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Legitimacy, The Social Turn and Constitutional Review: What Political Liberalism Suggests*

Zusammenfassung

Dieser Artikel stellt Fragen hinsichtlich der Auswirkungen des Ansatzes der die tragende Funktion und den wesentlichen Dienst, den Verfassungen leisten können, in ihrer Funktion, als öffentliche Plattformen erblickt, die der Legitimation staatlicher Gewalt dienen, auf die verfassungsrechtliche Praxis und den Diskurs haben. Dieser Vorstellung von "Legitimation durch Verfassung" folgend, wird das Staatsvolk in einer allgemeinen und regelmäßigen Unterstützung des politischen Regimes fortfahren, soweit und so lange, als die Behörden, denen es vertraut, ihm ausreichend Grund geben zu glauben, dass die Handlungen des Regimes einer für zumindest hinreichend gut befundenen Verfassung, Respekt zollen. Der Artikel befasst sich insbesondere mit dem Phänomen des jüngst unter progressiven, gemeinhin als liberal bezeichneten Verfassungsrechtlern, vermehrt zu beobachtenden Empfänglichkeit der Idee einer eingriffsextensiven Verfassungsgerichtsbarkeit. Er reflektiert hinsichtlich des Dilemmas das sich für jene ergeben kann, die der Ansicht sind, das seine hinlänglich gute ("legitimation-worthy") Verfassung Bestimmungen enthalten müsse, die die grundlegenden materiellen Bedürfnisse des Individuums respektieren ("sozio-ökonomische Rechte"), die jedoch auch weitverbreitete, liberale Bedenken hinsichtlich der Rolle von Gerichten bezüglich der Entscheidung über die Rechtmäßigkeit staatlichen Verhaltens in dieser Hinsicht, teilen. Der Artikel kommt zu dem Schluss, dass die Vorstellung einer experimentellen oder eingriffsextensiven Verfassungsgerichtsbarkeit unter dem Druck dieses Dilemmas entwickelt worden sein könnte. Darüber hinaus prüft er wohlwollend eventuelle zukünftige Entwicklungen, die diese Gedanken nehmen könnten, im Sinne einer Antwort auf diese weitverbreiteten Bedenken.

Résumé

Cet article questionne les effets de la pratique et du débat juridique-constitutionnel sur l'idée du rôle et de la fonction majeure joué par une Constitution juridique en tant que plateforme publique de légitimation des pouvoirs de l'Etat. Selon cette idée de « légitimation par la Constitution », les citoyens d'un pays trouveraient des raisons suffisantes de soutenir de manière globale et régulière un régime politique lorsque, et aussi longtemps qu'ils se sentent assurés par les autorités qui les représentent de la conformité des opérations menées par le régime aux conditions d'une charte constitutionnelle qu'ils

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estiment suffisamment pertinente. L'article traite principalement de la récente croissance et diffusion, au sein de la pensée des constitutionalistes progressistes libéraux, de la réceptivité à l'idée d'une « forme faible » de contrôle judiciaire constitutionnel. Il reflète le conflit susceptible de naître chez des personnes convaincues qu'une Constitution suffisamment pertinente (une Constitution « digne de ce nom ») devrait prévoir certains engagements portant sur les besoins matériels de base des individus (« les droits socio-économiques »), tout en partageant la « préoccupation libérale usuelle » qui consisterait à mettre en place des juridictions se prononçant sur le respect par l'Etat de tels engagements. L'article suggère que des propositions de contrôles judiciaires expérimentaux ou légers auraient émergé sous la pression d'un tel dilemme. Il progresse ensuite vers une exploration favorable de ces propositions de réponses à la préoccupation générale.

I. INTRODUCTION

A. Legitimation-by-Constitution (the Idea)

The "legal objects" known as constitutions might or might not also figure symbolically in processes by which a country's population develop and sustain a communal spirit and collective identity.[1] Alongside or as a part of the "integrative" function we thus theorize for constitutions, a function of *legitimation* perhaps deserves a focus of its own. Of course these two functions would be closely intertwined.[2] Both would operate on the level of the figurative and representational,[3] even as the operations of both would also be parasitic on a public apprehension of the constitution's actual, effective control – its "normative function" – in the conduct of real-world affairs.[4] Granting these close connections, isolation of a legitimation component from the rest of the integrative effect may still attract us as investigators of the play of constitutional consciousness in the social world.

We shall here be concerned with what *Martin Loughlin* calls the constitutional imagination. As Loughlin persuasively reminds us, ideas about a country's constitution – of what it consists, what work it does – are typically alive in the skeins of "narrative, symbol, ritual, and myth" through which people envision a political domain and so "shape … political reality."[5] If so, if we thus posit the ideational level as a potentially

1 *Dieter Grimm*, Integration by constitution, 3 Int'l J. Const. L. 193, 193-95 (2005).

2 Reference (in all but name) to a constitution's legitimation function as I shall develop it here appears in *Grimm*, *supra* note 1, at 192 (noting the constitution's use as a long-term "standard of judgment" for official behavior and sundry resulting benefits to social coordination and stability).

3 See id. at 194-95.

4 See id. at 194-95, 199-200.

5 See *Martin Loughlin*, The Constitutional Imagination, 77 Mod. L. Rev. 1 (2015); see also *Duncan Kennedy*, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought In America, *1850-1940*, 3 Research in Law & Soc. 3 (1980) (positing the existence of legal consciousness as "a set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest").

productive force in social affairs, then a special interest should attach to the following fact (if and where it is one): the inhabitation of constitutional consciousness by a sense of the legal constitution's indispensable service as a platform for legitimation of the state. Such a fact would point toward effects on social outcomes distinct from any we might foresee simply from a constitution's representation to its constituents of their distinct, collective identity as a self-standing, unified people or nation.[6]

By legitimation, I mean the social and communicative processes by which a country's people sustain among themselves a sense of assurance of the deservingness of its political regime of general and regular support. On the level of political philosophy, the idea of the constitution as a platform for legitimacy finds expression in *John Rawls's* proposal – named by him as "the liberal principle of legitimacy" – that enactments by political majorities can be justified to dissenters in any given case (regardless of which side of the case you might think true justice and policy would favor) by a showing that the winners have acted within the terms of a good-enough constitution.[7] On the level of mundane political rhetoric, "it's constitutional, after all" (meaning at least constitutionally permitted but perhaps also positively constitutionally called for) works in many countries as a formidable riposte to those who demand to know why they should be expected to accept in good spirit the compulsion of some law that they (not crazily) have found to be outrageous and oppressive.

Inspired by the lead of *Justice Grimm*,[8] I will speak of the *Rawlsian* proposal – with whatever ironical tinge you may find the expression to carry – as one for "legitimation by constitution." Sometimes, for convenience, I will reduce that to "LBC." When I speak of LBC, I will always mean *the idea of* LBC. The reference will always be to the idea of the constitution's indispensable service as a platform of legitimacy. I posit, as a hypothesis, the activity of that idea in constitutional consciousness, so as to consider possible resultant effects on constitutional practice and debate. As a prime case in point, I will offer the recent growth and spread, within the world of broadly-speaking liberal constitutional thought, of receptivity to the idea of "weak-form" judicial constitutional review. I will suggest a possible correlation of that development with a spread, within that same world, of conviction along on an entirely different front, regarding the so-called socioeconomic rights ("SER") of citizens vis-à-vis their states. I will suggest that LBC (the idea) provides a hinge between these two developments.

B. Political-Liberal Thought

I will develop both the idea of SER and the idea of LBC in terms of the political-liberal outlook within which both have recently found prominent philosophical endorsement.

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6 Cf. *Loughlin*, supra note 5:
The narrative schemes of *Hobbes, Locke* and *Rousseau* [which together fix the parameters of the modern constitutional imagination] present contrasting accounts of an imaginary past... [each with a view to] open[ing] new ways of conceiving political reality for the purpose of motivating us to accept the authority of a particular type of constitutional order.

7 See infra Part II(B)(3).

8 See *Grimm*, supra note 1.

I hope thereby to present their respective possible attractions in as liberally non-sectarian a terminology as the topic will allow.

"Political" liberal thought envisions possibilities for a more inclusive – thus a broader, looser – sort of explanation for the pursuit of liberal policies than those on offer (say) from the economic doctrine of market freedom or the libertarian doctrine of limited government. The project involves an interpretive reconstruction of liberal policies as outcomes of a quest for fairness in the basic terms of social cooperation, among citizens conceived as "free and equal," in modern conditions of a plurality of clashing views of the good held by members of society, with resultant disagreements about major matters of political and social practice. No doubt market freedom and constitutional government can both claim a place in such a conception, and political liberalism delivers a pronounced but qualified yes to both. The qualifications, though, are heavier than in some other liberal conceptions. My focus here will be on two ways in which they are: an embrace of socioeconomic rights as essential components of any legitimation-worthy constitution (the "social turn" of my title) and a related reconsideration of the role and work of judicial overseers in the pursuit of constitutional compliance by politicians and the public. Political-liberal thought, I will suggest, leads to complications both of economic liberalism's faith in the justice of the market and – relatedly – of classical-liberal insistence on judicial supremacy in the constitutional-legal field.[9]

That latter suggestion – of retreat from judicial supremacy – may seem headed for alliance with a party that marches these days under the banner of Political Constitutionalism.[10] Not so, however, if or insofar as that company might define itself as adamantly opposed to any kind and degree of an external, institutionalized supplement to electoral and parliamentary politics, for assurance of the constitutionality of state operations. Political-liberal constitutionalism cannot make do – or so I will suggest – without a distinct and dedicated institutional site for pronouncements on disputed questions of constitutionality.[11] The constitution-dependent, liberal principle of legitimacy necessarily depends on such an institutional service, not only or primarily to set up a negative blockade against wayward or oppressive political majorities but also, and more fundamentally, to provide positive support for an ongoing process of public-opinion formation in the interest of securing (or recuperating, as the case may be) the moral legitimacy of the state regime.

It may strike you that I have just drawn a distinction without a difference, because (you may think) it is mainly by stoutly and visibly blocking the path of would-be opp-

9 See, e.g., *Richard A. Epstein*, The Classical Liberal Constitution 77-80 (2014) (reviewing pros and cons and ending with "little doubt... about the intrinsic worth of the strong doctrine of judicial review" as "a matter of first principle").
Perhaps depending on the recent directions of change in the political climate where you are, I can see how some readers might feel that talk of a "reconstructive" or "social" turn in liberal thought takes Humpty-Dumpty liberties with the term "liberal," or at any rate fails to connect with the realities of ideological baggage with which that term is stuck. All I can say in response is that there are lots of social liberals around, including me, who would not easily give up their claim to represent liberalism at its truest and best. I will try to keep matters sufficiently clear by speaking, where it matters, of "broad-sense liberal." See also infra note 79.

10 See, e.g., *Richard Bellamy*, Political Constitutionalism: A Republican Defense Of The Constitutionality Of Democracy (2007).

11 See infra Part III(C).

ressive political majorities that a court of law can act to secure and uphold the legitimacy of the regime. I will hope to show you differently. I aim to suggest how attribution of a legitimacy-sustaining function for the constitution can be distinctly receptive to so-called "weak-form" conceptions of judicial constitutional review, and also, correspondingly, to allowance into our constitutional law of requirements on the state – such as, for example, socioeconomic rights – whose fulfillment (or not) will not, in the main, be crisply decidable by applications of trans-political legal norms through technically legal discourses.

II. SOCIOECONOMIC RIGHTS IN A LIBERAL CONSTITUTIONAL CONCEPTION

A. A Standard Worry

Socioeconomic rights ("SER") envision a targeted set of social outcomes – roughly, that no one at any time lacks the means of access to the fulfillment of certain basic material needs. Corresponding obligations would then fall on the state.[12] Let us leave open for now whatever questions may spring to mind about how further to define the state's obligations.[13]

A country's constitutional law might or might not contain a commitment to SER. In a political-liberal view, that suggestion sets going a series of questions, possibly up to the number of four. We start with (1) a question of ideal political morality. Political liberalism works, in part, by developing an ideal conception of basic attributes required of any political regime aspiring to justice in modern pluralist conditions. Is that ideal conception receptive or not to the idea of SER? If not, there would be little cause to pursue further the matter of socioeconomic commitments in constitutional law. But if so, the next question may be (2) whether a socioeconomic commitment is not only a requirement for the ideal justice of the regime but is also a condition for its minimal-moral legitimacy; and then, if so, whether (3) that necessarily would provide a reason to write that recognition into the country's constitutional law. And then if, but only if, we find that it would will we reach the fourth and final question – about how, if at all, our writing the commitment into constitutional law (if we do) will involve the country's courts of law in deciding, from time to time, the adequacy of the state's performance in the field of social provisioning.

I shall call these four questions respectively the questions of *justice*, *legitimacy*, *constitutionalization*, and *judicialization* in regard to socioeconomic rights. I have set up the questions as a conditional series, so that the first "no" puts a stop to going further. We must notice, though, that it may not be possible to work fully through the second

12 Because social outcomes are bound to depend heavily on patterns of conduct by actors in society, the expected state exertions might cover not only the state's own directly distributive actions but also its responsibility for the bodies of regulatory and general background laws that guide, sanction, and incentivize conduct in markets, families, and so on. See, e.g., *Dennis Davis & Karl Klare*, Transformative Constitutionalism and the Common and Customary Law, 26 S. Afr. J. Hum. Rts. 403 (2010).

13 See infra Part III(A).

query (regarding legitimacy) without having already in mind the fourth one (regarding judicialization). For suppose you thought that engagement of the country's judiciary in SER adjudications would be flatly unacceptable – say, because it would carry the judiciary so blatantly across a border between law and politics as to pose an excessive risk to the overall legitimacy of the constitutional regime. That might lead you to tip the dominoes backwards: An insuperable objection against putting questions of SER compliance into the adjudicative arena becomes a reason to keep SER out of the constitution, which then becomes a reason to deny that a commitment to SER can be required for the legitimacy of the regime – and all of that regardless of whether such a commitment is demanded by your or my conception of ideal justice.

I recall here what I have in the past called an American "standard worry" about a constitutionalized commitment to socioeconomic rights. *"By constitutionalizing socioeconomic rights,"* I wrote (giving voice to the standard worry),

you would force the American judiciary, and especially the Supreme Court, into a hapless choice between usurpation and abdication, from which there would be no escape without either embarrassment or discreditation. Down one path [would lie] the judicial choice to issue concrete, positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against the prevailing political will. Down the other [would lie] the judicial choice to debase dangerously the entire currency of rights and the rule of law – the spectacle of courts openly ceding to executive and legislative bodies a nonreviewable privilege of indefinite postponement of a declared constitutional right. In sum, a formal act of writing or reading socioeconomic assurances into constitutional law would pose grave risks of serious damage to the integrity (and to public confidence therein) of the country's practices of constitutionalism, of law and legality, and of democracy, upon which political legitimacy depends.[14]

So goes the standard worry. A main task of this essay is to see how political-liberal convictions about justice and legitimacy push back against it. The rest of this overview sets out more fully the steps in political-liberal thought that lead toward the pushback.

B. Four Questions

1. Justice: SER commitment as an ideal demand of fairness in the basic structure

Political-liberal thought starts out from a construction (or idealization) of a political society as a large-scale scheme and practice of cooperation across a diversely inspired and motivated population of citizens. (It thus falls squarely within the larger social-contract tradition in the history of political ideas.) "Cooperation" is the germinal notion. Already embedded within it is a conception of the citizens – the cooperators – as individualized agents: each one a distinct "source of claims and projects,"[15] each endowed with an own life to live for the better or for the worse, each possessed of certain "moral

14 *Frank I. Michelman*, Socioeconomic rights: explaining America away, 6 INT'L J. CONST. L. 663, 683 (2008).

15 *Martha Nussbaum*, Frontiers of Justice 32-33 (2006) (describing sympathetically *Rawlsian* contractualist theory).

powers" and a "higher-order interest" in their development and exercise – powers not only to "have, to revise, and rationally to pursue" a conception of the good or of one's aims in life but also to "understand and … act from principles" of due regard for others likewise endowed and situated.[16] (In these ideas – these linked intuitions of human individuality, agency, and reciprocity of recognition – lie, to my mind, the essence of any possible liberalism.)

We come now to the notion of a set of "basic terms" of social cooperation. The basic terms are those made manifest in the society's major political, social, and economic institutions – its "basic structure" – which combine to produce the differing positions, conditions, and prospects of life that various persons will occupy from time to time.[17] Consider, then, a population of would-be social cooperators, reciprocally bound in recognition of each other's common humanity and motivation by the moral powers and corresponding higher-order interests. It seems there would arise within this population a common concern for *fairness* in the basic terms of social cooperation amongst them. Social justice, then, would be equatable with the satisfaction of the presumed desire of free and equal persons, within a company of likewise free and equal persons so recognized, for fair basic terms of social cooperation.

Some notion of economic assurance or safety-net seems a likely implication. Modern liberals can hardly help but presuppose a largely market-based economy within a mainly democratic-majoritarian lawmaking system. These, for us, are prime basic-structural supports for political and economic freedom. But then – so runs the line of thought – we cannot fairly and reasonably expect our primordially free and equal cooperators to submit their fates to the operations of these freedom-serving structures, without also committing our society, from the start, to run itself in ways aimed at securing to everyone the conditions anyone would require to be or become a competent participant in them, a respected and self-respecting contributor to political exchange and contestation and furthermore to social and economic life at large. Fairness – justice – in the basic structure may thus quite defensibly be held to necessitate a principle potentially corresponding to a socioeconomic right.[18] It would be a principle of assured provision for the "basic needs" of all citizens[19] – a "social minimum," as *John Rawls* calls it – defined as a package of material goods and services up to the levels required for a person's capability

16 *John Rawls*, Justica as Fairness: A Restatement 18-19 (Erin Kelly ed., 2001); *John Rawls*, Political Liberalism 74 (1993).

17 A society's basic structure consists in its "main political and social institutions [and the way] they fit together into one system of social cooperation [and] assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time." *Rawls*, Restatement, supra note 16, at 10.

18 In fact, *John Rawls* found that justice ideally requires, in addition, a distinct and farther-reaching economic-distributional commitment, to what Rawls called a principle of "fair" (in pronounced contradistinction to merely formal) equality of opportunity. See *Rawls*, Restatement, supra note 16, at 42-43. Such a principle might, for example – depending on how we assess the relevant social and economic facts – point toward any or all of a quite muscular antidiscrimination policy, jobs policy, industrial policy, family policy, fiscal-redistributive policy, and educational adequacy going beyond the most basic level. Here we focus on the distinct claim that justice for the basic structure requires assured provision for everyone's basic needs.

19 *Rawls*, Restatement, supra note 16, at 47-48.

to "take part in society as [a] citizen[],"[20] and "to understand and to fruitfully exercise" his or her capacities as a self-actuating person.[21]

I hope now to have established, at least for the sake of the argument, a quite modest proposition: not that the *Rawlsian* principle of the guaranteed social minimum is the only way, or is necessarily the best conceivable way, to satisfy the economic-distributional requirements of liberal social-systemic justice, but only that there is nothing like an antipathy – rather, there is a strong, natural sympathy – between the principle of assured fulfillment of everyone's basic needs and the deeper inspirations of liberal political thought. Such a principle is one that liberals can find strong reason to support, not just as a happenstance political preference but as a dictate derived from a more encompassing conception of political morality to which, as liberals, they feel committed.

2. Legitimacy: SER commitment as a minimal condition for expectation of loyalty

So much for justice. *Legitimacy*, however, is something else.

Political liberals take for granted that the basic structure will saliently include a legal system. They join with liberals of all stripes in the belief that stable, effective, social ordering by law is an indispensable requirement for decent forms of human social coexistence. They share, furthermore, the belief that the stability of any legal order depends on a general expectation of regular compliance with the order's duly issued laws by everyone within range, regardless of inevitable, sincerely held, reasonable disagreements about the wisdom or rightness of those laws.[22] And yet it remains the case, in the sight of a political liberal, that every concrete instance of a liberal rule-of-law regime presents unremittingly a question of moral justification. That is because persons living within a liberal order inevitably – this is what *John Rawls* calls "the fact of reasonable pluralism"[23] – will find themselves sincerely, within the bounds of reason, divided over not just the wisdom or prudence of various laws and policies but about their compatibility with morality and justice. And then how – liberals must ask – can a demand for general compliance with duly issued laws be justified morally, consistent with a view of citizens as individually free, equal, and responsible moral agents?

"Legitimacy" is an idea that presents itself in answer to that question. We speak here of legitimacy in what is often called a moral or normative sense of that term, as opposed to a purely sociological or empirical use of it.[24] Legitimacy in the normative sense sets

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20 *Rawls*, Liberalism, supra note 16, at 166.

21 Id. at 7.

22 See *John Rawls*, A Theory of Justice 211 (rev. ed. 1999) (discussing "Hobbes's thesis"); *Frank I. Michelman*, Ida's Way: Constructing the Respect-Worthy Governmental System, 72 Fordham L. Rev. 345, 345-47 (2003) (elaborating on this view).

23 *Rawls*, Liberalism, *supra* note 16, at 36-37.

24 *Richard Fallon*, for example, differentiates between legitimacy in a "sociological" sense referring to current facts of acceptance by the populace of the regime's claim to merited political authority, and legitimacy in a "moral" sense referring to the regime's "worthiness to be recognized," according to some measure that we as external evaluators bring to the table. See *Richard H. Fallon, Jr.,* Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1795-96 & n. 25 (2005) (quoting from *Jürgen Habermas*, Communication and the Evolution of Society 178 (*Thomas McCarthy* trans., Beacon Press 1979)).

a minimum public standard for the operation of a state regime, a floor of decency required to authorize morally a civic demand for a regularity of compliance by citizens with the laws and policies that issue from that regime.[25] A denial of legitimacy to a state's practice of legal ordering thus casts into doubt any claim of that state's citizens to a moral permission to collaborate in support of the system's demands for a regularity of compliance with its laws by everyone. Liberals will be careful, then, about setting the legitimacy bar too high. One might think, for example, that a state could be, in the minimal-moral sense, legitimate as long as its political structures were ostensibly democratic in design and its operations displayed, in practice, a due regard for a small core of non-negotiable, so-called "basic liberties" of persons – even though (let's say) that state was plainly delinquent, by our standards, in the field of economic-distributive justice.[26]

Why introduce such a gap between justice and legitimacy? It seems we do so in order to allow for human imperfection and for honest political disagreement.[27] In any possible human practice, not only must we expect shortfalls from justice, but so also must we expect serious disagreements about what counts as a shortfall. If full and perfect justice were to set the standard for legitimacy, no modern real-world, concrete legal order could ever be deemed truly deserving of support by any fraction of the citizens remotely approaching a totality. A legitimacy standard, it appears, in order to do its assigned work – provide a public justification for the regime's projection of pressure and force to ensure a prevailing regularity of compliance with its duly issued laws – must be more accommodating of real-world political imperfection and disagreement than any corresponding ideal standard of justice conceivably could be.

Let us, for the moment, accept without further question the political-liberal proposal for a comparatively relaxed standard for the moral legitimacy of a state regime – relaxed, that is, by comparison with your or my ideal standards of justice. Does or does not the relaxed standard rightly – or let us say liberally – include the state's commitment to the social minimum, the provision for everyone's basic needs? *John Rawls* answered "yes" to that question.[28] A state, he evidently thought, would gravely weaken its claim to the presumptive compliance with its laws of all who live their lives within its domain if – having within its grasp the means to do so at no more than a moderate cost to anyone's enjoyment of the system's goods, and without violation of anyone's basic liberties – it failed of commitment to eliminate the traps of soul-defeating, structural poverty that it seems must inevitably otherwise arise and persist within a liberal market-based economy.

Again, I pause to state in modest terms a point I hope to have established, at least sufficiently to go on with the argument: *Not* that the retreat from justice to legitimacy

25 See id. at 1799.

26 Cf. *Rawls*, Liberalism, supra note 16, at 227-29.

27 *Rawls*, for example, wrote that unjust institutions can sometimes be tolerable because "a certain degree of injustice... cannot be avoided, [or] social necessity requires it, [or] there would be greater injustice otherwise" *John Rawls*, Legal Obligation and the Duty of Fair Play in: John Rawls: Collected Papers 117, 125 (*Samuel Freeman* ed., 1999).

28 He did so (as I explain below) by including, as one of the liberal "constitutional essentials," a guaranteed "social minimum" covering the "basic needs" of all citizens. See *Rawls*, Restatement, supra note 16, at 47-48.

provides a sure-fire solution to the quandary of bottomless, reasonable disagreement (a hard question, which we have yet to take up);[29] and *not*, either, that the *Rawlsian* social-minimum is, beyond all possibility of counter-argument, a condition of minimal-moral legitimacy for a liberal state. But only that neither of those propositions is alien to liberalism; only, that both are claims for which compelling motivations can be found in the deepest layers of liberal thought.

3. Constitutionalization: SER commitment as a liberal "constitutional essential"

John Rawls, I said, answered "yes" to the question of treating the state's commitment to the social minimum as a condition of minimal-moral state legitimacy. He did so in a particular way, of which we must now take notice: by conferring on the social-minimum commitment the rank of a "constitutional essential." This calls for a bit of explanation.

Rawls posed as follows what he called "the problem of political liberalism:"

> *How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?... How [may] deeply opposed though reasonable comprehensive doctrines... live together and all affirm the political conception of a constitutional regime? What is the structure and content of [such a regime]?*[30]

As a part of his response (already, as you can see, prefigured in his statement of the problem), *Rawls* proposed that citizens in an up-and-running political regime, calling upon each other for continued general loyalty to that regime, could base those calls on observations of conformity by the regime's operations to the terms of an established legal constitution. The coercive deployment of law by democratic majorities, he wrote, can be accepted by all – is "justifiable to others as free and equal" – as long as it is done "in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."[31]

Rawls called that *the liberal principle of legitimacy*.[32] Notice how it depends on the state's having in force a legitimation-worthy constitution (as we may call it), meaning one whose content measures up to what would be required to carry the moral weight of legitimation. The thought is that reasonable citizens, fated to disagree intractably over the ultimate rightness and goodness of the policies from time to time enacted into law by political majorities, can nevertheless agree to accept the results as long as those are kept within bounds set by a constitutional higher law that itself contains an adequate and proper set of "essential" guarantees. What it comes to, in effect, is this: If a country's constitution is adequately democratic in design, and if the constitution guarantees due respect for certain core rights and interests of persons, then that kind and degree of rightness in the constitutional laws can make it fair to call on everyone for compliance

29 See infra Part III(C)(1).

30 *Rawls*, Liberalism, supra note 16, at xx.

31 *Id.* at 137.

32 See id. at 137, 217 (proposing "the liberal principle of legitimacy"), 227-28 (specifying the "essential" components of a legitimation-worthy constitution).

with approximately all of the further laws, rulings, and decrees that issue in accordance with the procedures, requirements, and limitations laid down by that constitution.[33] A legitimation-worthy constitution confers upon all other laws and decrees that duly issue from it an entitlement to that outer layer of institutional respect we denominate as legitimacy. In other words: legitimation-by-constitution ("LBC").

We may conclude as follows: When *Rawls* classes commitment to the social minimum as a constitutional essential, he means the commitment is strictly required for the minimal-moral legitimacy of that country's entire, extensive practice of coercive legal ordering. And so we move another step along the way towards a highly credible endorsement, from well within the bastions of liberal consciousness, of a constitutional right to a social minimum: from a demand of ideal justice, to a condition of state legitimacy, to incorporation in constitutional law. We have reached the point of what we may call the "social-liberal" branch of political-liberal thought.

4. Judicialization

That then brings us to the fourth question, regarding judicialization. Perhaps this one seems trivial – already, in effect, decided by a judgment that inclusion of a commitment to energetic pursuit of the social minimum is required of any legitimation-worthy constitution. So to say would be, however, a mistake. Experience shows the contrary. So insistent can be the objection against judicialized supervision of the state's economic policies that it sets going the domino effect – the standard worry – that I mentioned near the beginning of this overview: If judicialization of economic policy is deemed intolerable, then economic policy, it may seem – and, hence, the state's pursuit of the social minimum – cannot be allowed to be a constitutional essential. And if it cannot be a constitutional essential, then – according to the political-liberal doctrine of legitimation-by-constitution – neither can it be deemed a condition for the minimal-moral legitimacy of the state's regime of legal ordering; and all of this regardless of any conviction we might hold that it is, indeed, a requirement of justice.

We see, then, that in order to defend its treatment of a social-minimum guarantee as a constitutional essential, the social-liberal branch of political-liberal constitutional thought must find a way to disarm or evade the standard worry. Only thus can it carry through in full its promotion of constitutionalized socioeconomic rights: from demand of justice, to condition of legitimacy, to incorporation in constitutional law (the idea of LBC at work) – and then, finally, to deflection of concern about a judicialization of economic policy.

John Rawls did not himself dwell much on the deflection. He apparently took for granted that law courts can make authoritative determinations of shortfalls from fulfill-

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33 *Rawls* describes as follows the "essential" content of a legitimation-worthy constitution:
a. fundamental principles that specify the general structure of government and the political process [including] the scope of majority rule; and
b. equal basic rights and liberties... that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and association, [and] the protections of the rule of law.
Rawls, Liberalism, *supra* note 16, at 227.

ment of basic needs without noticeable strain on normal adjudicative methods and skills.[34] Such has not, however, been – nor does it show signs of becoming – the prevailing view among professionals in the field of constitutional law. Professionals disposed toward agreement with the proposition of SER as an essential component of a legitimation-worthy constitution thus find themselves in a bind, as we are about to describe.

III. THE TWO PROCEDURALIZATIONS OF LBC

A. A Discursively Cogent Performance Standard

Recall, from the start of Part II, our initial, somewhat cursory definition: Socioeconomic rights envision a targeted set of social outcomes – roughly, that no one at any time lacks the means of access to the fulfillment of certain basic material needs. "Corresponding" obligations, we vaguely added on, would fall upon the state. But then what obligations correspond? Obligations how strict, for exertions how strong? No doubt the idea of a "right" to the state's exertions presupposes some standard for a sufficiency of effort in the indicated direction. But that standard need not necessarily be "whatever it takes to make it be the case that everyone has by tomorrow a decent house to live in" (and so on); and in fact, for reasons more or less obvious, it probably will not be that. It will more likely be a standard qualified and guarded to leave room for democratic lawmakers to take account of other principles – liberty, dignity, responsibility, security, general economic prosperity – that might also have traction in that society's ordering of political values.

Take, as a rough example, something like this: "The state shall, in all its fields of operation, formulate its policies and direct its conduct with a view to fulfillment of SER targets as soon, as widely, and as dependably as possible, paying due regard to other constitutional values and availability of resources." Such a standard quite glaringly lacks the property of "ruleness" or strong formality.[35] Now, strict ruleness is nowhere deemed a requirement for a norm-statement's inclusion as a requirement of constitutional law. Consider, however, a weaker property that I will name as *cogency* in public discourse. A norm-statement is cogent insofar as it connects with its relevant audience – fits into its cultural context – in such a way that debates about its correct or preferred application will be, for that audience, more or less persuasively examinable and decidable by appeals to publicly available reasons, or a balance of them. Discursive cogency is an obviously necessary property for any supposedly binding constitutional guarantee, even if strict ruleness is not. Our discussion to follow assumes that a constitutional commitment to SER can be and will be cast in terms that satisfy discursive cogency. That assumption, however, will not by itself suffice to meet the standard worry.

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34 See *Rawls*, Liberalism, supra note 16, at 228-29.

35 *Cf., e.g.*, *Max Weber*, 2 Economy and Society 56-57 (*Guenther Roth & Claus Wittich* eds., 1968) ("Law is... formal to the extent that... only unambiguous general characteristic of the facts of the case are taken into account.").

B. The First Proceduralization (Reprise)

Democracies decide on potentially coercive laws and policies by majorities in divided votes. When we ask how liberal citizens hope to justify the resulting impositions on free and equal dissenters, political liberalism replies with its proposal for LBC: As long as the country's constitution sets up institutions of political democracy, and as long as it furthermore guarantees respect for certain basic rights and interests of persons, then that kind of rightness in the constitution allows each of us rightly to call upon the others for a general disposition to comply with constitutional laws. The solvent for disagreement thus lies – or so runs the hope – in a *proceduralization* of the question, a deflection of it from one frame of inquiry (is this law truly what it ought to be?) to another (is this law constitutional?) where we expect a publicly certifiable answer to be more readily at hand.[36] Call this the "first" proceduralization of LBC.

C. The Second Proceduralization

1. The Problem Unfolded

We have noticed how a supposedly legitimation-worthy constitution can do the legitimation work we want it for – that is, can provide the basis for a publicly assertable claim of the current regime's deservingness of a continued regularity of compliance from citizens – only under expectations of tolerance by citizens for deviations from justice as reasonable citizens variously would detect them.[37] It is not clear, though, how tolerance of that kind can finally answer the difficulty posed by disagreement. The tolerance must have limits. However relaxed it may be from a full and strict standard of justice, a constitutionalized standard of legitimacy must still, after all, be a substantially demanding, discursively cogent standard. Yet it cannot be a self-applying rule. Its correct applications to testing cases can no more be certain or self-certifying – can no more be proof against the ravages of disagreement – than all-out justice itself. It seems evident that no such liberally-satisfactory standard can possibly be framed with both sufficient breadth to serve as a widely acceptable clause in a public contract on legitimacy and, at the same time, sufficient closure to fend off good-faith interpretative controversy at the point of application: not "freedom of expression," not "arbitrary arrest," and no, not even "torture," to take the extreme case.

No doubt the frequency of problematic cases can be reduced by weakening the standard. If (say) all that were required for a legitimation-worthy constitution were to be its credible commitment to periodic elections of officials and to such libertarian fundamentals as freedom from torture and arbitrary arrest, reasonably debatable questions of constitutionality would crop up less often than if the legitimation-worthy constitutional essentials additionally included such liberal commonplace items as procedural justice, freedom of expression, and equality before the law. But, it seems that the full set of

36 See *Frank I. Michelman*, Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary, 47 UCLA. L. Rev. 1221, 1234-36 (2000) (explaining this sense of proceduralization and its application to problems of legal controversy).

37 See supra Part II(B)(2).

essentials for any *liberally* legitimation-worthy constitution must include the latter or their look-alikes.

And there, then, is the full problem for any liberal project of legitimation-by-constitution. That project depends on an expectation of convergence by the public on an operative conception of the moral-minimum conditions for collaboration in the country's practices of coercion by law, in the face of persisting, heartfelt disagreements about the good and the right. That cannot be accomplished by a resort to abstractly stated "essentials" on which all can agree, but only because they paper over the persisting disagreements that inevitably will surface at the point of application of those essentials to concrete policies and actions. The requirements and constraints those terms would impose on state lawmaking will have to be such that we can expect a more-or-less dependable public convergence on whether they are being fulfilled *in practice, in application*, not just in the word but in the act. No assumption of public discursive cogency in the constitution's prescripts will meet the difficulty. Discursive cogency in a standard neither contradicts the fact of reasonable pluralism nor nullifies disagreement at the point of application.

2. A possible solution?

It does not follow, though, that no solution is available. And that is because it does not follow that citizens must always be sure *in their own minds*, or must always concur *directly* with fellow citizens, about the finally correct answers to questions of fulfillment of the constitutional essentials. A second proceduralization could come to the rescue. For suppose we had in operation a dedicated institutional service whose considered judgments regarding such questions were in fact widely trusted to fall within the bounds of honest, discursive defensibility – not, of course, infallibly but with a frequency sufficient to qualify those judgments as publicly authoritative for legitimacy-sustaining purposes. An obvious example would be a court of law exercising powers of constitutional review. It is, I believe, precisely with a view to this crucial function – to assist in the enablement of political legitimacy on liberal terms – that many liberals, including *John Rawls*, defend the use of courts as authoritative public arbiters of the fulfillment of the constitutional essentials.[38]

Granted, there is nothing in the idea of the second proceduralization to require that the trusted institutional service be identifiable as a law court, or that its deliberations take a form that meets our notion of a proper adjudication. The "service" could be (say) a committee of the Parliament – or even the Parliament sitting from time to time in

38 I quote here what I take to be the crucial *Rawlsian* text:
[T]he idea of public reason does not mean that the judges agree with one another, any more than citizens do, in the details of their understanding of the constitution. Yet they must be, and appear to be, interpreting the same constitution in view of what they see as the relevant parts of the political conception and in good faith believe it can be defended as such. The [Supreme Court's] role as the highest judicial interpreter of the constitution supposes that the political conceptions judges hold and their views of the constitutional essentials locate the central range of the basic freedoms in more or less the same place. In these cases at least its decisions succeed in settling the most fundamental political questions. (*Rawls*, Liberalism, supra note 16, at 237).

committee of the whole – specifically commissioned to pronounce upon the constitutional compliance of legislative bills and agendas, using the standard forms of parliamentary debate. The fact is, however, that courts and adjudication are the site and the process that are cemented into those positions by our currently dominant political cultures. Consider, then, how the stage is set where two further conditions are met: (1) a sense is widespread of the legal constitution's indispensable service as a platform for legitimation of the state (LBC), and (2) proposals for constitutionalized SER fall foul of currently prevailing idealizations of the province and operations of law courts. In those conditions, it may be expected that those who become convinced that SER assurances nevertheless belong among the essential components of any legitimation-worthy constitution will be receptive to thoughts of modification or revision of those currently prevailing idealizations. (Those dominoes, it seems, can tip in either direction.)[39]

IV. GENEALOGY OF AN IDEA? WEAK-FORM JUDICIAL REVIEW[40]

A. The Bind

Liberals have accepted more or less on faith – although not always without qualms[41] – that a regime's deviations from a due regard for core components of the classical liberal "negative" liberties (of the person, of conscience, thought, expression, association, privacy, and so on) can be decided, more or less satisfactorily to the public – and despite lingering disagreements around the edges – by a court-like authority. Not so, however, for questions about the conformity of a state's current practice to a standard of due regard for antipoverty. Such questions have tended to strike us as too intricately complex, too endlessly debatable, for courts of law even to address, much less dare to decide against an apparent contrary drift of democratic public opinion. To take an example I have used before:

> *Let's say Parliament this year has done all of the following: replaced welfare with workfare, increased by one half the budget allocation for job training, reduced the minimum wage by one-third, extended the collective bargaining laws to cover employers of as few as ten workers, abolished rent control, budgeted an annual sum of 30 billion crowns for housing allowances and job training, increased top-bracket income tax rates by five percent,... doubled the size of the employment discrimination mediation corps, and approved a new tariff schedule somewhat less protective than its predecessor, in exchange for reciprocal concessions from abroad.*[42]

39 See supra Part II(A).

40 Thoughts in this section trace back to stimulation from *Brian Ray*, Extending the Shadow of the Law: Using Hybrid Mechanisms to Establish Constitutional Norms in Socioeconomic Rights Cases, 2009 Utah L. Rev. 797 (2009).

41 See, e.g., *Frank I. Michelman*, The Constitution, social rights, and liberal political justification, 1 Int'l J. Const. L. 13, 32 n. 66 (2003).

42 Id. at. 30-31.

Is that state in compliance with a constitutional standard of (say) "effort reasonably directed to fulfillment [of SER targets] as soon and as widely as possible in the light of other basic constitutional values and availability of resources?" Is that a sort of question we think a court *of law* is fit to decide? Liberals have been strongly habituated to say "no," that standard fails to present what our discourse of justiciability calls a "judicially manageable" rule of decision.[43] It poses too "polycentric" a problem.[44] It would be so often resistant to anything approaching a sharply reasoned or logically demonstrable answer that inviting courts to decide it would pose an undue risk to overall judicial credibility and authority. The "standard worry" is on the loose.

Suppose, now, that you are a worker in the vineyards of constitutional law. Constitutional consciousness where you are incorporates the idea of LBC. In the manner of *Rawls'* "liberal principle," it looks to a country's higher-law constitution to serve as that country's dedicated platform for legitimacy, and it furthermore looks to courts of law to provide the needed confirmations of constitutional compliance in conditions of expected, frequent public disagreement (the "second proceduralization"). All of this you know in your bones as a socialized constitutional actor. Now suppose, in these conditions, you also hold the belief that some commitment – say, SER – for the fulfillment of which no judicially manageable standard, as conventionally understood, can be written, is a requirement for any morally legitimate state regime. You are, then, in a bind.

The bind might perhaps be generalized as a thesis on modern constitutional thought, preoccupied as that thought is with mappings of institutional situses – legislatures, administrations, courts of law (or it might be some altogether different configuration) – along with assignments to each of capacities and limitations, competencies and functions. In any given instance of a mapping, the idea of legitimation-by-constitution might or might not have purchase. Where that idea *has* in fact taken hold, a constitutional actor partaking of it or responding to it – and I include, for this purpose, constitutional scholars among constitutional actors – will be subject to a constant pull towards finding an acceptable fit between her current sense of the requirements for the moral legitimacy of a political regime and the institutional mapping she affirms or accepts as settled. Movement on one side of that function must always portend the possibility, at least, of a compensating movement on the other.

B. An "Experimentalist" Response

That is, of course, merely a speculation. Now, here is an observation to lay beside it. Legal scholars working detectably within the gravitational field of the broadly speaking liberal-constitutional tradition (I do not say they all would self-identify as "liberal") are these days turning out a profusion of theories and conceptions of so-called "weak-

43 See generally *Richard H. Fallon*, *Jr*., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274 (2006).

44 See *Lon L. Fuller*, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 394-95 (1978) ("We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole.") For a measured rebuttal of the "polycentric" worry, see *Sandra Liebenberg*, Socio-Economic Rights 72-75 (2010).

form"[45] – "dialogical,"[46] "experimentalist,"[47] "catalytic"[48] – judicial review. We can take as illustrative a "democratic experimentalist" model of judicial review.[49] The court acts in the first instance as instigator and non-dictatorial overseer of engagements among stakeholders very broadly defined, among whom state actors hold no privileged position, in an ongoing process of interpretative clarification of what a constitutionally declared right of (say) "access to health care services" consists of in substance and, simultaneously and reciprocally, of what sorts of steps by what classes of actors are concretely (in the current conditions of society, economy, and so on) now in order toward the achievement of due and adequate service to everyone's core interest – a process of successively clarified "benchmarking" as it is sometimes called. As the discursive benchmarking moves along and the emerging answers gain public recognition and authorization, the court might turn up the heat on deployment of its powers of review. At a relatively early stage, what the court presumes to dictate will be agendas of questions to be addressed and answered by one or another stakeholder group or class. At later stages, the court starts calling for substantive compliance with an emergent best-practice consensus, in the name of the constitutional right (say) to access to health care services. The screws tighten on what can count as a reasonable, sincere governmental response. The court serves as arbiter but it never has or claims a door-closing last word.

C. A Complication

My introduction of the experimentalist model is meant to suggest how the question of state compliance with a constitutionalized antipoverty commitment might be credibly proceduralized, while evading the standard worry of liberal constitutionalism. The model might thus open a path of lessened resistance to treating antipoverty as a liberal constitutional essential. Of course, any such hope would have to contend with a more orthodox liberal equation of properly *judicial* action with "strong-form" judicial review. The orthodox will protest that the experimentalist tribunal is not "doing law" at all, and much less is it implementing *a rule of* law over politics; it is rather, to the contrary, subjecting itself to the "rule" (if one could call it that) of a drift of public opinion that might or might not be according to law. The court appears as a (supposed) stronghold of systematic legal-normative reason under constant threat of invasion by vagrant, empirical desire. A reconstructive view, somewhat to the contrary, would likewise seek from the court its special input of normativity – but not input directly to a legal-rational deduction of outcomes; rather, input to processes of public-opinion formation with

45 See *Mark Tushnet*, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law 18-42 (2008). See also *Brian Ray*, Evictions, Avoidance, and the Aspirational Impulse, 5 Const. Ct. Rev. 173 (2014); *David Landau*, Giving Weak-Form Review Teeth, 5 Const. Ct. Rev. 244 (2014).

46 See *Rosalind Dixon*, Creating dialog about socioeconomic rights, 5 Int'l J. Const. L. 391 (2007).

47 See, e.g., *Oliver Gerstenberg*, Negative/positive constitutionalism, 'fair balance,' and the problem of justiciability, 10 Int'l J. Const. L. 904 (2012).

48 See *Katherine G. Young, Consstituting Economic and Social Rights* 167-91 (2012).

49 See, e.g., *Gerstenberg*, supra note 47; *Young*, supra note 48, at 150-55.

which, for legitimacy's sake, that normativity itself must sooner or later be harnessed – a collaborative, supportive role, then, for the court, rather different to that of a protectorate against a public opinion for which normativity supposedly is neither here nor there.[50]

I do not here try to pursue the question of a reconciliation of the orthodox and reconstructive impulses. My suggestion for now is simply that the introduction of the experimentalist model and its weak-review companions would seem to fit the bill as a response to crosscutting pressures from social-democratic political-moral impulses and a fixture of LBC in constitutional consciousness. The more these models gain in credibility and influence, the more space they open for inclusion of SER as an essential component of a legitimation-worthy constitution, while holding at bay the standard worry of liberal constitutionalism.[51]

V. FURTHER SIGNS AND ECHOES

I have been advancing here both a thesis about the world and a suggestion of its possible significance. The thesis is that of the implantation in constitutional consciousness of the idea of the constitution's indispensable service as a platform of legitimation. The suggestion is to look out for aspects of constitutional practice and debate that the thesis might help us to understand, explain, or appraise. Appraisal, I hasten to add, does not imply approval. I do not intend here any claim that confirmation of the effects (in practice) of the workings of LBC (the idea) would necessarily be good news. Obviously, it would not be that – at least not unambiguously – to anyone inclined toward doubt that regime-legitimation is an effect we have reason to welcome at all (much less to treat as a goal for collective action);[52] or that, if it is, the right or best way to pursue it is by

50 The complication posed by LBC to the work of a constitutional court is a topic I plan to address in future work. It seems that a legitimacy-sustaining court would have to engage in a kind of sympathetic consultation with public opinion that runs against the grain of classical judicial supremacy, even as that court also has to sustain public confidence in its independent confirmations of compliance with the constitutional essentials. A writing by *Robert Post* and *Reva Siegel* gets nicely at the dilemma. See *Robert Post & Reva Siegel*, Roe Rage: Democratic Constitutionalism and Backlash, 42 Harv. Civ. Rts. Civ. Lib. L. Rev. 373 (2007). See *also Frank I. Michelman*, Legitimacy, Strict Scrutiny, and the Case Against the Supreme Court, in: *Robert Post et al*., Citizens Divided: Campaign Finance Reform and the Constitution 182 (2014) (examining Dean Post's reflection, in his recent Tanner Lectures, on the complex relations among public opinion, judicial authority, and democratic legitimacy); *Martin Loughlin*. Towards a Republican Revival?, 26 O.J.L.S. 425, 435, 437 (2006) (insisting on the need to keep open the "agonal public space" – the space of "unity in disagreement" – that alone can sustain a "common solidarity" in support of "public institutions and practices – the fundamental laws").

51 See supra Part II(A).

52 For a recent strong expression of doubt from an American constitutional scholar, see *Abner S. Greene*, Against Obligation: The Multiple Sources of Authority in a Liberal (2012).

setting up a country's constitutional law as its contract for legitimacy.[53] I do not here take a position on either of those questions of value. My inquiry has in that sense been "positive," not "normative."

In support of this article's positive suggestion – of the possible observable effects of LBC in constitutional practice and debate – I have so far offered only one instance: the emergence of weak-form models of judicial review at the hands of constitutional actors of whom we might suppose that many would also be receptive to a social-democratic inflection of the full set of conditions for political legitimacy. Is there any more to be said along these lines? I offer next a quick survey of some possible places to look.

A. Realist Constitutional Scholarship

We see today a good deal of scholarship – much of it distinctly "realist" in spirit – with which the LBC thesis appears to dovetail nicely, or which it could possibly help to support or explain, or modify or refine. Take, for example, empirical studies that question whether the writing of protections for individual rights into constitutional law improves respect for those rights in practice.[54] The thesis of the inhabitation of constitutional consciousness by LBC provokes the thought that the answer might be more complex than the question on its face lets on. The answer might be "no, not directly in the way such-and-such authors have in mind and seek to negate by the evidence in their study; but maybe indirectly yes, insofar as affirmation of those rights in the country's constitutional laws might help to sustain a level of legitimation of the state, in default of which those rights, or the conditions of life they represent, would be less fully realized and enjoyed than under present conditions." The possibility seems worthy of investigation.[55]

Take now, for a second example, inquiries into the wellsprings of acquiescence by a population – Americans, it quite plausibly would be – in judicial decisions on constitutionality that they very strongly dislike and believe to be both noxious and wrong.[56] One study, finding that responses differ according to a citizen's level of "understanding

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53 For a recent American instance of full scale denial, see *Louis M Seidman*, On Constitutional Disobedience (2012). For my own milder doubts on this point, see *Frank I. Michelman,* Reply to Ming-Sung Kuo, 7 Int'l J. Const. L. 715, 724-26 (2009) (proposing a "governmental totality" conception – as opposed to a "constitution-as-contract" conception – of the putatively legitimation-worthy political system); *Michelman*, supra note 22, at 347-49, 360-65 (same).

54 See, e.g., *Adam Chilton & Mila Versteeg*, "*Do Constitutional Rights Make a Difference?"* (Coase-Sandor Institute for Law and Economics Working Paper No. 694 (2 d Series) (University of Chicago)), available athttp://ssrn.com/abstract=2477530.

55 Compare, for example, *Thomas L. Friedman*, Op-Ed., Order vs. Disorder, Part 3, N.Y. Times, Aug. 23, 2014, Sunday Review, at 1, (quoting Dov Seidman, a widely-followed author):

Protecting and enabling [cherished] freedoms... requires the kinds of laws, rules, norms, mutual trust and institutions that can only be built upon shared values and by people who believe they are on a journey of progress and prosperity together.

56 A wide assortment of such studies are described and reviewed in *James L. Gibson, Milton Lodge & Benjamin Woodson*, Legitimacy, Losing, but Accepting: A Test of Positivity Theory and the Effect of Judicial Symbols *(*Version 94, March 23, 2014), available at http://ssrn.com/abstract=2448710.

of democratic institutions and processes," speculates that, for those at the higher levels, an initial impulse to challenge or "do something about" an unwelcome decision is countered by thoughts that

> *the judiciary ought to be respected because [by contrast with the legislature] its decision-making processes are principled, not strategic, and [its] role... is, on occasion, to tame the passions of the majority. These citizens do not like the outcome, but cede the right of the courts to make such decisions and recognize that citizens must occasionally acquiesce to court rulings with which they disagree.*[57]

The suggestion is that citizens go along with the courts out of respect for the manner in which, or the mindset with which, the courts conducts their business: "Because the decision was made in a fair way, the thought that it ought to be accepted occurs."[58] From a supposition that these citizens act under the influence of LBC, an alternative (or additional) and subtly different (less benign?) sort of explanation might flow: Seeing or intuiting that legitimation of the state rides on public willingness to accredit judicial decisions on constitutionality, "the thought that [this one, too] ought to be accepted occurs."

B. Counter-Constitutional Advocacy (American)

As a third example, I offer the case of recent counter-constitutional scholarship in the *United States*. By "counter-constitutional," I mean scholarship that looks toward relief of our politics from constitutional shackles as legally debated and judicially construed. Proposed remedies (I draw here and below from a prior work on this topic)[59] range from a turn towards broadly idealized or instrumentalized modes of constitutional interpretation, to institutional reconstruction (affecting, say, the role and conduct of the Supreme Court), to a stepped-up reliance on ground-level social mobilizations to preempt the constitutional-interpretive choices of courts and other official bodies, to a more-or-less complete takeover of constitutional-constructive work by legislatures and voters.[60]

Now, vigorous as may be these currents of counter-constitutional advocacy, they almost all – with one or two notable exceptions[61] – stop short of outright *anti*-constitutionalism. They stop short, that is, of seeking to dislodge from American political culture its bedrock demand for submission by the state and its officials to a set of publicly codified, intelligibly debatable and interpretable norms for the conduct of government business, whose applied meanings may be open to debate but which no official body, from *Congress* and the *President* on down, may simply cast aside on the spot because it seems all-things-considered better right now to do so.[62] In our current run of counter-constitutional utterance we find indictments of major "hard-wired" constitutional struc-

57 Id. at 34-35.
58 Id. at 32.
59 See *Frank I. Michelman*, *W*hy Not Just Say No? An Essay on the Obduracy of Constitution Fixation, 94 B.U.L. Rev. 1143 (2014).
60 See id. at 1143-44 (2014) (citing exemplary sources).
61 See id. at 1144 (noting exceptions).
62 See id. at 1149.

tures[63] (say, the electoral college), of specific constitutional guarantees (say, of the right to bear arms), and of regnant constitutional applications (say, of the First Amendment to prohibit controls on political spending). Or the critiques may take issue more broadly with prevailing modes and styles of constitutional-interpretive work, or with abdication by the people to the Supreme Court of the conduct or control of that work. Hardly ever do we see a flat-out repudiation of the idea that the American state has and is destined always to have its higher-law constitution.[64] *Counter*-constitutionalism is one thing; outright *anti*-constitutionalism is hardly to be met in present-day America.[65] That observation would seem to chime nicely with (it would not come near proving) the thesis of a present-day fixture of LBC in the American political imagination, whether operating directly on the motivations of our constitutional critics, or indirectly through their intuitions of what will and will not go down with an American public whose minds they hope to dent.[66]

C. The Political Constitution Under Siege

I now introduce an arguable manifestation of a spread of LBC in the constitutional-cultural rain-water, which I can only start up here for further pursuit in work still to come. I have in mind the question of the pending demise of Britain's political constitution.[67] Deeply anchored in the British past as has been the boast and the fame – and no doubt the wisdom and the success – of that country's special sort of constitutional arrangement,[68] it seems the idea of a "political"-not-"legal" constitution began some years ago to fall away in parts of the Commonwealth hinterland,[69] and today the waves

63 "Hard-wired" refers to specifically detailed prescriptions for major political structures and procedures, which cannot be interpreted away. See *Sanford Levinson,* Our Undemocratic Constitution: Where The Constitution Goes Wrong (And How We The People Can Correct It) 29 (2006).

64 See id. at 1149-52 (expanding on these observations).

65 It has apparently been known here in the past. See *Louis Michael Seidman*, Constitutional Skepticism: A Recovery and Preliminary Evaluation 4-5, 7 (Jan. 28, 2014) (unpublished manuscript) (archived at http://perma.cc/W8RT-GXP3) (describing, documenting, and analyzing a rich history of challenges by American constitutional skeptics to "the goodness, enforceability, legitimacy, and workability of the Constitution" – amounting, in sum, to "doubts about whether moral and political disagreement can be bridged by a legal text" – while also concluding that the rejectionist stance today stands "far outside the mainstream" of American attitudes toward the Constitution).

66 For a more extended treatment, see *Michelman*, supra note 59.

67 See, e.g.*, Grégoire Webber*, Eulogy for the constitution that was, 12 Int'l J. Const. L. 468 (2014) (reviewing and citing extensively from *Martin Loughlin*, The British Constitution: A Very Short Introduction (2013)).

68 See, e.g., *Adam Tomkins*, Our Republican Constitution 67-114 (2005) (presenting a history of British constitutional ideas); authorities cited *supra* notes 10, 67.

69 See generally *Stephen Garbaum*, The New Commonwealth Model Of Constitutionalism: Theory and Practice (2013) (examining invasion of legal-constitutional models into countries having strong historical ties to the British constitutional tradition).

of change more than lap at the shores of the sceptered isle.[70] Do we see here the signs of a spread of LBC in the local and global constitutional imaginations? If we thought so, would that bear in any way on how Britons and others ought to respond? Are these from any point of view – explanatory, evaluative, prescriptive – questions worth posing?

I do not mean by them that opposition between the ideas of LBC and of the purely political constitution is an immediately self-evident proposition. It is not. The constitution in the historic British political imagination does not, after all, appear to have been straightforwardly equatable with "what[ever] happens."[71] In what has recently been called a more plausible view,[72] the constitution would at any given moment have been cognizable in the terms of a publicly-assertable, aspirational demand on the forms and working of a legitimate political regime – say, that it respects the claims of free and equal subjects to non-dominated lives;[73] and it seemingly would have been discussable as a set of regulatory norms extractable by argument from a bounded assemblage of usages, precedents, and laws (with both the bounds and the extractions being no doubt always open to debate). So, to state the obvious, when Britons of the past have denounced some act or course of conduct as unconstitutional, they cannot have meant that something had occurred that lay outside the bounds, descriptively speaking, of "what happens." They doubtless could have meant – did mean – that something had occurred that was, normatively speaking, "not done."[74] And they doubtless did mean, too, that this occurrence – being, as it was, a "not done" sort of a thing – was also gravely wrong. So the constitution was not codified, not "written," but it undoubtedly was palpably *there*, serving as a platform for claims regarding political acceptability or legitimacy. No clean opposition to LBC is yet in view.

Yet opposition there very well may be. The idea of LBC seems necessarily to posit as its "constitution" an objectively freestanding textual object "out there," definitively exterior and anterior to the politics it regulates, to which anyone can point with confidence that others will see there what he sees, never mind disagreements about the prescriptive significations of that mutually observable text.[75] Without that distinct exteriority of the constitution to whatever else happens to happen in politics, the first proceduralization of LBC could not go into operation.[76] But precisely that exteriority is what a less yielding conception of the purely political constitution – as composed (say) of Oakeshottian "traditions of behavior" that cannot intelligibly be lifted out of the streams of practice in which they immanently lie – seems committed to deny.[77] If so, then the opposition indeed is stark between LBC and the political-constitution idea, and my thesis

70 *See Loughlin*, supra note 50, at 425 (reporting a "widespread belief that the British [system] is in a state of flux... 'between parliamentary supremacy and constitutional supremacy'") (quoting Sec'y of State for Home Dept. v. Roth [2002] 1CMLR 52 [71] (Laws LJ)); Tomkins, supra note 68, at 6-33 (describing how "the model of legal constitutionalism has in recent years become the dominant discourse of public law scholarship in Britain").

71 *J.A.G. Griffith*, The Political Constitution, 42 Mod. L. Rev. 1, 19 (1979) ("The constitution is no more and no less than what happens.").

72 See *Webber*, supra note 67, at 468-69.

73 See *Tomkins*, supra note 68, at 61-64; *Bellamy*, supra note 10, at 154-56.

74 See *Webber*, supra note 67, at 469.

75 See *Michelman*, *supra* note 59, at 1152-54, 1156-67.

76 See supra Part III(B).

77 See *Webber*, supra note 67, at 474, 481-83.

(that the recession of the political constitution might correlate to a progress of LBC in (even) the British constitutional imagination) would be back on track; which is where, for now, we must leave it.

VI. CONCLUSION

My main business here – once having laid out the idea of LBC and shown its attractions within broad-sense liberal political thought – has been analytical, not evaluative or prescriptive. I have pointed to possible manifestations of the idea's anchorage in the background constitutional culture and to its bearing on some mid- and higher-level constitutional theoretic debates. Such manifestations – if that is what they are – might of course enter into our assessments of the idea's ultimate moral or practical appeal or its necessity to the support of a liberal political order. If, after all, the idea of LBC does carry in its train any of the pressures or effects whose possibility we have noted – an eclipse of historic British constitutional wisdom, a restraint on popular constitutional contestation (and so ultimately self-rule?),[78] or (somewhat conversely) a dilution of strict and supreme judicial guardianship of core civil liberties and rights – then its continued progress might not be just the development every reader would wish for.[79] I have not tried to address such questions here.

78 See supra Parts V(A), V(B).

79 It is also possible, of course, with regard to any class of rights or claims you might think of, that by constitutionalizing it you take the risk that the institutions of the second proceduralization will read the right adversely to the very sort of institutional outcomes you hoped it would promote. (Perhaps constitutionalized SER, in today's neoliberalizing climates, are at special risk of that kind of backfire. See *Frank I. Michelman*, The Property Clause Question, 19 Constellations 152, 156-67 (2012); *Frank B. Cross*, The Error of Positive Rights, 48 U.C.L.A. L. Rev. 857, 910 (2001).) Inasmuch as that is a sort of risk that flows generically from constitutionalization, whether or not done specifically for reasons of LBC, I say no more about it here.