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New Approaches to Classical Liberalism*

Abstract:

This article focuses on the following three novel and original philosophical approaches to classical liberalism: Den Uyl and Rasmussen's perfectionist argument from meta-norms, Gaus's justificatory model, and Kukathas's conscience-based theory of authority. None of these three approaches are utilitarian or consequentialist in character. Neither do they appeal to the notion of a rational bargain as it is typical within contractarianism. Furthermore, each of these theory rejects the idea that classical liberalism should be grounded on considerations of interpersonal justice such as those that are central to the Lockean tradition. It is argued that these three theories, despite their many attractive features, fail to articulate in a convincing manner some central classical liberal concerns.

1. Introduction

A classical liberal order is characterized by a state that is both limited and minimal. Although classical liberals disagree about the exact functions that such a minimal state is supposed to perform, that is, about how minimal it should be, the classical liberal state is unarguably small relative to virtually all existing states. Classical liberals generally hold that the main tasks of the justified state are to protect individuals' right to liberty and a system of robust property rights, and to provide those public goods that are conducive to an adequate protection of such individuals' fundamental rights.

A classical liberal order can be defended on different grounds. In other words, different reasons could be offered in support of the classical liberal order over the alternatives. The articulation of those reasons, and the discussion about their respective merits, is the subject matter of political philosophy. Traditionally, there have been two major and clearly distinct strands of classical liberal philosophy. The first one is the utilitarian strand, which argues for limits on the state on the basis of the greater aggregation of benefits that such a limitation is supposed to yield. The second traditional strand of classical liberalism justifies the minimal state as a mere expression of the respect demanded by the enforceable duties of justice individuals owe to each other as holders of certain

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natural rights. From this point of view, whether the observance of the demands of justice results in an aggregation of benefits that is as great as it can be is of no moral importance. While the utilitarian strand of classical liberalism finds its paradigmatic theorist in Jeremy Bentham,¹ the natural rights version finds him in John Locke.

It must be noted, however, that although historically predominant, not all traditional defenses of a liberal order can be framed in either one of these two alternative approaches. An argument could be made, for example, for the inclusion of a third, distinct strand of classical liberalism: the sort of contractarianism that finds inspiration in Hume and his reliance on mutual advantage. Contrary to the utilitarian strand, the contractarian one rejects the notion of aggregating benefits, and the corresponding sacrifices that such aggregation might entail for the liberty of some. Contrary to the Lockean strand, it claims that the only restrictions to our behavior that we should be willing to accept are those from which each and all of us are expected to gain.

In recent years, there have been some important contributions to the philosophical foundations of classical liberalism. Some of those contributions are characterized by important new insights and arguments within traditional frameworks.² Others, however, are characterized by genuinely novel forms of argumentation. Although certain aspects of these new approaches certainly have historical antecedents, they cannot be subsumed easily in the major traditional strands mentioned above. This article will focus on the following three recent and novel approaches to classical liberalism: Douglas Den Uyl and Douglas Rasmussen's perfectionist argument from meta-norms (2005), Gerald Gaus's justificatory model (2003; 2007; 2010; 2011), and Chandran Kukathas's conscience-based theory of authority (2003). Although it is perhaps important to emphasize that their differences might be more important than their similarities, these three recent approaches to classical liberalism do seem to share a common ground. They all seem to reject an understanding of political philosophy as a mere species of ethical inquiry. They seem to hold, rather, that political philosophy is a genus of its own. The truth of the sort of moral considerations to which we might appeal in evaluating the correctness of human interactions is not regarded by these theories as political philosophy's appropriate concern.

This article will present the central line of argumentation in each of these three theories. Although in doing so it is necessary to ignore many of their important complexities, it might still be possible to draw attention both to their most important virtues, as well as to what we might regard as their most important limitations.

¹ The characterization of Bentham as a classical liberal is more accurate in relation to his earlier writings. In his later writings, he is to be found suggesting more and more economic functions for the state.

² See, for example, Eric Mack (2002a; 2000b; 2010), and David Schmidtz (2006; 2010).

2. A Perfectionist Basis for Classical Liberalism: Den Uyl and Rasmussen's Aristotelian Approach

It is not uncommon for classical liberals to stress the importance of establishing a political order capable of securing the benefits of peace and social cooperation, and of preventing such an order from making burdensome demands on its citizens. Since the sort of state favored by classical liberals is rather minimal, it is also only natural to think that classical liberals must adopt a minimalist moral outlook, and remain silent regarding some fundamental ethical questions, such as the question of virtue or moral excellence. It could be thought that, over those matters that do not affect the possibility of social cooperation, individuals are free to decide as they wish, and that whatever they decide is regarded as appropriate. Den Uyl and Rasmussen believe, however, that this is a mistaken conception of classical liberalism. They argue that classical liberalism is most defensible when grounded on a perfectionist basis, rather than on some version of moral minimalism.

The most comprehensive formulation of their argument is found in *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (2005). Den Uyl and Rasmussen's basic claim is that the characteristic features of the classical liberal order are best understood as addressing the requirements of human flourishing. In other words, they suggest that the best grounding for the non-perfectionist character of classical liberal politics is of a perfectionist nature. In their view, the best perfectionist reasons to which we can appeal advise against the implementation of any perfectionist political measures.

The starting point of all perfectionist moral and political theories is an objective account of the human good.³ For those who find their inspiration in Aristotle, as Den Uyl and Rasmussen do, such an objective account is formulated in terms of 'human flourishing'. What is objectively good for humans is to develop their 'nature', that is, the capacities that are essential to and distinctive of human nature, rather than merely to satisfy the preferences that they might happen to have at any given time, or even under some ideal condition of full information, as is held by the most plausible subjective accounts of well-being. Initially, we might think that all perfectionist theorists will tend to endorse an illiberal order in which individuals are forced to act according to their objective good, and against their own preferences. Yet this is not true. Whether perfectionism allows for extensive governmental direction of people's lives will depend on whether individual liberty is itself regarded as an important part of human flourishing.

Mill's famous defense of the harm principle on the basis of the importance of individuality is perhaps the most well-known historical example of a liberal perfectionist argument (1869).⁴ Within contemporary political philosophy, authors such as Joseph Raz (1986), Thomas Hurka (1993), and Steven Wall (1998) have

³ For an overview and defense of the main perfectionist claims, see Wall 2009.

⁴ Von Humboldt's is perhaps the clearest historical example of a perfectionist argument against both the paternalistic state and the welfare state. His argument relies on the effects that welfare

also defended liberalism on perfectionist grounds. They reject the plausibility of the sort of stance exemplified by Rawls and his followers, according to which the state should be neutral regarding particular conceptions of the human good.⁵ For liberal perfectionists, the neutralist ideal is either unattainable (if focused on the effects of state actions) or unconvincing (if focused on the justification of those actions). As perfectionists, they claim that the ends of the state should be to create and maintain the conditions that are necessary for good lives. As liberals, they claim that in the creation and maintenance of such conditions, the state should give sufficient priority to individual liberty, since personal autonomy is an essential constituent of a fully good life.

In significant ways, however, Den Uyl and Rasmussen's theory is different from all these other perfectionist liberal approaches. Contrary to those previous authors, Den Uyl and Rasmussen do adhere to the thesis of state neutrality when understood as an ideal regarding how the political order should be structured. They do so, however, on perfectionist grounds.⁶

Den Uyl and Rasmussen argue that human flourishing is objective but highly individualized. Sociability, knowledge, leisure, aesthetic appreciation, creativity, moral virtue, health, pleasure, self-esteem, and practical wisdom are some of the most important goods that are necessary for human flourishing. Regardless of an individual's preferences, his or her life will be deficient if it fails to partake in some form of each of these general goods. The proper weightings for these general goods, however, is not something that can be determined in any abstract or universal manner. This will be determined, again, not by the mere preferences of the individuals, but by their own objective "circumstances, talents, endowments, interests, beliefs, and histories" (80). Thus, within this perfectionist outlook, there are many forms of human flourishing, and none of them is more valuable than the others. There are, however, forms of human

programs have on the character of those who are supposed to benefit from them, as well as on the character of others (1854).

⁵ The particular way in which this neutrality requirement is supposed to be understood is, however, subject to much disagreement. As Gaus notes, "Neutrality is sometimes understood as a doctrine about: constraints on legislation or legislators, the proper functions of the state, the prohibition of the state 'taking a stand' on some issues, the prohibition of the state enforcing moral character, or the requirement that the state take a stance of impartiality. Alternatively, neutrality can be understood as a requirement of a theory of justice rather than state action. There are also differences about whether neutral states (or theories of justice, or legislators) are supposed to be neutral between conceptions of the good, controversial conceptions of the good, conceptions of the good that citizens may rightfully adopt, comprehensive doctrines and conceptions of the good, particular sets of ends, particular or substantial conceptions of the good, ways of life, or final ends." (2009, 81–82)

⁶ In this sense, their theory is more similar to Kymlicka's (1990), which argues that the best way for the state to promote the good is for it to adhere strictly to the doctrine of state neutrality, while the liberal perfectionist authors reject such a doctrine, and thus are more prone to favor the direct promotion of the good through non-coercive state efforts that are claimed not to infringe upon individuals' autonomy. Whether this is indeed possible is, of course, a matter of dispute once we recognize that both taxes and subsidies distort the opportunity costs involved in people's choices, and thus can be regarded as manipulative. On this point, see Lecce 2008, 121–123.

flourishing that are best for specific individuals. This is the sense in which their account of the human good is objective.

Given that individuals might flourish in different ways, the question naturally arises: what sort of political order is the most adequate? Is it possible to set up a political order that will not prejudice the situation in favor of some forms of flourishing over others in a structural fashion? As the authors themselves put it, is it possible “to create and maintain a social/political context that is in principle both open to divergent forms of self-perfection and consistent with all?” (298) Those are the questions that the authors refer to as “liberalism’s problem”. It is important to note that the problem arises from the authors’ understanding of the requirements of human flourishing. They claim that the pluralism of the forms of human flourishing points to liberalism as the appropriate solution. This is the sense in which those previous questions are liberalism’s problem. Liberalism is best understood as a political theory addressing the issue of how society should be organized given the fact that individuals’ fundamental responsibility is their own flourishing, and that while they need each other, they also need their own moral space.

One of the most crucial points made by Den Uyl and Rasmussen is that, despite the diversity that human flourishing can take, it cannot take place without self-directed activity. They claim that no other features of flourishing could be regarded as such in the absence of self-direction: “self-direction is the condition through which any good becomes a good *for a person*.” (295) As defined by the authors, self-direction is “simply the act of bringing to bear one’s reason and judgment on one’s surroundings, making plans to act within or upon them, and conducting oneself accordingly” (276). Self-direction is what makes us the authors of our own actions, and allows us to conduct ourselves according to our own lights. The lack of a priori rules that dictate the proper weighting of the general goods necessary for flourishing is intrinsically linked with the importance of self-direction. The exercise of practical reason required by such weighting is something that cannot be done for others. Thus self-direction is a feature of human flourishing of which it can be said that “each and every person in a concrete situation has a necessary stake” (88). Given the diversity of the forms of human flourishing, no such thing could be said of any other feature.

This, according to Den Uyl and Rasmussen, has important implications for the design of a political order. Self-direction does not exist for an individual when another person directs that individual without her or his consent, since a person being used in this way is not able to follow his or her choice (280). The initiation of physical force is the single most threatening encroachment upon self-direction, as well as the most basic. Therefore, if we are concerned with human flourishing, such activity must be banned in all its forms (which is taken to include fraud and threats of physical force). Such a ban is the implication of the individual right to liberty, “which allows each person a sphere of freedom—a ‘moral space’ or ‘moral territory’—whereby self-directed activities can be exercised without being invaded by others” (90). The use of physical force is autho-

rized “only for the protection and preservation of the possibility of self-direction in society” (280).

The right to liberty is thus justified by an appeal to the nature of human flourishing. The right to liberty secures the possibility of human flourishing by seeking to protect the possibility of self-direction. If we are to reconcile our natural sociality with the diversity of human flourishing, the protection of the right to liberty is paramount.⁷ In Den Uyl and Rasmussen’s theory, however, the individual right to liberty is not limited to what one does with oneself. It also covers “the expression of the metaphysical fact that human beings are material beings that live and flourish through the exploitation of opportunities in the material world” (106). Thus self-direction requires that individuals “need to have the use and control of what they have created and produced protected from being used without their consent” (98). Self-direction is thus not necessarily respected by any random distribution of property rights: “A human being needs to have property rights to things that are the result of his or her own judgments and productive efforts. A person’s choices and judgments cannot be said to have been respected if the material expression of those judgments is divested from the individual.” (98) The right to property is thus “simply another name for the freedom to act and, hence, to live according to one’s own choices” (100). Different rules of original acquisition, as long as they are universal and do not make one’s right contingent “upon paying off others”, might be acceptable (105). Only unrestricted voluntary transfer of such acquisitions will, however, be compatible with the fundamental priority given to consent as the means of maintaining the integrity of moral territories interpersonally.

According to Den Uyl and Rasmussen, positive or welfare rights, that is, the sort of rights usually advocated by modern liberals, are excluded from the political order required by the correct understanding of human flourishing. This is because those rights “require that the lives, resources, and conduct of individuals be used or directed without their consent. They encroach upon the self-direction of persons, interfere in their lives, and treat individuals as objects for non-consensual use by others.” (281)⁸

This is a highly abbreviated and incomplete exposition of a highly subtle and complex theory. This brief exposition, however, should be sufficient to highlight some of the most salient and novel aspects of this approach to classical liberalism.

⁷ We might wonder whether the plurality of human flourishing is as important for establishing the right to liberty as the preeminence of self-direction is. In a later writing, the authors seem to recognize this point: “the value of liberty is easier to see when homogeneity is diminished. We do not think, however, that a lack of homogeneity is primary and essential to our defense of liberty.” (2008, 200)

⁸ Contrary to the right to liberty, the authors would argue that positive or welfare rights do not establish ‘compossible’ areas of moral freedom, that is to say, freedom which can be exercised by one person without encroaching on or diminishing that of others. This alleged feature of positive rights is sufficient to make them inappropriate aspects of a legitimate legal and political order. Yet it is significant to note that the authors also seem to believe that positive or welfare rights are also incompatible with the restriction against systematic bias that they place on meta-norms, since they will presumably favor some forms of human flourishing more than others (309–310).

In the first place, it should be clear that in Den Uyl and Rasmussen's theory individual rights are not established by a direct appeal to principles of interpersonal justice. The theory might certainly be understood as providing a theory of political justice that emphasizes the need for protecting individuals' liberty rights. The authors are opposed, however, to the attempt to justify such rights merely upon the reflection of the propriety involved in the different ways in which individuals might deal with one another in a pre-political scenario, as is typical within Lockean perspectives. It is in this sense that they reject thinking of politics as "the effective institutionalization of what is ethical", and claim that liberalism's essential uniqueness as a political theory is "its divestment of substantive morality from politics" (16–17). In their view, liberalism is a political doctrine that is best understood as addressing rather specific social and philosophical needs.

The authors choose to refer to rights as 'meta-norms', since rights merely provide the context under which individuals might flourish in diverse ways without requiring that the flourishing of any other individual or group be sacrificed. Contrary to regular ethical norms, meta-norms should not be taken to guide individual moral behavior. The authors claim that liberal political principles are not "straightforward ethical principles like any others" (27), and should not be "contrasted with other ethical philosophies" (34), as both critics and supporters of liberalism tend to do. Moreover, they claim that rights "are not directly concerned with human flourishing, virtue, or even moral obligation as generally understood" (63). Rights are merely concerned with context setting, that is, "with providing guidance in creating, interpreting, evaluating, and justifying political/legal systems" (63). Den Uyl and Rasmussen believe that failing to understand this specific function of individual rights is responsible for much of the misdirected criticism of them. Individual rights are not primary ethical principles, so "it is not at all permissible [...] to derive or infer moral norms or values from them" (36). Rights are a mere function of "the shared need to act in a peaceful and orderly social/political context" (91). They allow, merely, for the possibility of living well. They do not, and cannot, guarantee that individuals will indeed live well.

Thus, the authors think it is a mistake to regard ethical principles as differing only with respect to subject matter, and not according to type. Rights, in their view, merely create the institutional setting under which ethical norms may be effectively followed. From a political point of view, meta-norms have an incredible importance, for they allow for the very possibility of order and harmony among the plurality of forms of human flourishing. From a personal point of view, however, meta-norms are incredibly unimportant in the sense that they have nothing to say about how to live well. Those individuals who let their behavior be fully and exclusively guided by them will live highly deficient lives. Those theorists who resist liberalism for its alleged moral minimalism and subjectivism are, in Den Uyl and Rasmussen's view, conflating two different issues into one. First, there is the question of what moral excellence, flourishing, or virtue requires from individuals. Second, there is the question of what institu-

tional setting is best at enabling each and every individual act in those morally virtuous ways. In their view, there is no contradiction or theoretical tension in holding both that there is an objective human good that individuals are obliged to strive for, and that the most adequate institutional setting for individuals being able to do such a thing is one that places no such perfectionist demands on them. Their claim is actually stronger. Their basic claim is that the proper understanding of the requirements of human flourishing establishes the need for such an institutional setting.

Within the debate on the moral foundations of liberalism, those who oppose perfectionist approaches do not necessarily reject their characteristic objective account of the good. They usually focus their objections on the need to bracket such issues in order to secure the allegiance of citizens who reasonably disagree on the matter. But the particular conception of the human good defended by Den Uyl and Rasmussen differs in important ways from conceptions centered on the notion of autonomy typical of other liberal perfectionists. In particular, Den Uyl and Rasmussen's version of perfectionism is markedly pluralistic, not merely in the sense that there are several goods, but also in the sense that the relative importance of each of those goods varies greatly from individual to individual. Thus, although individuals' ability to direct their own lives is still the most predominant aspect of their account of the human good, their particular understanding seems to be compatible with a plurality of ways of life in a manner in which autonomy-based conceptions might not. In this sense, the recurring anti-perfectionist objection that in modern circumstances there could be no single conception of the good capable of serving as the basis of a stable political order loses most of its force.

Den Uyl and Rasmussen's conception of human flourishing is also capable of grounding a tighter connection with liberal politics than what we can expect from typical conceptions of autonomy favored by liberal perfectionists. The problem with liberal perfectionist theories, assessed from a prior commitment to a robust notion of individual liberty, is that they seem to require making the implausible claim that autonomy is either the only intrinsic good or one with lexical priority over all other goods.⁹ For if autonomy is merely a necessary component of a good life, it is not clear why the state could not suppress *some* autonomy for the sake of other goods that are also necessary for the good life, such as health, safety, or aesthetic appreciation. Den Uyl and Rasmussen's reliance on the importance of practical reason and self-direction for an individual's proper articulation of the several goods involved in human flourishing might be thought of as addressing this worry.

All versions of liberal perfectionism, however, face the question regarding the extent to which perfectionism is indeed compatible with liberal politics. As Wall notes (2008), strong rejections of state interference within liberal perfectionist theories run the risk of overstating the importance of the negative effect

⁹ The implausibility of this claim lies in the fact that any slightly more autonomous life will have to be judged better than any less autonomous life, regardless of what else the latter form of life has that the former form lacks. On this point, see Wall 1998.

that such an interference has on individuals' capacity to lead good lives. From a liberal perfectionist standpoint, it is clear why the state should not force people to take on only good activities, since this would eliminate the very possibility of leading an autonomous life. Yet it is less clear, for example, why the state should not eliminate some unmistakably bad options that would ruin the chances of leading a good life for oneself without ruining that of others. After all, individuals can exercise their autonomy in choosing among all of the many remaining options. For this reason, it is not uncommon for liberal perfectionists *not* to endorse strong rejections of paternalistic interference as demanded by classical liberalism.¹⁰

Contrary to other liberal perfectionists, Den Uyl and Rasmussen reject the notion that the function of the state is to *promote* the good or human flourishing. The role of the state is merely to provide the conditions for the possibility of human flourishing, by securing a peaceful and orderly social order. Given the importance of self-direction, and the plurality of the forms of human flourishing, this is all that the state can do. Any attempt by the state to promote human flourishing in an active manner, even if it is done with great care so as not to violate the requirements of autonomy or self-direction, as other liberal perfectionists propose, will inevitably favor some forms of human flourishing over others, and this is unjustifiable. Despite this difference between Den Uyl and Rasmussen's view and that of other liberal perfectionists, however, the question might still arise: why, in creating the legal structure of society, should the state allow for the possibility of individuals choosing unmistakably bad options for *all* forms of human flourishing? Why should not the state, in designing the legal order, close those options if this can be done without compromising peace and order, and if by doing so no form of human flourishing is given priority over others? While Den Uyl and Rasmussen reject the idea that the aim of politics is to assist individuals in flourishing, as perfectionists, they still claim that the construction of the political and legal order must be guided by the common requirements of human flourishing.¹¹ So the question is, what perfectionist basis could there be for giving individuals the freedom to act in ways that, according to the right conception of human flourishing, are unmistakably bad for themselves?¹²

¹⁰ For example, Wall says: "It is an unfortunate fact that in free societies some pursue lives of waste and ruin. Given the value and importance of autonomy, there are substantial limits to what governments permissibly can do to discourage such lives. But the limits, while substantial, may not rule out all efforts to discourage bad options." (1998, 219) See also Raz 1986, 412–423, and Arneson 2000. As already suggested, it is also not uncommon for liberal perfectionists to support political action oriented towards the promotion of perfectionist values other than autonomy, such as the public funding of the arts. See, for example, Hurka 1993, 158–160, and Wall 1998, 213–219.

¹¹ In a later writing, they write: "politics is itself a tool of human flourishing and thus in that sense the success of flourishing is of concern to the political order—that is, politics exists because flourishing is the central human concern. Flourishing is not of concern to the direct ends politics seeks to secure, but it is of concern to the nature and purpose of having political arrangements." (2008, 200)

¹² Perhaps the question could be formulated in these terms: why should self-direction be the only basis for metanormativity? See Thunder 2008 and Thomas 2008 for objections along these lines. See Den Uyl and Rasmussen 2008 for a reply.

The authors' answer would presumably be connected to the central role that self-direction plays in their theory.¹³ The suggestion that individuals could exercise their self-direction in choosing among all the many remaining options, as other liberal perfectionists might easily admit with respect to their conceptions of autonomy, is not appropriate for Den Uyl and Rasmussen's theory. Self-direction is not simply one general good among others that individuals need to enjoy to some degree for them to be able to flourish. The exercise of self-direction by an individual is what turns any generic good into a genuine, concrete good for that individual. This is why it was suggested that the possibility of trade-offs between self-direction and other goods seems to be excluded from their theory as well. The basic thought would then be that for individuals to lead a good life, they must identify life's values for themselves.¹⁴ Those who are prevented from choosing or even considering some unmistakably bad options will necessarily be precluded from exercising their own judgment involved in choosing or considering those options, and this is not something that contributes to their flourishing.

This is a highly plausible thought. In presenting it as a general argument against certain paternalistic policies, however, we could be overstating the significance of self-direction in relation to the significance of the benefits that could be successfully obtained through coercive interference. Evidence of this is that coercive forms of paternalism would not be rendered merely illegitimate, but in some way nonsensical; since it would be simply impossible to force somebody to act according to his or her best interest. This is certainly true in many occasions, such as when an activity improves a person's life only if the person autonomously endorses the value of such an activity, as is the case with religion. It does seem to be false, however, in many other occasions, especially if we hold an objective account of the human good.

Perhaps it is not necessary to think of the usual examples involving some form of dangerous drug. According to any plausible account of well-being, a life entirely dedicated to extremely trivial pursuits would also be of great disvalue. Facing these types of cases, a non-perfectionist liberal view will simply emphasize that individuals have the right to live their own lives according to their own decisions, even if those decisions are clearly contrary to their best interests. From a perfectionist perspective, however, the rights individuals have are primarily determined by the requirements of human flourishing. We might then be forced to choose between denying, contrary to appearances, that the undertaking of certain activities, or at least beyond a certain point, is damaging for human flourishing, or denying, contrary to a basic classical liberal tenet, that

¹³ Den Uyl and Rasmussen address the related issue of why the state should not guarantee education or a certain level of material security (2005, 330–331). In that case, their argument is related to the restriction against systematic bias and the impossibility of guaranteeing that such external goods will be incorporated in flourishing enhancing ways by those who are supposed to benefit from them.

¹⁴ This is also the thought behind Dworkin's idea that the value of a good life "lies in the inherent value of skilled performance of living" (1995, 241).

individuals have a right to perform such activities even when they do not harm others.

There are indeed contingent reasons, such as the inefficiency of the state or its inability to act within limits, to which the liberal perfectionist could appeal in blocking the legitimacy of state interference against actions that do not harm others. There is no reason why a perfectionist argument could not appeal to such sort of considerations in formulating its political recommendations in favor of a classical liberal order. In doing so, however, the initial worry might not be fully dissipated. This is because that worry is as pressing when understood in purely philosophical, rather than practical terms. Understood as such, the worry has to do with whether a perfectionist approach can adequately capture a basic classical liberal thought: that individuals should not be forcibly precluded from acting in ways that do not harm others, even if by doing so we could effectively prevent them from acting against their own interests.

3. Classical Liberalism as Endorsed by All: Gaus's Justificatory Argument

Justificatory liberalism is a family of liberal views, which stresses that the basic requirements of a just and legitimate state is that it can be justified to all reasonable citizens. Contrary to perfectionist versions of liberalism, which have some historical antecedents, justificatory liberalism is fundamentally a contemporary approach. The central motivation behind it is the idea that a plausible political philosophy must make room for the fact that contemporary societies are characterized by deep-seated reasonable differences about what makes life worth living. Justificatory liberals claim that any plausible political doctrine must be articulated in a way that makes sense to everybody. The work of John Rawls, especially his later writings (1993; 1999), has been very influential in shaping this sort of approach. In those writings, Rawls's main concern is precisely with the justice and stability of a society of free and equal citizens who remain profoundly divided by reasonable religious, philosophical, and moral doctrines. Rawls believes that a plausible account of liberalism should not be grounded on any *comprehensive* theory, such as those defended by liberal perfectionists, that appeals to substantive ideals of human excellence. Liberalism should be conceived, rather, in *political* terms. Understood in such terms, liberalism should be seen as the product of an overlapping consensus between different and conflicting views of morality, metaphysics, religion, and the human good.

The task justificatory liberals assign to themselves is to identify the principles that can be justified to all reasonable persons seeking to live under impartial principles of justice. Contrary to traditional social contract theorists, they are not concerned with the actual, implicit, or even hypothetical consent of real citizens. Like modern contractarian theorists, such as David Gauthier (1986), justificatory liberals are concerned with what some idealized version of citizens would agree to. Unlike those modern contractarian theorists, however,

they do not endorse an idealization purely in terms of instrumental rationality. Principles of justice are not understood as the outcome of a rational bargain among self-interested persons. They are understood, rather, as those principles to which all persons who have the capacity to put aside personal ends and goals in order to act on justified moral claims, and who seek to regulate their interactions in an impartial manner, would agree. This is the sense in which the idealized agents involved in the justificatory process are regarded as *reasonable*, rather than merely *rational*. Reasonable agents are rational agents, but they are not concerned merely with their *own* well-being.

Gerald Gaus is one of the main exponents of justificatory liberalism.¹⁵ Following Rawls, many justificatory liberals formulate their theories by imposing restrictions on the sorts of reasons that reasonable individuals might advance. Reasons should be shared. As conceived by these theorists, the project is to secure consensus on a common, public justification of liberal principles. The ideal is to have a shared political conception that could secure the moral commitment of all.¹⁶ Yet other justificatory liberals, including Gaus, claim that what is necessary is convergence on certain principles of governance, rather than on any particular reasons for adopting such principles (2011, 283–292). If we require more than that, we would not be showing enough respect for some citizens who are deeply committed to their comprehensive views, and no practical purpose is served by the project of seeking to secure consensus on a common justification for such principles. All we need to agree on is what principles or rules to implement, not on the reasons for implementing them.

Most authors adopting either of these two versions of justificatory liberalism believe that the regulative principles that would be agreed upon by agents committed to seeking impartial principles of justice, and not their own self-interested goals, will validate an expansive conception of the liberal state. Gaus argues, however, that justificatory liberalism favors classical liberalism, and not the egalitarian, modern forms that are usually associated with it.

Gaus's particular articulation of justificatory liberalism starts from rather uncontroversial premises. He takes as his starting point the supposition that we conceive of ourselves and others as free and equal, in the sense that no one has a natural or innate right to command others or to impose obligations on them. Each of us has a fundamental claim to validate the obligations and duties that are placed upon us (2007, 89–90; 2010, 234). Gaus claims that if we take these premises seriously, we would appreciate how deeply problematic the use of force by the state is. For such a force to be justified, we must show how each forcible imposition can be accepted by each individual's own reasons. This is what Gaus would call a 'public justification', and it is the only way in which such imposition would not fail to treat each individual as free and equal. Gaus does not claim that this validation by others is the same as their actual consent. Individuals can withhold consent for a variety of reasons (2007, 91–92). What

¹⁵ Justificatory liberalism has also been called 'contractualism', as distinct from the rational-bargain based 'contractarianism'.

¹⁶ See, for example, Audi 2000 and Qoung 2011.

matters is not what they would actually say, but what they would say if they were reasonable. If qua reasonable agents, the citizens would endorse the law and its penalties, then the citizens can be seen as the genuine legislators. Their will is not ignored.

Gaus believes, along with all liberals, that there is a presumption in favor of liberty and against coercion (2010, 238–239), or, in other words, a right not to be coerced (2011, 484). As understood by Gaus, however, this presumption or right does not yield any definitive conclusion. Importantly, it does not imply that there is a goal to reduce or minimize coercion (2011, 485). It merely states that interferences with liberty require justification in a way in which non-interfering actions do not. Thus the onus of justification is on the state for the use of force and coercive threats against its citizens. Gaus claims that this onus can be met with respect to each coercive law only if each and every reasonable citizen has a conclusive reason to accept such a law, that is, a reason to accept it over the alternatives, as binding on all (2010, 245–246).

Naturally, a major issue within justificatory liberalism is how to specify the ‘reasonableness’ of the citizens. Pure self-interest, hate, and spite are basically ruled out as acceptable motives. The idealized citizens do not make manifestly invalid inferences either, and they draw on appropriate and relevant values as well as on sound empirical claims. One could propose an idealization in such a way that citizens would all agree on certain substantive theses. Gaus believes, however, that doing so will defeat the very purpose of this approach, which is to recognize the inevitability of significant diversity and disagreement in modern, liberal societies (2010, 246; 2011, 276–277). At the appropriate level of idealization, reasonable citizens will not endorse obviously objectionable views, such as racism, or deeply implausible ones, such as radical versions of pacifism. But they would not share the same view on what is ultimately valuable, and thus the reasons that they would advance for endorsing or rejecting a law will differ.

It is important to note that in Gaus’s view, the truth of any given moral and political doctrine is irrelevant (2003, 154). The important question is whether a political doctrine provides a basis that cannot be reasonably rejected. A doctrine can be true and still fail to qualify as the doctrine to be implemented, for others might be able to reasonably reject it. In this particular sense, Gaus would agree with Den Uyl and Rasmussen that the justified political order cannot be understood as the institutionalization of morality, not even of the part of morality that is concerned with enforceable duties of justice. In Den Uyl and Rasmussen’s theory, politics deals with a specific problem, that of creating an institutional environment in which it is possible for all individuals to flourish. In Gaus’s theory, politics also deals with a specific problem, that of creating an institutional environment that all reasonable individuals could endorse. While Den Uyl and Rasmussen argue, however, that the correct conception of human flourishing establishes the need for liberalism, Gaus argues that such a need is established by the fact that as reasonable agents we could not agree, among other things, on what the correct conception of human flourishing is.

Gaus claims that it is a common mistake within justificatory liberalism to not be clear about the option set (although this is not true in the case of Rawls). The question is not merely whether particular legislative proposals will be reasonably rejectable or not. The question is whether particular legislative proposals will be reasonably rejectable or not *in relation to other options* (2010, 248; 2011, 268–269). Thus, we should suppose that after consulting their evaluative standards, and their plausible conceptions regarding human interactions, each reasonable citizen would be able to rank common legislative proposals or political systems more generally. We would expect deep disagreement in those rankings, given individual differences in evaluative and empirical judgments. This does not mean, however, that we could not a priori eliminate some of the proposals. All proposals that, from any reasonable perspective, will not be better than *no law at all* will have to be eliminated from the eligible set. This is connected to the presumption in favor of liberty. Furthermore, all proposals that are better than no law at all, but are strictly dominated in terms of Pareto, that is, all proposals that no one prefers over at least some other proposal, can also be eliminated from the eligible set.

Gaus believes that “the total absence of a coercive state is impartially demonstrably worse than a limited state that enforces personal rights and some system of property rights” (2003, 156). In other words, anarchist claims denying the very need for coercion “cannot block a public justification” (2003, 156). This is so because “those who reject all coercive states on the grounds that, in the absence of the state, people would all voluntarily do the right thing and contribute to the public welfare are making claims that fly in the face of everything we know about human psychology and collective action problems” (2003, 157). Thus, for the appropriate idealization, or in Gaus’s terminology, for the “Members of the Public”, anarchy is strictly dominated in terms of Pareto and thus eliminated from the eligible set. In other words, all reasonable citizens have a conclusive reason to accept the state over the alternative constituted by the non-existence of the state.

All reasonable citizens will also agree with granting persons rights to bodily integrity, freedom of association, and freedom of conscience and speech. Proposals to the contrary are clearly disrespectful of the freedom and equality of all citizens, and thus will not be included in the eligible set. Furthermore, Gaus claims that there is a compelling case for holding that only regimes that qualify as representative democracies will comprise the eligible set of possible political systems. This is because “only law-making procedures that are widely responsive to the judgments of the citizens are reliable protectors of basic individuals rights” (2011, 452).

Gaus also thinks that typical perfectionist or paternalistic policies that could only be understood as efforts “to make others more perfect in our own eyes” will have no place. Reasonable citizens will disagree on such evaluative considerations, and thus those who would be coerced by any particular perfectionist policies proposed will prefer not to have a policy at all. While it is true that all reasonable citizens might regard particular goods as valuable, such as health

and safety, for example, the same cannot be say of rankings or justifications of trade-offs between them. This is a point Gaus believes is not adequately noted among justificatory liberals who tend to believe that the fact that all reasonable citizens might agree on a list of ‘primary goods’ implies that the state needs to guarantee access to such goods. Gaus claims that our main disagreements about the good are not primarily about what is of value. Rather, they are about the relative importance of value (2003, 157; 2007, 96). So “even if everybody agrees that smoking causes cancer, rational people clearly do disagree about whether the pleasures are worth the risk of death. Given that rational people weight the relative values of pleasure and safety differently, coercive acts that can only be justified on the grounds that the pleasure does not outweigh the risk to health fail to provide a neutral case [...] and without that, no state policies discouraging smoking will be justified.” (2003, 158) Thus, according to Gaus, adherence to the justificatory model, and its commitment to respecting all reasonable views, has very definitive implications for the rejection of paternalistic or perfectionist rationales of intervention.¹⁷

The issue of whether this liberal state defended by Gaus on public justificatory grounds must be a classical liberal state or a modern welfare state is more complex. It is not hard to see how *some* system of property rights will be preferred by all reasonable citizens over a system with no property rights. This is because it is clear to all reasonable citizens how a distinction between “mine and thine” is necessary for peaceful and cooperative social life (2003, 159). For this reason, having a system of property rights will not be reasonably rejectable against the alternative constituted by the lack of such rights. A system of common ownership, where no exclusion is allowed, will be strictly dominated in terms of Pareto. The problem, however, is that there are many different possibilities regarding how property rights should be delineated. Is there a public justification for selecting one system among the many? In particular, is there a public justification for favoring a classical liberal system of strong property rights that precludes both extensive redistributive and regulatory policies?

Gaus notes that there is an “order of justification” that is canonical within the liberal tradition. Liberties having to do with political freedom and the integrity of the person are more basic or primary than economic liberties, or general issues related to the scheme of economic organization (2010, 250–251). Reasonable citizens will thus first establish the justification for the former over the latter. As already mentioned, since the idealized versions of the citizens are taken to endorse reasonable moral views and a presumption for liberty, there is a conclusive reason for every such member to endorse political regimes that offer a high probability of providing strong protection for civil rights, such as freedom of expression, freedom of association, rule of law, and personal rights.

Rawls had argued that reasonable agents will not consider, among the eligible set, economic arrangements such as state socialism, welfare state capitalism,

¹⁷ Gaus had also claimed that the justificatory model might preclude most contemporary legislation (2003, 160). In his latest writings, however, he seems to be less radical in his interpretation of the implications of his model for public policy (2011, 529–545).

and laissez-faire versions of liberalism. According to Rawls, these three kinds of social organization are deficient. Basically, the alleged problem with all these regimes is that they do not protect the fair value of political rights. In the case of capitalist systems, this is because the large inequalities of wealth that they allow endanger the worth of the political liberty of the least advantaged citizens (1996, 329; 1999, 242). For Rawls, the two options that will be regarded as included in the eligible set are market socialism and “property owning democracy”, where the latter requires a “distributive branch of government” whose task is to preserve and approximate justice in distributive shares and to prevent the concentration of power detrimental to the fair value of political liberty and fair equality of opportunity.

Gaus, however, regards these claims by Rawls as extremely implausible and perplexing. All of the available empirical evidence, after all, indicates that all versions of socialism are deeply deficient in securing basic liberties (2010, 251–255).¹⁸ If the reasonable deliberators care deeply about basic liberties, they would not include socialist regimes among the eligible set. Those regimes would be dominated by the capitalist alternatives. Gaus goes farther than pointing out that the capitalist, rather than the socialist alternatives, must be included in the eligible set. He claims that if we endorse the justificatory model, the justification of property owning democracy and welfare state capitalism is more difficult to achieve than the justification of a classical liberal regime.

Gaus believes that the justificatory model favors classical liberalism because classical liberals, who are to be found among the set of reasonable citizens, will tend to consider that the cost of coercion involved in greater redistributive states will end up outweighing the benefits of such programs (according to their own conception of value) sooner than egalitarians will (2010, 266–269).¹⁹ Gaus claims that even if we acknowledge that reasonable people might disagree about the ordering of the proposals from least to most coercive, classical liberals’ judgments of the range of the laws in which the benefits of coercion outweigh the costs are still decisive. This is because the limits of the eligible set are still defined by them, since they are the ones who see the least benefits and the most

¹⁸ As perplexing as those claims made by Rawls are, it is also perplexing that they are not usually seen in such a way within contemporary political philosophy. As Gaus notes: “Rawls can say, without evoking much dissent, that market socialism, which has been institutionalized only by General Tito’s repressive Yugoslav state, is within the class of acceptable regimes partly because it protects the value of political liberties, whereas a welfare state such as the United Kingdom, which probably protects political rights as well as any regime in history, is clearly unjust because it fails to protect the fair value of political rights.” (2011, 528–529)

¹⁹ It is important to note, however, that Gaus’s argument does not rely on assuming that the rejection of socialism entails a regime of private property with no extensive redistribution of wealth, in the sense that at this point classical liberals “will rank few if any redistributive laws as better than no laws at all, and so such laws will be excluded from the eligible set” (2011, 521). The rejection of socialism merely favors some system of private property, and it is the shape of such a system that must be decided. We cannot assume that a system of private property with no redistribution has some sort of priority over systems of private property with redistribution, such that we would take it as our baseline, and let reasonable citizens veto proposals for redistribution. This would be as unjustifiable as taking a system of property rights with redistribution as our baseline, and letting reasonable citizens veto all proposals for reducing redistribution.

costs of coercion. Due to the reasonableness constraint, egalitarians could not claim that a classical liberal state does not outweigh the cost of coercion, and that only an extensive redistributive state will (2010, 271–273). This is because such a claim would imply the implausible view that while a redistributive state is better than anarchy, anarchy is better than a classical liberal state.

It is important to note, however, that classical liberals do not have the ability to impose what they regard as the optimal system. Gaus's argument does not justify a classical liberal order. It holds, merely, that there is a classical liberal 'tilt'. All those proposals that classical liberals regards as 'too coercive' in relation to the benefits they yield are eliminated from the eligible set. Within the eligible set, however, there will be many legislative proposals that classical liberals would not prefer when compared to their own proposals, but they would prefer them when compared to not having any law at all. From all the proposals that compose the eligible set, the ones that are ultimately implemented are those that are chosen by democratic procedures (the adoption of which is also justified by the same sort of argumentative method).

As it was the case with Den Uyl and Rasmussen's theory, this exposition of Gaus's theory is highly simplified. But the nature of the argumentative strategy should be clear, and the main concerns one might have about Gaus's theory of classical liberalism seem to arise directly from the nature of his argumentative strategy.

In assessing Den Uyl and Rasmussen's theory, it was suggested that liberal perfectionism might be unable to capture a basic classical liberal thought. The thought is that people should not be forcibly precluded from acting in certain ways, even if by doing so we could effectively prevent them from acting against their own interests. Gaus's approach might be incapable of capturing another basic classical liberal thought. In this case, the thought is that economic liberties are as fundamental as any others, and that their justification should not rely on the collective benefits that they are supposed to generate.

For classical liberals, occupational freedom, the capacity to save and to invest in projects individuals regard as worthwhile, and the ability to exchange their property in their own terms with other consenting adults are not mere auxiliary liberties. Indeed, these liberties might be extremely important in securing political liberties. It is not an exaggeration, however, to suggest that classical liberals might regard economic liberties as more important than political liberties, insofar as they regard the value of the latter as merely instrumental. Political liberties are extremely important for classical liberals, but their importance derives from the need to constrain government and protect the spheres of private life. To a certain extent, Gaus recognizes this priority relation when it comes to personal liberties, such as those involved in freedom of association and freedom of expression. But for classical liberals, the economic arena is simply one area in which these basic freedoms are exercised, and it is perhaps the most important one or at least as important as any other. After all, it is quite implausible to believe that our freedom to form some type of civil association, such as a walking club, deserves some form of priority over our freedom to associate

with others to form a commercial enterprise, and provide goods and services that other individuals might want to acquire.

By adopting the canonical order of justification of the modern liberal tradition, according to which economic liberties should be granted only to the extent that they do not upset some desired distributive pattern, Gaus's view might not be able to capture the classical liberal concern for the priority and fundamental value of individuals' private spheres in all its force. Admittedly, reasonable disagreement might exist on this issue, and Gaus's approach is motivated by the recognition of the normative constraints that arise from it. Given the circumstance of the time, politics might indeed call for compromise. It might be a mistake, however, to demand such a thing from political philosophy. After all, we are grateful to past liberal political philosophers for articulating conceptions of individual liberty that are crucial in determining what contemporary political compromises are mainly about. If classical liberalism's insistence on the fundamental importance of economic liberties is lost in the project of articulating a political philosophy that no reasonable citizen could reject, this in itself might constitute a powerful case against undertaking such a project. Gaus's defense of the basic freedoms of association, expression, and personal integrity, on the ground that all reasonable citizens will endorse them, requires extremely little consideration in his overall argument. This is because we all now share certain very basic moral and political commitments that people did not share less than a hundred years ago, when many individuals were excluded from the protection that such freedoms entail. If we are committed to the value of individual sovereignty, it is only natural to motivate our intellectual efforts by the expectation that at some point in time a similar outcome will obtain in the case of economic liberty. Yet such an expectation might be diminished in important ways when political philosophy holds that assessing the truth of different political doctrines is not among its main concerns.

4. Classical Liberalism as a Theory of Authority: Kukathas's Liberal Archipelago

Chandran Kukathas takes his theory, as formulated in *The Liberal Archipelago* (2003), to be deeply shaped by the circumstances of the second half of the twentieth century. He believes that the problem that contemporary political philosophy faces is that of "coping with diversity in a world in which particularity or difference or separateness is being reasserted" (2). Kukathas claims that in recent years political philosophy has generally begun "with the assumption that the nation-state is the appropriate starting point for reflection on the political order" (257). Much of that reflection is concerned with "how diversity can be dealt with in a closed society, so that it does not compromise the unity of the society as a whole" (257). According to Kukathas, this sort of view "expresses a wish for a degree of social unity which is simply inconsistent with the extent of diversity, mobility, and disagreement in the modern world" (258). Kukathas

thinks that such a degree of unity can certainly be achieved. But the price is high. It could only be achieved “by suppressing diversity, or reducing freedom of movement, or stifling dissent” (258).

Political philosophers such as Rawls recognize the importance of diversity. Rawls thinks, however, that social cooperation in the face of diversity is likely to be maintained only if the society is governed by a shared conception of justice, characterized by an overlapping consensus. Gaus believes that Rawls’s approach does not really recognize the significance of diversity, since it is assumed that reasonable agents will be able to share the same sort of reasons regarding what a just society looks like. But it is the very subject of justice over which there is much dispute and conflict in a world of moral and cultural diversity, and our political philosophy should recognize this fact. Kukathas agrees. The attempt to bring our diverse ways of thinking into harmony by appealing only to reasons that we can all share is a mistake. Yet, in Kukathas’s eyes, Gaus’s theory would still fall significantly short of the ideal we should seek, since, at the end of the day, the rules that all reasonable citizens could endorse from their own respective reasons imply that many cannot live fully according to what their conscience dictates. Kukathas does not think that political philosophy should seek to achieve any sort of social unity through the elaboration of rules that we all can embrace. If we are genuinely concerned about diversity, diversity must prevail. People should have the real freedom to live by their own lights.

According to Kukathas, toleration is the fundamental value of liberalism. At the core of this liberal ideal of toleration lies the conviction that individuals should not be forced to act against conscience, that is, to act in ways that they consider wrong (25). Conscience is, according to Kukathas, the most important source of human motivation. This is not because conscience always overcomes other motives such as self-interest. It is because “conscience is what not only guides us (for the most part), but what we think *should* guide us” (48). This motivation is what makes us distinctively human, and what structures and governs human life more profoundly than any other motivation. We believe that transgressions to our own moral sense require justification, in a way that transgressions to our own mere self-interest do not, for example. “What humans find hardest to endure is the anguish that comes with acting unconscionable.” (53) Yet Kukathas does not claim that we act right because it causes less suffering. He claims that “acting rightly causes less suffering because we value it” (54). We attach the highest value to acting rightly, even if we often fail to act in such a way. We might disagree on what is right, yet the interest in acting rightly is an interest that we all share. Kukathas goes as far as claiming, perhaps not implausibly, that it is the “*sine qua non* of human flourishing” (56).

Kukathas does not think, contrary to many liberal theorists, that individuals’ fundamental interest lies in forming, revising, and rationally pursuing a conception of the good. The capacity to question our own beliefs and ends is not what is fundamental in Kukathas’s view. The “unexamined life may well be worth living” (56). Kukathas argues that it is a mistake “[t]o think that our interest in being able to assess and revise our ends is *more* important than our pursuit of

the ends themselves" (60). He claims that the liberal opposition to compulsion does not need to be understood as an endorsement of reflective choice, since it is "possible for the unchosen life to be regarded by the individual living it as worthwhile, even if it is not possible for the compelled life to be so regarded" (61). A life can be good even if it is not deliberately chosen. But it cannot be good if "a person finds he can, in conscience, only reject" it (64).

Kukathas thinks that the usual question that political philosophers pose to themselves, that is, the question of the rights, liberties, duties, entitlements, and obligations that individuals owe to each other, is the wrong question to ask. Given the significance of diversity, we should rather ask: who should have the authority to act? For this reason, Kukathas claims that "a liberal society will be one in which politics is given priority over morality" (19). The task of political philosophy is not to present an account of the demands of justice, but rather to present the way in which we should deal with the fact that people hold alternative conceptions of what justice demands. Liberalism, in Kukathas's view, does not identify a set of values and moral standards by which any community described by that name must abide. It identifies principles by which different moral standards may be allowed to exist. By existence, however, Kukathas does not merely mean the possibility of appealing to them. He means, rather, the possibility of setting institutions and rules that conform to such standards. Society does not have the sort of moral cohesion that many contemporary political philosophers, including those who recognize the importance of disagreement, such as Gaus, assume it can have. Without owing their allegiance to any particular interest, political philosophy should look at the problem of how the plurality of interests, often competing, can be accommodated. This understanding of political philosophy's role is analogous to Den Uyl and Rasmussen's, but only in form. In their theory, the plurality we need to be concerned with is that of the forms of human flourishing. In Kukathas's theory, it is the plurality of individuals' conceptions regarding what is right or just.

It is perhaps important to note that Kukathas does not endorse moral relativism. Neither does he offer a theory lacking in moral commitments. He offers, rather, a basic or minimalist moral commitment to a human interest that he believes all persons have sufficient reason to accept: an interest in not being forced to act against their conscience. Kukathas claims that "the only thing that can be asked equally of all with respect to any [...] set of ideas or behaviors is toleration. . .", where toleration is understood in undemanding terms as "resigned acceptance" (24). In this sense, toleration does not require respect, empathy, admiration, concern, dialogue, or understanding. It merely requires coexistence. Also, Kukathas does not claim that liberalism is about the protection of diversity, as is implied by William Galston's similar understanding of liberalism (1995). Galston favors an understanding of liberalism that is linked to the historical impulse of what he calls the Reformation Project, in contrast to the understanding of liberalism that he links to the Enlightenment Project, with its emphasis on the valorization of choice. Although similar in its fundamental concerns, Kukathas's theory does not recognize diversity as a fundamental value.

For Kukathas, diversity is the source of the problem to which liberalism offers a solution (29). That solution is fundamentally linked to freedom of association.

It is individuals' freedom to associate and dissociate with others that respects their fundamental interest in not being forced to act against their conscience. Authority is always needed to settle conflicts that cannot be resolved by means short of resorting to force. Yet, according to Kukathas, there is never a need to force anybody to accept a particular authority over others. A genuinely liberal society, therefore, must accommodate or tolerate the multiple authorities that individuals freely decide to create by exercising their freedom to associate and dissociate. The only thing a liberal society should not recognize is an association's denials of their members' right to exit. Thus, "a society is a liberal society to the extent it is willing to tolerate the multiplication of authorities, including authorities which seek to disentangle themselves more thoroughly from the wider society—provided they are prepared to bear the costs this invariably involves" (27). This is why Kukathas appeals to the metaphor of an archipelago.

The liberal order is an archipelago constituted of "different communities operating in a sea of mutual toleration" (8). Within the liberal archipelago, all groups are allowed to live by their different moral beliefs. The only requirement that they must recognize is that "no group has the right to compel anyone to become or to remain, a member" (75). All that is necessary as evidence of the recognition of the association's authority over an individual is the individual's election not to leave. Thus "disparate and conflicting standards of morality and justice co-exist", and individuals are free to associate with one another and to live by the moral standards they can in good conscience accept (76). Everybody is free to refuse to live among those whose moral standards they cannot abide. The good society is one "in which none would be required to live in groups or in associations (under terms) they reject" (93). Thus, the right to exit is the fundamental right. It is "an inalienable right, and one which holds regardless of whether the community recognizes it as such. It would also be the individual's only fundamental right, all other rights being either derivative of this right, or rights granted by the community." (96) This implies that the terms under which each community or association is governed could impose all sorts of restrictions on the individual liberty of its members, as long as no restrictions are imposed on the liberty to exit.

This focus on the importance of individuals' rights to form and live in communities, and to be guided by the rules that such communities choose to enforce, should not, according to Kukathas, lead us to recognize groups as holders of special rights or privileges. Groups are not "undifferentiated wholes but associations of individuals with interests that differ to varying degrees" (88). The identity of any given group is the product of individuals' decisions and choices, and the variability and mutability of the various forms of human associations reflects that. Individuals' right to exit cannot be infringed upon, even if it is necessary for the preservation of the association. The individual, however, does not have a special protection either with regard to his status in the association. Individuals' inalienable right to leave any association or community to which they

belong does not entail that the individual has “any fundamental claim upon others to ensure that he has the capacity to *join* a particular group or community, to *remain* within that group, or to *leave* it” (97).

Kukathas recognizes that, in some cases, the cost and risks involved in exiting a community would be high. According to Kukathas, this does not imply that those individuals are unfree to leave (107–108). Kukathas also recognizes that, particularly in associations into which people are born, “individuals are conditioned (or socialized) into accepting their lot” and the principle of freedom of association “does not protect [them] from being conditioned (or educated) to have preferences which make them little more than accomplices in their subordination to the norms of their societies” (109). But for Kukathas, “a person’s preferences have no bearing on whether or not he is free” (109). All that matters for freedom is whether individuals can act on their preferences, and not what preferences they have, or how they have formed them. Kukathas’s prior rejection of the characteristic liberal endorsement of autonomy, or reflective and deliberate choice as an integral part of a good life, is relevant here.

One might worry that Kukathas’s understanding of the right to exit is quite minimal. If acting according to conscience is so important, we might worry that associations could gratuitously increase the cost of exit so as to discourage dissenters to act according to their conscience. We might want to conclude that the group should then provide opportunities for dissent. Kukathas, however, would reject such a claim. For it is not only the conscience of the dissenters that is at stake. Forcing the other members to provide opportunities for dissent will be equivalent to forcing them to act according to what they think is wrong. Facing this inevitable conflict between what their respective conscience dictates, each party should be free to disengage from the other, for “it cannot be a solution to the conflict to say that one side must conform to the wishes of the other when no compromise is to be found” (95). We should only advocate their respective right to go their separate ways (116).

A natural understanding of Kukathas’s theory is one in which the state is simply in charge of protecting individuals’ rights to association and enforcing individuals’ rights to exit. Yet it is not entirely clear if this is indeed what Kukathas claims. In some passages, the state itself is seen merely as one among the many different associations. He claims, “the liberal archipelago is a society of societies which is neither the creation nor the object of control of any single authority, though it is a form of order in which authorities function under laws which are themselves beyond the reach of any singular power” (9). He claims that the “the principles of a free society describe not a hierarchy of superior and subordinate authorities but an archipelago of competing and overlapping jurisdictions” (4). The correct model, Kukathas argues, is the international society, “a society of multiple authorities operating under a *de facto* regime of mutual toleration” (27), and an “unmanaged” archipelago (29). He also says that “political society is [...] no more than one among other associations; its basis is the willingness of its members to continue to associate under the terms which define

it. While it is an ‘association of associations’, it is not the only such association; it does not subsume all other associations.” (75)

The analogy to the international society is helpful. Yet there is no one in charge of securing individuals’ right to exit. So, despite passages that would seem to indicate something different, perhaps the best interpretation of Kukathas’s theory of the state is one in which indeed its role is to protect and secure such an inalienable right to exit. He claims, after all, that the role of the state is to serve as an umpire, by preserving the order in which the many communities and associations coexist (212). Despite these doubts regarding what exactly the positive role of the state is, there are no doubts that Kukathas rejects the legitimacy of most functions of the contemporary state. He claims that it is not part of the state’s duty “to make society more healthy, or noble, or equal or more just. It is not for it to decide which ways of life are to survive and which die out; which traditions are to prevail and which to disappear.” (213) Furthermore, Kukathas explicitly rejects all redistributive programs of the state, since he claims that “the pursuit of equality can only come at the cost of the suppression of diversity” (215). This is because “groups display a diversity of attitudes to wealth (what it is and how it is distributed), to status, to income, to choice, to opportunity, and generally to well-being” (219). Moreover, among such groups, “understandings of what things may be properly be made the objects of distribution differ quite radically” (224). Thus, since equality conflicts with diversity, we should reject equality. This is because diversity is a fundamental feature of the human condition, and any attempt to suppress it, “will require the disruption of individual lives, and a denial of people’s wish to live by their own lights—according to conscience” (215).

The basic thought behind Kukathas’s theory is compelling, and it is fundamentally related to the very origins of liberalism: “people who differ should be able to live in different ways.” (98) Modern liberal societies are characterized by disagreement on fundamental issues. Agreement should be sought after to the extent that it is necessary for coexistence. Kukathas claims that the sort of agreement required for coexistence is minimal: we should agree to let others live according to the standards that we ourselves cannot agree to live by. We should simply agree to part company. Only a political order guaranteeing absolute freedom of association conforms to what Kukathas regards as the minimal moral demand that we should all observe: that of letting others live according to their own conception of what is right, even if we find their beliefs and behavior to be morally objectionable.

We might think that, from a classical liberal point of view, there are few grounds for rejecting Kukathas’s institutional proposal. Although Gaus seems to defend a more expansive state than Den Uyl and Rasmussen do (Gaus seems to endorse some form of minimal welfare rights), neither of their theories would allow for any limitation on individuals’ freedom of association. This is also the case if we adopt a more traditional Lockean perspective, such as that of Nozick (1974). If there is something that all these theories share, it is their recognition of the importance of a robust system of personal and property rights, and

a central element in such a system is the freedom to enter into any sort of voluntary agreement with other consenting adults. It is precisely the lack of such a qualification on consenting adults in Kukathas's theory that might generate resistance among liberal theorists of all stripes.

Kukathas claims that the sort of toleration endorsed by Rawls, for example, is not genuine, since whether and how far any practice will be tolerated is ultimately decided by its compatibility with a liberal conception of justice (121). This is exemplified by Rawls's endorsement of public education. Rawls argues that children's education should include knowledge of their constitutional and civic rights. They should be told that liberty of conscience exists in their society. As Kukathas points out, in Rawls's view, as well as in many liberals' view, this should be inculcated in children to ensure, for example, that "their continued membership in a religious sect when they become of age is not based simply on ignorance of their basic rights or fear of punishment for offences that do not exist" (123). This, according to Kukathas, is unjustified since we must remain agnostic regarding fundamental values, and not treat non-autonomy or non-liberal modes of life as morally inferior. Furthermore, we should not presuppose the existence of a common standpoint of morality. We should not understand toleration "as something which arises as an issue [...] because of the possibility of dissent [...] from the values implicit in that common standpoint" (125). In other words, illiberal minorities who do not teach liberal values to their children should be truly tolerated, in the sense that they should be recognized as having the right to teach their non-liberal values.

Galston has argued in a similar manner. The conclusions reached by Kukathas regarding the scope of tolerance are, however, more radical than those endorsed by Galston. Although Galston allows for wide parental rights when it comes to the education of children, he recognizes that there are limits having to do with the protection and promotion of the normal development of basic capacities, and with the requirements of "social rationality", which is "the kind of understanding needed to participate in the society, economy, and polity" (525).²⁰ For Kukathas, however, "[i]f there is an ultimate authority [...] that determines what ways are morally acceptable, liberalism is lost" (139).

The rejection of all forms of public education is not something that classical liberals will necessarily oppose. Neither will they oppose wide parental rights in general. There is a point, however, in which Kukathas's emphasis on toleration might become truly problematic, especially if we are genuinely concerned about the individual right to liberty of all, and not merely of adults. Some communities might decide to deny their children blood transfusions in life-threatening circumstances. Other communities might practice female genital mutilation on all teenage girls. These practices present extremely challenging issues, in part because they are associated with certain fundamental cultural or religious commitments. But the implication of Kukathas's theory is that whether or not such practices are related to those commitments is irrelevant. As Brian Barry has

²⁰ For Galston, the scope of permissible diversity is constrained by the imperatives of citizenship (1995, 528).

noted, if the rights groups have are not grounded on the particular cultural claim that such groups could make, something Kukathas explicitly denies, then all groups have a right of non-interference *irrespective* of whether what we regard as terrible practices are tied to important commitments (2001, 145).

Kukathas's response is ultimately based on two claims. The first one is that it is not easy for individuals to arrogate to themselves the power to do entirely as they wish with their children because "they will be bound by the norms or conventions or the laws of the communities to which they belong—which might in turn be shaped by requirements laid down by other associations of which these groups are themselves members" (144). Yet Kukathas himself acknowledges that "[i]t would not be wise to be 'too sanguine about the benign consequences of this. Some groups will always resist these pressures to conform'" (147). The second claim is that "there is no warrant for assuming that authority will be just—even if it succeeds in discerning what is just" (260). Kukathas claims that the argument for state interference for the sake of protecting children "relies on the assumption that the state will act rightly: it not only will not abuse its power to intervene, but also will know when it is appropriate to intervene." (147) Even if social pressures are not always enough, Kukathas concludes that it is "less dangerous than conferring greater powers upon the state on the assumption that it can only do good" (147).

Regardless of how convincing Kukathas's answer is, this particular issue might illustrate a problem with grounding political philosophy on the claims of conscience. Some members of society might believe that they have an obligation to protect the basic rights of all children, given their special condition of vulnerability. Other members of society might believe that they have a right to perform hurtful practices on their own children. If this is so, how could an appeal to conscience be able to adjudicate this conflict of views? It seems that no matter what option we choose, some individuals will not be able to live according to what their conscience demands. The difficulty is also present in the case of property. Kukathas believes that the historical debate over freedom of religion should be the paradigm for contemporary liberal political philosophy. Contrary to the case of religion, however, discussions over the justice of alternative schemes of property are discussions over resources that cannot accommodate multiple and conflicting arrangements. So if individuals hold different conceptions of ownership, such as Kukathas acknowledges they do, regardless of what property distribution is enforced, the state will be forcing some individuals to live contrary to their own conception of what is right.

A different implication of Kukathas's theory might clash with the reformative aspirations of classical liberalism. Classical liberals are generally discontent with the current political circumstances, since virtually all existing states have extended their scope beyond their essential functions, with the corresponding extension of taxing power. It is not clear, however, that Kukathas's theory could provide adequate grounds upon which to base a case against the typical current political order characterized by extensive, rather than minimal, states.

Kukathas emphasizes the fact that a liberal society is not one in which all its members live according to liberal principles. It is, rather, one in which its members have the freedom to choose how to live, where this freedom includes living under non-liberal principles. Furthermore, individuals are assumed to accept the terms under which they live insofar as they decide to live under them, while having the freedom to leave. It does not matter how costly the exercise of such freedom could be. Individuals also lack a right to join associations against the wishes of its current members. On what grounds, therefore, could citizens of any nation other than some notorious exceptions, such as Cuba and North Korea, present a case against the legitimacy of the political order under which they happen to live? As long as they are free to emigrate, Kukathas's theory seems to imply that they freely accept the terms by which they are governed, since the cost of exercising that freedom is not relevant. We must recall that Kukathas himself explicitly claims that the correct model for a liberal archipelago is the international society. As already noted, no one is in charge of enforcing individuals' right to exit in the international society, but if we understand Kukathas's theory as the formulation of a standard of evaluation, the fact that the international society lacks that particular institutional mechanism of enforcement does not imply that it does not satisfy the standard in question. In our time, the majority of governments do not impose restrictions on emigration. The international society composed of such governments would seem to count as a liberal archipelago in Kukathas's terms.

In another work Kukathas has argued against immigration restrictions, and in favor of open borders (2004). But his argument on immigration does not rely on his conscience-based theory of authority, and it is unclear whether the theory formulated in *The Liberal Archipelago* has the potential to ground a rejection of immigration restrictions. It needs to be clear, however, that the worry is not that Kukathas's theory does not imply the rejection of immigration restrictions. Although there might be strong classical liberal reasons against such restrictions (Maloberti 2011), this is a controversial area where reasonable disagreement might exist. The worry is, rather, that Kukathas's theory, despite its radical appearances, might have as its implication an endorsement of the political status quo in which extensive, redistributive states are the norm rather than the exception. In such a status quo, countless individuals who truly value their personal and economic liberties, but who were born in the wrong place, have no other place to go. It would be an unfortunate implication of our political philosophy if we could not recognize that individuals have, if not the right to enter other political communities, at least the ability to make a convincing case for why their liberties should be respected in the political communities in which they happen to live.

Kukathas's theory, as was the case with Den Uyl and Rasmussen's and Gaus's, might thus fail to articulate in a convincing manner a central classical liberal concern. Insofar as these three theories present themselves as providing a philosophical understanding of classical liberalism, this alleged deficiency would constitute a serious objection. In itself, however, it does not provide a

conclusive reason to reject any such theories. This is because we might conclude that one of these theories provides a better understanding of classical liberalism than the available alternatives. If such is the case, we should be willing to revise the status of the basic classical liberal thought that, allegedly, finds no proper theoretical articulation in the theory in question. Although reaching such an overarching judgment is beyond the scope of this essay, the value of these new approaches must surely be recognized. For one thing, each of these theories incorporates concerns that are at the center of contemporary political philosophy in general, and at the center of the contemporary debate regarding the foundations of liberalism in particular. This is a very important development, since any theoretical position denying all value to recent intellectual reflection will always lack credibility. If incapable of reframing itself in light of new challenges and concerns, a political doctrine is justly relegated to the confines of intellectual history. The recent theories of Den Uyl and Rasmussen, Gaus, and Kukathas illustrate that within political philosophy, classical liberalism is a genuine contemporary approach.

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