy of structures of supra-national governance by and large unconvincing – a theme which recurs also in Testa’s comments. Citing the work of Italian jurist Maria Rosaria Ferrarese, he points to the fact that “global law is under construction through the progressive substitution of contract regulation, arbitrates and judge-made law to statutory law” (p. 42). Consequently, according to Baccelli, “the normativity of law is fading, while governance is not capable of governing today’s huge concentrations of economic, geopolitical and symbolic power” (p. 42) and the tools of soft-law used by governance

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<sup>9</sup> J. Rawls, “The Domain of the Political and Overlapping Consensus”, *New York University Law Review*, 64 (1989), pp. 233-255.

<sup>10</sup> Ch. Mouffe, *The Democratic Paradox*, London, Verso, 2000, p. 33.



may perhaps mask a reality different than appearances: “one might ask how *moral* the moral suasion is, and if it is truly moral *suasion* and not *de facto* coercion” (p. 42).

My response is that the normativity of law, by which Baccelli actually means *statutory law*, is fading because the authority of nation-states is fading, and that of national parliaments is fading even faster. The strong normativity of law cannot be reinstated as such because there is hardly a way of restoring the authority of nation-states and lots of doubts are raised by the proposition of thinking of the EU’s or of a cosmopolitan authority’s in the guise of a nation-state writ large, if anything because no supranational *demos* can be easily assumed to play an equivalent role as the nation. Thus, we are stuck with the notion of coordinating action in concert at the supra-national level not through “statutory law”, and the attendant state-enforced sanctions, but in some other way, for which no better name than “governance” has been found. The task confronting political theorists in the 21<sup>st</sup> century is not to wish away governance but to spell out what *democratic* governance means and how it differs from *technocratic* or *authoritarian* governance. A first step toward articulating that notion seems to me to consist of rethinking the steering capacity of governance structures in terms of a monopoly on the “attribution of legitimacy” to the participants’ actions and then of qualifying that monopoly as subject to criteria of accountability and transparency (which mark the difference from non-democratic governance). The fact that suasion often masks coercion is no different from the fact that domestic electoral suasion often masks the power of money and media: an unfortunate and deplorable predicament, but no reason to wish away elections. After all, Brexit and the election of Trump are there to show that big money and electoral consensus do not always join hands.

Finally, I am surprised that Baccelli suspects that my “adoption of the Rawlsian paradigm results in a paradoxical undervaluation of the role and function of law and legal systems” (p. 43), when in fact Rawls is portrayed by Bellamy, Waldron, and Tushnet as one of the main representatives of so-called “legal constitutionalism”. In “legal constitutionalism” judicial review and the role of constitutional courts are foregrounded – for Rawls public reason is exemplarily embodied by the Supreme Court, not by Congress – to the detriment of the role of legislatures, emphasized instead by Bellamy and the other authors of “political constitutionalism”.



To return to the initial question, I believe that political liberalism is still today the best normative paradigm on offer for accommodating pluralism or difference within a democratic polity. It can be freed from the context-bound parameters reflected in it and is certainly not burdened by the drawbacks that clip the wings of competing normative paradigms such as Dworkin's, Habermas's or Sen's. The Dworkinian approach, just like Sen's, is burdened by "comprehensive" assumptions about rights (like Sen's is by assumptions about "capabilities") that are *highly controversial* – controversial not just cross-culturally, but also intra-culturally. The priority of rights is contentious matter for any utilitarian-minded Western philosopher. Furthermore, the Dworkinian approach has the drawback of reviving a divide between liberalism and democracy (democracy is attributed a merely instrumental role, as the best institutional framework for realizing the supreme virtue of equality) which it has been the great merit of Rawls and Habermas to bridge. The Habermasian approach – highly original though the theory of the public sphere and the co-originality thesis might be – is fatally flawed at two crucial junctures. First, the notion of "rational consensus", which relates to "compromise" pretty much in the same way as Rawls's "overlapping consensus" relates to "*modus vivendi*", is burdened by the basically unfulfillable requirement that consensus proceed *from the same reasons* even in the conditions of hyperpluralism that affect late-modern societies. Second, Habermas never metabolized "democratic dualism" within his framework. Consequently, his demanding idealized presuppositions of discourse must be satisfied even by the most banal administrative act, instead of merely applying to the approval of constitutional essentials. The consent of "all the affected ones" within a discursive exchange free of coercion is required even in order to *legitimately* turn a street into a one-way street. Needless to say, this places his normative model, when contrasted with the Rawlsian principle of liberal legitimacy, beyond the number of models that can seriously claim to capture what democratic legitimacy in a complex society means.

Thus, in response to the allegation of trying to immunize the Rawlsian-Ptolemaic paradigm, I would say that unless one is prepared to abandon a normative perspective and embrace one of various forms of "political realism", the Rawlsian framework is still by far the best game in town and my attempt, in *DH*, is to show that it can be productively enriched in order to make it applicable to contexts different than the original one.





### **Conjectures beyond the nation and how to avoid the domestic fallacy**

David Álvarez focuses his comments on my plea for a conjectural turn within political liberalism. He praises the promise, found in *DH*, of making the liberal-democratic polity more inclusive towards “outside and internal dissenters” and freeing it from “liberal domination” or the imposition of “secular toleration on incorporated minorities” (p. 46). However, Álvarez contends that such potential remains underfulfilled because my discussion of conjectural arguments and the multivariate polity remains centered on the domestic level instead of addressing the possible use and function of both at the level of supranational governance.

He begins by recalling the ethical pre-requisites of a valid conjectural argument, namely the status of its underlying motives and the exclusion of non-moral, strategic reasons from their number. Then he proceeds to outline a dilemma that has hitherto not received enough attention: any comprehensive doctrine is open to multiple interpretations, and different interpretations are on the one hand differently conducive to the sought convergence with some “political values”, yet on the other hand also differently conducive to preserving, or even enhancing, “the integrity of the belief-system”. We need “to determine what are the moral limits to the re-interpretation of a belief-system and what acceptable trade-offs between expediency and the integrity of a culture” are (p. 49). Obviously, by stretching thin its central tenets, nearly *any* comprehensive conception could be made compatible with the constitutional essentials of a liberal-democratic polity. On the other hand, if we follow an “originalist” path without flexibility, no moral outlook other than secular liberalism *à la Voltaire* would prove compatible with a political conception of justice. It seems to me that oriented reflective judgment – where orientation is provided by a principle of equal respect<sup>11</sup> – is the kind of competence of choice, much more than rational choice or sheer hermeneutic ability.

Álvarez then applies this framework to the international scene. Between the two extremes of a “duty to engage in conjectural argumentation to provide assistance to reform foreign institutions and political culture” and, on the other hand, understanding

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<sup>11</sup> On “oriented reflective judgment”, see A. Ferrara, *Justice and Judgment. The Rise and the Prospect of the Judgment Model in Contemporary Political Philosophy*, London, Sage, 1999, pp. 193-194 and 222.



regional regimes, like the EU, as clubs “with a sovereign right of admission and no duty to incorporate neighboring countries”, he argues that an intermediate terrain extends, where principled and pragmatic reasons concur in motivating actors such as the EU “to extend membership to their neighbors” (p. 50). Reasoning on a scenario clearly antedating the failed coup of 15 July, 2016 in Turkey and the successful ensuing repression, Álvarez invites us to imagine a EU that “needs to access a promising Turkish market and to attract its young and highly skilled workforce” and a Turkey

reluctant to accept the invitation because some EU regulations would conflict with the prevailing Islamist conception. The EU expert committee may suggest some Islamist democratic reforms that would be in line with the EU public reason. Even if the real motivation of the EU is manifest and sincere in its pragmatic interest, we may hold doubts regarding the reasonability of the accession (p. 50).

This example shows, according to Álvarez, that when discussing conjecture at the supranational level we have to allow for partially strategic motivations: on the one hand, this strategic component detracts from the quality of the hermeneutic dialogue set in motion by conjecture, on the other hand often strategic interest is “the engine that moves realistic utopias in history” (p. 51). The successful formation of consensus cannot be forecast in time and mode, rightly points out Álvarez, lest we fall back into a philosophy of history.

In corroboration to this point, and also drawing on Heath’s critique of Habermas, Álvarez puts forward an interesting suggestion: we should not hastily equate strategic action and bargaining and should accept “bargaining as a method to identify points of equilibrium and of justified satisfaction of individual expectancies where communicative deliberation failed to bridge intractable gaps in value and interest interpretation” (p. 53). In other words, bargaining could supplement hermeneutic conjectures when it comes to “elaborating criteria for ranking alternatives”, i.e. for ranking on a scale of acceptability interpretations of broad religious-moral conceptions that generate diverse consequences as far as political convergence and cultural integrity are concerned. At the juncture where I would incline to insert *oriented reflective judgment* (oriented both by the standard of equal respect and by the guidelines for the fulfillment of a cultural identity) Álvarez suggests to insert a moment of “bargaining”: consequently, *in lieu* of conjectural *arguments*, we should speak of a “conjectural space” where competing interpretations



and a bargaining process between mainstream interlocutors and members of the culture occurs. The result of the bargaining of cultural interpreters, external and internal to a culture, will then be “a *modus vivendi* on a higher moral ground” (p. 54).

I find this suggestion interesting – and Álvarez must be credited for providing a specific example about a Confucian conjectural space – but in my opinion it does not clarify *in what sense bargaining still responds to a normative standard*. Much as Álvarez tries to distinguish bargaining and strategic interaction, both have as common denominator the fact that the resulting equilibrium is legitimated solely by the empirical wills of the participants: there is no “right price” of something on the market, except as a metaphor for the statistic average of what *in normal conditions* large numbers of buyers are willing to pay for something. Furthermore, it is unclear how Álvarez’s alternative model can respond to the Rawlsian objection concerning the intrinsic instability of all *modus vivendi* arrangements, including the one of higher moral standing that he envisages. As soon as an interpretive equilibrium is reached, which pressures me to give up some aspects of my favorite interpretation of my religious culture for the sake of a closer integration, I have the incentive to use the newly acquired inclusion within the overlapping political culture to accredit further and revive the interpretation that I just had to abandon.

Finally, Álvarez criticizes my account of governance, in Chapter 7, for focusing almost exclusively on issues of legitimacy. He correctly reconstructs my claim that complaints as to the democratic deficit inherent in the tortuous and tenuous relation of the citizens’ democratic will to the regulations of supra-national (whether regional or global) governance often are ungrounded: they are based on the dubious assumption that standards of supranational legitimacy should mirror the ones operating at the national level. Then he accuses me of replicating the same mistake. My account of democratic governance in the end “justifies the global regime in functional terms relative to domestic conditions” (p. 58). In other words, it still embeds a statist standard of legitimacy, according to Álvarez: my account of governance, if projected at the global level, remains (somewhat mysteriously to me) “part of the constitutive framework of state government” (p. 58). This criticism is further substantiated by the observation that we



still lack an overarching deliberative space in which the competing partial discourses can be reinterpreted and prioritized according to a view that is coextensive to the scope of the *demos* subjected to its regulatory power, and which exceeds the national terms of representation (p. 58).

In response, I would reject the idea that conceiving of structures of global governance as an egalitarian association of states, on the model of a deeply reformed and democratized UN, freed from the anachronistic veto prerogative and with an effective set of checks and balances among truly separated global powers, amounts to a conservative vision premised on the untranscendable model of the nation-state. To the contrary, the very idea that the global order will be missing in democratic quality until a *demos* “which exceeds the national terms of representation” comes into being, far from embedding any new vision, except in the scale of the process, in my opinion epitomizes “the domestic fallacy”: a projection on the global stage of the same old narrative of a nation that at some point constitutes itself as a *demos* and grounds institutions that will give legal form, will realize and will assess the proper interpretation of its own will. I remain very skeptical of the idea that there can be a *demos* “which exceeds the national terms of representation” and I think that the burden of proof of showing us its feasibility is on those who invite us to think along these lines. The only version of this idea that I find attractive is the Habermas-derived idea of a *dual sovereignty* and *dual constituent power* wielded simultaneously by human beings *qua* citizens of their state and *qua* members of humanity: this imaginary, however, still corroborates the idea that central structures of governance coordinate, not replace, local governments.

### **On the passionate side of the political passions**

Marco Solinas’ comments, like Owen’s and Festenstein’s, focus on my attempt to integrate a reflection on the aesthetic sources of normativity, on the imagination and the passions within political theory, and more specifically within a discussion of the affective infrastructure of democracy and the democratic ethos. Solinas reconstructs my view of the democratic ethos very thoughtfully and compares it with Nussbaum’s view of “political emotions”. Both aim at overcoming the limitations of a merely proceduralist understanding of democracy and political legitimacy and at retrieving “those normative sources that are able to give political force to ‘good reasons’”. In fact, good reasons, if



uncoupled from the emotional aspect of human life, remain a mere “score-keeping of the ought” with no potential for motivating people to political action. Nussbaum brings into focus an interesting emphasis on enthusiasm as an emotional modality, which, if directed at the core principles and values of democracy, adds to the stability of the polity. One could easily imagine how the lack of enthusiasm, and an emotional tone of resigned acquiescence, may place us just one tiny step away from all sorts of anti-democratic contagion.

However, Solinas criticizes my account of the affective dispositions undergirding the democratic ethos – the orientation toward the common good, the passion for equality, the passion for individuality and the passion for openness – for operating “above all, although not exclusively, on the *cognitive* level”. This reductionist view of the emotional infrastructure of democratic politics is not just my own idiosyncratic problem – I find myself in the company of Stephen K. White, Rainer Forst, and Rawls. According to Solinas, for these authors and for myself “the cognitive dimension has priority over the emotional in the narrowest sense; the first one is a dimension that in many respects is even spiritual and ideal, although certainly embedded in individual attitudes of clear moral value” (p. 66).

His close reading of my text enables Solinas to quote passages where the emphasis on the cognitive dimension of the emotions is counterbalanced by political emotions that instead bring to the fore more passionate nuances. One of such passages is my favorable citation of Tocqueville’s characterization of the democratic peoples’ “passion for equality” as “ardent, insatiable, eternal and invincible” (quoted in *DH*, p. 46). In another passage I mention the spontaneous indignation aroused by exposure to injustice and humiliation. Solinas’s point could be strengthened by likening these two passions, especially the indignation aroused by humiliation and injustice, to a point famously made by Gadamer in his reconstruction of the Kantian doctrine of taste. Sometimes taste, understood as a talent to assess the aesthetic quality of artificial or natural objects, makes us react instinctively with admiration or revulsion to an object to which we are exposed, and only later reflection will give us an articulate account of why we reacted that way.<sup>12</sup>

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<sup>12</sup> See H.G. Gadamer, *Truth and Method*, New York, Continuum, 1975, p. 35.



Similarly, democratic citizens possessed of the democratic ethos immediately react with indignation when confronted with the humiliation of themselves or of third parties, or when they perceive the perpetration of gravely unjust acts and only subsequently, upon due reflection, are able to offer an account of their passionate reaction.

Solinas also connects this *individual* reaction of indignation in front of humiliation and injustice with the *non-individual* reaction of indignation on the part of global publics when confronted with powerful images of injustice. More often there is cause for concern about the lack of indignation, and much needs to be done in the way of empirically studying the mechanisms that trigger indignation in one case – as in the case of Aylan, the Syrian toddler drowned on a Turkish beach in the shipwreck of a boat of migrants – and fail to arouse comparable emotions in other cases.

A similar analysis should focus on the emotion of *horror* – as Solinas suggests – in response to occurrences of radical political evil and, one could add drawing on the work of Adriana Cavarero, in response to the indiscriminate killing caused by terrorist acts on the scale of 9/11, for which she has suggested the notion of “horrorism”.<sup>13</sup>

In the end, I cannot but share Solinas’s suggestion that by focusing on the emotional, and not just on the cognitive, aspects of the democratic passions, more light can be shed on “the political mode of operation of the imagination and of the democratic ethos” (p. 66), and a more complete understanding of the “enlarged mentality” be generated, that might enable us not only learn to *see* things as they look at others’ end, but also learn to *feel* as other people feel when exposed to what concerns us.

### **Conjecture and the role of recognition**

Leonardo Marchettoni focuses his comments on the notion of conjecture, central for my argument in *DH*. He painstakingly reconstructs the sections of my book where conjectural arguments are discussed and rightly contends, against Micah Schwartzman’s distinction of *conjectural reasoning* and *social criticism*, that the former is a variety of the latter. To his point that conjectural reasoning tends to shift into social criticism in that it is conducive to an “overall reinterpretation of some comprehensive view” (p. 75), I would

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<sup>13</sup> See A. Cavarero, *Horrorism: Naming Contemporary Violence*, New York, Columbia University Press, 2009.



add that the whole pragmatic point of a conjectural reasoning would vanish, or in any event remain confined to mere academic speculation, if we did not assume that the conjecturer is interested in producing a change of the addressee's attitudes concerning some political values or some issue of public concern.

Marchettoni credits me with harnessing exemplary normativity to the workings of conjecture: the chances of conjecture to convince the addressee do not depend on inferential cogency, but on the promise, embedded in the offered reconstruction, to bring to exemplary fulfillment the values inherent in the view conjecturally reinterpreted. That is the basis of the appeal of conjecture. Marchettoni points out how my normative model – imported from *The Force of the Example* – converges with Brandom's "Vernunft model of concept determination", which in turn Brandom attributed to Hegel: "conceptual contents evolve over time through a process of recollective reconstruction of a tradition that projects itself *into the future*, setting the future standards of correctness" (p. 77, my emphasis). For reasons that will become clearer below, this benchmark of "future promise", as opposed to "past record" – a future-orientedness which is also at the center of holistic discussions on scientific paradigms according to Kuhn – possesses a fundamental relevance.

In the closing section, Marchettoni criticizes my model of conjectural argument for its failing to adequately account for the moment of recognition inherent in each and every conjectural dialogue. As Marchettoni puts it, "the exemplarity of the reinterpretation from which the conjectural argumentation draws its force may exert its virtue only within contexts in which the authority of the conjecturer is *already recognized*" (p. 78). For this reason, Marchettoni continues, a dialogue in which conjectural arguments are offered and assessed somehow reshapes the relation among the interlocutors: "recognition of someone's authority, finally, defines the contour a new community that comes to light with the exemplary reinterpretation" (p. 78). If so, then one must wonder how fundamentalists, being the least reasonable among all citizens and at the same time those who are *not* prepared to see their tradition as open to critical rethinking, can ever be influenced by conjectural arguments. Thus, Marchettoni concludes, conjectural reasoning of the sort I envisage "can give good reasons [only] to





those who are already persuaded by liberal values and are looking inside their comprehensive view for a route to support them” (p. 79).

In response to this line of criticism, I suggest that we start from the “future oriented” quality of the pragmatic context wherein conjectural arguments are exchanged and assessed. Given that a certain comprehensive conception has thus far not really endorsed certain “political values”, e.g. gender equality, is it worth rethinking some of its constitutive elements along lines thus far supported only by marginal inside voices, which if adopted will lead such conception to be fully compatible with the endorsement of such political values? Will the newly reformed conception induce in the insider a sense of “enhancement” of her religious and moral life, of the tradition to which she belongs, a sense that “from now on” she will be in a better position to live as a citizen and a Christian, a Jew, a Muslim, a Hindu, a Buddhist, a Confucian (to name only a few of the religious conceptions, but the same applies to secular conceptions) that has learnt to “make the most”, to use a Dworkinian phrase, of the way of being in the world that her conception is all about? Has the new interpretation contributed to make the insider perceive his way of being in the world as more coherent, in the threefold sense of being more unified and consistent, more continuous over time in the sense a living organism changes and grows while remaining in some sense the same, more recognizably demarcated or different from other known ways of being in the world? Has the new interpretation contributed to the insider’s sense that the way of being in the world handed over by her tradition has acquired a new glitter of self-evident worth in which she can take pride and which commands her reverence? Has the new interpretation contributed to the insider’s sense that the way of being in the world handed over by her tradition has acquired a new degree of reflexivity, e.g. by providing her with internal reasons for self-reform and cognitive resources for making sense of why it has come to this crossroads? Has the new interpretation contributed to the insider’s sense that the way of being in the world handed over by her tradition has acquired an enhanced ability to come to terms with the changing



reality of the world within which it must orient human conduct and provide moral guidance?<sup>14</sup>

If the quality of a conjectural argument is understood along these lines, proper relevance can then be assigned to the aspect to which Marchettoni calls out attention, namely the recognition of the outsider's authority as an interpreter. It seems to me that recognition of the authority of the interpreter can plausibly only *follow* from the insider's positive answer to the evaluative questions outlined above. Such authority could not possibly be fathomed to exist *independently of* such positive answer or, worse, *in spite of its impossibility*. As outsiders, we may be recognized insofar as the interpretations we offer have the potential for eliciting positive answers to those questions on the insiders' minds. The kind of *previous* recognition referred to by Marchettoni, instead, seems directed to the role of calling the insiders' attention to some juncture of their comprehensive conception susceptible of being interpreted differently than in the mainstream version, by drawing on sources internal but somewhat more peripheral in their tradition. In that sense, the more authoritative the external interpreter, the greater gravitation pull will be exerted by his call to consider a conjectural argument about a certain specific tenet of the tradition considered. However, his authority is in no position to generate a positive answer to the above questions by *fiat*, before due consideration is given to the substance of the conjecture. And from a normative point of view, we could not imagine a liberal-democratic conception of the legitimate polity such that a sizeable number of citizens accepts the constitutional essentials in deference to an authority "previously recognized" as such, namely before and independently of having passed the test of a reflective judgment on the quality of its superior interpretive ability. Furthermore, we often undergo the sobering experience of seeing "previously recognized authorities" – respected politicians, spiritual leaders, or just famous intellectual figures – totally missing the point in their interpretation of a comprehensive conception, defending outdated views, failing to grasp the significance of new phenomena and trends, underestimating them, downplaying publicly their importance, ridiculing them instead of

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<sup>14</sup> These questions reflect the conditions that operate as guidelines orienting our judgment as to the authenticity of an identity, psychological in the first place, but derivatively and *mutatis mutandis* applicable to other sorts of identities, concrete and symbolic. They are discussed in A. Ferrara, *Reflective Authenticity. Rethinking the Project of Modernity*, London and New York, Routledge, 1998.



considering the teaching contained in them, sticking to a severely reductive and conventional understanding of the tradition. “Already recognized” carries no guarantee that the interpretive authority will necessarily be in the right concerning the new that needs assessment.

Finally, one word of comment is in order, concerning fundamentalism and the limits of conjecture. While in *DH* I conceded that conjectural arguments may prove ineffective with those who are not open-minded enough to be willing to reconsider significant aspects of their tradition – that’s why the next step is to allow them to endorse the constitution out of prudential reasons in *Fairburg*,<sup>15</sup> the multivariate democratic polity – I would resist the idea that an expanded and enriched “political liberalism” can only engage “those who are already persuaded by liberal values”. On the contrary, its unparalleled force, relative to other conceptions of liberal-democracy, consists of the fact that its central concepts – public reason, conjecture, reasonability, the political conception of justice, overlapping consensus, the principle of liberal legitimacy, political values, reflexive pluralism, and the like – potentially can engage the much broader constituency of those who in another vocabulary are identified as “men and women of good will”. Being reasonable is equivalent to being liberal only in the vocabulary of *comprehensive* liberals.

This is not to say that dialogue has to stop when one is not open to reconsider important aspects of one’s comprehensive conception. It means that then conjectural dialogue has to work by raising questions that elicit reflection, rather than by offering answers to already raised questions. To a Christian deeply unwilling to even consider the permissibility of abortion, we can address the question: if fetuses are real persons possessed of rights, why are they not given funeral services, why are they not baptized,

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<sup>15</sup> Fairburg is the name that, in my reply to comments by Seyla Benhabib, I gave to a fictitious liberal-democratic Western polity – a conceptual counterpart to Rawls’s famous fictitious decent Muslim-majority society called Kazanistan. In hyperpluralism-affected Fairburg, the last clause of Rawls’s principle of liberal legitimacy, requiring that the endorsement of the constitutional essentials proceed out of “reasons of principle”, is so modified as to accept also prudential reasons on the part of some of the citizens, for the sake of preserving the acceptability of the constitution by all citizens. See, “Special section on Alessandro Ferrara’s *The Democratic Horizon: Hyperpluralism and the Renewal of Political Liberalism*”, with comments by F. Michelman, S. Benhabib, S.K. White, W. Scheuerman, A. Laden and a reply by A. Ferrara, *Philosophy & Social Criticism*, 42 (2016), pp. 635-706. Specifically, see S. Benhabib, “The multivariate polity or democratic fragmentation”, pp. 649-656 and A. Ferrara, “Political liberalism revisited. A paradigm for liberal democracy in the 21<sup>st</sup> century”, pp. 681-706.



why do they not resurrect in the day of Last Judgment? To a Muslim who sympathizes for jihad and who considers suicide bombers heroes to be honored, we can always address the question: if offering one's life in sacrifice in a suicide attack is one of the highest honor-deserving deeds a human being can commit himself to, why do members of the government elite never teach their children to act likewise?

**What is *Fairburg* really a model of? And is “democratic dualism” applicable to supranational governance?**

With Italo Testa's comments, my notion of the *multivariate democratic polity* comes under more direct scrutiny. It is put to test a) from the standpoint of its being a merely adaptive response to changed historical circumstances or having a fully normative status and b) in terms of its compatibility with my attempt to rethink the legitimacy of supranational governance along the lines of democratic dualism. At the end of his contribution, Testa probes in depth the alleged tension between my deliberative understanding of supranational democratic authorship on the part of the citizens and my dualist approach to constitutionalism. I am very grateful to him for these objections, which prompt me to clarify a number of points that in *DH* may not come off as clearly as it could be desirable.

First, Testa invites me to clarify whether the response offered by the multivariate democratic polity to a ubiquitous and increasing hyperpluralism is best understood as a kind of factual adaptation or rather as a normative, prescriptive model for what *Fairburg*, the hyperpluralist liberal-democratic polity free of oppression, should look like. According to Testa, my multivariate model of democracy addresses not so much the dissenting minorities who have remained unconvinced by conjectural arguments – when conjectural arguments failed to win the minorities' consensus to the constitutional essentials, moving towards a multivariate polity cannot do the miracle of generating such concurrence – as the fellow political liberals and the competing theorists of agonism (see pp. 82-83). His reconstruction, however, is only partially accurate. In fact, I do think that the adoption of the multivariate model of democratic polity, if incorporated as the guiding normative script underlying the operation of democratic institutions, also sends an important message to dissenting minorities: in *Fairburg* we, the majority of citizens who endorse the constitution in accordance with which authority supposedly free of



oppression is exercised, do not respect you fellow citizens, who for the time being cannot agree with all of its essential elements on the basis of principles, any less because of your abiding by these essentials for the sake of a peaceful and reciprocally respectful political life in common. Testa, however, correctly deciphers the two messages conveyed by the multivariate model a) to fellow political liberals (i.e., under conditions of pronounced hyperpluralism we can still hold on to Rawls's principle of liberal legitimacy demanding requirement that the constitutional essentials be endorsable by *all* the citizens, if and only if we are prepared to loosen the binary distinction of overlapping consensus and *modus vivendi* in order to allow some citizens to endorse them out of prudence) and b) to the competing camp of the agonists (i.e., in no way political liberalism is thrown off balance by the persistence of dissent even on constitutional essentials: it can still accommodate hyperpluralism without renouncing the key element of its normative principle of legitimacy). He then proceeds to identify a crossroads at which his and my approach would differ.

When considered from my perspective, the multivariate conception sounds like

a realist adaptive argument – a “last resort” to adapt political liberalism to a situation which is not considered the best possible and is rather quite inhospitable for it. The linear progression from religious conflict up to overlapping consensus would continue to be the first choice, but now we can be reassured that political liberalism can survive and function also within factual conditions where this does not occur. If so, then the multivariate conception would not really modify the viewpoint of political liberalism on consent and dissent, because the burden of political legitimation would still be based exclusively on the former and on its teleological deployment (p. 85).

When considered from the perspective that Testa urges us to adopt, instead, “the varying intertwinement between overlapping consensus, constitutional consensus, *modus vivendi* and conflict, would not just be a contingent fact of societies nowadays, but a constitutive fact of political legitimacy” (p. 85). The difference lies in the *normative* import of the admixture of principled and prudential consent in *Fairburg*, the multivariate polity. Whereas according to my version of the case for *Fairburg* the central point is that political legitimation can function also under conditions of hyperpluralism, according to Testa political legitimation *at its best*, not just under such unfavorable conditions, “should be conceived in multivariate terms” (p. 86). Testa attributes me “a certain amount of



oscillation between the realist descriptive argument and the normative argument” but considers “the second option to be more promising, because it points toward a deeper transformation of the notion of democratic political legitimacy, which [...] if we take hyperpluralism seriously needs to embody dissent within itself as a constitutive fact” (p. 86).

Much as I appreciate the charity involved in Testa’s attributing me “an oscillation” between a better and a reductive view of the multivariate polity, I regret having to disappoint him and to confess that I side with the “adaptive-normative” interpretation *and*, at the same time, deny that it is reductive. It is not reductive because it goes without saying that a democratic polity whose citizens share a political conception of justice across their diverse reasonable comprehensive conceptions, and on such principled basis come to endorse the constitutional essentials, including rights and their implications, is a polity in which political power is exercised on a more legitimate basis. In fact, if democracy in the end means that we as citizens can somehow, no matter how complex our societies have turned to be in the 21<sup>st</sup> century, still recognize our authorship not in each and every single legislative, judicial and administrative decision but in the constitutional tracks with which such decisions must be consistent, then there is little doubt that the broader and deeper the consensus on the constitution, the less oppressive and more legitimate the exercise of authority in that society. This is the closest we can get to the Lincolnian ideal of “government by the governed” within our historical context. While obviously contestation has its legitimate place in a democracy – the heart of liberalism is the ineradicability of dissent and pluralism – and while the implications of rights, or even their exact scope and definition, may well be the subject of endless contestation, the yardstick for measuring legitimacy cannot but be the *convergence for reasons of principle* on the central elements of a constitution understood as the law of law-making. Convergence for normative reasons cannot but take precedence over convergence for reasons of expediency or prudence. Why? Because consensus proceeding from normative reasons – a shared view of justice, shared political values and a shared bill of rights – is less exposed to the instability of the matrix of utility undergirding prudential consensus and better safeguards all the participants from exposure to illegitimate forms of power. Thus, there can be no doubt that a multivariate



polity where some groups of citizens endorse the central core of the constitution only out of prudential considerations is still better than a polity where that normative core is imposed onto them against their will through the coercive force of the law, but is definitively a second best relative to the ideal case of a generalized overlapping consensus. We can accommodate – which is far from obvious for the mainstream of the Rawlsian tradition after Rawls – but certainly not welcome dissent over the central aspects of the constitution. There is nothing reductive in this view, because the alternative – treating consensus and dissent over the constitutional essentials not as merely co-existent, but as equally positive – is as nonsensical to me as affirming “A” and “not A” at the same time.

Moving on to the second set of objections raised by Testa, he considers the multivariate framework an advantageous starting point and endorses my rejection of accusations of “democratic deficit” leveled against instances of regional or global governance when these accusations result from the undue projection of domestic standards of democracy onto a supranational level. In his discussion of my thesis on the legitimacy of supranational governance, Testa focuses on my use of the dualist conception of democratic constitutionalism for disentangling the assessment of the democratic credentials of governance from the domestic standard of responsiveness to the will of the *demos*. My idea in a nutshell is that, drawing on the dualist paradigm, we can state that structures and methods of supranational governance can be considered democratic, as opposed to authoritarian or technocratic,

if and only if a) they take place within the boundaries of “constitutional essentials” that meet with the consent of free and equal citizens as manifested in referenda or in more indirect but still recognizable ways and b) some recognizable form of accountability remains in place (*DH*, p. 178).

Testa objects that a number of difficulties stand in the way of using this dualistic model to account for the democratic quality of governance. To begin with, the model of constitutionalization at work in the European Union, from the initial treaties to the Lisbon Treaty and including the pronouncements of the European courts, “is clearly based on a multileveled and composited architecture which is hard to combine with the clear-cut





distinction between a higher and a lower level that the dualist conception presupposes” (p. 89). And then, Testa continues, whilst the dualist picture

is a hierarchical and top-down one, where legitimation is transmitted from the upper to the lower level, the multileveled process of constitutional emergence [...] *should* be meant to be the composited result of a horizontal, netlike process plus both top-down and bottom-up dynamics. The question is not only, as some may argue, that here what the constitutional essentials to which we are supposed to consent to is not very clear – free and equal consent of the citizens to what exactly? – or at least are subject to a never-ending process of transformation. More importantly, even if we suppose that, at some given point, some constitutional essentials are specifiable, these are to a great extent to be conceived as something which also emerges from processes that, from the perspective of the dualist conception, are very often conceived of as emerging from the “ordinary” level of legislative, administrative and judicial acts (p. 89).

Several issues are here combined in one objection, but I would like to clarify two main points.

First, the dualistic model need not be equated with a rigid top-down distinction of the constitutional and the ordinary level of law-making. The recent work of Ackerman, the original founder of this paradigm, illustrates how since at least the mid-1930’s, in the domestic context of the United States constitutional reform no longer follows the canonical track of Article Five amendments, for historical reasons that it would be too long to sum up here. Instead, it follows the alternative track of the enactment of “landmark statutes”, of exemplary super-precedents or landmark cases adjudicated by the Supreme Court, and of the politics of presidential nomination for Justices of the Supreme Court.<sup>16</sup> Conversely, one could notice that a number of provisions formally of constitutional rank – e.g. the Eighteenth Amendment on Prohibitionism of 1919 – indeed resemble under many aspect ordinary laws, not in the least for their having subsequently been repealed without much ado (in 1933).<sup>17</sup> Given these developments of constitutionalism – ordinary statutes such as the Voting Rights Act (1965), the Civil Rights Act (1964) and the Fair Housing Act (1968) may possess constitutional “landmarkness”, and formal

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<sup>16</sup> B. Ackerman, *The Civil Rights Revolution*, Cambridge, MA, Harvard University Press, 2014, p. 40.

<sup>17</sup> See A. Ferrara, “Constitution and Context: Reflections on Ackerman’s *The Civil Rights Revolution*”, *Jerusalem Review of Legal Studies*, 7 (2016), pp. 19-30.



constitutional amendments such as the one on prohibitionism may lack it – I do not see why the peculiarities surrounding the emergence of a constitutional layer of legislation in the EU should be considered so atypical as to discourage the applicability of the dualist framework.

The second point concerns the alleged vagueness of the constitutional essentials at the EU level. I vigorously reject that notion. Of course, all constitutional orders are subject to a modicum of interpretive leeway – they are no axiomatic models – and the EU represents no exception in this regard. However, there is nothing particularly vague about the constitution of the EU. In each of the four distinct senses in which we can understand a constitution, Europe does have a constitution of its own. If by “constitution” we mean – along with Plato and Aristotle – a *politeia*, i.e., an explicit specification of the main institutions of a polity and of their reciprocal relations, Europe clearly has one. If by “constitution” we mean – ever since the Magna Charta – the above plus provisions for the protection of the rights of individuals against the authorities and especially the executive, Europe clearly has one. It consists of the rights mentioned in the Charter of Fundamental Rights, previously part of the Treaty of Nice and now included within the Lisbon Treaty. If by a “constitution” we mean all of the above plus a criterion or standard, explicit or implicit, for assessing the legitimacy of the exercise of political power, then Europe clearly has one such standard embedded in the Lisbon Treaty – a standard more tortuous and complicated than domestic ones, but it has one such standard in the so-called *acquis communautaire*. And finally, if our constitutional culture happens to incline us to demand something more substantive of a constitution – something closer to a set of political values that tell the rest of the world who we are and wish to be, politically – then also in this fourth and more demanding sense Europe has a number of constitutional essentials. They are buried below radar level because of the obtuse short-sightedness of the European national elites and the factual prevalence of national constitutional cultures that incline towards proceduralism, but there, in the Lisbon treaty, there is enough substance to build a *sense of difference* that EU citizens can be proud of. The following seven constitutional essentials, found in the Lisbon Treaty version of the *Charter of Fundamental Rights of the European Union*, jointly express the distinctive *political* identity of the EU as resulting from the combination of:



1. The explicit prohibition against including the death penalty into penal law, in that the death penalty is understood as a violation of the right to life (Article 2.2) – an obvious term of contrastive comparison with current U.S. and Chinese legislation.
2. The innovative way in which the right to bodily integrity is understood, through the explicit prohibition, within medical science and biology, of “making the human body and its parts as such a source of financial gain” (Article 3.2c).
3. The constitutionalization of the right to privacy in Article 7.
4. The new right to “freedom of information” alongside the more traditional right to “freedom of expression” or “free speech.” This freedom of information consists no longer simply of a right of the individual to express her own thoughts without censorship but also of an obligation to respect “the freedom and pluralism” of the media (Article 11.2), where the “pluralism” of the media calls for legislation that affects the concentration of media property.
5. The constitutionalization of equality between men and women “in all areas” (Art. 23).
6. The constitutionalization (Art. 38) of “a high level of consumer protection”, in order to bridge the gap between the influence of the great market players and that of the single consumer without falling back into the regressive utopia of the abolition of the market.
7. Finally, the “right of the elderly to lead a life of dignity and independence and to participate in social and cultural life” (Art. 25)

These seven constitutional essentials, taken together, express the European Union’s commitment to be the political space where under no condition can the state take the life of one of its citizens, residents, or temporary aliens; where the genetic infrastructure of the human being cannot be a source of profit; where no one should be left alone to face illness, where no one should suffer exclusion and indifference, along with the inevitable decline associated with the last stages of life, where no one should be left alone to fend for him or herself as a single individual against the economic powers that produce the goods that we consume and the information that we need in order to make our choices. This *is* by all means a constitutional core that ranks above the level of



ordinary legislation. In Brussels there can be wheeling and dealing over the milk quotas and the quotas of refugees and migrants that each member state is required to admit, over exceptions to the 3% public debt threshold, but there cannot be wheeling and dealing over death penalty, gender equality, genetic research for profit and a number of other areas. That is what it means to have a constitution. Thus, the dualist model is perfectly applicable to the case of the EU, in spite of the fact that we do not yet have, and like the UK perhaps never will have, a legal document called “the Constitution of the European Union”.<sup>18</sup>

Similarly, I am very skeptical of the idea that

if we take the multilevel dynamics of constitutionalization seriously, and we conceive of it in terms of a multivariate transnational polity, then we should assume that there cannot be a clear-cut bipartition between consensus and dissent and the allocation of these to two different levels, but rather that they are intertwined as constitutive elements of legitimacy (pp. 90-90).

How could there not be a clear-cut bipartition between consensus and dissent? Well-deserved consensus, which proceeds from justified reasons, contributes to the legitimacy of institutions and of the exercise of power. Dissent detracts from it. If some member state began to voice a dissent on a constitutional essential and proposed to reinstate the death penalty, how would that contribute to the legitimacy of the EU?

Finally, on the relation of governance to deliberative democracy I would agree with Testa that much needs to be done in the way of articulating a new sense of what the democratic authorship of the citizens might mean in a supranational context, where no unified *demos* can be presumed to exist. I have just tried to take a first tentative step by evoking the idea of consent on the constitutional framework within which governance operates as a requisite the legitimacy of governance, but this is just a beginning. No reason prevents us from starting from this step: certainly not an alleged indistinctiveness of the constitutional level at the supranational level and certainly not the weak accusation of “juridification” and “depoliticization of the democratic process” that comes from so-

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<sup>18</sup> The reasons why we may never have such a document are too complex to be discussed here, but for one illuminating introduction to the diversity of constitutional cultures co-existing in the EU in an unstable equilibrium, see B. Ackerman, “Three Paths to Constitutionalism – and the Crisis of the European Union”, *British Journal of Political Science*, 45 (2015), 4, pp. 705-714.



called “political constitutionalism” – a conception of constitutionalism premised on one of the most counter-intuitive ideas that can be imagined. Underlying the accusation of “juridifying” the democratic process, especially through judicial review, we not only find the dubious assumption that no clear distinction can be drawn between the rules of the game and the game being played, but also the idea that the rules of the game, to the extent that they can still be kept distinct from the way players actually play, are to be placed at the disposal of the players while they play the game. The idea that parliaments elected in ordinary electoral competitions could have final say – as opposed to *just proposing* an amendment – on the constitution is as far from being self-evident as the idea that soccer players could have a final say on the rules of soccer while they are playing.

I also cannot imagine how anyone could disagree with Testa’s reformulation of my criterion for the legitimacy of supranational governance: structures and methods of supranational governance can be considered democratic “if and only if they take place within the boundaries of constitutional essentials that meet with the consent of free and equal citizens *and allow for legitimate dissent*” (p. 92). What kind of democratic process worth its name, whether inflected as government or governance, could not allow for legitimate dissent? That goes without saying. What instead certainly calls for further exploration is Testa’s claim that my drawing on deliberative democracy, in order to make sense of how soft law and the mere “attribution of legitimacy” typical of governance could ever succeed in coordinating the actions of a plurality of actors, commits me to presuppose a “deliberative subject” and to clarify “if and how citizens are included within it even in an indirect way” (p. 94). Here the *demos* looms large at the horizon once again. In Testa’s words, a democratic life-form

cannot just consist of a spurious mix of constitutional judicial reviews, top-down methods of governance, intergovernmental power relations, plus some indirect deliberation provided by the democratically elected representative in the EU parliament: if not also supported by practices of political subjectivation, there cannot be any supranational polity of citizens (p. 95).

My inclination is to think that political subjectivation is nowadays difficult enough on the domestic scale, because of the social fragmentation that neoliberal financial capitalism has generated, and is going to meet even more prohibitive obstacles at the supranational level if by that term we mean active participation in face-to-face



engagements or actual mobilization for protracted periods of time, especially across cultural and linguistic divides, and in the absence of a supranational real public sphere nourished by genuine supranational media. So, I take, in the end, Testa's remark about the necessity of new forms of democratic subjectivation as a challenge for future reflection, simply adding that such subjectivation cannot take the form of a *demos* without thereby entangling us into the "domestic fallacy" once again.

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