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COMPREHENSIVE PLURALISM IS NEITHER
AN OVERLAPPING CONSENSUS NOR A
MODUS VIVENDI: A REPLY TO PROFESSORS
ARATO, AVINERI, AND MICHELMAN

*Michel Rosenfeld**

It is indeed fortunate for an author to have his work reviewed by three prominent scholars as fair, sympathetic, and incisive as Andrew Arato, Shlomo Avineri, and Frank I. Michelman. The task of replying to their respective critiques looms as daunting, however, for they pose certain fundamental challenges that go to the heart of the analysis I developed in *Just Interpretations*. Although the three critiques involved differ in several respects, they also overlap significantly. Taken together, these critiques raise important questions concerning key distinctions I draw in my diagnosis of the crisis in legitimacy confronting contemporary pluralist societies; the nature, scope, and desirability of comprehensive pluralism, which I argue is the conception of the good best suited to cope with the crisis in question; and the practical usefulness of comprehensive pluralism in connection with a legitimate apportionment of responsibility among law, ethics, and politics. Specifically, the most salient challenges launched by these critiques relate to: (1) the distinctions I draw between the modern and the postmodern, and between homogeneous and heterogeneous groups—or, in my terminology, between intracommunal and intercommunal relationships; (2) my assessment of the relationship between the right and the good and, in particular, my claim that, in the context of comprehensive pluralism, the good has priority over the right; (3) the distinction I draw between comprehensive pluralism and Rawls's conception of an overlapping consensus;¹ and, finally, (4) the practical implications of comprehensive pluralism in terms of drawing a cogent boundary between what ought to be regulated by antimajoritarian constitutional norms and what should remain

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¹ JOHN RAWLS, *POLITICAL LIBERALISM* 133-34 (1993).

within the realm of majoritarian politics.

I shall attempt to address each of these challenges with a view to clarifying and further elaborating the thesis I advanced in *Just Interpretations*. Furthermore, as I see them, all these challenges are closely related to one another, thus calling for responses that are not only mutually consistent, but also mutually reinforcing. Before embarking on specific responses, however, I must briefly concentrate on a central issue which is key to a proper understanding of comprehensive pluralism, but which remains largely absent or underemphasized in two of the three reviews.

I. THE HEGELIAN UNDERPINNINGS OF COMPREHENSIVE PLURALISM

Among the three reviewers, only Avineri explicitly characterizes the project carved out by comprehensive pluralism as Hegelian.² For his part, Michelman acknowledges the dialectical aspirations of comprehensive pluralism³ but, as I read him, provides a predominantly Kantian account of it.⁴ Arato does not mention the subject at all, but asserts that there is an inconsistency between the first part of the book, which he regards as Derridian, and the third part, which he believes implies some commitment to natural rights.⁵

Although the concerns targeted by comprehensive pluralism largely overlap with those tackled by Derrida, Rawls, and Habermas, among others, comprehensive pluralism is conceived above all in Hegelian terms. Consistent with this, moreover, while comprehensive pluralism has definite affinities with the respective views of Derrida, Rawls, and Habermas, when properly understood it is by no means reducible to any one, or any combination, of these. Instead, from the perspective of comprehensive pluralism, the contributions of each of these views must be assessed dialectically—that is, not on their own terms, but in relation to the conflicts which they confront, and from the counterfactual standpoint of imaginable resolutions of such conflicts within the plausible limits set by historically grounded prevailing horizons of possibility. Thus, as I shall further indicate below, from the perspective of comprehensive pluralism, some

² Shlomo Avineri, *Just Interpretations or Restituta Republica?*, 21 CARDOZO L. REV. 1939, 1940 (2000).

³ Frank I. Michelman, *Modus Vivendi Postmodernus? On Just Interpretations and the Thinning of Justice*, 21 CARDOZO L. REV. 1945, 1964 (2000).

⁴ At the very least, Michelman casts a Kantian glance on comprehensive pluralism, to the extent that he argues that it can be interpreted as articulating a position ultimately akin to that elaborated by Rawls in *POLITICAL LIBERALISM*.

⁵ Andrew Arato, *Law and Interpretation*, 21 CARDOZO L. REV. 1929, 1930 (2000).

insights of Derridian theory may be reconciled with some insights of Habermasian or Rawlsian theory without inconsistency—so long as these insights are grasped as partial and one-sided contributions within the larger scope of an ongoing dialectical process. Similarly, there is no denying certain affinities between comprehensive pluralism and Rawlsian overlapping consensus, provided it is understood that, within a broader Hegelian dialectic, the former is by no means collapsible into the latter.

Before expanding further on these points, it is necessary to clarify the sense in which comprehensive pluralism is the product of a Hegelian vision and approach. Indeed, such a clarification is crucial in view of how discredited some of Hegel's ideas have become, and how even some of his most sympathetic exponents, such as Charles Taylor, have concluded that his grandiose synthesis has become obsolete.⁶

Whereas Hegel's idea of inexorable historical progress culminating in the triumph of Absolute Spirit can be readily discarded, his insight that every generation is embedded in a concrete historical setting confronting particular conflicts and contradictions seems as valid today as it ever was. So is his dialectical approach, which essentially seeks to resolve contradictions through reconciliation of the part with the whole—with the part only becoming understandable in terms of its place within the whole, and, conversely, the whole only susceptible to being adequately grasped in terms of the full panoply of determinate relationships that bind together its various constituent parts.⁷ As applied to the intersubjective arena in which relationships center around law, ethics, and politics, moreover, the dialectical approach focuses on various antagonistic positions considered as partial, and seeks to overcome existing conflicts and contradictions. The dialectical approach accomplishes this by mediating between the various partial perspectives and a suitable overall perspective meant to transcend all its partial counterparts,

⁶ CHARLES TAYLOR, *HEGEL* 537-38 (1975). Most notably, as Taylor observes, the complete overlap of reason and reality in Absolute Spirit—the crowning culmination of Hegel's system—seems highly implausible today. See *id.* at 547, 551. But see SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* 6 (1989) (“[F]ar from being a story of [the] progressive overcoming [of antagonism], dialectics is for Hegel a systematic notation of the failure of all such attempts . . .”).

⁷ G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* para. 20 (A. Miller trans., 1977) (1807); *id.* at 277 (“The whole is a stable equilibrium of all the parts, and each part is . . . at home in this whole . . . because it is itself in this equilibrium with the whole.”); see also JEAN HYPPOLITE, *GENÈSE ET STRUCTURE DE LA PHÉNOMÉNOLOGIE DE L'ESPRIT DE HEGEL* 322 (1946) (explaining that, for Hegel, “the Truth is the Whole and . . . each of its moments only acquires meaning in relation to its place in the overall dialectic”) (author's translation).

not by repudiating the latter, but rather by recasting each perspective in terms of its more comprehensive outlook, and then incorporating them into an integrated and cohesive whole. Accordingly, inasmuch as comprehensive pluralism embraces this dialectical approach, it incorporates Derridian, Rawlsian, and Habermasian insights, among others—but not standing alone and not on their own terms. As will be more fully discussed below, each of these insights figures as one facet of a multifaceted theoretical construct.

In Hegel's view, the dialectical process of incorporating parts into a whole that transcends them implies both a cancellation and a preservation of the parts involved. Hegel refers to this process as "*Aufhebung*." In his own words:

What transcends (*Aufheben*) itself does not thereby become [n]othing It . . . retains the determinateness whence it started. To transcend (*Aufheben*) has this double meaning, that it signifies to keep or to preserve and also to make to cease, to finish Thus, what is transcended is also preserved; it has only lost its immediacy and is not on that account annihilated.⁸

In the context of Hegel's system, the unfolding of the dialectic results in a progression not only from part to whole, but also from less differentiated wholes to ever more differentiated wholes, culminating in a fully differentiated whole. This process is made possible because the whole that results from the resolution of the conflict among its parts becomes itself a part in the new conflict which erupts upon reaching the next higher stage of the dialectic. This process is then repeated until the culmination of the dialectic at the end of history, when the fully differentiated whole is to become completely intelligible.

Comprehensive pluralism, however, makes no assumptions concerning historical progress or the possibility of reaching higher stages of ever more encompassing integration. In spite of this agnosticism, comprehensive pluralism remains firmly within the Hegelian camp as it strives to cope with the conflicts it encounters through deployment of a dialectical approach moving from part to whole. Specifically, confronted with pluralism in fact and competing conceptions of the good that are, at least in part, mutually incompatible, comprehensive pluralism strives for reconciliation beyond the current standoff. And given constraints imposed by its agnosticism, comprehensive pluralism must pursue reconciliation counterfactually, through postulation of an imagined resolution of existing conflicts into a larger whole. Such imagined

⁸ G.W.F. HEGEL, 2 SCIENCE OF LOGIC 119-20 (W. Johnston & L. Struthers trans., 1966).

resolution, moreover, needs to conform to the strict requirements of dialectical logic (which is not a formal logic, but rather one built on negation and confrontation as a means of progressing from the part to the whole⁹), and thus cannot be merely arbitrary or fanciful. Finally, even if the conflicts targeted by comprehensive pluralism proved impossible to resolve, their imagined resolution consistent with dialectical logic would still remain important, as it would provide a critical (counterfactual) perspective from which to gauge the failures of the status quo.

There is another crucial point of convergence between comprehensive pluralism and Hegel's philosophy: they both agree on the centrality of reciprocal recognition between self and other in the context of all normatively oriented relationships. To be sure, reciprocal recognition is also key for certain liberal theorists such as Habermas, Rawls, and Michelman,¹⁰ and undoubtedly has certain Hegelian roots for them. But, at least for Habermas and Rawls, the normative implications associated with the need for genuine reciprocal recognition turn out to be much more Kantian than Hegelian in nature.¹¹ And as will be more fully discussed below, one of the key differences between comprehensive pluralism and the paths followed by Habermas and Rawls stems from the distinctly Hegelian approach that comprehensive pluralism adopts in its endeavor to cope with the need for reciprocal recognition in settings where pluralism in fact prevails.

For Hegel, all legal and other normative relationships are premised on previous acceptance of reciprocal recognition.¹² The same is also true for Habermas and Rawls, but the latter two part company with Hegel somewhere along the process leading to the realization of reciprocal recognition. Because of this, the nature and implications of reciprocal recognition differ in key respects between Hegel, on one hand, and Habermas and Rawls, on the other. For comprehensive pluralism, in turn, reciprocal recognition is much more like it is for Hegel than for the latter two.

⁹ For a more extended summary of the principal features of dialectical logic, see Michel Rosenfeld, *Hegel and the Dialectics of Contract*, 10 *CARDOZO L. REV.* 1199, 1207-09 (1989).

¹⁰ Michelman, *supra* note 3, at 1959.

¹¹ See MICHEL ROSENFELD, *JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS* ch. 5 (1998), for a more extended account of the Kantian underpinnings of Habermas's working through the requirements of reciprocal recognition in his discourse on the theoretical approach to law and morality.

¹² G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* para. 51A (T. Knox trans., 1952) (1821) (noting that property rights entail recognition by others); *id.* para. 71R ("Contract presupposes that the parties entering it recognize each other as persons and property owners.").

For Hegel, reciprocal recognition is the result of a struggle which he details in the *Phenomenology*, most notably through the celebrated dialectic between lord and bondsman.¹³ For present purposes, what is most important about this struggle is that the antagonists are transformed through a series of dialectical reverses. Thus, the lord seeks recognition without having to recognize the bondsman as another self, and therefore endeavors to become the master by enslaving the bondsman. But by forcing the bondsman to work for him, the lord becomes dependent on the labor of the bondsman, and accordingly the relationship becomes transformed. And as a consequence of this dialectical reversal, in the words of Hyppolite, the slave becomes the master of the master while the master becomes the slave of the slave.¹⁴ Furthermore, this reversal makes it plain that the desired recognition which led the lord to subordinate the bondsman cannot be attained so long as the antagonists remain unequal. To resolve the struggle for recognition, another dialectical reversal must take place, in order to put the antagonists in a position to grant each other mutual recognition as equals.

Just as reciprocal recognition emerges as the culmination of a dialectic process for Hegel, so, too, it does for comprehensive pluralism. Indeed, settings in which pluralism in fact prevails are characterized by a struggle among competing, and at least to some degree incompatible, conceptions of the good. So long as each actor remains enclosed within his or her conception of the good, one can only envisage keeping the competition among antagonistic conceptions of the good under control through subordination. To overcome this predicament and advance toward reciprocal recognition, it is necessary to embark on a dialectical course capable of defusing antagonisms among rival conceptions of the good by recombining them as parts of a yet to be fully articulated, more inclusive whole. Ideally, in this new whole the underlying conceptions of the good will not fade, but rather become better integrated within a more encompassing perspective.

In sum, for both Hegel and comprehensive pluralism, reciprocal recognition is the result of a dialectical process. Moreover, to adequately grasp the full import of such reciprocal recognition, it is as crucial to take proper account of the various phases of the dialectic as it is to appreciate the product emanating from that process. For liberal theory, such as that of Habermas or Rawls, on the other hand, reciprocal recognition is largely axiomatic, given the presupposition that all persons are inherently

¹³ HEGEL, *supra* note 7, paras. 178-96.

¹⁴ HYPOLITE, *supra* note 7, at 166.

equal. As I hope will become clear below, keeping in mind the difference between reciprocal recognition as *process* as opposed to as *product* is important for purposes of assessing the implications of comprehensive pluralism.

II. THE MODERN VERSUS THE POSTMODERN

Both Arato and Michelman question the distinction I draw between the modern and the postmodern.¹⁵ Moreover, they link their criticism of that distinction with criticism of my distinction between homogeneous and heterogeneous societies,¹⁶ and of the use I make of deconstruction.¹⁷ Obviously, all three subjects are related, as the deconstructive approach—and what I take to be the ontological and ethical dimensions of deconstruction¹⁸—plays an important role in carving out the postmodern from the modern as well as a constitutive and semantic role in shaping the divide between homogeneous and heterogeneous societies. With this in mind, I will focus in this section on the distinction between the modern and the postmodern and on the role of deconstruction. I will then deal with the objections to my views concerning the distinction between homogeneous and heterogeneous societies in the next section.

As Michelman emphasizes, the distinction I draw between modern and postmodern societies is an “ideal-typical” one.¹⁹ A modern society is thus one in which social cohesion—albeit a tenuous one—is perceived as possible through the maintenance of procedural safeguards, notwithstanding widely diverging conceptions of the good. A postmodern society, on the other hand, is one in which no apparent common ground—procedural or substantive—can emerge above the clash between conceptions of the good, and in which any social order is bound to be considered by significant segments of the population as arbitrary, coercive, and unjust. Consistent with this, whether a society is modern or postmodern is above all a matter of perception within the relevant society—that is, a matter of self-consciousness. In other words, the divide between modern and postmodern must be gauged from the internal standpoint of *participants* rather than from the external standpoint of *observers*.

In view of the reviewers’ critiques, two further points relating to the distinction between the modern and the postmodern must

¹⁵ Arato, *supra* note 5, at 1931; Michelman, *supra* note 3, at 1947-49.

¹⁶ Michelman, *supra* note 3, at 1947-49.

¹⁷ Arato, *supra* note 5, at 1932-33.

¹⁸ ROSENFELD, *supra* note 11, at 18-20.

¹⁹ Michelman, *supra* note 3, at 1949.

be briefly addressed. First, the conclusion that a particular society was modern at some point in its history need not be questioned solely because subsequently observers can give a cogent account of it in postmodern terms. For example, if participants within a society perceived certain procedural safeguards within their society as neutral among prevailing conceptions of the good, that society would properly be characterized as modern, even if outside observers could persuasively demonstrate that what was believed by participants to be neutral was in fact biased in favor of certain prevailing conceptions of the good as against others.

Second, the fact that a modern society requires rallying around certain procedural safeguards, perceived as transcending the clash among competing conceptions of the good, does not necessarily imply that there must be a consensus over *which* safeguards should be prevalent. Moreover, the fact in question does not require limiting the relevant procedural safeguards to ones that are purely procedural—or, in other words, entirely devoid of any substantive content. For example, a society would not cease being modern simply because there was a disagreement over whether fairness and greater social cohesion would best be secured through increased liberty or through greater equality. Similarly, a society's modernity would not be altered depending on whether the procedural safeguards of its basic institutions depended on formal liberty and equality or on a more substantively grounded conception of the two.²⁰

²⁰ Admittedly, the use of "procedural" in the present context is rather broad, and at times can even be misleading. It is certainly not limited to a "pure" or "mere" procedure, such as the flipping of a coin to adjudicate a dispute. Beyond that, the distinction between "procedural" or "process based" and "substantive" is a highly contested one in both constitutional theory, *compare, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that the fundamental rights protected by the Bill of Rights of the United States Constitution are essentially process based), with Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980) (arguing that the Bill of Rights guarantees substantive rights above all), and in political philosophy. See Michel Rosenfeld, *A Pluralist Critique of Contractarian Proceduralism*, 11 *RATIO JURIS* 291 (1998). Thus, for example, Rawls's "justice as fairness," which he characterizes as procedural, see JOHN RAWLS, *A THEORY OF JUSTICE* 120 (1971), could just as plausibly be considered as being more substantive than procedural. See Rosenfeld, *supra*.

Strictly speaking, the key distinction is not between "substantive" and "procedural," but between "neutral" as between competing conceptions of the good and "biased" as between these competing conceptions. Accordingly, if justice depends on contract or democracy it ought to be viewed mainly as procedural, whereas if it depends on enforcement of natural rights it should be considered primarily substantive. However, if contract, democracy, and natural rights were equally neutral as between competing conceptions of the good, then they would all loom as equally suitable for purposes of modern justice. In short, within the perspective of modern societies, if a procedural standpoint is just it must be deemed neutral, and if a neutral standpoint is just, then it must either be procedural or the functional equivalent of a procedural standard.

These last two points can be usefully illustrated by means of a brief reference to the *Lochner* case, which recognized a constitutional “substantive due process” right to freedom of contract.²¹ To better appreciate this illustration, moreover, let us set aside questions peculiar to American constitutional jurisprudence—such as those dealing with Framers’ intent issues—and focus instead on the more general question concerning the need for constitutional protection of freedom of contract as a requirement of justice for a modern society. *Lochner* was a 5-4 decision striking down a New York law prohibiting the employment of bakery employees in excess of ten hours per day or sixty hours per week on the ground that it violated the fundamental right to freedom of contract embedded in the federal Constitution. From a modern perspective, this decision can be regarded as just, provided freedom of contract is deemed neutral as between competing conceptions of the good, and fundamental to maintaining a requisite degree of social cohesion in the face of widely diverse aims and interests.

For the dissenting Justices, in contrast, freedom of contract was not essential to basic constitutional justice, but rather the cornerstone of a particular economic vision which a large part of the population did not share. In Justice Holmes’s famous words:

The 14th Amendment does not enact Mr. Herbert Spencer’s social statistics . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire.²²

Notwithstanding this conclusion, Holmes did not reject the proposition that liberty as enshrined in the Fourteenth Amendment can rise above partisan politics and become integrated as a pillar of constitutional justice. As he puts it:

I think that the word liberty in the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.²³

Significantly, Holmes did not reject the possibility of fundamental principles that are neutral as between the diverse conceptions of the good embraced by Americans. He merely disagreed with the Court’s majority concerning which principles ought to count as truly neutral in the requisite sense. Therefore,

²¹ *Lochner v. New York*, 198 U.S. 45 (1905).

²² *Id.* at 75.

²³ *Id.* at 76.

both the majority Justices and their dissenting brethren in *Lochner* held constitutional views entirely consistent with a modern outlook.

From a postmodern perspective, however, all positions articulated in *Lochner* fail the neutrality test and are ultimately reducible to partisan expressions inextricably linked to highly contestable as well as actually contested conceptions of the good. Indeed, even if laissez faire, or any other economic regime, could be proven to lead to maximization of wealth, it would still fail the above-described test of neutrality. This is because wealth maximization is not a priority for all conceptions of the good, and may even plausibly be considered a serious threat to certain fundamental values and objectives linked to certain conceptions of the good. On the other hand, from a postmodern perspective, neither rationality, nor fairness, nor any single set of traditions is ever likely to rise above divisions over the good in a country as diverse as the United States. Accordingly, from a postmodern perspective, Justice Holmes's position in *Lochner*, in the end, is as partisan and as tied to particular conceptions of the good as that of the majority Justices.

Turning now to the relationship between deconstruction and comprehensive pluralism, it is easy to understand Arato's perception of an inconsistency between Part I and Part III of *Just Interpretations*.²⁴ Indeed, deconstruction—at least understood exclusively as an interpretive method—is in the business of breaking up what purport to be coherent units of meaning, by underscoring the contradictions, inconsistencies, and ambiguities which they embody, whereas comprehensive pluralism's aim of articulating a cogent normative vision—albeit from a counterfactual standpoint—is a reconstructive project. Within the dialectical framework that circumscribes comprehensive pluralism, however, deconstruction is not taken on its own terms, but rather as part of a multifaceted process directed to accounting for the differences that divide self from other, as well as identifying common grounds where self and other could conceivably meet halfway without having to give up relevant differences.²⁵ In other words, from a dialectical standpoint, deconstruction may well provide an optimal means by which to shed light on all the relevant parts—and even perhaps on the need to search for an adequate whole—but it cannot alone lead us to any vision of what

²⁴ Arato, *supra* note 5, at 1930.

²⁵ For present purposes, I gloss over differences in various plausible conceptions of the nature and scope of deconstruction. For a discussion of this issue, see ROSENFELD, *supra* note 11, at ch. 1.

may, in any relevant sense, be projected or imagined as an adequate whole. As I emphasize in the book, "one could characterize [Derrida's] deconstructive enterprise in Hegelian terms, as an ontological privileging of difference that makes it irreducibly transcendent, thus preventing its sublation (*Aufhebung*) within a totality encompassing both self and other."²⁶ In short, what the postmodern predicament entails is both that every meaningful assertion can be deconstructed, and that the resulting, seemingly endless proliferation of differences must be countered by an ever more urgent search for new, non-oppressive ways of forging normative links between self and other.

Unless both the deconstructive and the reconstructive sides of the postmodern condition are properly accounted for, one risks either falling into mere relativism, if not nihilism, or collapsing the postmodern into the modern. Comprehensive pluralism seeks to avoid both these pitfalls, and accordingly its quest for justice cannot be equated with that of liberalism—and in particular with the liberalism of Habermas or Rawls—for liberalism cannot shed its strong links to the modern. This key difference between comprehensive pluralism and liberalism hopefully will become more apparent in the following sections. For now, suffice it to note that, to the extent that Michelman equates the project of comprehensive pluralism with that of liberalism, he either minimizes the differences between the modern and the postmodern or he reads me as not consistently adhering to the postmodern.

Acceptance of the postmodern has an important consequence—namely, that norms can only be meaningful in relation to the conception(s) of the good from which they issue. Accordingly, no norm transcends particular conceptions of the good, and anyone who becomes aware of this must concede that the norms that he or she embraces cannot be legitimately cast as neutral or universally valid. This does not mean that one should weaken one's commitment to one's conception of the good or to the norms derived from it; but it does mean that one has no right to be confident that one's conception of the good and the norms associated with it would be good or right for others committed to different conceptions of the good. Furthermore, inasmuch as no such confidence is warranted, everyone should become more open to coexistence among a plurality of conceptions of the good.

Acceptance of the proposition that what is good for me is not necessarily good for others is the point of departure of the search

²⁶ *Id.* at 20 n.7.

for justice within the framework of comprehensive pluralism. Leaving aside, for the moment, whether justice falls within the domain of the good or within that of the right,²⁷ the challenge confronting justice consists in finding a fair halfway point between self and other. Justice cannot meet that challenge, however, for that would require full reconciliation of the universal and the particular and full integration in each case of the rule and the exception. Under those circumstances, the best that can be hoped for is to inch closer to justice without ever achieving it, through deployment of the dialectic between deconstruction and reconstruction.

Viewed as two distinct moments within the same dialectic, deconstruction focuses on differences between self and other, whereas reconstruction concentrates on the identities between the two. From the standpoint of justice, moreover, the aim is to fully integrate all identities and differences within a larger whole arising from resolution of the struggle between self and other. Such full integration remains impossible, but certain levels of integration remain plausible—at least from a critical counterfactual perspective. And among plausible levels of imperfect integration, some will undoubtedly be more satisfactory than others. Thus, for example, regardless of the particular identities and differences most at stake in a given struggle between self and other, an attempted resolution of that struggle which takes into account that the other has his or her own perspective would, in all likelihood, be less just than one which seeks to accommodate the other in terms of the perspective which the other has actually embraced.²⁸ In short, although all relevant identities and differences cannot be fully or definitely reconciled, and although justice can never be realized, the search for justice remains imperative and some plausible resolutions of actual conflicts less unjust than others.

Within the ambit of comprehensive pluralism, the above conception of justice assumes that self and other, each from his or her own perspective, prefer some accommodation with one another to complete lack of contact. Moreover, this conception of justice also assumes that, in spite of unbridgeable differences, self and other share enough in common that dialogue between them and search for mutual accommodation (even if ultimately unsuccessful) are neither altogether impossible nor utterly futile.

²⁷ The issue of priority as between the right and the good will be addressed *infra* in Part IV.

²⁸ The former kind of justice corresponds to what I call "justice as mere reciprocity," while the latter kind corresponds to what I call "justice as reversible reciprocity." ROSENFELD, *supra* note 11, at 249-50.

That said, however, comprehensive pluralism does not rely on the existence of any common perspective linking self to other, and it emphatically rejects the possibility of "the view from nowhere."²⁹ While self and other may both seek fair means of mutual accommodation, each of them can only do so from the standpoint of his or her own perspective.³⁰ Accordingly, the impossibility of justice from the standpoint of comprehensive pluralism stems from the impossibility of at once preserving and transcending the respective perspectives of self and other.

III. THE CONTRAST BETWEEN HOMOGENEOUS AND HETEROGENEOUS SOCIETIES

Consistent with his criticism of the sharp distinction I draw between the modern and the postmodern, Michelman also questions the importance I accord to the difference between homogeneous and heterogeneous societies.³¹ Specifically, Michelman challenges my assertion that the crisis in legal interpretation experienced in the United States is only typical of a heterogeneous society, and argues that the crisis in question also can be cogently understood in all its relevant respects as that of homogeneous society.³² In this connection, the crucial issue for Michelman is whether principles can maintain their identities under differing sets of applications. If they can, then, in Michelman's view, while Americans may disagree vehemently on particular applications of certain constitutional rights, such as those to the free exercise of religion or to equal protection, it would nonetheless be fair to conclude that they widely agree on the broad principles on which these rights are founded.³³

To deal with these issues, it is imperative to keep in mind that the distinction between homogeneous and heterogeneous societies, which is based on the distinction between self and other, is relational, fluid, and contextual, rather than fixed or pertaining to essence. Thus, the relationship between self and other is in some contexts one between individuals, and in others one among

²⁹ THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986).

³⁰ This last statement is not inconsistent with the commitment to justice as reversible reciprocity, *see supra* note 28, which requires that the self seek to understand the claims of the other from the perspective of the other. While the latter requirement obligates the self to take into account what it would be like to be in the skin of the other, this can only be done through imagination and projection, which necessarily remain connected to the self's perspective. For example, I can imagine and empathize with another's pain—but only through an act of imagination based on recollection of my own pain, as I cannot literally feel any other person's pain.

³¹ Michelman, *supra* note 3, at 1947.

³² *Id.* at 1950-51.

³³ *Id.* at 1950.

groups. Moreover, a single individual may belong to different selves confronting different others. For example, an American woman may view herself above all as an American in the context of a war between the United States and another country, and primarily as a woman at an international conference on the rights of women. Furthermore, what distinguishes a homogeneous society from a heterogeneous one is that in the former intersubjective dealings are intracommunal, whereas in the latter they are to a very significant degree intercommunal. In other words, in a homogeneous society there is a strong sense *at the group level* that the entire society constitutes a single self—albeit that at the individual level most relationships remain best characterized as being between self and other. Conversely, in a heterogeneous society collective dealings which are society-wide—and most likely those that involve different groups without being society-wide—are definitely structured as confrontations between self and other.³⁴

Given these criteria, it seems fair to conclude that most, if not all, contemporary constitutional democracies—including the United States—are sufficiently heterogeneous that society-wide dealings within any of them cannot be cogently regarded as being in all relevant respects intracommunal. Furthermore, inasmuch as modern societies are heterogeneous,³⁵ the difference between modern and postmodern heterogeneous societies can be summarized as follows: In both modern and postmodern heterogeneous societies, society-wide dealings are intercommunal, but in modern settings the relevant intercommunal norms are deemed fair and neutral among competing, purely intracommunal conceptions of the good.³⁶ In contrast, postmodern societies would deny the very possibility of finding fair and neutral intercommunal norms to mediate among those who adhere to different conceptions of the good.

Determining whether particular dealings within a heterogeneous society are best characterized as intracommunal

³⁴ Given the contextual nature of the relationship between self and other, societies can span the entire spectrum from completely homogeneous to extremely heterogeneous, with most being partly homogeneous and partly heterogeneous. For our purposes, it suffices to characterize a society as heterogeneous if it divides into self and other over important issues likely to have a significant impact on the realization or maintenance of social cohesion.

³⁵ While I believe that all modern societies are pluralistic-in-fact, and hence heterogeneous, the argument I pursue here depends only on acceptance that some modern societies are heterogeneous.

³⁶ This does not necessarily mean that all relevant actors would agree on which particular norms would guarantee fairness and neutrality, but it does imply that they would all agree that it is possible to find *some* such norms.

rather than intercommunal is not always easy. This is because the nature of the relations involved is not fixed, but rather depends on contextual factors which can only be properly assessed in terms of the totality of relevant circumstances in play. Moreover, the appearances surrounding such relations can often be deceiving. In particular, generalized professions of commitment to the same abstract principles may, in certain cases, conceal irreconcilable differences in perspective which would ultimately undermine any genuine attempt to cast the conflicts involved as intracommunal.

To illustrate, let us focus briefly on Avineri's claim that Israel, viewed as a "Jewish" state, is much more heterogeneous than American society.³⁷ On the surface, this claim may well seem counterintuitive, for Israeli Jews all share the same religion and, to a large extent, a common ethnic and cultural background. In contrast, the United States is multiracial, multi-ethnic, and multireligious society with a long history of slavery and racial discrimination. Upon further reflection, however, while it may not be altogether clear which of the two societies involved may be more heterogeneous, it should be apparent that, to a very large extent, relationships between religious Jews and secular Jews in Israel should be regarded as intercommunal rather than intracommunal. Indeed, whereas secular Jews in Israel, by and large, are committed to Western values and democratic ideals, religious Jews believe that the Jewish state should be governed by rabbinic law, and that such law should be binding even on nonbelieving Jews. Accordingly, the respective conceptions of the good of religious and secular Jews in Israel are so far apart that relations between the two groups are often confrontational and divisive on several fundamental issues, such as the basic structure of the Israeli polity.³⁸

Intercommunal relations can result from encounters among alien cultures, such as liberal Western culture and illiberal non-Western culture, or from a profound split within a particular culture, such as that between secular and religious Jews in Israel. It may not always be easy to pinpoint when splits within a culture are serious enough to transform relations within that culture from intracommunal to intercommunal ones. More specifically, in some

³⁷ Avineri, *supra* note 2, at 1941. I take Avineri to mean that even if we focus exclusively on the Jewish community in Israel, that community is more heterogeneous than American society taken as a whole, with the possible exception of Native Americans.

³⁸ Although many dealings between religious and secular Jews in Israel are clearly intercommunal in nature, this does not mean that the two groups are not to some degree linked by intracommunal bonds. For example, the vast majority within the two groups would undoubtedly share significant bonds of solidarity on such issues as the Holocaust or anti-Semitism.

cases, consensus—or apparent consensus—on broad abstract principles, combined with sharp disagreement on application of such principles, may fall within the ambit of intracommunal relationships; in others, such combinations definitely play out in the context of intercommunal relationships. For example, both partisans and foes of abortion may concur that respect for human dignity is a paramount value. However, to the extent that abortion foes consider abortion to be murder and defenders of the right to abortion consider it essential to a women's dignity, dealings between the two camps would clearly have to be characterized as intercommunal. Moreover, while Michelman's example relating to adherence to the principle of equality may not be as clear, it is certainly plausible that the dispute between supporters of the majority opinion and those of the dissent in *Plessy v. Ferguson*³⁹ is better characterized as an intercommunal rather than an intracommunal disagreement. Similarly, some of the vehemence among professed supporters of equality over affirmative action suggest intercommunal rather than intracommunal feuds.⁴⁰ In such cases, ideals such as human dignity or equality mean such different things to different people that they share little in common other than their names.

IV. COMPREHENSIVE PLURALISM AND THE PRIORITY OF THE GOOD OVER THE RIGHT

Michelman's claim that comprehensive pluralism advances a position that, in the end, is no different from that elaborated by Rawls in *Political Liberalism* depends heavily on the distinction he draws between the "right" and the "good." As Michelman puts it, the right "asks what ought to be done" whereas the good "asks what is of value to a person, group or society."⁴¹ Furthermore, Michelman asserts that even if there were unanimous agreement on the good, questions concerning the right would still be inevitable in relation to issues of aggregation or distribution.⁴²

One may quibble with Michelman's last assertion, for it seems

³⁹ 163 U.S. 537 (1896). In *Plessy*, the majority held that "separate but equal" was consistent with equal protection and intimated that racial segregation was in the public good. The dissent deemed state-required segregation unconstitutional and pernicious, given its tendency to perpetuate the notion that African Americans are inherently inferior to whites.

⁴⁰ See Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989) (discussing the irreconcilable visions of race relations and affirmative action espoused, respectively, by Justice O'Connor and Justice Marshall).

⁴¹ Michelman, *supra* note 3, at 1962.

⁴² *Id.*

entirely plausible to have a sufficiently elaborated theory of the good which could quite naturally subsume issues of aggregation and distribution. To take Michelman's own example of a society in which there is universal agreement that glory is the ultimate good for all humankind, it does not necessarily follow, as he claims, that determination of how much glory for whom would have to be a question of the right. Indeed, the theory of the good based on glory could be elaborated to the point that it would prescribe how much glory for whom would best approximate the ultimate good. Moreover, under those circumstances, any person's claim to glory would not be a claim of right, but rather one predicated on the conviction that satisfaction of such claim would contribute to realization of the good.

In the context of a homogeneous society operating pursuant to a single, unanimously shared conception of good, there would arguably be no need for the right.⁴³ Be that as it may, in the context of heterogeneous modern societies, there is an inescapable need for both the good and the right. And this squarely raises the question of priority between the two. Deontological theories, such as Kant's, clearly prescribe the priority of the right over the good.⁴⁴ Conversely, teleological theories, such as utilitarianism, assume priority of the good over the right.⁴⁵

The key to the split between the right and the good in modern societies is found in the pluralization or fragmentation of the good. This is most obvious in the case of pluralist societies with a multiplicity of competing conceptions of the good. In such societies, intercommunal dealings among the various different groups raise issues of distribution which fall within the domain of the right—at least in the sense that, to be fairly resolved, the distribution questions at issue must be considered above and beyond the competing conceptions of the good that divide the polity. Furthermore, the split between the right and the good would also remain important even in a society which shared a single conception of the good at the collective level, but which allowed each individual, to a significant extent, to pursue his or her own good consistent with that conception.⁴⁶

⁴³ Cf. Arthur J. Jacobson, *Hegel's Legal Plenum*, in *HEGEL AND LEGAL THEORY* 111-19 (Drucilla Cornell et al. eds., 1991) (distinguishing jurisprudences based on duty from those predicated on rights, with the former leaving no room for rights).

⁴⁴ See Robert G. Olson, *Deontological Ethics*, in 2 *THE ENCYCLOPEDIA OF PHILOSOPHY* 343 (Paul Edwards ed., 1967).

⁴⁵ See Robert G. Olson, *Teleological Ethics*, in 8 *THE ENCYCLOPEDIA OF PHILOSOPHY* 88 (Paul Edwards ed., 1967).

⁴⁶ Such a society would be pluralistic-in-fact at the individual level, but not at the collective level, and may thus be considered borderline between homogeneous and

Underlying the Kantian deontological paradigm is an atomistic society in which each person concentrates on the pursuit of his or her own individual good. So long as such pursuits could steer clear of one another, they would remain mutually compatible. But that is not possible within the Kantian vision, as the pursuit of individual good by one necessitates recourse to others as means toward one's targeted good.⁴⁷ Moreover, to the extent that persons are enlisted for purposes of furthering the good of others, such persons' pursuit of their own good becomes subordinated to that of others. To counter such subordination of one equal to another, Kantian morality imposes the categorical duty to treat others exclusively as ends, thus superimposing the realm of the right above that of the good.

By categorically prohibiting the treatment of others except as ends in themselves, Kantian morality actually does more than impose the priority of the right over the good. In effect, it promotes the right to the exclusion of the good, thus casting the right in a way that, strictly speaking, annihilates the good.⁴⁸ Accordingly, Kantian morality, strictly speaking, is impossible, and must therefore be relegated to the realm of the ideal. The ultimate lesson of Kantian deontological theory, therefore, seems to be that, in the context of fragmentation of the good, the right must be given absolute priority, even if that makes it impossible.

Unlike Kant, Rawls does not postulate an absolute priority of the right over the good, but rather a relative one. For Rawls, the priority of the right over the good is instantiated in the lexical ordering of the two principles of justice—namely, the equal liberty principle and the difference principle—encompassed in justice as fairness.⁴⁹ Moreover, the Rawlsian priority of the right is doubly relative: it is relative in the sense that the first principle of justice can be suspended whenever a society falls beyond a minimum acceptable level of welfare,⁵⁰ and it is also relative, or more

heterogeneous. Moreover, an example of such a society would be a modern society made up exclusively of *homo economicus*. Any modern or postmodern society with religious, cultural, ethnic, or language differences, however, would have to be characterized as embodying a plurality of conceptions of the good.

⁴⁷ For example, all employment or contractual relations presumably involve regarding one's employee or fellow contractor as a means to the good desired through the employment or contract relation.

⁴⁸ In this connection, it is significant that Kant relies on a utilitarian criterion, rather than on the categorical imperative, when evaluating the realms of law and politics. See IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT'S POLITICAL WRITINGS 118-19 (Hans Reiss ed., 1970).

⁴⁹ RAWLS, *supra* note 20, at 30, 43.

⁵⁰ *Id.* at 45-48. Achieving the minimum welfare necessary to be able to enjoy rights is certainly a precondition to the enjoyment of such rights, but remains in and of itself a good, albeit one arguably commonly shared by all.

precisely confined, in the sense that it is limited to the domain of equal liberty, allowing the treatment of others as means rather than exclusively as ends beyond that domain.⁵¹ In sum, for Rawls, the priority of the right over the good is relative and confined, but within these constraints it allows for an orderly integration of both the right and the good.

In the context of utilitarianism as a paradigmatic teleological theory, it is clear that the good has priority over the right. Moreover, while it is conceivable that utilitarian morality could completely do away with the right—by submitting all normative questions, including those pertaining to distribution, directly to the test of the greatest good for the greatest number—it seems quite reasonable to assume that such morality might ultimately be better served by reserving some room for the right. To the extent that the individual may be best situated to determine what is good for him or her, and that the individual's good figures in the determination of the greatest good for the greatest number, it would make sense to carve out a domain of rights affording each individual some space to pursue his or her own good. Ultimately, however, any rights would remain subordinated to the good, and could be limited, modified, or even eliminated upon proof that this would maximize utilities.

In the last analysis, in any setting in which there is a multiplicity of conceptions of the good or a fragmentation of the good, there seems to be a need for coexistence between the right and the good. Moreover, inasmuch as the right can ascend above the conflict among conceptions of the good or the competition among individuals who seek to reach their own perceived good—or, in other words, inasmuch as the right can secure neutrality in relation to the conflict or competition in question—the right ought to receive priority over the good. Conversely, so long as the problems resulting from pluralization and fragmentation of the good can best be dealt with terms of a more encompassing conception of the good, the good ought to receive priority over the right.

Comprehensive pluralism emerges in the context of clashes among competing conceptions of good which do not lead to any fair or neutral resolution under any plausible conception of the right as having priority over the good. Indeed, although it shares with Habermas and Rawls the goal of fostering reciprocity among self and other, comprehensive pluralism parts company with them precisely because the reciprocity they promote from the

⁵¹ This is true so long as compliance with the difference principle and with fair equality of opportunity is maintained. *See id.* at 179-80.

standpoint of the priority of the right inherently favors certain conceptions of the good over others.⁵² Thus, the key question confronting comprehensive pluralism is: How can the normative impasse, stemming from the inability to overcome the clash among competing conceptions of the good by appealing to intercommunal norms predicated on the priority of the right, be adequately resolved?

The answer provided by comprehensive pluralism is that the only way out of the normative impasse in question is through counterfactual imagination of a community of communities, which would incorporate the various conceptions of the good associated with the different existing communities dialectically into a more broadly encompassing conception of the good. Moreover, consistent with its Hegelian underpinnings, comprehensive pluralism regards this community of communities as a whole seeking to incorporate the conceptions of the good emanating from the various existing communities that are its parts. To be sure, this projected community of communities remains ultimately counterfactual and retains the quality of a work in progress. Also, it incorporates existing conceptions of good not on their own terms, but as reconceived from its more encompassing perspective.

Although mediation between community of communities norms (second-order norms) and individual community norms (first-order norms) requires reliance on the right, comprehensive pluralism clearly depends on the priority of the good over the right. Actually, structurally speaking, comprehensive pluralism shares much in common with the version of utilitarianism sketched above. In such a utilitarian vision, the individual good figures in the collective good and requires the right for its protection. Similarly, in the context of comprehensive pluralism, the good targeted through vindication of second-order norms depends on protection of first-order norms, which requires a certain degree of reliance on the right. Furthermore, in the utilitarian ethos, questions about proper limitations on the pursuits motivated by the good of the individual or about proper constraints on rights must be resolved in terms of the overall collective good—i.e., the greatest good for the greatest number. Likewise, in the normative universe carved out by comprehensive pluralism, limits on the vindication of first-order norms and proper delimitation of the domain of the right must be made in terms of the vision of the good projected by the totality of second-order norms. In sum, like utilitarianism, comprehensive pluralism is a teleological rather

⁵² See ROSENFELD, *supra* note 11, at ch. 5; Rosenfeld, *supra* note 20, at 302-03.

than a deontological theory. The crucial distinction between the two, however, is that they prescribe sharply different conceptions of the good. Whereas utilitarianism is concerned with maximizing utilities, comprehensive pluralism embraces a vision of the good predicated on the greatest possible accommodation of diverse conceptions of the good consistent with promotion of equal dignity and respect among self and other.

V. COMPREHENSIVE PLURALISM AND RAWLS'S *POLITICAL LIBERALISM*

The central point of Michelman's critique is that, in the last analysis, either: (1) there are no relevant differences between comprehensive pluralism and the theory of political justice elaborated by Rawls in *Political Liberalism*; or (2) comprehensive pluralism fails to sustain a coherent normative position and thus becomes reducible to a plea for strategic accommodation as the lesser of several possible evils. In other words, for Michelman, comprehensive pluralism is the equivalent of either an overlapping consensus or a mere *modus vivendi*.⁵³

Michelman is right in pointing out affinities between comprehensive pluralism and the theory advanced by Rawls in *Political Liberalism*. As a matter of fact, there are undoubtedly points of convergence between comprehensive pluralism and both overlapping consensus and *modus vivendi*. Comprehensive pluralism, however, is not reducible to either of these, and the relevant differences are in the end much more important than the relevant similarities.

By retreating in *Political Liberalism* from the position he advanced in *A Theory of Justice*—i.e., by abandoning the requirement of a consensus on comprehensive justice in favor of consensus confined to political justice—Rawls seems to have preserved the essentials of his deontological vision while making far greater room for accommodation of diverse conceptions of the good. Indeed, whereas comprehensive justice requires far-reaching subordination of conceptions of the good, an overlapping consensus concerning political justice appears to leave much more latitude for divergence among competing comprehensive views. Furthermore, at least when viewed broadly, there seems to be a remarkable analogy between Rawls's overlapping consensus and comprehensive pluralism. Within the realm of political justice marked by an overlapping consensus, the same set of norms is operative, while beyond that domain diverse norms may

⁵³ Michelman, *supra* note 3, at 1959.

legitimately coexist without threatening the justice or fairness of basic institutions. Likewise, comprehensive pluralism seems to divide into a core and a periphery, with commonly shared, second-order norms operative at the core, and diverse, first-order norms competing at the periphery.

Upon closer examination, however, the analogy between Rawlsian overlapping consensus and comprehensive pluralism breaks down. Both overlapping consensus and comprehensive pluralism depend on the fact of pluralism, but Rawls limits acceptable pluralism to what he calls "reasonable pluralism."⁵⁴ And "reasonable pluralism" confined to the realm of the political is tantamount to no pluralism at all. Indeed, consistent with Rawls's view, reasonable pluralism boils down to endorsement of the norms embodied in justice as fairness.⁵⁵ In other words, in the realm of the political, justice as fairness provides the only legitimate normative criterion and consequently the right retains priority over the good. Accordingly, the only real concession to pluralism Rawls makes in *Political Liberalism* is to accept diverse comprehensive views so long as they each prescribe justice as fairness in the political realm. For purposes of the overlapping consensus, it does not matter if some embrace justice as fairness as the operative normative criterion in the political realm for religious reasons, others do so for moral reasons, and still others

⁵⁴ RAWLS, *supra* note 1, at 144.

⁵⁵ *Id.* at 59. Michelman points out that, subsequent to *Political Liberalism*, Rawls has expanded his conception of political justice to embrace political conceptions other than justice as fairness. See Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in CAMBRIDGE COMPANION TO JOHN RAWLS (forthcoming); see also John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV 765, 773-75 (1997). As the manuscript for *Just Interpretations* was completed in 1996, I did not consider the last cited work by Rawls. Be that as it may, I do not believe that Rawls's recent expansion of his conception of political justice brings comprehensive pluralism any closer to his conception of overlapping consensus, except perhaps in a rather trivial way. In Rawls's expanded view of reasonable political conceptions, acceptable conceptions encompass all those that are predicated on the criterion of reciprocity. *Id.* at 774. Consistent with that, all views, including comprehensive pluralism, which endorse the principles of equal citizenship and equal right to participate in the political arena would qualify. But this would include such a broad array of widely differing views as to become virtually meaningless. On the other hand, taking a closer look at Rawls's expanded conception of political justice, it becomes apparent that it does not differ that much from his position in *Political Liberalism*. Indeed, in addition to reciprocity, Rawls's expanded view still requires "fair cooperation" and still insists on the priority of the right over the good. *Id.* at 774-76. Significantly, in referring to conceptions besides justice as fairness that would satisfy his expanded vision of political justice, Rawls cites Habermas's discourse theory. *Id.* at 774-75. In the end, the key distinctions between Rawls's views and comprehensive pluralism, which have to do with the contrast between a Hegelian and a Kantian approach, and between the relative places occupied respectively by the right and the good, do not appear to have changed measurably as a consequence of changes in Rawls's most recent works.

for philosophical reasons.⁵⁶ While Rawls specifies that justice as fairness provides a *moral* criterion applicable to relationships within the political realm,⁵⁷ he does not seem to care how that moral commitment ties in with the diverse comprehensive views with which it remains compatible.

While the image of an overlapping consensus connotes flexibility and diversity, in the end justice as fairness is fixed *ex ante* and imposes a nonnegotiable set of operative norms delimiting the right applicable to the realm of the political, regardless of the actual configuration of comprehensive views prevalent throughout the polity. Comprehensive pluralism, on the other hand—precisely because it is predicated on priority of the good, and because its conception of the good is in part informed by the intracommunal conceptions of the good prevalent in the polity—does not impose any fixed set of norms *ex ante*. To be sure, justice as fairness and comprehensive pluralism share a commitment to some of the same norms, such as toleration, freedom of conscience, and freedom of expression. But they arrive at these norms differently—justice as fairness through the right and comprehensive pluralism through the good. And this difference is far from trivial, for at least two reasons. First, the scope of the commonly shared norms is likely to differ depending on whether they are subsumed under justice as fairness or comprehensive pluralism. Second, unlike the theory of justice as fairness, under comprehensive pluralism the precise norms involved and their actual contours cannot be established *ex ante*. Indeed, they depend both on the particular relevant first-order norms involved and on the unfolding of the dialectical process oriented toward a plausible reconfiguration of the relationship between the implicated first-order norms and applicable second-order norms. In short, not only are there significant differences between the norms prescribed by comprehensive pluralism and those dictated by justice as fairness, but the configuration of actual prescriptions emanating from comprehensive pluralism is also likely to differ from one context to the next.

Even if comprehensive pluralism is not reducible to Rawlsian overlapping consensus, and even if it proceeds somewhat differently than does justice as fairness, one may still agree with Michelman that functionally or pragmatically there is little difference between the two. In other words, one may concede that comprehensive pluralism is a comprehensive view in Rawlsian terms, but insist that it is one that satisfies the criteria of

⁵⁶ RAWLS, *supra* note 1, at 59-60.

⁵⁷ *Id.* at 11.

contested matters and consequent subjection of the latter to judicial control is optimal. And he wonders whether comprehensive pluralism can provide sensible and workable boundaries between what should ultimately remain subject to judicial review and what should fall within the scope of majoritarian politics.⁶⁰ As an example, Avineri mentions the United States Supreme Court's constitutionalization of abortion rights,⁶¹ and the ensuing debate over whether polarization surrounding the abortion issue could have been averted by leaving the matter to majoritarian politics.⁶²

In line with the importance it accords to contextual and relational factors, comprehensive pluralism draws a distinction between the actual and the counterfactual. The counterfactual points to what would be ideal or optional, and thus offers a critical vantage point from which to assess prevailing conditions and plausible resolutions of current conflicts. The actual, on the other hand, stands in contrast to the counterfactual; focus on the actual is supposed to highlight contextual and relational particulars in terms of their specific history and the concrete conflicts in which they have become embedded. In the end, it is through confrontation between the actual and the counterfactual that issues such as that raised by Avineri can best be addressed from standpoint of comprehensive pluralism.

From a counterfactual standpoint, comprehensive pluralism apportions matters between constitutional norms and majoritarian politics according to a threefold partition.⁶³ First, matters coming directly under second-order norms—that is, matters pertaining to the normative core of the community of communities—should be subsumed under constitutional norms. Second, matters depending on the relative centrality of conflicting claims pursuant to the principle of justice as reversible reciprocity ought to be subjected to certain constitutional standards, such as the requirement of proportionality. And third, all remaining matters, which presumably raise no priority issues in relation to justice as reversible reciprocity, should be left to majoritarian politics.

The question of where to fit abortion within this tripartite scheme is particularly difficult, given the unique position of abortion within the normative configuration carved out by comprehensive pluralism.⁶⁴ However, subjects closely related to

⁶⁰ Avineri, *supra* note 2, at 1941-42.

⁶¹ See *Roe v. Wade*, 410 U.S. 113 (1973).

⁶² Avineri, *supra* note 2, at 1942.

⁶³ See ROSENFELD, *supra* note 11, at 249-50.

⁶⁴ See *id.* at 272-73.

the abortion issue, such as privacy rights, religious liberty rights, and the relationship between the state and religion, clearly do fall within the first of the three above listed categories. From a counterfactual standpoint, therefore, these latter subjects ought to be constitutionalized.

But it does not necessarily follow that they must be constitutionalized in every instance, regardless of actual contextual factors. For example, if a polity is so polarized over the relationship between religion and the state that constitutionalization would threaten social cohesion, it may be better to leave these matters to majoritarian politics. And if, in the give and take of ordinary every day politics, workable accommodations consistent with mutual dignity and respect could be worked out, then actual majoritarian politics would roughly correspond to counterfactual constitutionalization. Accordingly, the proper response to the question of whether or not to constitutionalize depends on the context in which the question is raised, and on the totality of circumstances involved.

In conclusion, the project of comprehensive pluralism is founded on one basic insight. The insight is this: In a contemporary pluralistic society there are many competing conceptions of the good, each good in itself, but none good enough to be embraced by all. Under these circumstances, it becomes imperative to imagine an overriding conception of the good which would encompass all others in the context of an elaboration of a community of communities. While working on breaking free from the impasse resulting from clashing visions of the good, it should become apparent that there is no escape from plurality, but the plurality of conceptions of the good can itself become a good—or, more precisely, the good that may bind together other goods. And once this becomes accepted, all that can be done is to embark on a dialectical quest to harmonize the plurality of goods.

