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Relative Constraint and Public Reason: What is "The Work We Expect of Law"?

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RELATIVE CONSTRAINT AND PUBLIC REASON: WHAT IS "THE WORK WE EXPECT OF LAW"?*

Frank I. Michelman[†]

I. COMFORT IN WINTER

As Steven Winter presents it in *A Clearing in the Forest*,

legal decisionmaking could be characterized as relatively constrained or (if one prefers) as moderately indeterminate. But it would be more accurate still to say that law is indeterminate in more-or-less predictable ways: Rarely do the legal materials provide a single "right" answer to a legal question; but . . . legal decisionmaking is nevertheless regular, systematic, and largely predictable.¹

Not that this is a problem from any instrumental standpoint. The mere fact of moderate indeterminacy in adjudication is, Winter says, beside the point of whether "decisions are sufficiently regular and predictable to do the work we expect of law."² As long as "processes of persuasion operate" to constrain decisionmakers in sufficiently predictable ways, Winter offers, "law can 'operate as law.'"³ In sum, it suffices to that end if legal decisionmaking is a "relatively" constrained activity.⁴ Which is exactly, as Winter explains masterfully in *Clearing*, what cognitive science tells us we firmly can expect legal

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¹ Steven L. Winter, *A Clearing in the Forest* 316 (2001) [hereinafter *Clearing*].

² *Id.* at 313.

³ *Id.* at 153; see *id.* at 313.

⁴ See *id.* at 316.

decisionmaking to be: relatively constrained, indeterminate to be sure but only moderately so and within predictable bounds.

Clearing thus seems to be a work designed in part to convey to anxious liberal jurists, reeling from decades of indeterminacy critique,⁵ a consolatory message from cognitive science, to wit: By force of something like laws of nature, a certain, shared and common base of neural and cultural predispositions makes it highly likely that processes of persuasion among appropriately situated legal decisionmakers, judges in particular, will "operate" to constrain their choices in ways sufficiently predictable for law to function as law, or do the work we expect of law.

Being myself something of an anxious liberal jurist, how shall I respond to this offer of comfort? To be provocative, let me now say that I am not sure it is a wholly innocent offer that my friend Winter has kindly put before the likes of me. Flashing back to some prior conversations between the two of us, I think the offer may be meant as an enticement to us anxious liberal jurists to stop obsessing over what we've been prone to regard as a morally pressing concern about the legitimacy of state coercion in the name of the law.⁶ "The fear," as Winter sees it, has been that the pliability of the legal material leaves judges "free to impose their personal values" tyrannically on the rest of us, and so his book aims to show that "this conventional concern is greatly exaggerated."⁷ Now, I would like to stop obsessing, of course (if you can believe me), but my problem is that I am not sure Winter has accounted fully for the grounds of liberal legitimacy-anxiety, or even attempted to offer comfort that possibly could quell it; although—and this will be an important part of what I wish to say—I do think that what he has done so far carries considerable promise of a possibly formidable future attempt, and I mean "promise" in both of the senses that may occur to you.

⁵ See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 31 (1997).

⁶ See, e.g., Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1206-07 (1981).

⁷ CLEARING, *supra* note 1, at 109.

II. LAW'S WORK

My doubt about whether *Clearing* itself can count as such an attempt reflects directly my inability to tell from what Winter has written in that book exactly what work he thinks should be included in "the work we expect of law."⁸

"Positive legal ordering," let us say, means an effective social practice in which most inhabitants of a territory stand ready, most of the time, to comply with norms of conduct pronounced to be law there by socially recognized legal officials—and furthermore to support the use of social force, if necessary, to secure compliance in general with such norms. On grounds I believe to be no less Hobbesian⁹ than they may also be Kantian,¹⁰ political liberals uniformly affirm the moral necessity of positive legal ordering. Roughly, we go on the unshakeable belief that there are numerous attainable worlds in which positive legal ordering prevails that clearly must be better for everyone in them than any realistically conceivable world could be from which this practice is absent. (In that respect, one opposite to political liberalism is a principled, thoroughgoing anarchism.)

But let us try now to be a bit more specific about the human and social demands that we aim or expect to have satisfied by a social practice of positive legal ordering. If we had on the table Winter's answer to that question, we would know better what he understands by "the work we expect of law." And indeed we can focus the query more sharply, because *Clearing* apparently shares with virtually all of the rest of jurisprudence the perception that it is at the point of *adjudication*—the point at which concrete social controversies are submitted for ostensible decision according to law¹¹—that the pretensions of legal ordering to do some societal work or other truly are put to the test. Adjudication is where the legal rubber meets the road of life.

⁸ *Id.* at 313.

⁹ See THOMAS HOBBS, *LEVIATHAN* chs. 13-17 (M. Oakeshott ed., 1962) (1651).

¹⁰ See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* § 42 (John Ladd trans., 1999).

¹¹ But see *infra* Part VIII for qualification.

So then what are the social needs and demands that we aim or expect to be satisfied by a social practice of positive legal ordering that culminates in adjudication, be it actual, anticipated, or imagined? What, in that sense, is the work we expect of law? For our purposes here, a rough-and-ready answer will suffice. First, people doubtless count on the law and its administration for a relatively stable transactional context, one in which a multitude of diversely interested and motivated social actors can plan and pursue their sundry affairs and projects with reasonable foreknowledge of the probable, relevant responses of others, including legal officials. Second, people doubtless further look to the legal regime for a relatively peaceful and decisive way to get specific, eruptive social controversies resolved so that life can go on. Possibly third, a regime—or “rule”—of law is often thought to have the further purpose of ensuring the moral defensibility of the exercises of force and coercion, explicit and implicit, that political government inevitably involves within a modern society driven by sharp and deep conflicts of interests and of ethical vision.

There we would have three possible components of the work we expect of law: stability, settlement, and legitimation.¹² The first two items on my rough list of demands that we look to law to help us satisfy, stability and settlement, are self-explanatory. The arguable legitimation function of law may be a bit more obscure—it surely is more controversial—and I will elaborate on it below.¹³ Only at the end of this Essay will I have a word to say about law’s putative expressive function and its possible relation to the argument of Winter’s book.

III. LEGITIMATION IN WINTER?

Suppose you think that stability and settlement account fully for the work we expect of law. You, then, should readily

¹² Some theorists might wish to add a fourth function for the law, that of expressing the political community’s values and through them its solidarity and sense of identity. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 166, 168-75, 190, 225, 264 (1986); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). I cannot say much in this brief essay with the “expressive” view’s possible relation to Professor Winter’s work.

¹³ See *infra* Part V.

accept Winter's proposition that an assurance of the *relative* constraint of adjudication, of the sort that he so fascinatingly shows us cognitive science is helping to underwrite, is all we need for confidence that law can do its expected work. Surely law can make highly valuable contributions toward fulfilling society's needs for stability and settlement, even if everyone knows that adjudicative outcomes will vary, from judge to judge and from time to time, even in ways that can make real differences to interested parties, as long as everyone also knows the variations will not (except possibly very rarely) be radical or shocking.

Now suppose for a moment that we doubt gravely whether law's *legitimation* function can withstand and survive even such a moderate indeterminacy. (I will explain soon why we might.¹⁴) Such a doubt would leave us uncertain about Winter's intended message regarding the alleged legitimation function for law when he says that relative constraint suffices for legal decisionmaking to do the work we expect of law. For then his possibly intended message could be any one of three we can think of, two negative and one positive. *First possible negative message*: Winter might be implying that the legitimation demand is not one that matters, nor worth caring about at all. *Second possible negative message*: He might be implying nothing about the demand's worth or importance but only something about law's inability to handle it: "Sure, legitimation matters," Winter might be heard as saying, "but it isn't part of the work we expect of law, or at any rate of any work we *ought* to expect of law, because, as I am engaged here in showing, it's a demand beyond law's ability to handle, unlike the demands for stability and settlement."¹⁵

On a third possible construction, Winter's implication regarding the legitimation function might be a positive, constructive one. Although he does not discuss the matter in *Clearing*, Winter may in fact stand ready to include legitimation within the work we (rightly) expect of law, and to

¹⁴ *Id.*

¹⁵ Consider, for example, this passage: "When social practices and values are controversial or in disarray, the legal rules and principles will be too. . . . [W]e cannot expect the law to resolve difficult, controversial cases in a way that is different or removed from the realm of politics." CLEARING, *supra* note 1, at 328-29. I return to this passage below in Part VII.

uphold, against the sort of doubt I have mentioned and have yet to explain,¹⁶ the proposition that the merely relative constraint of adjudication leaves law quite able to perform that function, too.

IV. "CONSTRAINT" OF ADJUDICATION: PREDICTIVE, MOTIVATIONAL, OR WHAT?

So far, I have been probing one of three key terms in Winter's claim that the relative constraint of judicial decisionmaking leaves law fully capable of performing the work we expect of law. I have been asking what Winter might understand by "the work we expect of law." I next want to raise the question of what he means by speaking of adjudication as being more or less "constrained." (In case you are wondering, the third key term I have in mind is "law," for there is a fair question about what Winter is referring to when he speaks of something called "law" that might or might not succeed in doing certain work. I will come to that at the end of these observations.¹⁷)

There are a number of differing ways in which we may understand the notion of "constraint" of adjudication. Here I will distinguish among the three major senses of *predictive* (or *causal*) constraint, *normative* constraint, and *motivational* constraint. When I speak of adjudication being more or less constrained in one or another of these senses, I mean adjudication society-wide, as a whole practice or institution, and not just some individual instance. In all cases, constraint is a matter of degree.

Adjudication, then, is *predictively* constrained in the degree to which we expect decisions made by sundry judges confronting the same case or question to converge upon the same result or upon a set of results that vary only within known and practically tolerable limits. Expectation here reflects belief about causation. Insofar as we may believe adjudicative outcomes to be products of biological and sociological causes beyond the immediate, personal and voluntary control of any given adjudicator, and we may further

¹⁶ See *infra* Part V.

¹⁷ See *infra* Part VIII.

believe these causes to be similar for all adjudicators, we will believe adjudication to be predictively constrained. Note that predictive constraint, while thus a matter of what *we believe* about the causal environment of judicial decisions, is also an empirical matter. One's belief in its existence can, after all, be tested against the hard facts.

Next, *normative* constraint. You hold adjudication to be normatively constrained if and only if you hold the following two propositions to be true. First, for any given case there is a right or best adjudicative act or decision, or perhaps a small, select set of those that are indistinguishably right or best. Second, to the extent that adjudicators fail to make these right or best decisions, they fail to act well, or as they ought, or as they would have to act in order to meet our reasons for setting them up to act at all and then for heeding the actions they take. In other words, normative constraint is the idea that the moral justification of our concession of special powers to judges, to direct state coercion against losing parties to lawsuits, depends on the results judges reach and not just on the procedures they follow, or on the people's willingness to abide by the outcomes of those procedures whatever they are.¹⁸ Note that normative constraint is a non-empirical, strictly theoretical matter. Your belief in the existence or non-existence of its twin premises—the existence of right answers and the judicial obligation to seek them—cannot be tested against any hard facts.

We come then to *motivational* constraint. This is the empiricized version of normative constraint. You will hold adjudication to be motivationally constrained in the degree to which you believe that judges, as a matter of fact, believe the twin premises of normative constraint to be true and that the judges feel impelled, therefore, to strive impartially to attain

¹⁸ The idea of normative constraint does not, however, in itself imply any particular theory of rightness in result. In particular, it does not equate "right" or "best" with anything like transcendently fair or just. Whoever, for example, believes that judges earn their suppers and their stripes by and only by striving toward outcomes that are wealth maximizing, believes adjudication to be normatively constrained. Indeed "best" and "right," here, can mean just about anything: consonant with Rawlsian justice, wealth-maximizing, most conducive to community survival and success, linguistically most apt or most plausible to the mass or dominant part of some population, most congruent in result with the outlooks or value-orderings of the mass or dominant part of some population.

the best answers. Like causal or predictive constraint, and unlike normative constraint, motivational constraint is an empirical, not a theoretical matter. You can test your belief in its existence against the hard facts—assuming you can find them out, which in principle you can—about what judges subjectively are trying to do.

In other words, adjudication can be motivationally constrained as long as judges merely *believe* the twin premises to be true, whereas those premises *really* must be true in order for adjudication to be normatively constrained. In that sense—it being always something of a challenge for moderns to get a firm grasp on what it might mean for moral premises “really” to be true¹⁹—motivational constraint may appear to be the “weaker” of the two conceptions. But suppose you are one who easily accepts the truth of the twin premises. For you, then, motivational constraint may be the stronger, more demanding conception. To believe in its existence, you would have to swallow what may strike you as highly dubious speculations about the beliefs and motivations of judges.

I am now in a position to suggest that law cannot perform its legitimation function unless citizens at large can have a well-founded belief that adjudication is motivationally constrained. At least, that would appear to be so according to an important form of contemporary liberal thought that we may call “constitutional contractarian.” In the constitutional contractarian view, hope for the moral redemption of the coercive side of legal ordering rests on the idea that everyone having a share of official power to say what the law is—judges, perhaps, above all—will exercise that share in conformance with an ideal called “public reason.” As will appear, public reason is a particular form of motivational constraint. In what follows, my questions will be: (1) whether a widespread, well-founded belief in the actual prevalence of the constraint of adjudication by public reason could coexist with a widespread perception that adjudication is, from a predictive standpoint, only relatively and not totally constrained; and (2) whether Winter’s account of the cognitive-scientific grounds for belief in relative *predictive* constraint of adjudication provides any

¹⁹ See, e.g., Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061.

warrant for belief that adjudication also is conducted under the *motivational* constraint of public reason.

V. RECIPROCITY AND PUBLIC REASON IN CONSTITUTIONAL CONTRACTARIAN THOUGHT

Liberals are individualists at heart.²⁰ Accordingly, they want to know how it possibly can be right for members of society to mobilize force or the threat of force (this is what positive legal ordering does) as a way to bring a population of presumptively free and equal individuals into "average compliance" with various laws and regulatory regimes that none of them ever individually chose and many do not now approve.²¹ Supposing your country's positive lawmaking system to be (roughly) a democratic one, the challenge is to explain how "citizens [may] by their vote properly exercise . . . coercive political power over one another."²² The difficulty lies in explaining how your or my exercises of political power may be rendered "justifiable to others as free and equal."²³

According to a "liberal principle of legitimacy" propounded by John Rawls, the answer lies in submitting our exercises of political power to the dictates of a certain kind of law—a constitution or what I elsewhere have called a "law of

²⁰ I mean individualists, not "atomists." See FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 11-14, 65-67 (1999). And I mean normative, not ethical, individualism. The latter distinction is implicit in Charles Larmore's important essay, *The Moral Basis of Political Liberalism*, 96 J. PHIL. 599 (1999). In Larmore's account, political liberalism, in a post-Romantic age, cuts its ties to any and all substantive views about "the ends of life," most particularly views that make the value of an act or course of conduct depend entirely on its having expressly chosen by an individual upon his or her own "critical reflection," and not because of its fit with any unchosen "sentiment of belonging." *Id.* at 603-05, 623. But as Larmore further explains, what has required this retrenchment of liberalism from that sort of romantic-individualist *ethics* is liberalism's own, historic, core commitment to a normative principle of "respect for persons," corresponding to which is recognition of every individual's right "to be bound only by principles whose justification he can rationally accept." *Id.* at 607, 621. "Respect for persons," Larmore neatly writes, "lies at the heart of political liberalism, not because looking for common ground we find it there, but because it is what impels us to look for common ground at all." *Id.* at 608.

²¹ For "average compliance" see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 448 (William Rehg trans., MIT Press ed. 1996) (1992).

²² JOHN RAWLS, *POLITICAL LIBERALISM* 217 (Columbia University Press 1996) (1993).

²³ *Id.*

lawmaking"²⁴—that all can endorse “in the light of principles and ideals acceptable to them as reasonable and rational.”²⁵ The moral strategy here is “procedural” in a salient, contemporary use of that term, the aptness of which will soon become apparent.²⁶ At its core stands an uncompromising, ultimate moral concern with the freedom and equality of individuals taken severally but regarded universally as free and equal.²⁷ Hence the demand that potentially coercive political acts be acceptable from the standpoints of *each* (not “all,” in some collectivized sense of “all”) of countless persons among whom rational conflicts of interest and vision abound. Acceptable, that is, in principle. Acceptable hypothetically, in all reason; acceptable in the sight of whoever applies the test of acceptability.

In Rawls’s formulation, political coercion is justified when it is exercised in support of laws issuing from a known constitutional regime (the significance of “known” will become apparent), as long as all may be expected to endorse this, and assuming everyone to be not only rationally self-interested but also “reasonable.” “Reasonable” here means three things. First, a reasonable person accepts the inevitability of positive legal ordering. She doesn’t pretend we somehow are going to get along without lawmakers making laws, and judges resolving their meanings-in-application, that have to bind everyone regardless of who likes or approves each law or each application and who does not. Second, a reasonable person accepts the fact of deep and enduring conflicts of interests and ethical visions within her society—what Rawls calls the fact of reasonable pluralism.²⁸ Third, she is imbued with the liberal spirit of reciprocal recognition by persons of each other as normatively free and equal individuals. A reasonable person thus stands ready to accept the laws as long as: (a) she sees everyone else generally supporting and complying with them;

²⁴ See MICHELMAN, *supra* note 20, at 6.

²⁵ RAWLS, *supra* note 22, at 217.

²⁶ For further discussion of proceduralism in constitutional thought, see Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 *RATIO JURIS* 63 (2000); Frank I. Michelman, *Postmodernism, Proceduralism, and Constitutional Justice: a Comment on van der Walt & Botha* — *CONSTELLATIONS* — (forthcoming 2002) [hereinafter *Constitutional Justice*].

²⁷ See *supra* note 19.

²⁸ See RAWLS, *supra* note 22, at 36-37.

and (b) she sees how these laws merit mutual acceptance by a competently reasoning group of persons, all of whom desire, and suppose each other to desire, to devise and abide by laws reflecting fair terms of social cooperation in conditions of deep and enduring but reasonable ethical disagreements and conflicts of interests among free and equal persons.²⁹

But wait a minute. No matter how reasonable we ask each other to be, surely none of us really expects that every discrete act of lawmaking could pass such a test of rational acceptability to every supposedly reasonable, self-respecting inhabitant of a modern, plural society. Realistically, our hope must be more modest, more "procedural." Our hope is that an aptly designed *general system or regime* for lawmaking—or call it a constitution—might be able to pass such a test. Maybe we can imagine some such regime, about which we would be prepared to say that *it* ought to be found acceptable, as a regime, by every rational and reasonable person. If so, then we might further maintain that the rational acceptability to you, as reasonable, of the constitutional regime commits you to accept whatever specific laws may issue from the regime.³⁰ That, after all, would appear to be exactly the point of Rawls's claim, in his "liberal principle of legitimacy," that exercises of political coercion are justifiable insofar as they issue from "*a constitution*, the essentials of which all citizens may be expected to endorse."³¹

We may now introduce the idea of a *sufficient, legitimating constitutional agreement*.³² Four terms compose this idea, as follows:

²⁹ See *id.* at xlv, xlv, 226-27; John Rawls, *The Idea of Public Reason Revisited*, in COLLECTED PAPERS 573, 576-79, 581, 605-06 (Samuel Freeman ed., 1999) [hereinafter Rawls, *Public Reason Revisited*].

³⁰ See Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3 (1992), cited approvingly by RAWLS, *supra* note 22, at 234 n.19. Cf. JOHN RAWLS, A THEORY OF JUSTICE 195-201 (1993) (on "the four-stage sequence"). This means that your finding particular ordinary laws unjust gives you no ground for resort to unlawful force, not that it gives you no ground for denunciation, civil disobedience, or conscientious refusal.

³¹ Rawls, *supra* note 22, at 217.

³² I develop and examine this idea at greater length in Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement: Can "Discourses of Application" Help?*, in HABERMAS AND PRAGMATISM (M. Aboulafia & C. Kemp eds., forthcoming 2002); Frank I. Michelman, *Social Rights, the Constitution, and Liberal Political Justification*, __ ICON __ (forthcoming 2002).

First, what is supposed to be "legitimated" (in the sense of justified morally) by this agreement is *positive legal ordering*, the coercive exercise of collective power through lawmaking, by and among citizens considered individually free and equal.

Second, what is supposed to have the desired legitimating effect is *agreement* by each person affected. Not, however, actual agreement but hypothetical (what some would call "counterfactual" agreement)—the "acceptability" of the political practice among persons affected by it, envisioning those persons not only as rational but also as reasonable.

Third, the legitimating hypothetical agreement is a *constitutional* agreement. We do not apply the universal-reasonable acceptability test to each and every law that crops up in a country's politics. We rather apply it to the country's system for lawmaking.

Lastly, then, "sufficiency." In order to meet the test of rational acceptability to every reasonable person, a lawmaking system has to include a principle or guarantee affecting every topic for which a rational person, responding reasonably, would demand a guarantee as a condition of willing support for the system as a whole. This minimal set of principles and guarantees must be extensive enough to compose a system for political decisionmaking about which every affected, supposedly reasonable person rationally can say: "A system measuring up to these principles and terms—all of them—is sufficiently regardful of my and everyone's interests and status as free and equal persons that I ought to support it and its legislative products, provided everyone else does."

It seems clear that a sufficient, legitimating constitutional agreement will have to contain some reliable, substantive assurances regarding what we may as well call people's rights. At least it will have to guarantee compliance with what Rawls calls the "central ranges" of certain basic negative liberties,³³ meaning with those obvious applications of the principles of freedom of thought, conscience, and expression, for example, that—as cognitive science in Winter's hands helps to explain—no one in our world respectably could dispute and few would think of disputing. (For example, an

³³ See RAWLS, *supra* note 22, at 295-96.

outright ban against criticizing the government falls within the consensual core of constitutionally guaranteed freedom of expression but a law against expressive flag burning very possibly does not.³⁴) Just as obviously, though, the notional constitutional agreement must provide some sort of assurance going beyond that one, because falling outside these highly consensual "central ranges" are innumerable issues touching on very sensitive ethical and moral nerves. Think, for example, of our society's current debates and controversies over constitutional-legal treatments of affirmative action, the death penalty, and the right to bear arms. (Once upon a time we would have had to mention slavery.) Americans cannot know in advance the official resolutions of such controversies, much less of the indefinite, unknowable, future stream of comparably sensitive ones. We lack, so to speak, the corresponding terms of the notional constitutional agreement, except as from time to time resolutions are handed to us by law-speaking officials, mainly the ones we call judges. But how can a notional constitutional agreement be "sufficient" unto the purposes of liberal political legitimation³⁵ when at any and every moment it lacks so much seemingly essential information?

VI. PUBLIC REASON AS MOTIVATIONAL CONSTRAINT

Rawls responds that such an agreement may be sufficient, depending on the degree of our assurance that judges and other officials approach their work of resolving the open questions under the constraint of public reason. In the last analysis, what that roughly means is that whoever engages in any exercise of political power respecting such choices does so through a sincere exercise of judgment regarding which choice will be truest to some full set of constitutional principles. It would be a specific set that the decisionmaker has in mind and stands ready to defend as based in the spirit of reciprocity, of mutual recognition by citizens of each other, and regard for each other, as free and equal persons diversified by a reasonable pluralism of ideas of

³⁴ Cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 106 (1999) (remarking that a nation that enforces law against flag burning would not on that account be launched on a path towards becoming "Stalinist Russia").

³⁵ See *supra* notes 20-31 and accompanying text.

the good.³⁶ If citizens could be confident that public reason in that sense prevails in public decisionmaking over matters of basic constitutional import—so runs the line of thought—then perhaps that confidence, combined with strict guarantees of everyone's continual enjoyment of the undisputed cores of the traditional civil liberties and civil rights, could give every reasonable person a sufficient basis for accepting the legislative outcomes of a democratic constitutional regime. And notice, then, the converse of this proposition: If the facts on the ground are such that citizens *cannot* reasonably maintain confidence in the effective constraint of public reason on official choices affecting matters of basic constitutional import, then the extant system of positive legal ordering is unjust. It fails to measure up to the moral demand for justice in politics, as political-liberal thought conceives of that demand.

Bottom line: The chance for liberal justice rests on a twofold hope: (1) that citizens can know what they need to know about not only the uncontested terms—the overt clauses, as we might say—of an aspirationally sufficient and legitimating constitutional agreement, but also about the spirit in which questions of application left open by the clauses will be addressed by those having the powers of decision; and (2) that such knowledge can make the constitutional system “complete” enough to merit universal reasonable acceptance of the legislative and adjudicative products of the system. Remember, we already supposedly have the assurance of adjudicative convergence on those “central ranges” of application of the standard basic liberties, regarding which we *can* posit something close to country-wide, reasonable-and-rational, substantive agreement. (For the answer to the question why we can, we may think of how Steven Winter—and I see him as arm-and-arm on this point with the recent work of Mark Tushnet³⁷—argues that facts of neural and cultural conditioning allow us a fairly confident prediction that the central ranges will be respected and enforced by judges of

³⁶ See, e.g., RAWLS, *supra* note 22, at 1-li; Rawls, *Public Reason Revisited*, *supra* note 29, at 578-79, 581.

³⁷ See Frank I. Michelman, *Populist Natural Law (Reflections on Tushnet's "Thin Constitution")*, 34 U. RICH. L. REV. 461, 462-64, 473-75 (2000) (discussing Tushnet's theory of an “incentive-compatible” and “thin” constitution as presented in TUSHNET, *supra* note 34).

the law, through processes of persuasion carried on in the public eye among persons who have cared and been able to attain high judicial office.³⁸) To those assurances, we now hope to add another: that judges and others exercising law-speaking powers approach the remaining, open, and controversial questions of basic-liberties application under firm inspiration and guidance by the spirit of liberal reciprocity.

We can see how the two types of assurance might be thought to combine. The "tight" central-ranges guarantee is relatively strong in *decisiveness* of application but correspondingly restricted in *scope* of application. The "loose" public-reason guarantee extends to a much wider range of politically decidable matters, but at the cost of allowing in much more disagreement about what ought to be done, and correlative uncertainty about what will be done. The idea, it seems, is to use the looser guarantee to supplement the tighter one, in hopes of eking out a total constitutional-legal practice about which a rational and reasonable person can fairly be expected to say: "A system that not only contains these stated principles—these clauses—but that also is bound to these discursive expectations is sufficiently regardful of my and everyone's interests and status as free and equal persons that I ought to support it and its legislative products, provided everyone else does."

But of course there's the rub. The wishful "ideal" of public reason cannot play its intended role in liberal political justification unless it really does generate an actual *constraint* of public reason.³⁹ That it does so must furthermore be a matter of *knowledge* among citizens. Allowing that citizens do not have to know exactly how every judge will answer every debatable constitutional-legal question that will materialize over the future course of history, they do have to know at every moment that a certain, settled set of reciprocity-tending aims and values will guide and constrain decisions. Thus there will have to be some underlying social agreement on the substance—or call it if you want, the spirit—of the guiding aims and values. The puzzle is how we can posit the requisite background agreement without denying or obfuscating the supposed social

³⁸ See, e.g., CLEARING, *supra* note 1, at 152, 321, 331.

³⁹ See Rawls, *Public Reason Revisited*, *supra* note 29, at 576.

fact of deep ethical diversity that it is the business of this kind of legitimation theory not to obfuscate but to overcome.⁴⁰

VII. A COGNITIVE SCIENCE OF PUBLIC REASON? (COLLAPSING THE "PREDICTIVE"/ "MOTIVATIONAL" DISTINCTION)

It seems at this point that the hope for political legitimacy, as political liberals conceive it, ultimately rests on three propositions: first, that a country's people retain a shared commitment to liberal reciprocity, however otherwise ethically divided they may be; second, that we can eke out a sufficient, legitimating constitutional agreement, *given* secure knowledge that our judges are motivationally constrained not only to vindicate the consensual cores of the constitutional clauses on basic civil liberties and civil rights, but to keep their resolutions of the open questions—of extension, interpretation, application—within the bounds of what reciprocity can countenance; and, of course, third, that we can and do *know* that judges truly will strive to do exactly that.

But how, exactly, can we hope to "know" the unwritten terms or spirit in which constitutional-interpretative questions are being addressed, and will be, by those having the power to decide them? After all, even for Rawls the ideal of public reason seems often to figure as a strictly counterfactual, normative ideal, and one that is potentially highly critical of actual political practice anywhere on earth.⁴¹ His point, then, is that *if* the ideal of public reason is *not*, in fact, sufficiently realized in a given society's actual practice, then the liberal principle of legitimacy will not be met in that society, and exercises of coercive political power will not, then, in that society, be morally supportable.

But Rawls also explains public reason as what he calls a "realistically utopian" idea. He means that the actual history of constitutional-democratic countries, combined with reasonable psychological and sociological speculation, gives a basis for belief that the public-reason ideal *can* be realized adequately in practice, "taking men as they are and laws [as] they might

⁴⁰ For fuller discussion, see *Constitutional Justice*, *supra* note 26.

⁴¹ See, e.g., RAWLS, *supra* note 22, at 213.

be.⁴² We have, Rawls argues, a strong enough basis for belief in this possibility to make constitutional justice the best approach to the pursuit of political justice, at least for a society whose dominant political culture already falls generally within the constitutional democratic tradition.

One can hardly help wondering what cognitive science in Winter's hands might have to say about an empirical speculation of that kind. Can the science, perhaps, by a kind of merger of causal-predictive and motivational constraint, underwrite the likelihood of the requisite convergence of constitutional adjudicators on decisions more or less guaranteed to keep within the bounds of what reciprocity can countenance? Keep in mind that these constitutional adjudicators are people engaged among themselves in processes of persuasion, and under pressure of public opinion of which persons who rise to high public office can hardly be unconscious or uncaring.⁴³

Winter's current book does attempt an answer. It does not concern itself much at all with normative questions. But it is not entirely silent, either. It says at least this much:

The insight that law is a socially contingent artifact . . . implies that legal meaning is possible only to the extent that the society enjoys a relative stability of context: When there is a consensus in practices and consequent values . . . then the courts will be able to articulate "principled" decisions that people will recognize as valid. . . . But when social practices and values are controversial or in disarray, the legal rules and principles will be too. It follows that we cannot expect the law to resolve difficult, controversial cases in a way that is different or removed from the realm of politics.⁴⁴

If we take that at face value, then is Winter in the posture of destroying the hope reposed by political liberals in public reason? The "relative" predictive constraint of adjudication expected by cognitive science apparently will fail just at the point where adjudication meets up with the ethically "difficult and controversial" cases that are the focal concern of the political-liberal theory of political legitimation

⁴² See John Rawls, *The Law of Peoples* 11-13 (1999) (quoting Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston trans., 1968) (1762)).

⁴³ See *supra* note 38 and accompanying text.

⁴⁴ CLEARING, *supra* note 1, at 328-29.

through constitutional law. Law, then, in short, apparently will not be able to "do the one thing [liberals] most want to depend on it for."⁴⁵ If that indeed is the meaning, then, combining it with the claim that an adjudicative process that is only relatively constrained can nevertheless support "the work we expect of law," we get either negative message number one or negative message number two:⁴⁶ either political legitimation, at least as political liberals conceive it, is not worth worrying about, or it is worth worrying about but law obviously cannot be its vehicle.

And yet what has not yet been explored, as far as I can see, is the possibility of the positive message. The question would be whether cognitive science might underwrite a sufficient expectation of actual judicial convergence on the reciprocal-recognition norm (or something like or akin to it) to support a political-liberal theory of political legitimation through constitutional law applied under constraint of public reason. Cognitive science obviously is deployed by Winter as the guarantor of enough societal "consensus in practices and consequent values" to support enough motivational and predictive constraint to contribute usefully toward the stability and settlement aims that society holds out for law. Why not legitimation, too?

Nailing down an answer to that question lies beyond the scope of this preliminary inquiry, but we can list some possibilities in quick review. One seemingly plausible, but by no means self-evident, response would be substantive. Perhaps cognitive science tells us that the actual neural/cultural inheritance of humankind, or of humankind in our part of the world, simply does not jibe with the particular sort of constraint on adjudication that we've seen to be required by the "liberal principle of legitimacy,"⁴⁷ that is, one that sounds in the liberal criterion of reciprocity. (Sociobiology, this may be your cue.)

Now consider a second sort of answer. Time and again, Winter mentions that a cognitive-scientific account of the relative constraint of adjudication (predictive) is tantamount to

⁴⁵ *Id.* at 163.

⁴⁶ See *supra* text following note 14.

⁴⁷ See *supra* note 25 and accompanying text.

a prediction that adjudicators will converge on those "values and perspectives" that happen to be dominantly "socially shared"⁴⁸ in a society's "most conventional" cultural precincts.⁴⁹ As Winter presents it, the dark side of the coin of relative constraint of adjudication (predictive) is that "law . . . always . . . enforces . . . the dominant normative views of the culture."⁵⁰ But in fact he does not say "dark" or anything like it, and there is no apparent reason why we should imagine him thinking any such thing. Jürgen Habermas might,⁵¹ but that is because Habermas takes moral universalism very seriously indeed.⁵² By contrast, there is no sign that Steven Winter takes it seriously at all. Nor is there any self-evident reason why the Rawlsian "liberal principle of legitimacy" should not avail itself of the lucky contingency, wherever it might be found to exist, of widespread popular sympathy for the liberal ideal of reciprocity. As Rawls himself explains, his constitutional-contractarian response to the problem of political legitimacy has been specifically shaped to societies already imagined as falling with a certain broad, historical tradition of political sensibility.⁵³ It has, he says, been "constructed" or "worked out" from ideal elements—"fundamental ideas"—drawn from "the most deep-seated convictions and traditions of a modern democratic state."⁵⁴

We come, then, to a third possible objection to summoning cognitive science à la Winter to the support of a Rawlsian hypothesis of a "realistic utopia" of public reason.⁵⁵ It would be that the very idea disastrously confuses motivational

⁴⁸ CLEARING, *supra* note 1, at 318.

⁴⁹ *Id.* at 323; *see id.* at 321 (suggesting the likelihood of subordination of the "personal preferences" of individual judges to "some larger set of values shared by the wider audience").

⁵⁰ *Id.* at 331.

⁵¹ *See, e.g.,* HABERMAS, *supra* note 21, at 200, 209 (stating that "In a pluralistic society in which various belief systems compete with each other, . . . [w]hat counts for one person as a historically proven topos is for others ideology or sheer prejudice . . . [T]he practice of interpretation requires a point of reference beyond settled legal traditions."); *id.* at 223 (a "suspicion of ideology" hangs over every claim of a universally shared "background understanding").

⁵² *See* Frank I. Michelman, *Morality, Identity, and "Constitutional Patriotism"*, 14 *RATIO JURIS* 253, 256, 258, 262 (2001).

⁵³ *See, e.g.,* RAWLS, *supra* note 22, at xl-xli; *cf.* Rawls, *Public Reason Revisited*, *supra* note 29, at 573-74.

⁵⁴ RAWLS, *supra* note 22, at 13-14, 300-01.

⁵⁵ *See supra* note 41 and accompanying text.

with predictive constraint. In Rawls's hands, *the ideal* of public reason seems always to refer to the subjective state of whoever is in a position of wielding power to say what the law is. It means that person's sincere readiness to explain her decision as true to some full set of constitutional principles that she has in mind and stands ready to defend as based in the spirit of liberal reciprocity. That is how conscientious, liberal-minded citizens and officials carry out what Rawls calls their duties of "civility."⁵⁶ By contrast, the whole tendency of Winter's line of cognitive-scientific argumentation leans toward the displacement (or transformation) of conscious agency by (or into) behind-the-back causality—or, in other words, the transformation of what I have called motivational into what I have called predictive constraint.⁵⁷

Does Rawlsian liberal legitimacy, then, really depend on the conscious motivations of decisionmakers being what they morally ought to be, regardless of any level of confidence we may have that decisionmakers will be biologically and sociologically caused to act "as if" thus consciously motivated? Why should it? It is one thing to ask in what spirit faithful liberals consciously will consider their choices when deploying their shares of power to say what the law is or shall be. To that question the "ideal" of public reason gives the answer. It would seem, though, to be quite another thing to ask what citizens at large must *know* about the manner in which judges will decide hard cases in order to find the legal order deserving of their respect and support. To that end, why should it not be enough for citizens to have assurance that the judges will act *as if* consciously actuated by the ideal of public reason, thus under the "constraint" of public reason—or as Rawls likes to put it, according to the "idea" (even if not the "ideal") of public reason?⁵⁸ And is not that just the sort of assurance that cognitive-science à la Winter might be in a position to offer?

⁵⁶ See, e.g., Rawls, *Public Reason Revisited*, *supra* note 29, at 578, 581.

⁵⁷ See *supra* Part IV.

⁵⁸ See Rawls, *Public Reason Revisited*, *supra* note 29, at 574-76.

Or is the last word here to be that of Justice Holmes?⁵⁹ It is not, after all, beyond consideration that the difference between a citizen's sense of having been accidentally tripped over and her sense of having been intentionally kicked is what finally makes the difference between legitimate and illegitimate legal ordering. If it does, then liberal legitimacy really does depend on citizens being able to know that judges are motivationally—consciously—constrained by the ideal of public reason. Rawls himself, to my reading, leaves the question exquisitely unresolved.⁶⁰

VIII. THE NEGATION OF "THE LEGAL MATERIALS"

The deep and ultimate claim of Winter's book may be markedly more radical than what appears on its face. As I have mentioned, *Clearing* apparently shares with virtually all jurisprudence the perception that it is at the point of *adjudication*—the point at which social controversies are submitted for ostensible decision *according to law*—that the pretensions of legal ordering to do work for society are put to the test. Adjudication means the business of deciding cases according to what Winter sometimes refers to as "the legal materials."⁶¹ It means adjudicators having resort to such rules,

⁵⁹ See *Dairy Road Partners v. Island Ins. Co.*, 992 P.2d 93, 115 (Haw. 2000) ("The Connecticut Supreme Court affirmed the trial court, quoting Professors Prosser and Keeton for the proposition that 'the distinction between intentional and unintentional invasions draws a bright line of separation among shadings of almost infinitely varied human experiences. . . . As [Justice Oliver Wendell] Holmes observed, even a dog knows the difference between being tripped over and being kicked.' [American Nat'l Fire Ins. Co. v. Schuss, 607 A.2d 418 (Conn. 1992)] at 422 (quoting W.P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 8 (5th ed. 1984).").

⁶⁰ Rawls, *Public Reason Revisited*, *supra* note 29, at 578:

[W]hen, on a constitutional essential or matter of basic justice, all appropriate government officials act from and follow public reason, and when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment expressing the opinion of the majority is legitimate law. It may not be thought the most reasonable, or the most appropriate, by each, but it is politically (morally) binding on him or her as a citizen and is to be accepted as such. Each thinks that all have spoken and voted at least reasonably, and therefore all have followed public reason and honored their duty of civility.

Id.

⁶¹ See, e.g., *CLEARING*, *supra* note 1, at 316 (quoted at the outset of this essay).

standards, and principles as they feel able to draw from statutes, judicial precedents, and any other propositional products or aspects of their country's history that may in their minds qualify as legal. It is that more or less distinctly pedigreed collection of normative propositional stuff, together with the adjudicative uses to which it professedly is put, to which Winter apparently refers when he speaks of something called "law" that might or might not succeed in accomplishing the work we expect of law.

But immediately one feels the urge to qualify. Without a doubt, Winter's book slips into the sort of positive-ish talk I have just been describing, about law as a distinct and demarcated body of normative propositional stuff. It is, however, hard to suppress the thought that Winter's talk in this vein is maintained provisionally, for the sake of effective communication with his intended professional audience in its present, imperfect state of understanding of where the real truth lies. For good and understandable reason, Winter frequently talks the talk of a positivist notion of law, but one cannot be so sure that he, in the bottom of his heart, means to walk the walk. Ostensibly, Winter's claim is that "the legal materials" provide sufficient predictive determinacy of adjudicative outcomes, at least when filtered through "processes of persuasion" among biologically and sociologically pre-conditioned judges, to do the work we expect of law.

Ultimately, though, Winter may intend a more radical claim, one that finally would kick aside any notion of a socially cognizable body of distinctively "legal" propositional stuff. The claim then would be that officials acting in the role of judges, in the sorts of social settings we currently know as adjudicative, commonly pre-conditioned as they are and responding as they must to entrenched public opinion, predictably would converge on a sufficiently—if only "relatively"—constrained range of outcomes to accomplish successfully the work we expect of law, even if their persuasive processes were to pay no particular attention to any particularly "legal" body of normative propositional stuff. I am suggesting the possibility that Winter's deeper conviction is that we don't need "law" at all, in the positivist, stuff-y sense conveyed by a phrase like "the legal materials," in order for judicial institutions to carry out successfully the work we expect of law. The institutional

arrangements, settings, and practices, then, would be the crucial factor while “the law”—the legal “materials”—would be but an epiphenomenal effect of the institutions, an aura surrounding them.

Now it is fairly easy, under Steven Winter’s sterling tutelage, to imagine law’s work thus being done, assuming that work to be confined to stability and settlement. But to suggest that legitimation, too, might thus be accomplished would be utterly transformative for political-liberal thought. It would be to leave behind the “liberal principle of legitimacy”—the theory of legitimation through the notional idea of a sufficient, legitimating, hypothetical-contractual *body* of constitutional *law* (to be applied, to be sure, under constraint of public reason)—for something else; not something utterly unrelated, but something very different. It would be to carry one giant step further the process of the proceduralization of normative, liberal legal thought.

