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Michael J. Perry, A Critique of the "Liberal" Political-Philosophical Project, 28 Wm. & Mary L. Rev. 205 (1987), https://scholarship.law.wm.edu/wmlr/vol28/iss2/2

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A CRITIQUE OF THE "LIBERAL" POLITICAL-PHILOSOPHICAL PROJECT*

MICHAEL J. PERRY**

Several years ago I wrote a book about the proper role of the judiciary—particularly the federal judiciary, and especially the Supreme Court of the United States—in adjudicating constitutional issues.¹ In that book I assumed that there can be right answers—and wrong ones, too—to questions of morality. I was concerned mainly with questions of political morality. I argued that judges should play a relatively large role in locating the right answers to constitutional questions, understood as an important species of questions of political morality. That assumption was—and

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Some of the concepts articulated in the Essay formed the basis for the Cutler Lecture in Constitutional Law, delivered March 17, 1986, at the Marshall-Wythe School of Law, College of William and Mary.

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Several colleagues at Northwestern and elsewhere have given generously of their time in commenting on drafts of the Essay of which this Article is a part. I am grateful to all of them. For discussions of John Rawls's political philosophy, which is a concern of this Article, I am grateful to my Northwestern colleague, Bob Burns.

remains—controversial, however, and so I decided to put the assumption in question. I began the Essay of which this Article is a part as an effort to address the problem whether answers to moral questions have truth value—whether moral claims bear the predicate true/false or any equivalent predicate, such as rationally acceptable/unacceptable. In the course of writing the Essay, however, my inquiry broadened. Although I do address in the Essay the problem of right answers to moral questions, my fundamental subject is the proper relation of moral beliefs, including moral beliefs religious in character, to politics and law, especially constitutional law, in a morally pluralistic society. This Article is one part of the Essay.

In this Article I conclude that the relation between morality and politics envisioned by liberal political philosophy is impossible to achieve. I base this conclusion on a critical examination of the political philosophies of three liberal thinkers—John Rawls, Bruce Ackerman, and Ronald Dworkin—whose work has been prominent, among other places, in the academic setting in which I teach: the American law school. (Both Ackerman and Dworkin are academic lawyers. Rawls, of course, is a philosopher.) None of these three philosophical liberals has succeeded in portraying a politics that is neutral or impartial among the basic differences—in particular among the competing conceptions of human good—that constitute the moral dissensus of our pluralistic society. Of course, it is possible that eventually someone will succeed where Rawls, Ackerman, and Dworkin have failed. However, Rawls, Ackerman, and Dworkin are exemplary philosophical liberals, and their failures are exemplary. It is difficult to imagine anyone succeeding where they have failed. The liberal political-philosophical project is spent. It is past time to take a different path.

I.

John Rawls is our most prominent contractualist political philosopher. Rawls's theory of justice is contractualist in the sense that

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2. Rawls is also our most prominent Kantian political philosopher. See Rawls, Kantian Constructivism in Moral Theory, 77 J. PHL. 505, 517 (1980) [hereinafter Rawls, Kantian Constructivism]. However, I am not sure precisely what it means to say that Rawls is Kantian. For a recent clarifying comment by Rawls, see Rawls, Justice as Fairness: Political Not
Metaphysical, 14 Phil. & Pub. Aff. 223, 224 n.2 (1985) [hereinafter Rawls, Justice as
Fairness].

Although contemporary contractualist thought is sometimes said to be Kantian, it “differs
from Kant among other things in making no demands on a theory of noumenal freedom,
and also, importantly, in admitting considerations of a general empirical kind in determining
fundamental moral demands, which Kant at least supposed himself not to be doing.”
Williams, Persons, Character, and Morality, in B. Williams, Moral Luck 1, 1 (1981); see
also M. Sandel, Liberalism and the Limits of Justice 39 (1982). Perhaps the Kantian char-
acter to contemporary contractualist thought resides in its abstraction from, or perhaps its
annihilation of, the identities of persons. According to Roger Scruton, a sympathetic inter-
preter, Kant’s view was that

if we are to find an imperative that recommends itself on the basis of reason
alone, then we must abstract from all the distinctions between rational agents,
discounting their interests, desires, and ambitions, and all the “empirical con-
ditions” which circumscribe their actions. Only then will we base our law in
practical reason alone, since we will have abstracted from any other ground. By
this process of abstraction I arrive at the “point of view of a member of an
intelligible world.” This is a point of view outside my own experience, which
could therefore be adopted by any rational being, whatever his circumstances.
The law that I formulate will then be an imperative that applies universally, to
all rational beings.

R. Scruton, Kant 69 (1982). The affinity between Kant’s view and the view of contractualist
thinkers like Rawls is apparent. For them,

the moral point of view is basically different from a non-moral, and in particu-
lar self-interested, point of view, and by a difference of kind, . . . the moral
point of view is specially characterized by its impartiality and its indifference
to any particular relations to particular persons, and . . . moral thought re-
quires abstraction from particular characteristics of the parties, including the
agent, except in so far as these can be treated as universal features of any
morally similar situation; . . . the motivations of a moral agent, correspond-
ingly, involve a rational application of impartial principle and are thus differ-
et in kind from the sorts of motivations that he might have for treating some
particular persons (for instance, though not exclusively, himself) differently be-
cause he happened to have some particular interest towards them.

Williams, supra, at 2.

The Kantian perspective is problematic, as Ronald Beiner, among others, has noted:
Because the rational subject, for Kant, may be viewed from two perspectives,
empirical and transcendental, it is always problematical how the transcen-
dental perspective that guides Kant in the three Critiques can be related back to
the actual human concerns of knowing, acting, and judging subjects in the phe-
nomenal world. Here we are presented with problems that apply generally
within transcendental idealism. If the transcendental subject is a universal
subject and if the only way for it to win a rationally compelling basis for its
principles of judgment is by ascending to a universal standpoint detached from
all contingent empirical conditions, what is it that gives the deliberations of
this subject enough determinacy to have any content at all? In the ascent to
universality, at what point is one sufficiently distanced from the particular and
and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."

According to Rawls, we should try to base our politics and law on principles of justice the justification of which satisfies certain conditions, the principal one being impartiality "among citizens

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the contingent to satisfy the transcendental requirement, and what particularities of human experience can be tolerated without this requirement being violated? And if it is through shedding all particularity and contingency that the Kantian subject secures transcendental validity for its judgments, doesn't the standpoint of the transcendental subject turn into no standpoint at all, and isn't the universal self in danger of becoming self-less? How far can the "enlarged mentality" expand without ceasing to be the possession of an individuated subject retaining its own identity?


3. J. Rawls, A Theory of Justice 11 (1971). Rawls further said: "[T]he original position . . . is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice . . . . The idea . . . is simply to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves." Id. at 18. In another work, Rawls elaborated on this point:

[T]he original position is simply a device of representation: it describes the parties, each of whom are responsible for the essential interest of a free and equal person, as fairly situated and as reaching an agreement subject to appropriate restrictions on what are to count as good reasons. . . . [T]his position models what we regard as fair conditions under which the representatives of free and equal persons are to specify the terms of social cooperation in the case of the basic structure of society . . . .

Rawls, Justice as Fairness, supra note 2, at 237-38; see also Scanlon, Contractualism and Utilitarianism, in Utilitarianism and Beyond 103, 111-12 (A. Sen & B. Williams eds. 1982):

[My] contractualist account of moral wrongness refers to principles "which no one could reasonably reject" rather than to principles "which everyone could reasonably accept" for the following reason. Consider a principle under which some people will suffer severe hardships, and suppose that these hardships are avoidable. That is, there are alternative principles under which no one would have to bear comparable burdens. It might happen, however, that the people on whom these hardships fall are particularly self-sacrificing, and are willing to accept these burdens for the sake of what they see as the greater good of all. We would not say, I think, that it would be unreasonable of them to do this. On the other hand, it might not be unreasonable for them to refuse these burdens, and, hence, not unreasonable for someone to reject a principle requiring him to bear them. If this rejection would be reasonable, then the principle imposing these burdens is put in doubt, despite the fact that some particularly self-sacrificing people could (reasonably) accept it. Thus it is the reasonableness of rejecting a principle, rather than the reasonableness of accepting it, on which moral argument turns.
with opposing religions, philosophical and moral convictions, as well as diverse conceptions of the good."

Rawls’s effort is to identify the requisite liberal principles—principles whose justification is “impartial” or “neutral” among certain opposing religious, philosophical, and moral views. (Hereafter I will say “moral” rather than “religious, philosophical, and moral.”)

Liberal epistemology holds that one cannot resolve such differences rationally. At least, such differences have not been rationally resolved in the past and, according to liberalism, will not be in the foreseeable future. The liberal political-philosophical project, therefore, is to transcend the differences by being impartial among them. “Our social order is not only an arena for competing interests; it is also one for competing views, religious and nonreligious, as to the best way for human beings to live,” Alasdair MacIntyre has written. “On the dominant [liberal] view,” continues MacIntyre,

it is held that either because rational agreement on the nature of the good life for human beings cannot be reached or just because as a matter of fact it has not been reached . . . , the rules that constitute morality must be neutral between alternative and conflicting views of the good for human beings. Pluralism about the good is to coexist with rational agreement on the rules of morality."

Rawls is “not trying to find a conception of justice suitable for all societies regardless of their particular social or historical cir-

4. Rawls, Kantian Constructivism, supra note 2, at 542-43. No one should doubt that Rawls’s theory of justice is a moral theory, his principles of justice, moral principles. As Rawls has recently emphasized, “a political conception of justice is, of course, a moral conception . . . .” J. RAWLS, supra note 3, at 224; see id. at 245. He continues:

[I]t is a moral conception worked out for a specific kind of subject, namely, for political, social, and economic institutions. In particular, justice as fairness is framed to apply to what I have called the ‘basic structure’ of a modern constitutional democracy. . . . By this structure I mean such a society's main political, social, and economic institutions, and how they fit together into one unified system of social cooperation.

Id. at 224-25.


His aim, rather, is “to settle a fundamental disagreement over the just form of basic institutions within a democratic society under modern conditions.” To understand why Rawls thinks that settling this disagreement requires impartial principles of the sort he aims to provide, we must understand how Rawls envisions “a democratic society under modern conditions.”

The relevant modern conditions, for Rawls, are what he calls the “circumstances of justice,” and they are of two kinds:

first, the objective circumstances of moderate scarcity; and, second, the subjective circumstances, namely, that persons and associations have contrary conceptions of the good as well as of how to realize them, and these differences set them at odds, and lead them to make conflicting claims on their institutions. They hold opposing religious and philosophical beliefs, and affirm not only diverse moral and political doctrines, but also conflicting ways of evaluating arguments and evidence when they try to reconcile these oppositions.

The second of the circumstances of justice—the “subjective” circumstances—is crucial for Rawls:

[Although moderate scarcity may be overcome or largely mitigated, justice as fairness assumes that deep and pervasive differences of religious, philosophical, and ethical doctrine remain . . . .] Justice as fairness tries to construct a conception of justice that takes deep and unresolvable difference on matters of fundamental significance as a permanent condition of human life.

Rawls’s view of the subjective circumstances explains his view that if principles of justice are to fulfill what Rawls calls “the practical task of political philosophy”—namely, “to settle a fundamental
disagreement over the just form of basic institutions within a democratic society under modern conditions—they must be principles all members of the society can accept, notwithstanding their ‘deep and unresolvable’ moral differences. Specifically, they must be principles whose justification is impartial among the differences that constitute the subjective circumstances of the society. The justification of these principles must not presuppose a position on any of the basic moral issues as to which there are ‘deep and pervasive differences’ in the society. In that sense, the justification must transcend the subjective circumstances.\(^{12}\)

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12. See Rawls, *Justice as Fairness*, supra note 2, at 225:

[As a practical political matter no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state. The social and historical conditions of such a state have their origins in the Wars of Religion following the Reformation and the subsequent development of the principle of toleration, and in the growth of constitutional government and the institutions of large industrial market economies. The conditions profoundly affect the requirements of a workable conception of political justice: such a conception must allow for a diversity of doctrines and the plurality of conflicting, and indeed incommensurable, conceptions of the good affirmed by members of existing democratic societies.]

See also id. at 223, 226, 230.

According to Rawls, the transcendent justification (if there is one) cannot take into account “the whole truth, if the whole truth is to include the truths of religion and of philosophy and of moral and political doctrine.” Rawls, *Kantian Constructivism*, supra note 2, at 542. Because there are deep and persistent differences as to which religious, etc., claims are true, “there is no alternative . . . to founding a conception of justice suitable for a well-ordered democratic society on but a part of the truth, and not the whole. . . .” Id. Rawls emphasizes that point time and again: “Justice as fairness tries to construct a conception of justice that takes deep and unresolvable differences on matters of fundamental significance as a permanent condition of human life.” Id.

As I explain in Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A ‘Naturalist’ Perspective*, 20 Ga. L. Rev. 995 (1986), the naturalist conceives of moral knowledge as knowledge of how to live so as to flourish, and so seeks to ground his or her moral theory, including his or her theory of justice, in the whole of the relevant truth. For the naturalist, justification is an epistemological problem; to seek to justify a naturalist moral claim is to argue for its truth. By contrast, Rawls seeks to ground his theory of justice not in truth, but in a hypothetical agreement. For Rawls, justification “is not primarily an epistemological problem.” Rawls, *Kantian Constructivism*, supra note 2, at 519. The following passages suggest the difference, with respect to the matter of truth and justification, between Rawls’s liberal project and the naturalist one:

The search for reasonable grounds for reaching agreement . . . replaces the search for moral truth . . . [B]etter than think of the principles of justice as true, it is better to say that they are the principles most reasonable for us . . . [T]he idea of approximating to moral truth has no place in a [contractualist] doctrine: the parties in the original position do not recognize any principles of
But there is no such transcendent justification. At least Rawls fails in his effort to provide one. The category or set of principles whose justification is impartial among the differences that constitute the subjective circumstances seems empty.

Consider the primary justification Rawls offers for his principles of justice. They are, he argues, the principles all ("free and rational") persons, understood or conceived a certain way, would accept ("in an initial position of equality"). Thus, Rawls's justification presupposes—explicitly presupposes—as these passages from Rawls's Dewey Lectures illustrate—a particular conception of the person:

[T]he task of justifying a conception of justice becomes: how can people settle on a conception of justice . . . that is most reasonable for them in virtue of how they conceive of their persons . . . The task is to articulate a public conception of justice that all can live with who regard their person and their relation to soci-

Id. at 519, 554, 556, 565, 567, 569. Rawls further states:

[T]he aim of justice as fairness as a political conception is practical and not metaphysical or epistemological. That is, it presents itself not as a conception of justice that is true, but one that can serve as a basis of informed and willing political agreement between citizens viewed as free and equal persons.

Rawls, Justice as Fairness, supra note 2, at 230. In a previous work Rawls said:

This usage, however, does not imply that there are no natural uses for the notion of truth in moral reasoning. To the contrary. For example, particular judgments and secondary norms may be considered true when they follow from, or are sound applications of, reasonable first principles. These first principles may be said to be true in the sense that they would be agreed to if the parties in the original position were provided with all the relevant true general beliefs.

Rawls, Kantian Constructivism, supra note 2, at 569.

13. In the Essay of which this Article is a part, I discuss a different justification Rawls advances in support of his principles of justice—in effect, a "Good prior to Right" justification as distinct from the "Right prior to Good" justification criticized in this Article.

14. For a recent elaboration by Rawls of what he means by "citizens as free and equal persons," see Rawls, Justice as Fairness, supra note 2, at 233-34.
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Rather than think of the principles of justice as true, it is better to say that they are the principles most reasonable for us, given our conception of persons as free and equal. ... [In contractualism, first principles are those that are most reasonable for those who conceive of their person as it is represented in the procedure of construction [which, for Rawls, is the “original position”]].

What conception of the person does Rawls’s justification presuppose? As Michael Sandel and others have argued, Rawls understands the person as an entity whose identity or “self” is prior to, rather than constituted by (even in part), moral convictions and commitments.

That conception of the person, however, is not impartial among the differences that constitute the subjective circumstances of a modern democratic society, of which American society is, for Rawls, the paradigm. Rawls suggests that the conception of the person he proffers is the conception “implicit” in our culture “or at least congenial to its deepest tendencies.” But, contrary to Rawls, there is not just one conception of the person implicit in American culture. There is, in addition to Rawls’s conception, one according to which persons are partly constituted by their own moral convictions and commitments. American philosopher Richard Rorty writes:

[T]hink of the moral self, the embodiment of rationality, not as one of Rawls’ original choosers, somebody who can distinguish her self from her talents and interests and views about the good, but as a network of beliefs, desires, and emotions with nothing

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15. Rawls, Kantian Constructivism, supra note 2, at 517, 519, 554, 569.
16. See M. Sandel, note 2, at 10-11, 12, 55, 58-59, 172-73; Sandel, The Procedural Republic and the Unencumbered Self, 12 Pol. Theory 81 (1984); see also Galston, Moral Personality and Liberal Theory: John Rawls’ Dewey Lectures 10 Pol. Theory 492 (1980); Scheffler, Moral Scepticism and Ideals of the Person, 62 Monist 288, 295 (1979) (“[i]t is the ideal of a person who . . . regards the conception of himself or herself as rational chooser of his or her own ends as more dear than any particular end.”).
17. See Rawls, Kantian Constructivism, supra note 2, at 569.

Recall that a Kantian view, in addressing the public culture of a democratic society, hopes to bring to awareness a conception of the person and of social cooperation conjectured to be implicit in that culture, or at least congenial to its deepest tendencies when properly expressed and presented.

Id.
behind it—no substrata behind the attributes. For purposes of moral and political deliberation and conversation, a person just is that network, as for purposes of ballistics she is a point-mass, or for purposes of chemistry a linkage of molecules.¹⁸

Rawls has recently acknowledged this sort of criticism I am making: “The description of the parties may seem to presuppose some metaphysical conception of the person, for example, that the essential nature of persons is independent of and prior to their contingent attributes, including their final ends and attachments, and indeed, their character as a whole.”¹⁹ Rawls then tries to explain why his conception of justice does not depend “on philosophical claims . . . about the essential nature and identity of persons.”²⁰ According to Rawls, our “reasoning for principles of justice” in accordance with the restrictions represented by the original position”²¹—which require, inter alia, that we not rely on our particular moral convictions—“no more commits us to a metaphysical doctrine about the nature of the self than our playing a game like Mo-

¹⁸. Rorty, Postmodernist Bourgeois Liberalism, 80 J. Phil. 583, 585-86 (1983); see M. Sandel, supra note 2; Galston, supra note 16; cf. Scheffler, supra note 16, at 294:
   Many of Rawls' critics and commentators have argued that at least some of the conditions characterizing the original position are nevertheless neither weak nor widely shared. Rather, it is urged, they are controversial conditions, and they are controversial precisely because they arise directly out of an ideal of the person that is itself an object of controversy, and place the stamp of that ideal indelibly on the original position. Thus it is said that even though the parties in the original position do not explicitly accept the ideal, the characterization of the original position and of the parties themselves constitutes a kind of model of the full-blown ideal. Now in itself, the idea that the original position models the ideal is far from uncongenial to Rawls; indeed, he explicitly intends for the original position to be regarded as a model, among other things. But unless the model is constructed out of elements that are weak and widely shared, as Rawls had hoped it was but as his critics suggest that it is not, serious questions are raised about the justificatory relevance of any hypothetical choice in the original position.


¹⁹. Rawls, Justice as Fairness, supra note 2, at 238.

²⁰. Id. at 223 (passages rearranged).

²¹. See supra note 3.
nopoly commits us to thinking that we are landlords engaged in a
desperate rivalry, winner take all.”22

The problem with this response, as Rawls’s reference to the role
playing in Monopoly makes clear, is that for a person to forego
reliance on—to “bracket”—his or her particular moral convictions
in reasoning toward principles of justice is not for that person—the
particular person he or she is—to reason toward principles of jus-
tice, since those convictions are partly self-constitutive. It is,
rather, for the person to play the role of someone else reasoning
toward principles of justice—someone without the bracketed con-
victions. That is, it is to play the role of someone else unless he or
she brackets one or more particular moral convictions at some step
in reasoning toward principles of justice because certain other con-
victions require it—or, put another way, unless persons bracket
one or more aspects of their particular conception of the good at
some step in reasoning toward principles of justice because certain
other aspects of their conception of the good require them to do so.
In that case, however, they have not, at the beginning, bracketed
their conception of the good. To the contrary, it is precisely be-
cause, at the beginning, they have relied on their conception of the
good that at a later step in reasoning toward principles of justice they forego further reliance on their conception. For such persons,
then, the principles of justice at which they finally arrive are not
prior to their conception of the good, but derivative of it.

Rawls’s theory of justice, however, has been thought by many
commentators to be one in which the Right is prior to the Good in
the sense that no conception of the good plays a role in the deriva-
tion (justification) of the principles of justice.23 If Rawls’s theory is
indeed of that (Right-prior-to-Good) sort, then, in Rawls’s theory,
for a person to bracket his or her conception of the good in reason-
ing toward principles of justice is necessarily for him or her to as-
sume the role of someone else reasoning toward principles of jus-
tice—someone without his or her conception of the good; indeed,
someone without any conception of the good. What sort of entity is
that? Rawls calls such an entity a “person,” but it is difficult to see

23. See, e.g, R. Beiner, supra note 2, at 126; see also R. Scruton, Sexual Desire: A
Moral Philosophy of the Erotic 324 (1986).
why principles of justice derived in that way have any claim on real persons, each of whom not merely has, but is partly constituted by, a conception of the good.  

Perhaps, however, this critique misconceives the character of Rawls’s theory of justice. Richard Rorty has written that “Rawls’ writing subsequent to A Theory of Justice have helped us realize that we were misinterpreting his book—that we had overemphasized the Kantian and underemphasized the Hegelian and Deweyan elements.”

Perhaps Rawls’s theory is one in which the Good is prior to the Right in the sense that persons’ conception of the good plays a determinative role in their acceptance of the principles of justice. If so, then Rawls’s contractualist theory is not, as has commonly been thought, of the Right-prior-to-Good sort, but of the Good-prior-to-Right sort. I discuss the latter sort of contractualism (including Rawls’s theory understood as such a theory), and contrast it to the former sort, in another section of the Essay of which this Article is a part. For present purposes suffice it to say that if Rawls’s theory is of the Right-prior-to-Good sort, then it presupposes a problematic conception of the person: someone—or, better, some “thing”—whose identity or self is prior to, rather than constituted by (even in part), a personal conception of the good, moral convictions, and commitments.

I reject that conception of the person and accept a conception according to which a person’s convictions are partly self-constitutive. My present point, however, is not the one made by, for ex-

24. See supra note 2 (noting the problematic character of the Kantian “transcendental” perspective).
26. See supra note 18 and accompanying text; see also Lomasky, Personal Projects as the Basis for Basic Rights, 1 Soc. Phil. & Pol’y 35, 42-43 (1984):

At bottom, the two conceptions of morality that have been opposed rest on different analyses of relations persons bear to their own ends. There is a metaphysical gulf that separates one from the other. Emphasis on the moral significance of project pursuit is based on a conception of personal identity over time which incorporates not only criteria of memory retention and bodily continuity but also persistent attachment to one’s ends. As an active being, one’s identity is not simply a given but is created and recreated continuously through identifying oneself with one’s projects. One understands a life as a life, and not merely a jumble of discrete episodes, by focusing on motivational patterns that persist over long periods of time and order a large number of particular varia-
ample, Sandel, namely, that Rawls’s justification of his principles of justice is ineffective to one who rejects Rawls’s conception of the person (though that point is true and important). It is possible, of course, that there may be one or more justifications—albeit non-transcendent justifications—for Rawls’s principles of justice, or for something like them, that would be effective to someone who rejects Rawls’s conception of the person. I address that possibility in another section of this Essay, in discussing contractualism of the Good-prior-to-Right sort. My point is more fundamental: Rawls’s

A coherent life, coherent from both the outside and the inside, is not open to motivation from just any direction. Rather, it will systematically embrace some potential source of value and stand aloof from others. Consider as variation on a theme from Kafka in which a person awakens one morning to find that he has the body of a loathsome insect. Suppose that instead of a bodily metamorphosis he had undergone an equally radical volitional transformation. That to which he was formerly drawn he is now indifferent; outcomes he had previously worked to avert now command his allegiance. And suppose further that such shifts occurred regularly and could assume an unlimited variety of forms. In such a scenario, the unity of the person as an acting, purposive being would have completely broken down. Indiscriminate evaluators of this sort are different in kind from project pursuers, and even if it makes sense to suppose them bound by some moral framework, it would be a morality different from that applied by and to project pursuers . . . .

[A] correct analysis of what we fundamentally take persons to be must incorporate project pursuit.

In thinking of the conception of the person presupposed by Rawls’s theory, interpreted as a Right-prior-to-Good theory, I am reminded of a song—“Freezing,” lyrics by Suzanne Vega, music by Philip Glass—on Glass’s 1986 album Songs from Liquid Days:

If you had no name
If you had no history
If you had no books
If you had no family
If it were only you
Naked on the grass
Who would you be then?
This is what he asked
And I said I wasn’t really sure
But I would probably be
Cold
And now I’m freezing
Freezing

27. See M. SANDEL, supra note 2.
liberal project must be adjudged a failure even by one who accepts Rawls's conception of the person. The project, recall, was to locate principles of justice whose justification is impartial among the differences that constitute the subjective circumstances of a modern democratic society. But Rawls's justification of his principles, in presupposing a particular conception of the person, presupposes a position on a basic issue—"What is a 'person'? What are the constituents of personal 'identity'?"—as to which there are deep differences in American society, differences partly constitutive of our subjective circumstances.

And, indeed, it is difficult to imagine any such project succeeding—difficult, that is, to imagine any justification of principles of justice that does not presuppose a position on one or more of the basic issues as to which there are differences constitutive of the subjective circumstances of our society. As MacIntyre has written, "the morality spoken of by contemporary liberal moral philosophers . . . is constituted by a set of principles or rules to which any rational agent would assent . . . [N]o such set of rules has as yet been identified."28

Thus, the Rawlsian vision of the proper relation between morality/religion and politics/law is a failed vision: the requisite principles of justice—principles whose justification transcends the subjective circumstances—simply do not exist. At least, Rawls has not succeeded in identifying any such principles.

It is possible, of course, to redefine the Rawlsian project. One might argue along these lines, for example:

> Once one agrees that the original position, in virtue of possessing features that some rational people reject, embodies an ideal of the person that some rational people appear not to share, then the conclusion seems inescapable that the more defensible way of presenting Rawls' two principles is as part of a system of hypothetical imperatives . . . . Since the original position models a particular ideal of the person, Rawls can simply be construed as making a claim of the following hypothetical form: If one

28. MacIntyre, supra note 6, at 509-10.
prizes this ideal of the person, then it is rational to abide by these principles of justice.29

One might even try to defend the Rawlsian ideal of the person. But, thus redefined, the project is no longer liberal. The search is no longer for a transcendent conception of justice. The Rawlsian conception of justice is within the subjective circumstances of fundamental disagreement and must compete there. It does not, as Rawls hoped, transcend those circumstances. Thus, "Rawls must defend [his] theory ... against the sorts of objections he elsewhere raises against the notions of rationally justified final aims. That is, he must enter into precisely that arena of conflicting perfectionist claims that the formal structure of justice as fairness was designed to sidestep."30

II.

Bruce Ackerman's political philosophy is based on a master principle—the principle of "neutrality"—the function of which is to test distributive principles on which the state might want to rely in allocating resources, like food, or other things, like the right to vote. According to Ackerman, no distributive principle is legitimate if its justification violates the neutrality principle. A justification violates the neutrality principle if (and only if) it relies on either a claim to the effect that one conception of human good—of

29. Scheffler, supra note 16, at 295. A different revisionist strategy is pursued by Charles Larmore, who suggests that Rawls's principles of justice are best understood as a modus vivendi among people having different ultimate commitments (often at home in different subcommunities), a system of mutual advantage, to which we primarily adhere, not because it expresses our deepest self-understandings, but rather for the more prudential reason that it serves our other values. ... [Rawls's principles are] primarily a modus vivendi among persons having constitutive views of the good life which are shared with some but differ from those of many others.

Larmore, Book Review, 81 J. PHI. 336, 338, 340 (1984) (reviewing M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1982)). For Larmore, then, Rawls's principles of justice are not prior to the good; a person ought to accept Rawls's principles (or something like them), in Larmore's view, because doing so is a means to the end of achieving personal good. Elsewhere in this Essay I discuss "liberal" principles thus understood and Rawls's theory thus construed.

30. Galston, supra note 16, at 506. "And he must answer more fully the contentions of those who ... see in Rawls's Kantian universalism a systematic violation of the individualistic particularity that characterizes the human good." Id.
what way or ways of life, or what political arrangements, are good for human beings, whether human beings generally or particular human beings—is better than another, or a claim to the effect that one human being is intrinsically superior to another.\textsuperscript{31}

I do not know what it means to say that one human being is intrinsically superior to another.\textsuperscript{32} Moreover, any argument in support of a particular distribution of a resource that relies on such a claim seems to rely as well on a claim that it is good to distribute the resource on the basis of intrinsic worth. However, that further claim seems to be ruled out by that part of the neutrality principle banning claims that one conception of the good is better than another.\textsuperscript{33}

Let us put aside the question what it might mean to say that one human being is intrinsically superior to another and ask instead

\textsuperscript{31} B. Ackerman, supra note 18, at 11.

Rawls's project was to locate principles of justice whose justification is impartial among the differences that constitute the subjective circumstances. The project failed, because Rawls's justification of his principles of justice did not transcend the subjective circumstances. Indeed, if as it seems there is no transcendent justification of principles of justice, Rawls's project was doomed to failure. Ackerman's project fails too, but not because Ackerman supposes there to be a transcendent justification for his master principle—a neutral justification of the neutrality principle. Ackerman understands that there is no such justification:

[While Neutrality excludes a broad range of normative argument from the practice of liberal politics, it does not follow that these arguments should also be excluded when the subject is the justification of the entire practice of liberal argument, considered as a whole. Indeed, it would be a categorical mistake to imagine that there could be a Neutral justification for the practice of Neutral justification—for Neutrality makes no sense except as a part of the practice it constitutes.]


\textsuperscript{32} Imagine two human beings, A and B. To say that A is superior to B seems to be to say that A compares favorably to B in terms of some factor X, like strength, intelligence, or race. But what does it mean to say that A is intrinsically superior to B? That A compares favorably to B, not in terms of some X, but period? If that is what it means, then the statement is incoherent, because A and B cannot be compared at all except in terms of some X. Perhaps “A is intrinsically superior to B” means that A compares favorably to B in terms of some X, which is not merely intrinsically good, but better than any other factor, including any factor in terms of which B compares favorably to A. In that case, X would have to be the ultimate standard of comparison. How might one defend the claim that X is the ultimate standard of comparison? By asserting that one simply knows—“intuits”—it? Perhaps that (in addition to claims about the worth of conceptions of human good) is what the neutrality principle bans: assertions of an intuition that a particular standard of comparison (strength, intelligence, being-white, not-being-a-Jew, etc.) is the ultimate standard.

\textsuperscript{33} See infra note 39 and accompanying text.
whether there is any distributive principle whose justification does not presuppose that one conception of human good is better than another. If there is none, then the former question is unimportant for present purposes. Ackerman assumes that the principle of equal distribution is consistent with the neutrality principle—that it can be justified without relying on a claim that one conception of human good is better than another. But can it? Assume that an equal distribution of some resource is challenged. Can it be defended consistently with the neutrality principle? Consider these strategies:

1. The distribution must be equal, because the justification of any unequal distribution fails the neutrality principle.

This defense fails the neutrality principle. It presupposes that there is a presumption in favor of equal distribution (and, so, against unequal distribution), such that if no unequal distribution can be justified in terms that pass the neutrality principle, the distribution must be equal. But that presumption fails the neutrality principle. It is an open question whether any distributive principle can survive the neutrality principle. (We are presently inquiring whether the principle of equal distribution can survive it.) It is possible, of course, that none can. If no distributive principle can survive the neutrality principle, then whatever distributive principle gets the benefit of the presumption—the benefit, that is, of being tested last and getting to say “all the others failed, therefore I win by default”—will prevail. The question thus becomes whether the decision to award the benefit of the presumption to the principle of equal distribution rather than to some other distributive principle can be justified in terms that pass the neutrality principle. And the answer, of course, is no.

34. Ackerman adopts the simplifying strategy of addressing the problem of distributive justice in an idealized world before turning to the real world with all its complications. The principle of equal distribution holds that in establishing the state in the idealized world and making an initial distribution of resources, every citizen is entitled to an equal share.

2. The distribution must be equal (as between A and B), because A is at least as good as B and A's conception of human good is at least as good as B's.36

This defense presupposes that if A is at least as good as B, and A's conception of human good is at least as good as B's, then A is entitled to at least as much as B—an equal share. Why should we accept that presupposition?

a. One possible answer is: To say "A is at least as good as B, and A's conception of human good is at least as good as B's" is to say—that is, it simply means—that "A is entitled to at least as much as B." However, that response renders Ackerman's neutrality principle anything but neutral. Thus understood, the neutrality principle rules out any principle other than that each person is entitled to the same share of resources as every other person. To begin there is to begin with an ipse dixit on the question-in-chief—namely, the question of what distribution(s) is legitimate.37

b. A second possible answer is: It is just obvious—self-evident—that if A is at least as good as B, and A's conception of human good is at least as good as B's, then A is entitled to at least as much as B. The problem with that response, as Gilbert Harman has observed, is that "[o]n its face, that assertion [of obviousness or self-evidence] would seem to violate neutrality. The egalitarian would be claiming to have a privileged insight into the moral universe."38 That is, he or she would be claiming to have a privileged insight—an intuition—as to what distribution is legitimate assuming the equality both of human beings and of conceptions of human good.

c. A third possible answer is: Resources should be distributed proportionately to the worth of one's person and of one's conception of human good. But why should resources be distributed pro-

36. See Harman, supra note 35, at 397-98: [Ackerman] argues that an equal distribution of power can be justified on the ground that because each person is at least as good as any other, each person is entitled to at least as much (power, wealth, etc.) as any other person. This principle, he asserts, does not violate neutrality. It does not say that anyone is better that anyone else, only that each person is at least as good as anyone else.

37. See id. at 401.

38. Id.
portionately to worth? Because it is good to do so? Why prefer that conception of what it is good to do to some other conception, say, the utilitarian conception? The claim that resources should be distributed proportionately to worth "violates neutrality for it stands, boldly, for a conception of the good. It asserts that it is good to distribute [resources] in shares proportional to . . . merit."39

Thus, Ackerman's equal-distribution principle cannot be justified in terms that pass the neutrality principle.

Rawls sought impartiality in the justification of his theory of justice, but he did not find it there, because no justification of principles of justice can be impartial among the philosophical-religious-moral differences that constitute the subjective circumstances. Ackerman sought neutrality in his master principle itself (rather than in the justification of the principle). As this examination of Ackerman's position suggests, however, a truly neutral master principle is of no help in resolving conflicting distributive claims: Either the neutrality principle is weak, in which case it rules out no distributive principle, or, like Ackerman's, it is strong, in which case it rules out every distributive principle, even the principle of equal distribution.

The relation between morality and politics, as envisioned by Ackerman and like that envisioned by Rawls, is unattainable: Ackerman's neutrality principle is not one with which politics can comply. Ackerman's neutral politics is an impossibility.

III.

Ronald Dworkin argues that a "certain conception of equality," which he calls "the liberal conception of equality," is "the nerve center of liberalism."40 According to Dworkin, liberalism takes, as its "constitutive political morality,"41 a conception of equality that "government [must] treat all those in its charge as equals, that is, as entitled to equal concern and respect."42 Or, as Dworkin puts it

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39. Fletcher, supra note 35, at 2108; see Harman, note 35, at 400-01.
41. Id. at 127.
42. Id. at 125.
elsewhere: "This form of liberalism insists that government must treat people as equals in the following sense. It must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of his equal worth."\(^{43}\)

Dworkin’s master principle—the equality principle—is vague. It is not clear precisely what the principle requires or forbids government to do. Happily, however, Dworkin offers us another less vague principle—call it the “neutrality” principle—according to which “government must be neutral on what might be called the question of the good life . . . [P]olitical decisions must be . . . independent of any conception of the good life, or of what gives value to life.”\(^{44}\) Politics, says Dworkin,

must be neutral in one particular way: among conceptions of the good life. Whatever we may think privately, it cannot count, as a justification for some rule of law or some political institution, that a life that includes reading pornography or homosexual relationships is either better or worse than the life of someone with more orthodox tastes in reading or sex. Or that a life suffused with religion is better or worse than a wholly secular life.\(^{45}\)

It is difficult to tell whether, in Dworkin’s view, the neutrality principle is a distinct principle somehow derived from, or is instead simply a (partial) specification of the meaning or content of,


\(^{44}\) Dworkin, *Liberalism*, supra note 40, at 127.


Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s. These postulates, taken together, state what might be called the liberal conception of equality. . . .

the equality principle. If the latter, it bears mention that Dworkin does not defend the equality/neutrality principle, but merely treats it as "axiomatic" for authentic liberals. If the former, it bears mention that Dworkin not only does not defend the equality principle, he does not show how the neutrality principle is derived from the equality principle. Dworkin's political theory is, then, to say the least, underdeveloped.

Recall that whereas Rawls sought impartiality in the justification of his principles of justice, Ackerman sought neutrality in his master principle itself. Dworkin is like Ackerman on that score, or at least closer to Ackerman than to Rawls: If the neutrality principle is simply a specification of Dworkin's master principle (the equality principle), then Dworkin seeks neutrality in his master principle; if the neutrality principle is somehow derived from Dworkin's master principle, then he seeks neutrality in the derived principle.

In any event, this is the crucial question: Are there any—indeed, can there be any—political institutions or policies that are consistent with Dworkin's neutrality principle, institutions or policies that do not presuppose that one conception or range of conceptions of human good is better or worse than another?

46. Dworkin seems to argue that the neutrality principle is somehow derived from the equality principle, which is foundational. Dworkin, What Liberalism Isn't, supra note 45.
48. Cf. Holborow, Dworkin on Treating Citizens as Equals, 3 OXFORD J. LEGAL STUD. 371, 375 (1983) ("Dworkin owes us some other account of why his conception of equality is to be preferred. In the absence of such an account he has shown merely that the conception [of equality] that he has outlined is a possible one, not that it is compelling.").
49. Dworkin has criticized Ackerman for arguing that liberalism's commitment to "neutrality" is more basic than its commitment to "equality." See Dworkin, What Liberalism Isn't, supra note 45. According to Dworkin, the commitment to equality is basic and the commitment to neutrality (Dworkin seems to say) somehow derives from it. See id. Dworkin's criticism rests on a misunderstanding of Ackerman's position. Ackerman argues that there are several paths to his neutrality principle, and that the path one person finds most attractive is not necessarily the path another finds most attractive. Ackerman's principal concern, however, is not with the relative merits of the various paths, but with the neutrality principle. Nothing Ackerman says is inconsistent with Dworkin's argument that the equality principle is fundamental and somehow leads to the neutrality principle, although nothing he says requires that conclusion either. See B. Ackerman, supra note 18, at 11-12, 359-60. (I do not mean to suggest that Dworkin's neutrality principle is the same as Ackerman's, although it is not clear that it is not.)
50. See A. MacIntyre, supra note 5, at 112:
It is simply not possible for government, in making the sorts of choices any government must make, to comply with Dworkin's neutrality principle. Indeed, in enacting the very sort of nonmoralistic and nonpaternalistic program Dworkin obviously has in mind for a truly "liberal" state, a government would thereby act inconsistently with the neutrality principle. Consider this example: A has a conception of human good according to which, all things considered, it is better for her (and for persons generally) to have lawful access to pornographic materials if and when she wants to read or view them—better, that is, to live in a society in which her access to such materials is not impeded by law. B has a rather different conception of human good—one according to which, all things considered, it is better for him (and for persons generally) not to have lawful access to pornographic materials if and when he wants to read or view them. A public policy concerning access to pornographic materials cannot be neutral. The policy must either affirm A's conception of human good (and deny B's) and permit access or, instead, affirm B's conception, (and deny A's) and forbid access. There is no neutral standpoint.

Thus, no government can satisfy Dworkin's neutrality principle. Not even one steadfastly pursuing Dworkin's vision of "liberal" justice. Dworkin's theory of justice presupposes that a certain conception or range of conceptions of human good is sound, and that other conceptions are infirm. In particular, his theory presupposes that certain political and legal arrangements are good for

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Ronald Dworkin has recently argued that the central doctrine of modern liberalism is the thesis that questions about the good life for man or the ends of human life are to be regarded from the public standpoint as systematically unsettled. On these individuals are free to agree or to disagree. The rules of law hence are not to be derived from or justified in terms of some more fundamental conception of the good for man. In arguing thus Dworkin has, I believe, identified a stance characteristic not just of liberalism, but of modernity.

51. For an argument that "no government action can be value neutral," see Frug, Why Neutrality?, 92 YALE L.J. 1591 (1983); see also Should We Legislate Morality?, in PHIL. & PUB. POL'Y, Summer 1982, at 1, 3-4 (reporting comments of Mark Sagoff); cf. Boyle, A Catholic Perspective on Morality and the Law, 1 J.L. & RELIGION 227, 233-34 (1983) ("There is no neutral ground on which legislators, judges or citizens can stand and rationally arbitrate the conflicts between moral perspectives. Any such ground will in fact be some moral perspective and the illusion that it is neutral will have the effect of disregarding the moral views of some citizens.").
human beings and others are bad, or at least that certain arrange-
ments are better than others, given the nature of real human inter-
ests. In Dworkin’s view, moralistic and paternalistic arrangements
are inferior to nonmoralistic and nonpaternalistic ones, because the
former frustrate what Dworkin implicitly sees as the fundamental
human interest in autonomous decision making with respect to the
shape of one’s life. In Dworkin’s moral universe “freedom is con-
sidered an essential and indispensable constituent of a good life;
only a life in which I pursue goals that I have freely chosen can be
a genuinely good life for me, and only in leading such a life can I
be truly happy.” What Isaiah Berlin said of “[t]he ideas of every
philosopher concerned with human affairs” applies to the political-
philosophical ideas of Dworkin: “in the end [his ideas] rest on his
conception of what man is and can be.”

Dworkin has tried unsuccessfully to answer this sort of objection
I raise. His liberalism does not presuppose a conception or range of
conceptions of human good, Dworkin asserts, because

the liberal conception of equality is a principle of political or-
ganization that is required by justice, not a way of life for indi-
viduals, and liberals, as such, are indifferent as to whether peo-
ple choose to speak out on political matters, or to lead eccentric
lives, or otherwise to behave as liberals are supposed to prefer.

In short, liberalism is a theory of justice or of the Right, not a
theory of the Good (according to Dworkin). That response is little
more than an attempt to win the point by terminological fiat.
Dworkin can call his theory a theory of justice if he wants, but that
does not alter the fact that at bottom Dworkin is arguing that cer-
tain political and legal arrangements are better than others for
human beings, given a particular understanding “of what man is
and can be.”

such thinkers, it is more important to grasp this central notion or image (which may be
implicit, but determines their picture of the world) than even the most forceful arguments
with which they defend their views and refute actual and possible objections.” Id.; cf. J.
Coleman, AN AMERICAN STRATEGIC THEOLOGY 196 (1982) (“As every philosophy contains an
implicit anthropology and sociology, it contends, at crucial points, with theological visions of
the human and the social and vice versa.”).
54. Dworkin, Liberalism, supra note 40, at 142-43.
If Dworkin wants to insist that he has been misunderstood and that his theory of justice is indeed of the Right-prior-to-Good sort—a sort that, significantly, even Rawls has now apparently abandoned—then we may, arguendo, give Dworkin the point, for thus understood his theory is vulnerable to precisely the same critique levelled at Rawls's theory, interpreted as a Right-prior-to-Good theory, earlier in this Article: Any Right-prior-to-Good theory presupposes a conception of the person controversial within the subjective circumstances of justice and therefore fails to transcend those circumstances. Perhaps, however, Dworkin does not aspire to, or, at least, claim to provide a transcendent theory of justice. Even if so, there remains an insurmountable difficulty: As I explained earlier, any Right-prior-to-Good theory of justice—including, therefore, Dworkin's theory, if it is indeed of the Right-prior-to-Good sort—presupposes a deeply problematic conception of the person.

Ackerman's neutrality principle, as I have argued, is so severe that no principle of distributive justice can satisfy it. Although Dworkin has criticized Ackerman's principle on that ground, it is difficult to see how Dworkin's own neutrality principle is any less severe. It is difficult to see, that is, what political choices Dworkin's principle would allow, once it is understood that even "liberal" choices presuppose a conception or range of conceptions of human good. (Alternatively, they presuppose a Right-prior-to-Good theory of justice, vulnerable to the critique made earlier in this Article.) There are no political institutions or policies—not even institutions and policies of the "liberal" kind Dworkin has in mind—that do not involve the very sort of presupposition Dworkin's neutrality principle disallows.

I hope I am not misunderstood: To say that government and politics cannot possibly comply with Dworkin's neutrality principle is not to say that government and politics cannot be neutral with respect to particular disagreements. Of course government can be neutral with respect to particular disagreements—for example,

56. See Dworkin, What Liberalism Isn't, supra note 45, at 47 ("When Ackerman tries to rebut certain familiar justifications of economic inequality . . . he tacitly relies on the idea that neutrality forbids any appeal to any principle of justice whatsoever.").
some theological disagreements among religious sects. However, for
government to maintain a neutral stance toward particular dis-
agreements is not for it to comply with Dworkin's neutrality prin-
ciple. The decision to maintain a neutral stance toward, say, some
theological disagreement concerning the nature of God is necessa-

rily for it to proceed on the basis of a particular conception or
range of conceptions of human good, according to which a certain
constitutional arrangement regarding "church and state" is better
for human beings—whether all human beings or simply
some—than certain other arrangements, all things considered.

So much for Dworkin's neutrality principle. But what about his
equality principle—the principle of equal concern and respect? As
I have argued elsewhere, it misconceives the nature of moral ra-
tionality, including political-moral rationality, to think that moral
discourse should or even can proceed on the basis of a master prin-
ciple. If, however, equality were to be the master political princi-
ple, it could not reasonably be conceived as Dworkin conceives it,
because thus conceived government cannot avoid denying persons
the equal concern and respect due them: As we have seen, govern-
ment cannot avoid taking sides with respect to conceptions of
human good, affirming some and denying others. John Finnis's lu-
cid discussion of the matter merits full quotation:

It is sometimes said that to prefer, and seek to embody in legis-
lation, some conception or range of conceptions of human flour-
ishing is unjust because it is necessarily to treat with unequal
concern and respect those members of the community whose
conceptions of human good fall outside the preferred range and
whose activities are or may therefore be restricted by legislation.
As an argument warranting opposition to such legislation this
argument cannot be justified: it is self-stultifying. Those who
put forward the argument prefer a conception of human good,
according to which a person is entitled to equal concern and re-
spect and a community is in bad shape in which that entitle-
ment is denied; moreover, they act on this preference by seeking
to repeal the restrictive legislation which those against whom
they are arguing may have enacted. Do those who so argue and
so act thereby necessarily treat with unequal concern and re-

57. See generally Perry, supra note 12, generally.
spect those whose preferences and legislation they oppose? If they do, then their own argument and action is itself equally unjustified, and provides no basis for political preferences or action. If they do not (and this must be the better view), then neither do those whom they oppose. Nor can the argument be rescued by proposing that it escapes self-stultification by operating at a different “level of discourse”: for example, by being an argument about entitlements [justice] rather than about good. For there is no difficulty in translating any “paternalist” political preference into the language of entitlement, by postulating an entitlement of every member of a community to a milieu that will support rather than hinder his own pursuit of good and the well-being of his children, or an entitlement of each to be rescued from his own folly. Whether or not such entitlements can be made out, they certainly pertain to the same “level of discourse.” Nor, finally, can the argument we are considering be saved by a stipulation that arguments and political programmes motivated, as it is, by concern for “equal respect and concern for other people” must be regarded as showing equal concern and respect for everyone, even those people whose (paternalist) arguments and legislation they reject and override. For . . . such a stipulation is merely an ad hoc device for escaping self-stultification; if overriding someone’s political preferences and compelling him to live in a society whose ways he detests were ipso facto to show unequal concern and respect for him in one context, so it would be in any other.58

Thus, if equality were to be the master principle, it would have to be conceived so that government could avoid acting in its contravention. Thus conceived, the equality principle would rule out some but not all evaluations of human good.59

IV.

As I have indicated, one need not take issue with Rawls’s effort to justify his principles of justice to see that his project has failed. It is enough to realize that in presupposing a controversial conception of the person—a conception controversial in the subjective circumstances of the United States and other modern democratic so-

58. J. Finnis, Natural Law and Natural Rights 221-22 (1980).
59. See id. at 222-23.
A CRITIQUE OF THE "LIBERAL" PROJECT

The appeal of the liberal project is obvious. The moral and other differences that constitute what Rawls calls the subjective circumstances of justice are deep, pervasive, and persistent. If there were some way government and politics could transcend those differences by achieving the impartiality Rawls sought, or the neutrality Ackerman and Dworkin sought, perhaps it would make sense to do so. But, as I have explained in this Article, there is no way for government and politics to transcend the subjective circumstances. The liberal project—the search for the Holy Grail of official normative impartiality or neutrality—is doomed to failure. For all their differences, the arguments of Rawls, Ackerman, and Dworkin are united in their failure to show otherwise.

Although only Rawls, Ackerman, and Dworkin have been discussed here, it bears emphasis that other, kindred theorists—Alan Gewirth, for example—have not succeeded where Rawls, Ackerman, and Dworkin have failed. For the reasons elaborated in this Article, any "deontological" or Right-prior-to-Good liberal theory—any liberal theory in which no particular conception or range of conceptions of human good plays a role in the derivation of a principle or principles of justice—is doomed to failure, as is any theory, like Ackerman's or Dworkin's, rooted in a neutrality principle. The liberal political-philosophical approach to the problem

60. Cf. supra note 49.
62. For an effective critique of Gewirth's theory, drawing on several earlier critiques of the theory, see Bishop, Gewirth on the Justification of Moral Rights (1985) (unpublished manuscript); see also Gewirth's Ethical Rationalism (E. Regis ed. 1984).
of the relation of morality/religion to politics/law, therefore, is a dead end. An alternative approach (or approaches) must be tried. To say that liberalism-as-neutrality is an impossible goal, however, is not to deny the possibility and worth of a different goal, liberalism-as-tolerance, which I discuss in another section of the Essay.

Ackerman has written:

In one way or another we must learn to deal with our competitors in the struggle for power. A first response is to persuade them to abandon their errors and adopt our truths; a second, to convince them that toleration is in their self-interest; third, to induce them to sympathize with us, despite the error of our ways. But is there a fourth way — a way we may travel together when, to our dismay, the others lead nowhere?

Yes: we can speak Neutrally to one another when we find we have nothing better to say. The dialogic effort does not lead to self-contradictory gibberish but to a form of community that, for all its difficulties, permits us to sustain communication without lying about our ultimate disagreements.

And if we disdain the art of constrained conversation, how will we come to terms with one another?

Is there a fifth way beyond excommunication and brute suppression?63

Given the inadequacy of Ackerman’s fourth way—neutral dialogue—his final question becomes all the more urgent.

How can we, the members of a morally pluralistic society, hope to resolve our conflicting political claims through a discursive process given, first, our deep moral differences and, second, the absence of a transcendent conception of justice? From the perspective of the person as inevitably a partisan in the subjective circumstances—as inevitably a member of some particular moral (perhaps religious) community within the larger pluralistic society—the question is: “How can I, a member of one moral community among many, hope to engage in productive moral discourse with persons outside my moral community, given our moral differences and the absence of transcendent principles of justice?”

63. Ackerman, supra note 31, at 389-90.
If it is the case (as I believe it is) that a person—a "self"—is partly constituted by his or her moral convictions,84 then, in choosing principles of justice, partisans cannot bracket their membership in their moral community, their particular moral convictions, because that membership and those convictions are constitutive of the very self. To bracket them would be to bracket—indeed, to annihilate—him or herself. And doing that would preclude him or her—the particular person he or she is—from engaging in moral discourse with other members of society. Because the partisan's membership in a particular moral community—the participation in a particular moral tradition—is self-constitutive, partisans must find a way to engage persons outside their moral community in moral discourse that does not require them to do what in any event they cannot do—bracket that membership.

But is there such a way?65

64. See supra note 18 and accompanying text.
65. See Barry, Introduction to the Symposium, 93 Erruns 328, 329 (1982-83) ("[I]f ... [Ackerman's] critics are correct and the project of constructing a coherent political theory on the basis of neutrality fails, and fails not in ways that simply require more ingenuity to fix up the weaknesses but because of its intrinsic impossibility, where does that leave us?"). Political philosophers like Rawls, Ackerman, and Dworkin tend simply to assume—to take for granted—that basic moral and religious differences are insusceptible to the kind of assessment that could lead to rational agreement .... The real contest between Rawlsian liberalism and its most interesting critics relates to whether conceptions of the good incompatible with liberalism can in fact be rationally justified. But on this issue Rawls himself has nothing much to say. What can be granted without hesitation is that liberal principles were the right ones to adopt when competing religious beliefs and divergent conceptions of the good embroiled Europe in the religious wars. Religious beliefs and conceptions of the good were, in that highly particular context, part of a dialectical impasse that made the attainment of rational agreement on a whole range of issues impossible. Whether they remain so is another question—and one well worth asking.

J. Stout, The Flight From Authority 240-41 (1981); see Galston, supra note 16 at 516: "Few contemporary theorists (and Rawls is surely no exception) are more willing than were their overtly skeptical predecessors to entertain perfectionist, intuitionist, or naturalist theses."