Habermas's Discourse Theory of Law and Democracy

Hugh Baxter
Boston University School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview
Part of the Law Commons, and the Legal Theory Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol50/iss1/6

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
Habermas's Discourse Theory of Law and Democracy

HUGH BAXTER†

Introduction ........................................................................ 206
I. Background: Habermas's Theories of Action and "Rationalization" ........................................................................ 208
   A. Communicative and Strategic Action ...................... 209
   B. Discourse and Communicative Rationality ........... 219
   C. The "Lifeworld" and Its Rationalization ............... 222
   D. Rationalization and the Development of "Systems" ................................................................. 234
II. Habermas's "Reconstruction" of Modern Law............ 238
   A. The Two Aspects of Legal Validity and Habermas's Method of Reconstruction .......... 238
   B. The System of Rights .............................................. 243
      1. The Grounds of Law's Legitimacy .................... 244
      2. The "Discourse Principle" and the Categories of Basic Rights ........................................... 250
   C. The Constitutional State ........................................ 261
      1. The Internal Link Between Law and Political Power ............................................................. 262
      2. Communicative and Administrative Power ...... 266
      3. The Typology of Discourse and Bargaining...... 272
      4. Binding Administrative Power to Communicative Power ...................................................... 281
III. Discourse Theory and the Theory and Practice of Adjudication ................................................................. 294
   A. Discourse Theory and Dworkin's "Constructive Interpretation" ............................................. 295

† Associate Professor, Boston University School of Law. Thanks to participants in faculty workshops at the Universities of Illinois and Texas; special thanks to David Lyons, Pnina Lahav, Richard McAdams, Sandy Levinson, Manuel Utset, Daniela Caruso, and (most of all) Marina Leslie. Copyright © 2002 Hugh Baxter. The author herein grants permission for this article to be photocopied for classroom purposes and distributed at or below cost.
INTRODUCTION

For more than the last thirty years, Jürgen Habermas has been among the preeminent social theorists and philosophers in the world. His influence in the American legal academy, however, has been relatively limited until recently. Law, while a background topic of the comprehensive social theory Habermas constructed through the 1970s and early 1980s, was not an independent topic of Habermas's analysis until his 1986 Tanner Lectures. Since then, Habermas has published a full-scale theory of law, entitled Faktizität und Geltung, recently translated into English as Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. With completion of this work, Habermas has moved toward the center of legal-theoretical debate.

Habermas's project has two parts. The first is the "discourse theory of law and democracy" proper, which Habermas describes as a "reconstruction" of the "normative self-understanding of... modern legal orders." The central theme of this part of the project is that legitimate law and radical democracy mutually presuppose one another.

3. At least three English-language symposia have been organized to consider Habermas's work on law. See Nancy Ehrenreich, Exploring Habermas on Law and Democracy, 76 DENV. U. L. REV. 927 (1999); Michel Rosenfeld, Habermas on Law and Democracy: Critical Exchanges, 17 CARDOZO L. REV. 767 (1996); Symposium, Habermas, Modernity, and Law, 20 PHIL. & SOC. CRITICISM 1 (1994). Further, while a full listing of the critical literature is unnecessary, it is worth noting that the list of leading American legal scholars who have reviewed or otherwise systematically discussed Between Facts and Norms includes Frank Michelman, Cass Sunstein, and Richard Posner.
4. BETWEEN FACTS AND NORMS, supra note 2, at 82 (emphasis omitted).
Habermas’s normatively ambitious discourse theory first develops an account of the “system of rights” that must be recognized, in one form or another, for a legal order to be legitimate, then turns to the “principles of the constitutional state” that would be required to secure those rights. Habermas then “test[s] and elaborate[s] the discourse concept of law and democracy” against, first, contemporary discussions in legal theory, and second, contemporary controversies in constitutional practice and theory.\(^5\)

The second part of Habermas’s project locates this discourse theory in a model of modern complex societies. Habermas has two purposes here. First, he wants to examine whether the discourse theory, developed through normative “reconstruction,” actually has a purchase on factually existing social conditions. Second, elaborating his theory of law and democracy through social-theoretical concepts allows him to deepen, and to make more concrete, his normative theory.\(^6\)

This article addresses only the first part of Habermas’s work on law and democracy—the normative “discourse theory” proper—leaving the social-theoretical elaboration to a companion article.\(^7\) I begin, in Part I below, by setting out the basic concepts of social action and social theory that Habermas incorporates from his work of the late 1970s and 1980s. I then examine, in Part II, Habermas’s “reconstruction” of modern law’s “normative self-understanding.” I discuss in Part II.A Habermas’s account of the basic problematic of modern law—the risk of dissensus that has increased with social modernization—and I analyze the tension between law’s “facticity” and law’s “validity” that organizes Habermas’s entire theory of law and democracy. With that as background, I critically examine in Part II.B Habermas’s analysis of the “system of rights.” There I

\(^5\) Id. at 7.

\(^6\) Michael Power nicely explains the two moments of Habermas’s thinking: the “reconstructive-transcendental,” exemplified by Habermas’s investigation into the conditions of legal and political legitimacy, and the “critical-reflective,” in which the “realizability” of what is discovered through reconstruction “is a relevant preoccupation.” Michael K. Power, *Habermas and the Counterfactual Imagination*, in *HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES* 207, 220-21 (Michael Rosenfeld & Andrew Arato eds., 1998) [hereinafter *HABERMAS ON LAW AND DEMOCRACY*].

suggest skepticism about Habermas’s largest claims for this system: that it reconciles longstanding tensions between “private” and “public autonomy” and between the idea of basic rights and the idea of popular sovereignty. I then criticize, in Part II.C, Habermas’s account of the constitutional state, particularly his reliance on what he calls “the discourse principle.” This principle is the basis for Habermas’s theory of law and democracy, but I argue that it cannot bear the weight that Habermas places upon it.

In Part III, I turn to Habermas’s “testing” of the discourse theory against recent developments in the theory and practice of adjudication. Part III.A addresses the general theory of adjudication that Habermas develops in dialogue with Dworkin’s theory of “constructive interpretation,” and Part III.B considers the special case of constitutional adjudication. In both parts, I am critical of the uses to which Habermas puts the notion of judicial “discourses of application”—a notion that is central to Habermas’s idea of courts’ appropriate role in a separation-of-powers scheme. An additional defect of Habermas’s theory is its inability to account for—and Habermas’s understandable unwillingness to exclude as illegitimate—the common-law adjudication process that is basic to Anglo-American law. I criticize also the distinction Habermas tries to establish between his “proceduralist” theory of constitutional adjudication and the “neorepublican” theory of Frank Michelman. Finally, I consider the implications that Habermas’s proceduralist theory might have for constitutional adjudication. I argue that Habermas’s theory needs to be much more concretely specified and more closely connected to particular constitutions, not just to the idea of the modern constitution in general.

I. BACKGROUND: HABERMAS’S THEORIES OF ACTION AND “RATIONALIZATION”

As I suggested in the Introduction, Habermas’s theory of law and democracy depends upon an array of philosophical and sociological concepts developed in his earlier work. *Between Facts and Norms* does not much discuss those notions; instead, it invokes them with minimal explanation. This decision is understandable—the past work develops those ideas at great length. But for the reader unfamiliar with Habermas’s past work, some explanation is in order. I
focus on the concepts basic to Habermas's present theory of law and democracy: the distinction between communicative and strategic action (Part I.A), the notions of discourse and communicative rationality (Part I.B), the idea of the "life-world" and its "rationalization" (Part I.C), and the notion of social "systems" (Part I.D). 8

A. Communicative and Strategic Action

Since the 1960s, a recurring focus of Habermas's work has been the theory of action, and particularly rational action. 9 His most systematic taxonomy of action types appears in his 1981 magnum opus, Theory of Communicative Action. With qualifications I will make clear, that taxonomy still structures Habermas's present work.

The three kinds of rational action Habermas identifies are instrumental action, strategic action, and communicative action. Instrumental action is the solitary performance of a task according to "technical rules." 10 As solitary action, it differs from communicative and strategic action, which Habermas defines as forms of social interaction. 11 Habermas's focus is decidedly on interaction rather than solitary action. Accordingly, instrumental actions are significant to his analysis only so far as they function as the

---

8. This account is a somewhat abbreviated version of the parallel discussion in Baxter, supra note 7, at Part II. Readers familiar with that discussion will not find surprises here.


10. 1 Theory of Communicative Action, supra note 9, at 285.

11. See id.
“task elements” of patterns of communicative or strategic action.\textsuperscript{12}

That leaves the more difficult distinction between communicative and strategic action. Habermas first characterizes the distinction in terms of different “action orientations.” In communicative action, Habermas says, actors are oriented toward mutual “understanding” (\textit{Verständigung}). In strategic action, by contrast, actors are oriented toward “success,” as measured by their “egocentric calculations” of interest.

This first characterization does not get Habermas very far. Both communicative and strategic action, Habermas acknowledges, are goal-directed, and so the orientation toward “success” says too little by itself to distinguish the two types.\textsuperscript{13} Nor does the term “communicative” clearly mark a difference. Communicative action, Habermas acknowledges, does not consist wholly in speech acts\textsuperscript{14} and further, strategic action often includes the use of speech.\textsuperscript{15}

The difference between communicative and strategic action lies not so much in the actors’ “orientations” as in the different mechanisms by which individual actions are coordinated, i.e., linked together to form patterns of interaction and to establish social relationships among actors.\textsuperscript{16} Habermas’s distinction between these coordinating

\begin{itemize}
  \item \textsuperscript{12} See id.
  \item \textsuperscript{13} See \textit{Jürgen Habermas, Reply to My Critics, in Habermas: Critical Debates} 219, 265 (John B. Thompson & David Held eds., 1982); \textit{Jürgen Habermas, Remarks on the Concept of Communicative Action, in Social Action} 151, 154 (Gottfried Seebass & Raimo Tuomela eds., Ruth Stanley trans., 1984); Jürgen Habermas, \textit{A Reply, in 1 Theory of Communicative Action, supra note 9, at 214, 264. Nor is the goal of communicative action only the goal of reaching an understanding with another. See 1 Theory of Communicative Action, supra note 9, at 101 (“[C]ommunicative action is not exhausted by the act of reaching understanding in an interpretive manner.”).}
  \item \textsuperscript{14} See \textit{1 Theory of Communicative Action, supra note 9, at 101 (“[T]he communicative model of action does not equate action with communication.”).}
  \item \textsuperscript{15} See Habermas, \textit{Reply to My Critics, supra note 13, at 264.}
  \item \textsuperscript{16} See, \textit{e.g.}, \textit{1 Theory of Communicative Action, supra note 9, at 101 (“Concepts of social action are distinguished... according to how they specify the coordination among the goal-directed actions of different participants.”); id. at 298 (“From the standpoint of a sociological theory of action, my primary interest has to be in making clear the mechanism relevant to the coordinating power of speech acts.”); id. at 273-74 (criticizing “analytic action theory” for failing to “consider the mechanisms for coordinating action through which interpersonal relations come about”); id. at 282 (“Social actions can be
mechanisms is a distinction between two different uses of language. He explicates these different uses of language through what he calls "formal pragmatics."

Both parts of the term "formal pragmatics" are significant. With "pragmatics," Habermas signals his focus on language in use—on utterances or "speech acts"—as opposed to a semantic focus on the meaning of isolated sentences or propositions. By "formal," Habermas means that he seeks not to describe and classify the "communicative practice of everyday life" as it operates within a particular language (that would be "empirical" pragmatics), but instead, to "rationally reconstruct" the necessary presuppositions of communicative practice. What Habermas pursues in his formal pragmatics, and what he means by "rational reconstruction," is a theory of the unreflectively mastered, pretheoretical communicative capacities of ordinary competent speakers. He first explicates the idea of communicative action, then analyzes strategic action.

The central idea in Habermas's formal pragmatics, and the basis for his conception of communicative action, is the notion of a speech act's "validity." Habermas distinguishes among three forms of validity to which speech acts may lay claim: propositional truth (Wahrheit), normative rightness (Richtigkeit), and sincerity (Wahrhaftigkeit). Typically, Habermas observes, just one of these validity claims is distinguished according to the mechanisms for coordinating individual actions . . . ."

17. This, at any rate, is how Habermas characterizes the difference between pragmatics and semantics.
18. 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 328.
19. See id. at 319-20 (describing J.L. Austin's typology of speech acts).
20. See, e.g., JÜRGEN HABERMAS, What Is Universal Pragmatics?, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 1, 9 (Thomas McCarthy trans., 1979) (1976) (reconstructive procedures "systematically reconstruct the intuitive knowledge of competent subjects") (emphasis omitted); id. at 14 ("[R]econstructive proposals are directed to domains of pretheoretical knowledge, that is, . . . to a proven intuitive foreknowledge.") (emphasis omitted).
21. Or, at least the claim that the utterance's "existential presuppositions" are satisfied. See 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 99, 306-07. This qualification is necessary to account for speech acts that do not directly assert matters of fact.
22. See, e.g., id. at 75, 99. One might ask: why these three and only these three forms of validity? For a brief discussion of Habermas's answer to this question, see Baxter, supra note 7, at Part II.A.1.
thematic in a particular speech act: in a confession, for example, the claim to sincerity is thematic, as is the claim to truth in a factual assertion. Habermas’s formulation of the main categories of speech acts reflects this insight: in “constative,” “regulative,” and “expressive” utterances, the claims to truth, rightness, and sincerity are (respectively) thematic.

Nonetheless, Habermas contends, any speech act in communicative action raises simultaneously all three claims, even if ordinarily the speaker raises only one directly or thematically. This contention seems counter-intuitive. We would not ordinarily say, for example, that a speaker’s request for a glass of water “raises a truth claim”—that she claims it to be true that a glass of water can be obtained and brought in a reasonable amount of time. But Habermas’s argument does not depend upon this point. For his purposes, and for ours, it is enough to say that at least in principle, any speech act can be criticized along any of the three dimensions of validity. For example, a hearer might respond to the request for a glass of water by objecting that, as a matter of fact, no water (or no glass) is readily available. Or the hearer might object that the request is normatively inappropriate, because the hearer is

23. See 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 308-09.
24. See JÜRGEN HABERMAS, Toward a Critique of the Theory of Meaning, in POSTMETAPHYSICAL THINKING: PHILOSOPHICAL ESSAYS 57, 77 (William Mark Hohengarten trans., 1992) (1988) (describing these kinds of speech acts as the “three basic modes”); 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 325-26. Habermas also distinguishes “communicative” and “operative” speech acts, see id. at 326, but the definitions of those classes are unimportant for present purposes.
26. Cf. 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 306 (using this example).
27. Compare 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 99 (asserting that a communicative actor “must raise at least three validity claims with his utterance”), with id. at 306 (justifying this claim by noting that even if one claim is thematic, the other two may come into play with a hearer’s criticism). See also HABERMAS, Toward a Critique of the Theory of Meaning, supra note 24, at 76-77 (only one claim may be “thematically emphasized in any explicit speech act,” but “[e]very speech act as a whole can always be criticized as invalid from three perspectives”); COOKE, supra note 25, at 60-61 (“The fact that any given speech act can be contested from more than one point of view supports Habermas’s claim that every speech act raises three validity claims simultaneously.”).
HABERMAS'S DISCOURSE THEORY

not someone who can be expected to fetch water for the speaker. Along the same lines, the hearer might object that the request is insincere—motivated by a desire to control the hearer more than to obtain needed water. What Habermas means is this: every speech act constitutive for communicative action involves all three “validity claims” in that, in principle, a hearer can challenge the utterance in each of the three different ways.

This emphasis on hearers’ possible criticisms marks an important theme in Habermas’s notion of communicative action. Validity claims, Habermas maintains, are essentially criticizable. By “criticizable,” he means that in communicative action the hearer may respond to the claims by taking a “yes or no position”—either accepting the speech act’s claims or opposing them with criticism or requests for justification. And at least to the extent the interaction between speaker and hearer is to remain communicative, the speaker assumes the obligation of providing such justification if necessary. Further, particularly in the case of regulative speech acts (such as a promise), mutual acceptance of a validity claim may impose obligations relevant to future interaction. In these senses, the mutual acceptance of validity claims, or further discussion between speaker and hearer aimed at consensus concerning those claims, is the “mechanism of understanding” that coordinates communicative action.

The mechanism coordinating strategic action, by contrast, is not “understanding” or “consensus”—mutual acceptance of validity claims—but “influence” (Einflußnahme). The term “influence” requires explication.

---

28. The example is Habermas's. 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 306.
29. See, e.g., id. at 301 (“[V]alidity claims are internally connected with reasons and grounds” and “can be rejected only by way of criticism and defended against a criticism only by refuting it.”).
30. See, e.g., id. at 38-39, 101, 305-07.
31. Habermas is not always careful to include this qualification expressly, but it follows from his position. The alternatives to providing a requested justification are either breaking off interaction or switching over to strategic action. See HABERMAS, What Is Universal Pragmatics, supra note 20, at 3-4.
32. See 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 99.
33. See id. at 303-04.
34. See, e.g., id. at 286 (distinguishing between “causally exerting an influence upon” one’s partners in interaction and “coming to an understanding with them”); Habermas, A Reply, supra note 13, at 242 (distinguishing between
In one sense of the word, communicative actors may seek to influence each other. In discussing a problematic claim, one may try to persuade the other that his position is correct, and the other may try to convince the other of her criticism. But by “influence,” Habermas says, he means “exert a causal influence,” independent of the convincing force of reasons that could support claims to validity. So far, however, the characterization of “influence,” and thus the characterization of strategic action, is only negative—influence operates in some way other than mutual recognition of validity claims.

Habermas tries to characterize the mechanism of influence more precisely by distinguishing between two subtypes—“open” and “concealed” strategic action. Of these two subtypes, Habermas has given far more attention to concealed strategic action. The kind of “influence” characteristic of concealed strategic action is, in effect, deception—primarily conscious deception. The technical criterion Habermas adopts for concealed strategic action concerns the “avowability” of the parties’ intentions or aims. In concealed strategic interaction, at least one participant pursues aims that he knows could not be avowed without jeopardizing that participant’s success, while at least one participant assumes that all are acting communicatively. A


35. See HABERMAS, Toward a Critique of the Theory of Meaning, supra note 24, at 79; HABERMAS, Remarks on the Concept of Communicative Action, supra note 13, at 153.

36. See 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 332-33.

37. He also mentions the possibility of unconscious deception, which he calls “systematically distorted communication.” See id. at 333. In this form of interaction, the parties believe that they are acting communicatively, but at least one party is in the grip of an individual psychopathology or powerful social ideology that distorts, and in distorting subverts, the process of reaching understanding about claims to validity. For a brief treatment in Habermas’s recent work, see Habermas, A Reply, supra note 13, at 226.
simple example: one person requests a loan from another person without disclosing that the money will be used for a criminal purpose. Assuming that the person from whom the loan is requested has no reason to endorse the criminal purpose, the aim is nonavowable, in Habermas's sense, because to declare it is to make tender of the loan unlikely. This kind of action is parasitic on communicative action, Habermas believes, because the success of the coordinating speech act depends upon the hearer's belief that the speaker could redeem the claim to have spoken his intentions sincerely or truthfully.8

Habermas has given less attention to the notion of open strategic action. This relative lack of attention is curious, given the prominence Habermas gives open strategic action in his conception of the economic and administrative systems. But from his general characterization of strategic action—that it operates through "influence" rather than "understanding" or "consensus"—we can assume that openly strategic actors do not presuppose or seek a consensus in plans or goals, or at least not a consensus resting on mutual acceptance of validity claims. But how can open strategic action be characterized positively?

In Theory of Communicative Action, Habermas attempted to specify open strategic action with formal-pragmatic analysis. Focusing on the variant of open strategic action most difficult to distinguish from communicative action—the sort that, like communicative action, is coordinated by speech acts—Habermas assumed that the characteristic kind of coordinating speech act is the "simple" or "pure imperative." By "simple" or "pure" imperative, Habermas meant a command that is a sheer assertion of power of speaker over hearer. To these simple imperatives Habermas contrasted speech acts that are similar in form—invoking a command or order—but which, on Habermas's analysis, belong to communicative action. These sorts of commands or orders Habermas called "normatively authorized" requests.39

---

8. As I have explained elsewhere, Habermas's usual account of concealed strategic action relies on an idiosyncratic reinterpretation of J.L. Austin's notion of "perlocutions." See Baxter, supra note 7, at Part II.A.1. The avowability criterion described in the above text, however, is much less problematic. See id.; see also Cooke, supra note 25.

39. See 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 300-01.
Since his publication of Theory of Communicative Action in 1981, Habermas has acknowledged the untenability of any "sharp distinction between normatively authorized [requests] and simple imperatives."\textsuperscript{40} Instead, Habermas now argues, from a sociological perspective we see a "continuum between" purely "de facto" power and "power transformed into normative authority."\textsuperscript{41} While at one end of the continuum is the pure or simple imperative—his standard example is the bank robber's "hands up" demand—Habermas now admits that such an imperative is only an "extreme case" or "limit case."\textsuperscript{42} Rather than a "categorial" difference between pure imperatives and normatively authorized requests, Habermas has come to recognize, there is only a "difference of degree."\textsuperscript{43}

But if the "pure imperative" is only the limiting case of open strategic action, then what is the paradigm case? Habermas has not much elaborated on this point. Still, from his preliminary specification of strategic action, together with other remarks scattered throughout his work, we can construct at least a sketch. The paradigmatic case of open strategic action seems to be competition among rational opponents, each pursuing self-interested goals according to rules of rational choice. Each tries to influence or steer each other's choices, and each is aware that the other is operating in this way. The choices of each are conditioned by their respective predictions of the other's choices as well as by the consequences of their interaction. Game theory, rational choice theory, and decision theory, Habermas sometimes suggests, formalize this paradigmatic case of open strategic action.\textsuperscript{44}

But this paradigmatic case differs in important ways from the norm-free, purely power-driven form of action that the "pure imperative" model described. Strategic competition, Habermas acknowledges, typically takes place against a normative backdrop.\textsuperscript{45} Strategic action in the marketplace,

\textsuperscript{40} See Jürgen Habermas, Reply to Skjei, 28 INQUIRY 105, 112 (1985).
\textsuperscript{41} See HABERMAS, Toward a Critique of the Theory of Meaning, supra note 24, at 83.
\textsuperscript{42} See id. at 84; Habermas, A Reply, supra note 13, at 239.
\textsuperscript{43} Habermas, A Reply, supra note 13, at 239.
\textsuperscript{44} See, e.g., id. at 242 (game theory as model for strategic action); id. at 243 (game theory and decision theory as models, though actual strategic action usually falls short of the standards of rationality these models postulate).
\textsuperscript{45} See, e.g., BETWEEN FACTS AND NORMS, supra note 2, at 25 ("Naturally,
for example, presupposes general acceptance of a variety of legal norms—such as criminal-law norms that forbid some tactics or strategies and permit others, norms of property law that outfit some with more market power than their opponents, rules that define the possibilities for different kinds of transaction, and the like. These legal norms structure the participants’ choices among strategies and tactics. Further, apart from state-enforced law, informal social norms may shape strategic interactions in particular spheres of economic activity. Even paradigmatic cases of strategic action, then, may involve the mutual recognition of legal and social norms. The distinction between communicative and strategic action cannot be as sharp as Habermas had thought originally.

Habermas now recognizes this consequence. His account in *Between Facts and Norms* describes interactions as “fall[ing] along a continuum” between purely communicative and purely strategic action, with most actual situations presenting a “melange” of these types. In fact, Habermas’s “discourse theory of law” preserves an important place for action that reflects elements of both pure types: regulated bargaining and fair compromise. What Habermas insists upon is not an on-or-off distinction among actual interactions in the world, but a difference between two approaches to the dimensions of validity he distinguishes. Habermas expresses this difference as one between a “performative” attitude, constitutive for communicative action, and the “objectivating” attitude that is constitutive for strategic action.

By “performative,” Habermas means (in this context) something like “oriented toward validity.” Within the

---

46. *See id.* at 139. In this passage Habermas uses the terms “value-oriented” and “interest-governed” rather than “communicative” and “strategic.” But Habermas associates the former pair of terms with the various concepts he uses to distinguish communicative and strategic action. Habermas explicates “value-oriented” action in terms of an orientation toward reaching understanding, consensus, and the “performative attitude” (discussed below in text); he analyzes “interest governed” action in terms of a balance of interests, “power positions,” “threat potentials,” and the “objectivating attitude.” *See id.* at 139-40. And just above he speaks of “mutual understanding” and “influence” as the relevant mechanisms by which action is coordinated. *See id.* at 139.

47. *See id.*

48. See infra Part II.C.3.
performative attitude, social norms are criticizable and in need of justification. By “objectivating,” Habermas means that social norms appear not so much as potentially justifiable or criticizable, but simply as social facts, with more or less calculable consequences attaching to their violation or obedience. Within this objectivating attitude, norms are primarily conditions for, or obstacles impeding, the success of the actor’s self-interested pursuits. (Holmes’s “bad man” is a good illustration.) From the “performative” perspective, Habermas speaks of the “validity” (Geltung) of social norms. From the “objectivating” perspective, he refers to norms’ “facticity” (Faktizität). This distinction between validity and facticity, we will see, is the organizing device for Habermas’s theory of law and democracy.

The various distinctions Habermas uses to distinguish communicative from open strategic action—distinctions between influence and consensus, validity and power, performative and objectivating—do not unequivocally and uncontroversially classify actual interactions as purely communicative or purely strategic. Even interactions Habermas would classify as paradigm cases of strategic action—such as marketplace competition—operate against the background of rules and norms. Participants in strategic action may recognize these norms as binding not just in a “factual” sense (because of potential sanctions) but also as normatively obligatory. Further, actions may be “communicative” with respect to the immediate participants but “strategic” with respect to others—as when one deliberates with another to produce an optimal business plan.

For present purposes, however, the question is not so much whether Habermas’s scheme works as a classificatory

49. See HABERMAS, Toward a Critique of the Theory of Meaning, supra note 24, at 80.
50. See BETWEEN FACTS AND NORMS, supra note 2, at 524 n.18 (“[S]trategic actors encounter normative contexts, as well as other participants, only as social facts.”); see also id., at 121, 448.
51. See O.W. Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 459 (1897).
52. See infra Part II.A.
53. Those other distinctions include: consensus and influence, validity and power, reasons and sanctions, rational and empirical motivation, cooperation and pursuit of self-interest.
scheme for pigeonholing particular interactions. The more relevant question, instead, concerns the further theoretical purposes to which Habermas wishes to put the idea of communicative action.

B. Discourse and Communicative Rationality

One such purpose is to provide an account of the ways modern societies manage conflict and dissensus. As will become more clear below, a central premise of Habermas’s theory of modernity is that the risk of dissensus—disagreement as to plans of action or as to claims about the world—increased with the demise of traditional forms of authority and traditional world-views. Habermas distinguishes three basic alternatives for handling dissensus in simple interactions: attempting to resolve the disagreement communicatively, continuing the interaction under premises of strategic action, and breaking off the interaction entirely. Law, it will turn out, institutionalizes all three possibilities. It creates spheres of action in which individuals may pursue their interests without securing the agreement of others—whether by refusing to interact, or by opting to interact strategically. And law also establishes procedures through which disagreements can be resolved more or less communicatively. The mechanisms of action coordination Habermas distinguishes in his typology of social action find analogues in his discourse theory of law.

A second purpose of Habermas’s action theory is to rethink and expand the idea of rationality. Most familiar accounts of rationality—such as those found in economic theory, game theory, decision theory, and rational choice theory—are keyed toward the problematics of instrumental or strategic action. Beginning from the notion of communicative action, Habermas hopes to develop a new conception of rationality, which he calls, unsurprisingly, “communicative rationality.” The idea of communicative rationality, like the idea of communicative action, depends centrally upon the notion of criticizability. Claims to

---

54. See, e.g., BETWEEN FACTS AND NORMS, supra note 2, at 25-27.
55. See HABERMAS, What Is Universal Pragmatics, supra note 20, at 3-4. Sometimes Habermas mentions other possibilities, such as “carrying out straightforward ‘repair work,’” or continuing the interaction but avoiding the controversial issue. See BETWEEN FACTS AND NORMS, supra note 2, at 21.
validity are essentially criticizable, and they may be supported or opposed with reasons and argument. The criticizability of validity claims creates the rational potential of communicative action—the possibility of communicative rationality.

One way to develop the dimensions of Habermas's notion of communicative rationality is to distinguish between everyday and more reflective forms of communicative action. Consider, as an instance of everyday communicative action, an example Habermas provides in Theory of Communicative Action: a flight attendant's request that a passenger put out a cigarette. If the passenger responds to the request by demanding reasons, the flight attendant likely will invoke the relevant federal regulation and explain that he has authority to enforce it. Should the passenger demand more justification than that—by, for example, questioning the FAA's authority to pass such a regulation, or by invoking a putative constitutional right to smoke at will—the flight attendant likely will switch over to strategic action, mentioning the sanctions for failure to comply and, if necessary, deploying those sanctions. And so while the regulation offers a reason for compliance, and one not entirely reducible to the mere fact of potential sanctions, the role of rational criticism and justification is sharply circumscribed. The fact that a claim is criticizable in principle does not mean that criticisms and demands for justification always are in place. In everyday contexts, the pressures of action often limit the rational potential of communicative action.

When removed from the pressures of immediate action, however, this rational potential may be developed more fully. Habermas refers to various forms of "argumentation" or "discourse," in which participants pursue more

56. See 1 THEOR Y OF COMMUNICATIVE ACTION, supra note 9, at 25; JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION, supra note 34, at 158; see also Habermas, Reply to My Critics, supra note 13, at 235 (distinguishing between "communicative action in the naive attitude" and "reflectively achieved understanding").

57. See 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 300-02.

58. Sometimes Habermas has given the term "discourse" a more narrow meaning than "argumentation." See 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 23, 41-42. In more recent writings, however, the terms seem to be synonymous. See COOKE, supra note 25, at 31-32.
methodically the task of criticizing and defending the
claims to validity that Habermas has identified. Here
validity claims serve less as a means of coordinating
participants' goal-directed plans of action—as in everyday
communicative action—and more as an explicit theme of
communication and debate.

Habermas introduces the idea of discourse through
various “idealizations.” Participants in discourse must have
equal opportunities to raise topics, arguments, and
criticisms. The situation must exclude all force “except the
force of the better argument,” and it must exclude “all
motives except a cooperative search for the truth.” Habermas
sometimes has referred to these idealizations as
describing an “ideal speech situation,” or alternatively, an
“ideal communication community.” While Habermas
describes these conditions as “general pragmatic pre-
suppositions” of discourse, he is aware that they are never
completely fulfilled. Here it is a matter of more and less,
and Habermas is willing to speak of “discourse” when these
demanding conditions are “sufficiently fulfilled.” The ideal
conditions are “presupposed” in actual communicative
practice to the extent that significant deviations are a
prima facie reason to question an apparent consensus that
is reached—though these deviations are of course not
sufficient by themselves to refute a claim upon which the
participants have reached agreement.

Discourses, Habermas recognizes, are exceptional forms
of communicative action—“islands in the sea of practice.”

59. See JÜRGEN HABERMAS, Wahrheitstheorien, in VORSTUDIEN UND
ERGÄNZUNGEN, supra note 34, at 127, 177.
60. See 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 25.
Habermas's reference to “truth” should be read to consider the other “truth-
analogous validity claims” he identifies.
61. See, e.g., HABERMAS, Wahrheitstheorien, supra note 59, at 174-83; 1
THEORY OF COMMUNICATIVE ACTION, supra note 9, at 25; JÜRGEN HABERMAS,
Richard Rorty's Pragmatic Turn, in ON THE PRAGMATICS OF COMMUNICATION
343, 365, 367 (Maeve Cooke ed., 1998); BETWEEN FACTS AND NORMS, supra note
2, at 322-23; JÜRGEN HABERMAS, Remarks on Discourse Ethics, in JUSTIFICATION
AND APPLICATION: REMARKS ON DISCOURSE ETHICS 50 (Ciaran P. Cronin trans.,
1993) [hereinafter JUSTIFICATION AND APPLICATION].
62. See, e.g., HABERMAS, Richard Rorty's Pragmatic Turn, supra note 61, at
365; BETWEEN FACTS AND NORMS, supra note 2, at 322-23 (describing “ideal
speech situation” and “ideal communication community” as “equivalent”).
63. 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 25.
64. Id. at 25; BETWEEN FACTS AND NORMS, supra note 2, at 178.
65. Habermas, Reply to My Critics, supra note 13, at 235.
Nonetheless, Habermas claims, the institutionalization of discursive practices—in contexts such as scientific research, democratic procedure, and legal procedure—is a characteristic feature of modern societies. These developments Habermas interprets as a progressive realization of the rational potential implicit in communicative action. In this way Habermas recasts the great sociologist Max Weber's theory of "rationalization," focusing on the realization—though only a partial and selective realization—of communicative rationality.

C. The "Lifeworld" and Its Rationalization

In developing his account of communicative "rationalization," Habermas supplements his formal-pragmatic analysis of rational action with social-theoretical concepts. The concept with which he begins is the notion of society as the "lifeworld" of social actors.

The term "lifeworld" requires some explanation. It originated in the later work of the philosopher Edmund Husserl, who used it to mark a contrast between the world of everyday experience and the world as constructed by the "objective sciences." The lifeworld, for Husserl, was the pretheoretical world of taken-for-granted certainties. This "realm of original self-evidences" provides the "grounding soil" for all human activities, including the scientific activity of constructing the "objective-scientific" world. Husserl’s idea of the lifeworld was developed further—and made more fruitful for social theory—by Alfred Schutz, a sociologist and philosopher who was much influenced by Max Weber as well as Husserl.

Habermas's initial presentation of the lifeworld concept largely tracks Schutz’s analysis. The lifeworld is the

66. See HELMUT R. WAGNER, ALFRED SCHUTZ: AN INTELLECTUAL BIOGRAPHY 288 (1983) (Alfred Schutz, who made the concept fruitful for social-scientific inquiry, "accepted Husserl’s authorship of this conception").
68. Id. at 127.
69. Id. at 131.
70. Id. at 130; see id. at 121-35.
71. On Weber's early influence on Schutz, see WAGNER, supra note 66, at 13-16.
72. Habermas refers mostly to a work Schutz left unpublished at his death
unproblematic, taken-for-granted setting in which actors are located spatially, temporally, and socially. Actors encounter both an objective or natural world of things and a social world of other human beings. Their encounters with those worlds are shaped by their past experiences. But this lifeworld is essentially shared or “intersubjective,” not the creation or private preserve of individual subjects. The “segment of the lifeworld” in which particular actions or interactions take place is the “situation” of action. The situation is a “context of relevance” circumscribed by a “horizon” rather than by fixed boundaries: what is within the horizon of relevance, and thus included in the situation of action, depends upon the “theme” of action and the actors’ “plans.” Actors interpret and define their situation, and formulate their plans, in reliance upon a


74. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 123; SCHUTZ & LUCKMANN, supra note 72, at 19, 35-92.

75. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 120, 122; SCHUTZ & LUCKMANN, supra note 72, at 5.

76. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 121, 122 (describing examples of misunderstanding that could arise if participants do not sufficiently share common experiences); SCHUTZ & LUCKMANN, supra note 72, at 7-8.

77. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 121-26; SCHUTZ & LUCKMANN, supra note 72, at 4-5, 15.

78. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 123; SCHUTZ & LUCKMANN, supra note 72, at 113-18.

79. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 122-23; SCHUTZ & LUCKMANN, supra note 72, at 19 (describing contexts of relevance); id. at 182-228 (discussing the “relevance structures” of the lifeworld).

80. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 122-23; SCHUTZ & LUCKMANN, supra note 72, at 114-15.

81. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 121-23; SCHUTZ & LUCKMANN, supra note 72, at 19, 116-18 (on the “plan” of action); id. at 186-95 (on “thematic relevance”).
“stock of knowledge”—socially conditioned and transmitted, and differentially distributed among a society’s members. Action, on this view, is “mastery of the situation,” or, the realization of a plan.

But even in his preliminary sketch of the lifeworld concept, Habermas introduces an important variation on Schutz’s account. Schutz links the lifeworld to the problematic of action in general, and even “subjective experience” in general. Habermas, by contrast, introduces the lifeworld as the background not to experience in general, or even to action in general, but as the background and “horizon” for specifically communicative action. The concept of the lifeworld, Habermas says, is “complementary to that of communicative action.”

Accordingly, Habermas develops his concept of the lifeworld in terms familiar from his theory of communicative action. In interpreting their situations and pursuing their plans, he says, communicative actors in “lifeworld” situations proceed consensually. Their actions presuppose, or are directed toward establishing, “common situation definitions.” On the basis of these common situation definitions, they seek to harmonize their plans of action. The mechanism for this cooperative process of interpretation and action is the mechanism of communicative

82. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 121-23; see SCHUTZ & LUCKMANN, supra note 72, at 113-16 (discussing actors’ “determination of the situation”).

83. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 124-25 (on the notion of a “stock of knowledge”); id. at 122 (describing an example of locally or occupationally shared custom unknown to an outsider); SCHUTZ & LUCKMANN, supra note 72, at 122-25 (on the stock of knowledge); id. at 304-18 (distinguishing between “subjective” stocks of knowledge and the “social” stock of knowledge, and analyzing the non-uniform distribution of the social stock of knowledge).

84. 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 135; see SCHUTZ & LUCKMANN, supra note 72, at 116; see also id. at 116-18 (on “mastering the situation”).

85. See SCHUTZ & LUCKMANN, supra note 72, at 28-32 (on fantasy); see id. at 32-35 (on dreaming).

86. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 119 (the lifeworld is “the horizon within which communicative actions are ‘always already’ moving”).

87. Id. at 119; see also id. at 144, 204 (discussing “complementary concept of communicative action”).

88. Id. at 121, 127.

89. Id. at 127.
action: mutual acceptance of claims to validity. The lifeworld, Habermas says, is “so to speak, the transcendental site where speaker and hearer meet, where they can reciprocally raise claims . . . , and where they can criticize and confirm those validity claims, settle their disagreements, and arrive at agreements.”

Habermas introduces further amendments to Schutz’s phenomenological conception of the lifeworld. A main target is Schutz’s emphasis—overemphasis, according to Habermas—on the “stock of knowledge” as a basic structure of the lifeworld. This stock of knowledge, which Habermas interprets as “cultural patterns of interpretation, evaluation, and expression,” cannot be the only lifeworld resource on which communicative actors rely. According to Habermas:

The one-sidedness of the culturalistic concept of the lifeworld becomes clear when we consider that communicative action is not only a process of reaching understanding; in coming to an understanding about something in the world, actors are at the same time taking part in interactions through which they develop, confirm, and renew their memberships in social groups and their own identities. Communicative actions are not only processes of interpretation in which cultural knowledge is ‘tested against the world’; they are at the same time processes of social integration and of socialization.

Thus, the lifeworld resources on which communicative actors rely, in interpreting their situations and harmonizing their plans, include group memberships and personal identities, as well as the cultural stock of knowledge.

As Habermas acknowledges, his account of the lifeworld’s resources tracks the culture/society/personality

90. Id. at 126.
91. Id. at 134.
92. Id. at 139; see also id. at 138 (Schutz’s account of the lifeworld’s resources is “abridged in a culturalistic fashion”).
93. See also id. at 135 (“Action, or mastery of situations, presents itself as a circular process in which the actor is at once both the initiator of his accountable actions and the product of the [cultural] tradition in which he stands, of the solidary groups to which he belongs, of socialization and learning processes to which he is exposed.”). The criticism of Schutz is not entirely fair. At the very least, he includes in the “stock of knowledge” many of the skills, competences, and know-hows that Habermas places under the heading of “personality.”
schema that Talcott Parsons famously developed in American sociology. In a further transformation of Schutz's phenomenological lifeworld concept, Habermas proposes that we consider social formations as a whole, not just particular situations of action, as lifeworlds. From this perspective, he says, culture, society, and personality are "the structural components of the lifeworld." He defines these "components" as follows:

I use the term culture for the stock of knowledge from which participants in communication supply themselves with interpretations as they come to an understanding about something in the world. I use the term society for the legitimate orders through which participants regulate their memberships in social groups and thereby secure solidarity. By personality I understand the competences that make a subject capable of speaking and acting, that put him in a position to take part in processes of reaching understanding and thereby assert his own identity.

These initial definitions require two clarifications. First, rather than refer to "society" as a "component" of society seen as lifeworld, it would be better to refer (as Habermas sometimes does) to the "institutional component"—that is, the system of social institutions.

94. See 1 Theory of Communicative Action, supra note 9, at 158 (referring to the "customary (since Parsons) division into . . . society, . . . culture, and . . . personality"); see also 2 Theory of Communicative Action, supra note 73, at 133-34 (attributing the schema to Durkheim).

95. See 2 Theory of Communicative Action, supra note 73, at 136 (if the lifeworld concept is to be "theoretically fruitful," one must develop "a reference system for descriptions and explanations relevant to the lifeworld as a whole and not merely to occurrences within it"); id. at 137 (aim is to develop a theory of how a lifeworld, seen as a whole, maintains and reproduces itself).

96. Id. at 134; see also id. at 138, 145, 153, 255, 308, 356. I have criticized elsewhere the idea of culture, society, and personality as "components," as well as Habermas's more general idea of the lifeworld. See Baxter, supra note 7, at Part III.C.4.

97. 2 Theory of Communicative Action, supra note 73, at 138.

98. See id. at 366.

99. See id. at 134 (referring to the societal component as "institutional orders"); id. at 141 (suggesting that "institutions" constitute the societal component); id. at 146 (referring to the societal component as "the institutional system"); id. at 153 (referring to the "institutional system"); id. at 174 (referring to "the societal component of the lifeworld—the system of institutions"); id. at 262 (societal component as "institutional orders"); id. at 318 (referring to "the system of institutions, that is . . . the societal component of the lifeworld"); id. at 366 (referring to "the institutional components of the lifeworld").
that define group memberships and coordinate interaction through binding norms and institutionalized values. Law figures prominently in Habermas's account of this institutional component. He includes the constitutional framework of state offices, and central "legal institutions" like contract and property, as well as "the bases of constitutional law, the principles of criminal law and penal procedure, and all regulation of punishable offenses close to morality."

Second, the "personality" component includes not just the speech- and action-related competences that Habermas mentions in the above definition, but also motivations. Habermas, of course, is working at a high level of abstraction when he refers to competences and motivations as a structural component of the lifeworld, not just attributes of individual persons. What he has in mind is something like a social stock of typical personal competences and motivations, some subset of which individuals develop through processes of socialization and continuing social interaction. As with the distribution of knowledge, the distribution of these competences and motivations is far from uniform.

This account of culture, society, and personality as structural components of the lifeworld is not just an abstract classification of the resources on which communicative actors rely. Habermas uses it to address the basic social-theoretical question of how a society reproduces itself—how, that is, it maintains itself through time and changes in the content of cultural tradition, institutional structure, and personal competences. He distinguishes between two aspects of social reproduction. The "symbolic reproduction" of society as lifeworld is the reproduction of the different lifeworld components he has distinguished—culture, society, and personality. The "material reproduction" of society as lifeworld involves the "maintenance of the material substratum of the lifeworld." Material reproduction implicates the "purposive" aspect of communicative action—"goal-directed interventions into the

100. See id. at 266.
101. See id. at 365.
102. See id. at 183, 276.
103. See id. at 136-37 (in order to develop a "theoretically fruitful" conception of the lifeworld, we must "explain the reproduction of the lifeworld itself").
104. Id. at 138.
objective world”—while symbolic reproduction depends more upon the aspect of mutual understanding.105

To each of the components of society-seen-as-lifeworld, Habermas attributes a particular function in symbolic reproduction. “Cultural reproduction” consists in the transmission and renewal of cultural knowledge, so as to “secure[] a continuity of tradition and coherence of knowledge sufficient for daily practice.”106 “Social integration” establishes social solidarity through shared norms and institutionalized values. In so doing, it coordinates interaction and “stabilizes the identity of groups to an extent sufficient for everyday practice.”107 “Socialization” operates to develop personal identities, “secur[ing] for succeeding generations the acquisition of generalized competences for action and see[ing] to it that individual life histories are in harmony with collective forms of life.”108 These three reproductive processes are interrelated, in that the reproduction of any one component contributes to the reproduction of the other two as well.109 And further, Habermas argues, any particular communicative interaction both draws on, and helps reproduce, each of the lifeworld’s components:

In coming to an understanding with one another about their situation, participants in interaction stand in a cultural tradition that they at once use and renew; in coordinating their actions by way of intersubjectively recognizing validity claims, they are at once relying on membership in social groups and strengthening the integration of those same groups; through participating in interactions with competently acting reference persons, the growing child internalizes the value orientations of his social group and acquires generalized capacities for action.110

But under what conditions does a lifeworld’s reproduction count as its “rationalization”? Habermas addresses this question by, first, returning to Weber’s understanding of rationalization.

As Habermas notes, Weber’s notion of “rationalization” is both broad and complex. Weber’s introduction to his

105. Id. at 232; see also id. at 138.
106. See id. at 140 (emphasis omitted).
107. See id. at 140.
108. See id. at 141 (emphasis omitted).
109. See id. at 142 fig.21.
110. Id. at 137.
HABERMAS’S DISCOURSE THEORY

studies of the world religions\textsuperscript{111} mentions the following historical developments as aspects of “Occidental rationalism”: modern empirical and experimental science; systematic theology; a systematized, formalized, and predictable law; various developments in music, including Western systems of harmony, written notation, and innovations in instrumentation; the Gothic vault and dome in architecture; the technique of perspective in painting; the development and market circulation of printed literature; the modern university; specifically Western forms of bureaucratic administration, with technically and legally trained officials; periodically elected parliaments connected to a party system; the capitalist enterprise with its rational organization of wage labor; rationalized forms of economic calculation and action; capital markets; technological employment of scientific knowledge; and a rational vocational ethic (the Protestant ethic).\textsuperscript{112} The breadth of this list indicates the comprehensiveness of Weber’s notion of rationalization. But it raises questions as to how this list is to be ordered, and whether “rationalization” bears the same sense throughout.\textsuperscript{113}

Habermas imposes order upon this “confusing”\textsuperscript{114} list of developments by reading Weber through the culture/society/personality schema that organizes Habermas’s own account of the lifeworld’s “components.” He distinguishes, accordingly, among rationalization of the cultural tradition, rationalization of basic social institutions, and the rationalization of personal motivations, competences, and dispositions.

Following Weber, Habermas sees the rationalization of culture as a process of differentiation among “spheres of value”: science in the “cognitive” sphere, law and morality in the “evaluative” dimension, and autonomous art in the

\begin{footnotes}


\textsuperscript{112} Id. at 13-27.

\textsuperscript{113} Weber made clear that the terms “rational,” “rationalism,” and “rationalization” had different senses in different contexts. See, e.g., MAX WEBER, The Social Psychology of the World Religions, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 267, 293 (H.H. Gerth & C. Wright Mills eds. and trans., 1958); MAX WEBER, Religious Rejections of the World and Their Directions, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY, supra, at 323.

\textsuperscript{114} See 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 158.

\end{footnotes}
“expressive” dimension. This conception of the different cultural spheres corresponds closely to Habermas’s account of the various validity claims raised in communicative action. The correspondence is particularly apparent with respect to the cognitive and evaluative spheres: science, Habermas notes, focuses on questions of propositional truth, and law and morality focus on questions of normative rightness. Further, and again following Weber, Habermas identifies in each of these three spheres of value a “cultural system of action” that developed in early modernity. These systems institutionalized discourse with respect to the relevant validity claim. The “scientific enterprise,” connected in large part with universities, professionalizes scientific inquiry. The “artistic enterprise” produces, distributes, and criticizes artistic and literary works. Religious associations specialize in questions of morality. Finally, with respect to legal questions, Habermas locates “the legal system,” which he understands to include “specialized juridical training,” professionalized scholarly discussion of legal issues, as well as “public justice.” In these ways, cultural rationalization realizes the rational potential in communicative action.

Habermas approaches more warily Weber’s account of the rationalization of “society” and “personality.” For Weber, what a theory of rationalization must explain in these dimensions is, with respect to “society,” the development of the modern bureaucratic state and capitalist economy, and with respect to “personality,” the origins of a methodically rational pattern of life conduct—the Protestant ethic of labor in one’s calling—that served the rationalizing developments in state and economy. In Habermas’s view, this explanatory strategy focuses too narrowly on the path modernization actually took, and not

115. See id. at 167 fig.3.
116. See id. at 180. The fit is looser with respect to art. Whereas the third validity-claim Habermas attributed to communicative action was “sincerity,” the value-standard he connects to art is “authenticity.” See id. By “authenticity,” Habermas seems to mean authenticity in the expression of an artist’s subjectivity. Id. at 161. In this way there is at least an analogical connection between the validity claims of “sincerity” and “authenticity.”
117. He refers here to “scientific jurisprudence.” See id. at 165. The German word translated as “scientific” (wissenschaftlich) has a broader connotation than its English counterpart, meaning something like “systematic” and “professionalized.”
enough on the rational potential left unexhausted. Accordingly, Habermas argues, Weber cannot give systematic significance to his occasional comments that “rationalization,” as it actually has played out, has led to pathological and irrational consequences. To capture the ambivalence of “rationalization” as it has unfolded, Habermas argues, we need more systematic criteria that are not so closely identified with a capitalist economy, bureaucratic state, and the patterns of life-conduct that serve those central social structures.

Habermas identifies three conditions that must be satisfied if the reproduction of the lifeworld is to count as its “rationalization.” The first builds on the idea of differentiation with which Weber approached the problem of cultural rationalization. Habermas presents the initial point of this rationalization process as one in which a myth-based cultural tradition reigns supreme, not only underwriting the interpretive schemes of a society’s members, but determining social roles and group memberships, fixing a relatively concrete moral code, prescribing procedures and standards for political institutions, fixing the division of labor and limiting the extent of individual economic initiative, and determining from the outset who will be able to acquire which competences and skills. Just as the rationalization of culture involves the differentiation of three spheres of value, so the rationalization of the lifeworld as a whole involves the differentiation of the “components” culture, society, and personality. Society, or, the institutional order, differentiates itself from the cultural tradition through a “gradual uncoupling of the institutional system from worldviews,” with the result that “formal procedures for positing and justifying norms” rather
than mythic traditions, establish the legitimacy of social institutions.  

The differentiation of the personality component appears in the “extension of the scope of contingency for establishing interpersonal relations”—that is, the greater possibilities for individual initiative in establishing social relations and acquiring competences and motivations.  

And to the extent the cultural tradition is disentangled from the operation of social institutions, “the renewal of traditions depends more and more on individuals’ readiness to criticize and their ability to innovate.”  

What Habermas means with this sketchy account is that the cultural tradition loses much of its prejudicial power over the course of social interaction:

These trends can establish themselves only insofar as the yes/no decisions that carry everyday communicative practice no longer go back to an ascribed normative consensus, but issue from the cooperative interpretation processes of participants themselves. Thus they signal a release of the rationality potential inherent in communicative action.

The other two conditions Habermas sets for the rationalization of the lifeworld—a differentiation between form and content, and an increasing “reflexivity” in the lifeworld’s symbolic reproduction—can be considered together in their effects on each of the three lifeworld components. For culture, the differentiation between form and content means that the “core, identity-securing traditions” lose the concreteness of mythical worldviews and develop into abstract basic values (such as autonomy, liberty, and the like), as well as formal procedures and structures for communication and argumentation. The increased “reflexivity” of cultural reproduction arises with the institutionalization of the cultural systems of action Weber mentioned: the academy and scientific laboratory, institutions of professional legal training and scholarship, religious associations, and the community of artistic

120. See id. at 146.
121. Id.
122. Id.
123. Id.
124. Id.
creation and criticism. These institutions and practices subject the cultural tradition to ongoing criticism and revision. Culture is not merely reproduced, in the sense of being carried forward unchanged; it is critically appropriated and discursively transformed.

In the institutional order, the trend toward a differentiation between form and content brings general moral and legal principles that are "less and less tailored to concrete forms of life." Here Habermas might have in mind conceptions of the moral agent and legal person that increasingly abstract from particular characteristics, such as status, class, religious affiliation, ancestry, and eventually race and sex, as well as the sense that particular norms need to be justified not just traditionally but in terms of more general principles. Here, too, Habermas emphasizes the development of formal procedures for creating and justifying norms, with democratic procedures figuring as particularly important:

Mead and Durkheim... stress the evolutionary significance of democracy: democratic forms of political will-formation are not only the result of a power shift in favor of the carrier strata of the capitalist economic system; forms of discursive will-formation are established in them. And these affect the quasi-naturalness of traditionally legitimated domination in a similar way, even as modern natural science, jurisprudence with specialized training, and autonomous art break down the quasi-naturalness of ecclesiastical traditions.

The democratic process is "reflexive," in two senses. First, the creation and justification of norms is itself normatively regulated. Second, the democratic institutionalization of political discourse allows for a reflective, or critical, attitude toward traditional norms and institutions.

In the "personality" component of the lifeworld, the separation between form and content brings an increasing emphasis on "formal competences." With the universalization of at least basic formal education, individuals acquire generalized competences—reading and quantitative skills, for example—that are applicable in many different settings,
not just in a particular task or craft.\textsuperscript{129} The professionalization of formal education, together with the development of social-scientific disciplines surrounding child-rearing and education, counts as an increased "reflexivity" in the socialization process. Here, too, traditional patterns increasingly are subjected to critical scrutiny and revision.\textsuperscript{130}

In all these ways, according to Habermas, the symbolic reproduction of the lifeworld's "structural components" has brought a communicative rationalization, or, the "release of the rationality potential in communicative action."\textsuperscript{131} Running through this account is an emphasis on three related points. First, with the communicative rationalization of the lifeworld, social interaction comes to depend more on communicatively achieved consensus, as opposed to consensus prescribed in advance by tradition. Second, this rationalization has meant an increasing importance of discourse, and not just naive or unreflective communicative action. Third, the rationalization of the lifeworld has brought the institutionalization of discourse, not just its episodic eruption.

D. Rationalization and the Development of "Systems"

But "rationalization," for Habermas, is not just the release and institutionalization of communicative rationality. The process that has brought the communicative rationalization Habermas identifies has, at the same time, produced a state and economy that operate on other principles—and in ways that may be dysfunctional for what Habermas calls the lifeworld.

Habermas's general argument on this point is as follows. The communicative rationalization of the lifeworld is part of a trend toward greater social complexity. If agreement is not secured in advance by tradition, but depends instead upon the interpretive and discursive achievements of participants, then the possibility of

\textsuperscript{129} See id. ("[T]he cognitive structures acquired in the socialization process are increasingly detached from the content of culture knowledge with which they were at first integrated [and] . . . . [t]he objects in connection with which formal competences can be exercised become increasingly variable.").

\textsuperscript{130} See id. at 147.

\textsuperscript{131} Id. at 77; see also id. at 88, 146, 180, 288.
disagreement becomes more burdensome and risky. 132 And accordingly, the problem of coordinating action becomes more difficult. One way in which modern societies have managed this greater risk of dissensus, according to Habermas, is through the development of generalized "media" such as money and power 133—"steering media," in Habermas's preferred terminology. The systems that develop around these media, Habermas argues, coordinate action and integrate society in a way fundamentally different from the way those functions are fulfilled through communicative action and consensus concerning validity claims.

The usual way Habermas introduces this difference is through the distinction between action orientations and action consequences. 134 Communicative action, with its "mechanism of mutual understanding," "harmonizes the action orientations of participants." 135 By this Habermas means that communicative actors are oriented either toward reaching agreement with each other or toward an agreement that already has been reached. The interaction is coordinated through this agreement or mutual search for agreement. And at a more encompassing level, society itself is integrated through a general consensus about institutionalized norms and values. So it appears, at least, from the perspective of a theory of communicative action.

But according to Habermas, interactions steered by the "media" around which the economic and administrative systems develop—money and power—are coordinated through action consequences. By this he means that actors in, for example, a monetary transaction may be indifferent whether they share some mutual commitment to norms or values. Each participant is oriented toward her own success. In that sense, then, the actors’ orientations are not, as in the case of communicative action, congruent or even necessarily complementary. Instead, what coordinates interaction in this situation, and particularly what binds together a network of market transactions, is the "functional[] intermeshing of action consequences." 136

132. See id. at 182-83, 262.
133. See id. at 180-81, 183, 261-63, 272, 276, 281.
134. See, e.g., id. at 117, 150, 186-87.
135. Id. at 150.
136. Id.
Similarly, the administrative system, with its steering medium of political power, operates through relations of command and obedience. Official command, not communicative agreement, is the mechanism that coordinates action in the bureaucratic organizations that structure the administrative system. And official command mediates the "interchange" relations between the administrative system and other social spheres. Habermas uses the term "system integration" to refer to the societal cohesion that the steering media of money and power produce. The contrast is to the "social integration" that binds a social lifeworld together through normative consensus or communicatively achieved agreement over claims to validity.\textsuperscript{137}

Much of \textit{Theory of Communicative Action} is devoted to the construction of a theory that comprehends both social and system integration. This project involves the synthesis of two methodological approaches: one focusing on society as the "lifeworld" of social groups and individuals, and the other focusing on those spheres of action—the economy and state administration, in Habermas's view—that operate as social "systems." The culmination of this synthesis is a systems-theoretical model of "interchange" between communicatively organized, socially integrated "lifeworld" spheres and the systemically integrated economic and administrative systems.

I have criticized this model at length in other work.\textsuperscript{138} It suffices here to note the conclusions Habermas draws from that model. The central aim of \textit{Theory of Communicative Action} is to account systematically for both the accomplishments and the pathologies of what Weber called "rationalization." The accomplishments include not just the communicative rationalization of everyday practice and social decisionmaking arrangements but also the development of complex economic and administrative systems that reduce, in a non-traditionalistic way, the risk of dissensus. The pathology Habermas identifies is not the development of such systems \textit{per se} but their overextension. According to Habermas, the "hypertrophic"\textsuperscript{139} economic and administrative systems have "colonized" informally and communicatively organized spheres of life. The cost has

\begin{itemize}
  \item \textsuperscript{137} See, e.g., \textit{id.} at 117-18, 150-51, 186-87.
  \item \textsuperscript{138} See Baxter, \textit{supra} note 7.
  \item \textsuperscript{139} \textit{2 Theory of Communicative Action}, \textit{supra} note 73, at 332.
\end{itemize}
been impairment of the "symbolic reproduction of the lifeworld"—interference, that is, with the processes of cultural reproduction, social integration, and socialization.

The emphasis in Theory of Communicative Action thus is on threats to "the lifeworld,"—i.e., to non-bureaucratic, non-economic relations and social spheres. While Habermas briefly discusses then-current forms of political resistance to the "colonizing" tendencies he identifies, his main strategy is to argue that these tendencies face unavoidable limits, independent of any commitment to political resistance, in the lifeworld's functional requirements of symbolic reproduction. On one hand, this strategy avoids tendentious assumptions about political change. On the other hand, however, it is normatively defensive. And further, assessing whether a society faces a crisis in, for example, cultural reproduction—which Habermas defines as maintaining a "continuity of tradition and coherence of knowledge sufficient for daily practice"—calls for a substantive judgment as to whose "daily practice" matters and how much knowledge any particular person needs to acquire.

Habermas's recent work on law is a very different kind of project. He presents a normative theory of law and democracy and tries to identify the conditions under which it could be more fully realized. To be sure, he is concerned to argue that the normative theory is not just his own whim, but instead, a position with deep roots in both the theory and practice of modern law and politics. Nonetheless, the argument is normatively ambitious in a way that Theory of Communicative Action is not. The central ideas of that normative theory are the notions of communicative action, discourse, and communicative rationality that I have sketched above.

140. See id. at 391-96.
142. 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 140 (emphasis omitted).
II. HABERMAS'S "RECONSTRUCTION" OF MODERN LAW

A. The Two Aspects of Legal Validity and Habermas's Method of Reconstruction

The premise of Habermas's analysis of modern law is the social condition he has described as the "rationalization of the lifeworld." Through this process of rationalization, Habermas has argued, the cultural tradition has been largely secularized and has lost much of its power to prescribe in advance the division of labor and social roles. Action must be coordinated less through an unproblematic background consensus and more through the achievements of participants themselves. Interest positions are more sharply differentiated, and the possibility of dissensus and conflict accordingly has increased. Communicative action, Habermas has said, offers one mechanism for coordinating action and integrating society. But attempts to secure communicative agreement are burdensome and risky, Habermas has maintained, and further, modern societies are characterized by the development of spheres of strategic (or "media-steered") interaction. Accordingly, communicative agreement cannot be the only mechanism by which action is coordinated and modern societies integrated.

Modern law addresses these difficulties. On one hand, law enforces compliance by strategic actors (and those otherwise uncommitted to the law's normative claims) through sanctions. On the other hand, if a legal order is to provide a stable basis for social integration, it must be accepted as generally legitimate. According to Habermas, modern law is characterized by these two aspects: its steering of actors' choices through sanctions and its claim to legitimacy. Both are essential. Law, on Habermas's analysis, "leave[s] the choice of action orientation up to the addressees." In other words, it offers the alternative between two forms of compliance: one motivated by a concern for the sanctions that the norm's enforcement would impose, and the other motivated by a belief that the legal norm is legitimate. Law, then, is tailored to both the "objectivating" and "performative" attitudes that Habermas

143. See supra Part I.C.
144. BETWEEN FACTS AND NORMS, supra note 2, at 29.
used to distinguish between strategic and communicative action.\textsuperscript{145}

The idea that a legal order's legitimacy buttresses its long-run stability is a staple of social theory. And as Habermas notes, it features particularly prominently in Max Weber's sociology of law.\textsuperscript{146} Habermas parts company with Weber, however, as to exactly how social theory should understand the notion of legitimacy. For his part, Weber distinguished between social (or de facto) validity and "ideal" validity.\textsuperscript{147} With the notion of social validity, Weber meant to address the issue whether, as a matter of sociological fact, members of a society generally believe that the society's legal order and its norms are obligatory. With the notion of ideal validity, by contrast, Weber meant to refer to the question whether, as a matter of legal or political theory, a society's legal order and norms are legitimate—whether, that is, a legal order's socially accepted claim to validity genuinely may be redeemed. Weber's sociology of law, and with it his notion of a legal order's legitimacy, addresses only the matter of social validity. A legal order's ideal validity, Weber says, is a question for legal theory or jurisprudence or the philosophy of law, not for sociology.\textsuperscript{148}

Habermas's "reconstructive" approach does not so quickly exile the question of ideal validity. His perspective on legitimacy is more abstract than Weber's focus on actors' actual beliefs about legal norms and the legal order. Habermas's reconstruction of "the self-understanding of... modern legal orders"\textsuperscript{149} focuses on the presuppositions that underlie modern practices of legal justification. Because the process of rationalization has undermined the social order's religious and metaphysical support, Habermas argues, the only plausible form of justification is through discourse.\textsuperscript{150} An important part of Habermas's reconstructive analysis of law, therefore, is to analyze the various kinds of discourse

\textsuperscript{145} See supra Part I.A.
\textsuperscript{146} See Between Facts and Norms, supra note 2, at 67-68; see also, e.g., 1 Max Weber, Economy and Society 31, 213 (Guenther Roth & Claus Wittich eds., 1978).
\textsuperscript{147} See, e.g., 1 Weber, supra note 146, at 31-33, 311-13.
\textsuperscript{148} See Between Facts and Norms, supra note 2, at 69-70.
\textsuperscript{149} Id. at 82 (emphasis omitted).
\textsuperscript{150} See id. at 106-07.
involved in making and applying legitimate law.\textsuperscript{151} At the same time, Habermas argues, the emphasis on discourse does not mean that he is concerned only with law's "ideal validity." Instead, Habermas intends his discourse theory of law to reconstruct the presuppositions characteristic of modern societies, not to survey law from a perspective generated solely through an extrinsic ideal theory. As with his notion of "rationalization," Habermas's reconstructive analysis of a modern legal order is designed to capture its unexhausted rational potential, but from a perspective more or less immanent to the legal order, not a utopian perspective.

The tensions Habermas identifies at the outset of his theory of law—tensions between ideal and empirical validity, and between legitimacy and enforcement—exemplify a more general theoretical logic underlying \textit{Between Facts and Norms}. The German title of that book is \textit{Faktizität und Geltung} which, translated literally, means "facticity and validity." This distinction between "facticity,"\textsuperscript{152} and "validity" organizes the argument of \textit{Between Facts and Norms} at every level. With "facticity," Habermas associates ideas such as law's positivity, certainty or predictability, institutional connections, and coercive enforcement.\textsuperscript{153} With "validity" he associates law's (ideal) legitimacy and "rational acceptability"—i.e., its claim to be more normatively worthy of obedience. As suggested above, Habermas considers both moments essential. So, too, is the tension between them.

It may be worth a moment to make the architectonic of Habermas's project more clear. \textit{Between Facts and Norms} divides into two main parts, each paired with one side of the most comprehensive facticity/validity distinction Habermas identifies. The first part, on the "validity" side, is

\textsuperscript{151} See infra Part II.C.3.

\textsuperscript{152} The word "\textit{Faktizität}" is not so rare as the English word "facticity." The latter, however, shows up at least in unabridged dictionaries, and is defined as "having the quality of being a fact." 5 \textsc{The Oxford English Dictionary} 652 (2d ed. 1989).

\textsuperscript{153} See \textit{Between Facts and Norms}, supra note 2, at 8, 28-30, 32, 64, 198, 447-48 (connecting "facticity" and coercive enforcement); \textit{id.} at 198 (connecting "facticity" and certainty or predictability); \textit{id.} at 64 (connecting "facticity" and law's institutional dimension); \textit{id.} at 28, 95, 447-48 (connecting "facticity" and positivity).

\textsuperscript{154} See \textit{id.} at 29; see also \textit{id.} at 38, 64, 95, 198, 447-48.
the reconstructive and normative theory: the "discourse theory of law" proper,\textsuperscript{155} established through a reconstructive account of modern legal orders' "self-understanding."\textsuperscript{156} The second part, on the "facticity" side, is the "communication theory of society," in which Habermas examines, from the point of view of social theory, whether the reconstructive discourse theory is plausible under factually obtaining conditions of modern social complexity. I consider in this article only the first part of Habermas's project, treating the communication theory of society in a companion article,\textsuperscript{157} but Habermas makes clear that he understands the two parts to be moments of the same project.\textsuperscript{158}

In this first division—between discourse theory proper and the communication theory of society—the tension between facticity and validity is, Habermas says, "external." By this he means that he is concerned, in that aspect of his project, with the tension between officially legitimate democratic and legal procedures, on one hand, and on the other hand, the systems of "social power" that may displace or otherwise influence those procedures "externally."\textsuperscript{159}

But the tension between facticity and validity, Habermas argues, inhabits also the very notion of legal validity itself.\textsuperscript{160} And so even in Habermas's discourse theory proper—which occupies the "validity" side in the "external" tension between facticity and validity—the tension between facticity and validity reappears, this time

\begin{itemize}
\item \textsuperscript{155} I say "proper" because Habermas also sometimes calls the whole project his "discourse theory of law and democracy."
\item \textsuperscript{156} This part comprises chapters 3-6 of Between Facts and Norms. (The first two chapters are introductory, designed to set out the basic distinction between facticity and validity.)
\item \textsuperscript{157} Baxter, \textit{supra} note 7.
\item \textsuperscript{158} See Jürgen Habermas, \textit{Reply to Symposium Participants, Benjamin N. Cardozo School of Law, in HABERMAS ON LAW AND DEMOCRACY, supra note 6}, at 381, 444 (turn to social science is "meant to make it plausible that the reconstructed normative self-understanding of modern legal orders does not hang in mid-air," but instead "connects with the social reality of highly complex societies").
\item \textsuperscript{159} See \textit{BETWEEN FACTS AND NORMS, supra} note 2, at 38 (characterizing as an "external relation between facticity and validity" the problem of "the facticity of legally uncontrolled social power that penetrates law from the outside"); see also id. at 82 (referring to the "external tension between the normative claims of constitutional democracies and the facticity of their actual functioning").
\item \textsuperscript{160} See, \textit{e.g.}, id. at 64, 82, 96.
\end{itemize}
as an "internal" tension, or, as a tension immanent in the "validity dimension" of modern law itself.\textsuperscript{161} The basic figure of Habermas's work on law is the nesting of tensions between facticity and validity. That is the architectonic of Habermas's reconstructive theory of law and democracy.\textsuperscript{162}

The structure of chapters in \textit{Between Facts and Norms} reflects this architectonic. After the first two chapters, which sketch basic concepts in Habermas's earlier work and introduce the facticity/validity distinction, chapters three and four present the core of the discourse theory proper—the "validity" side of the most comprehensive facticity/validity division. Chapters seven and eight address the "communication theory of society" that occupies the "facticity" side of that distinction. The intervening chapters five and six "test" the discourse theory, Habermas says, by addressing adjudication-related issues in legal theory and constitutional law.

\textsuperscript{161} Id. at 42.

\textsuperscript{162} In this respect, and ironically, Habermas's recent work seems close in logic to the theory of autopoietic systems developed by Niklas Luhmann—Habermas's long-time partner in debate, and still the object of Habermas's polemic. Luhmann's recurring strategy is to identify an "internal" and an "external" side of a distinction—as between "self-reference" and "external reference," "closure" and "openness," or "system" and "environment"—then to show that each side of the distinction presupposes the other. See, e.g., Niklas Luhmann, Das Recht der Gesellschaft 74 (1993) (unity of law presupposes the distinction of law from its environment); id. at 76 (openness is possible only on the basis of closure); id. (distinction between system and environment is internal to the system); id. at 83 (system's closure as unity of closure and openness); id. at 223-24 (idea of justice as the unity of a difference, or a unity in difference); id. at 308 (legal decision as the unity of a difference among alternatives); Niklas Luhmann, The Unity of the Legal System, in AUTOPOIETIC LAW 12, 23 (Gunther Teubner ed., 1988) (self-reference as the "simultaneous practice of self-reference and external reference"). As Luhmann notes, however, the distinction between facticity and validity is not one of mutual exclusion. See Niklas Luhmann, Quod Omnes Tangit: Remarks on Jürgen Habermas's Legal Theory, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 157, 161 [hereinafter Luhmann, \textit{Quod Omnes Tangit}]. In this respect, the facticity/validity distinction differs from the distinctions on which Luhmann's method thrives. Perhaps for this reason, Luhmann does not see a parallel between Habermas's rhetorical strategy and his own. See id. (describing Habermas's characterization of the facticity/validity relation as "not much more than a formula for perplexity").

Chapters three and four, devoted to the “validity” side of the most general facticity/validity distinction, seem in turn to divide along the lines of that same distinction. In chapter three, Habermas addresses, first, what he calls “the system of rights,” by which he means the categories of basic rights (five, according to Habermas) that any modern system of law must recognize if it is to count as legitimate. He turns then in chapter four to an account of “the principles of the constitutional state,” addressing the institutional mechanisms and procedures required to implement the basic rights that he has set out abstractly, under the heading of “the system of rights,” as conditions of any legal system’s legitimacy. The account of the system of rights thus seems to track the “validity” side of Habermas’s basic distinction, while the account of the constitutional state develops the institutional and positive dimension of law that Habermas connects with “facticity.” Yet Habermas’s argument—a characteristic argument throughout his work on law and democracy—will be that the two moments, analytically distinguishable, mutually presuppose and complete one another.

In Part II.B below, I examine Habermas’s account of the system of rights. In Part II.C, I will take up Habermas’s account of the principles of the constitutional state.

B. The System of Rights

The task of Habermas’s “system of rights” is to mediate two related tensions: between private and public autonomy, and between basic rights and popular sovereignty. Here, too, Habermas sees these tensions as expression of a more general tension between facticity and validity. Basic individual rights create spheres of morally neutralized action, thus securing individuals’ private autonomy. But these rights must be justified and made legitimate through a “legislative procedure” that is based on the “principle of

163. I say “seem to divide” because Habermas does not make the claim explicitly.
164. See BETWEEN FACTS AND NORMS, supra note 2, at 82 (the “system of rights as a whole is shot through with that internal tension between facticity and validity manifest in the ambivalent mode of legal validity”); id. at 129 (suggesting that the relation between private and public autonomy is a relation between facticity and validity); id. at 136 (“tension between private and public autonomy” as “tension between facticity and validity”).
poplar sovereignty.”\textsuperscript{165} The idea of Habermas's system of
rights is to show that these two aspects of modern law are
not only compatible but “co-original.”\textsuperscript{166}

First, however, Habermas must show that modern legal
orders’ “self-understanding” manifests the tension that he
proposes to mediate.

1. The Grounds of Law's Legitimacy. Habermas's
reconstruction of modern legal orders' “self-understanding”
begins with readings of two traditions: nineteenth-century
German civil-law theory and the social contract theory of
Rousseau and Kant. Habermas draws two conclusions from
these readings. First, the ideas of human rights and
popular sovereignty are “the sole ideas that can justify
modern law.”\textsuperscript{167} Second, neither tradition succeeded in
reconciling the two ideas. This account is the background
for Habermas's own attempt to mediate the tension
between human rights and popular sovereignty, private
autonomy and civic autonomy.

In German private-law theory, Habermas sees the
primacy of individual private-law rights to property and
free contract. For the mid-nineteenth century authors in
this tradition, these rights presupposed an equality among
legal persons and were based in the mutual recognition of
all. But this mutual recognition was independent of
authorization by a democratic legislature. The justification
for these private-law rights was that they created and
maintained a zone of personal sovereignty and private
autonomy.\textsuperscript{168} This moral grounding of private-law rights
gave way, according to Habermas, with the ascent of
positivist theories of the late nineteenth century—theories
that traced the validity of law not to its correspondence
with moral notions but to the binding will of a sovereign.\textsuperscript{169}
And according to Habermas, subsequent developments in
German civil-law theory—efforts to restore the moral
grounding of private-law rights, to add “social rights” to the
negative liberties of private law, or to explain the

\begin{footnotes}
\item[165] Id. at 82-83.  
\item[166] See id. at 127.  
\item[167] Id. at 99.  
\item[168] Id. at 85.  
\item[169] Id. at 85-86.  
\end{footnotes}
connection between private autonomy and democratic lawmaking—have been unsuccessful.\footnote{170}

In Rousseau, Habermas finds the ideas of political autonomy and popular sovereignty that are absent in classical civil-law jurisprudence. And with Rousseau's link between democratic lawmaking and the general will, the exercise of political autonomy seems to guarantee the equal liberties of all. In that sense, Habermas says, Rousseau's emphasis on civic autonomy establishes "an internal connection between popular sovereignty and human rights."\footnote{171} But Rousseau places demanding preconditions on this exercise of civic autonomy. If the legal order is not to be a coercive order, the political community must be small and already integrated through a shared cultural tradition, and its members must possess extraordinary civic virtue.\footnote{172} In Habermas's view, however, these conditions amount to a denial of the basic problematic of modern law: the differentiation of interest positions, the pluralization of groups and conceptions of the good, and the increasing importance of self-interested action. And thus, according to Habermas, the promised reconciliation of private and civic autonomy remains fictive—at least with respect to a recognizably modern society.\footnote{173}

Finally, in Kant Habermas finds both a notion of political autonomy and an emphasis upon private individual liberties. The grounding for these private rights is, as in German civil-law jurisprudence, a moral notion of autonomy and the mutual recognition of rights among equals. These particular rights are for Kant the specification of a more general right to equal liberties. The requirement that these rights be specified in positive law seems to link Kant's system of rights to the idea of popular sovereignty. But according to Habermas, the status of these individual rights as prepolitical natural rights creates an "unacknowledged competition between morally grounded human rights and the principle of popular sovereignty."\footnote{174} The morally grounded system of rights operates as a limit on democratic legislation. Thus, rather than reconciling the

\footnotesize

\footnote{170. Id. at 86-89.}
\footnote{171. Id. at 101 (emphasis omitted).}
\footnote{172. Id. at 102.}
\footnote{173. See id. at 101-02.}
\footnote{174. Id. at 94 (emphasis omitted).}
idea of human rights with the principle of popular sovereignty, Habermas claims, Kant subordinates the latter to the former.175

Habermas incorporates into his preliminary notion of law several points on which his three readings converge. Modern law, in all three, centers around a “system of rights.” These rights take the form of equally distributed, mutually recognized individual liberties that define the legal person as rights-bearer. Following Kant and the German civil-law tradition, Habermas sees these individual rights as the basis for private autonomy—the sphere of individual decisionmaking that must be preserved if law is to be legitimate. Further, from Rousseau and Kant, Habermas incorporates the idea of popular sovereignty or democratic lawmaking as a source of legitimacy. The idea here is that a legal order is legitimate to the extent that its norms are authored by their addressees. Habermas refers to this idea, interchangeably, as “civic autonomy,” “public autonomy,” or “political autonomy.” And according to Habermas, Rousseau and Kant saw also that these two sources of legitimacy needed to be genuinely reconciled—popular sovereignty with individual rights, or, put differently, private autonomy with civic autonomy. But the reconciliations failed in each case, according to Habermas, because each tacitly ranks one term in these conceptual pairs over the other. Kant, Habermas maintains, emphasizes a “moral reading of human rights” that subordinates popular sovereignty and civic autonomy. Rousseau provides an “ethical reading of popular sovereignty”—where, by “ethical,” Habermas means “pertaining to a particular community’s form of life.”176 Kant and the early German civil-law theorists thus grounded law in morality. Rousseau grounded it in the shared life of a unified and virtuous ethical community. In both cases, law’s legitimacy is established extralegally, by virtue of the postulated correspondence between the legal order and some other order—whether moral or (in Habermas’s sense) ethical.

According to Habermas, the subordination of law to morality or ethical life misunderstands the place of law in

---

175. See id. at 105-06, 449.
176. See infra Part II.C.3. (discussing problems in Habermas’s idea of “ethical discourse”).
modern society. Legal norms are not just imperfect copies of universal moral norms, nor are they simply emanations of an existing, prepolitical consensus.\textsuperscript{177} Habermas sees the relation between law and morality as complementary, and he understands both as differentiated from particular forms of life belonging to ethically unified communities.\textsuperscript{178} He makes these points in the first instance through his theory of rationalization.

The process Habermas calls the "rationalization of the lifeworld" brings an increasing pluralism of forms of life, with the customary norms and practices of each "devalued to mere conventions."\textsuperscript{179} This allows the differentiation of both morality and law from traditional norms based in particular homogenous communities. On Habermas's reading, morality becomes increasingly universalistic—Habermas focuses on Kant's moral theory, but utilitarianism would qualify as well—and moral norms are to be justified not simply by their coherence with particular traditions but impartially, through universalistic moral discourses.\textsuperscript{180} With the positivization of law, legal norms come to be generated through legally prescribed procedures.\textsuperscript{181} The process of rationalization, then, weakens the connections between legal and moral norms, on one hand, and the customs of particular communities, on the other.

The positivization of law—the generation of legal norms through legally prescribed procedures—differentiates legal from moral norms.\textsuperscript{182} So too does the internal link between the validity of a legal norm, but not a moral norm, and the norm's enforcement.\textsuperscript{183} And so too do the different references of the two kinds of norms—to members of a legal community, in the case of legal norms, and (on Habermas's view) to "humanity or a presupposed republic of world citizens," in the case of moral norms.\textsuperscript{184} But Habermas sees the relation between law and morality not just as differentiation: the two kinds of norms, he says, are

\begin{itemize}
  \item \textsuperscript{177} See \textit{Between Facts and Norms}, supra note 2, at 105-06.
  \item \textsuperscript{178} See \textit{id.} at 105.
  \item \textsuperscript{179} \textit{Id.} at 106.
  \item \textsuperscript{180} See \textit{id.} at 97-98.
  \item \textsuperscript{181} \textit{Id.} at 111.
  \item \textsuperscript{182} \textit{Id.} at 79, 110.
  \item \textsuperscript{183} \textit{See id.} at 155-56.
  \item \textsuperscript{184} \textit{Id.} at 108.
\end{itemize}
"complementary." Law, according to Habermas, compensates for the heavy burdens that universalistic, post-conventional moralities place upon individuals. Some of these burdens Habermas classifies as "cognitive." Postconventional moralities consist not in a list of concrete duties but primarily in a universalization principle and an idea of discursive justification. Because they require autonomous determinations, postconventional moralities require the individual to make difficult judgments in justifying general principles, in deciding which of several potentially applicable principles should apply, and in applying an abstract principle to a factual situation. Legal norms ease this burden with their relative concreteness. And through their employment of sanctions to induce compliance, legal norms address also the "weakness of the will" problems that are exacerbated in postconventional moralities. From a functional point of view, then, law supplements morality in regulating interpersonal relations, and it does so through institutionally bound, coercive mechanisms that are absent from postconventional morality.

Habermas thus rejects the idea that law is subordinate to morality or the prepolitical customs and norms of a particular homogenous community. And although he sees legal and moral norms as complementary, he rejects the idea that law's legitimacy can be established solely through moral theory: the institutional dimension of law and its coercive mechanisms are sufficient to differentiate law, and the basis of its legitimacy, from morality. Thus, if human rights and popular sovereignty are to be the grounds of law's legitimacy, they need to be understood not in a moral or ethical sense, but directly as legal rights and legal procedures.

---

185. Id. at 105-06, 113, 118, 452, 453.
186. See id. at 114-15.
187. See id. at 153.
188. See id. at 115-16.
189. See id. at 107 ("We must not understand basic rights or Grundrechte, which take the shape of constitutional norms, as mere imitations of moral rights, and we must not take political autonomy as a mere copy of moral autonomy."); id. at 105 ("Human rights, too, which are inscribed in citizens' practice of democratic self-determination, must then be conceived from the start as rights in the juridical sense, their moral content notwithstanding.").
Habermas's reconstruction of the system of rights aims at an account that "gives equal weight to both the private and the public autonomy of the citizen."\(^{190}\) In accounting for civic or political autonomy, Habermas says, he must incorporate the sense in which a legal order can be said to be authored by the members of a legal community who are also the addressees of legal norms.\(^{191}\) Here he must make room for democratic procedures of lawmaking—or as Habermas puts it, for the "discursive processes of opinion-and will-formation in which the sovereignty of the people assumes a binding character."\(^{192}\) And in accounting for private autonomy, Habermas claims, he must leave room for individuals not to exercise this very "communicative freedom."\(^{193}\) Legally protected private liberties involve actors' freedom to "withdraw from the public space . . . to a position of mutual observation and influence."\(^{194}\) In terms of Habermas's action theory, these liberties "entitle one to drop out of communicative action"\(^{195}\) and to act strategically with respect to individual interests. In these respects, private liberties are basic to the creation of morally neutralized spheres of strategic action—spheres of action that Habermas's earlier work analyzed as the economic and administrative systems.\(^{196}\)

But Habermas has in mind here more than just the freedom to act strategically in pursuit of economic gain or power. He speaks also of a right to "privacy" that consists in an actor's refusal "to give others an account or give publicly acceptable reasons for her action plans."\(^{197}\) This freedom to withdraw from the exercise of "communicative freedom"—that is, the freedom to refuse to exercise one's public or political autonomy—is a necessary condition of that

\(^{190}\) Id. at 118.

\(^{191}\) See id. at 104 (the account must "decipher, in discourse-theoretic terms, the motif of self-legislation according to which the addressees of law are simultaneously the authors of their rights"); id. at 120 (the idea of political autonomy implies that "those subject to law as its addressees can at the same time understand themselves as authors of law").

\(^{192}\) Id. at 104.

\(^{193}\) See id. at 119-20.

\(^{194}\) Id. at 120.

\(^{195}\) Id.

\(^{196}\) See supra Part I.D.

\(^{197}\) BETWEEN FACTS AND NORMS, supra note 2, at 120.
communicative freedom itself. In that respect, public autonomy already could be said to presuppose private autonomy.

2. The “Discourse Principle” and the Categories of Basic Rights. Habermas's categories of basic rights are designed further to reconcile the tension between private and public autonomy—a tension that appears also in the relation between human rights and popular sovereignty. Habermas approaches this reconciliation project with what he calls “the discourse principle.” In its general form, this principle is neutral between law and morality. As Habermas puts it, the discourse principle “merely expresses the meaning of postconventional requirements of justification”—that is, the requirements of justification in a rationalized “lifeworld,” where tradition and religious or metaphysical worldviews are no longer sufficient to legitimate social norms or institutions. Habermas states the principle as follows:

Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.

I will examine later the ambiguity of “could” in the expression “could agree.” For now, clarification of the other terms—all of which are expressly defined—will

198. See Klaus Günther, Communicative Freedom, Communicative Power, and Jurisgenesis, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 234, 238. Ulrich Preuss suggests that on this point Habermas needs a theory of civic obligation and virtue. See Ulrich K. Preuss, Communicative Power and the Concept of Law, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 323, 334-35. In his reply, Habermas makes clear that he means only that there can be no legally enforceable duty to exercise one's communicative freedom. Jürgen Habermas, Reply to Symposium Participants, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 371, 438. Habermas does not preclude a moral duty to exercise one's political autonomy, although Preuss is right that Habermas does not argue for such a duty.

199. Habermas notes that his prior work has failed to distinguish adequately between the discourse principle in general and the version appropriate to moral discourse. BETWEEN FACTS AND NORMS, supra note 2, at 108.

200. Id. at 107.
201. Id.
202. See infra text accompanying note 359.
203. Niklas Luhmann makes this observation and argues that Habermas relies on the ambiguity of the word “could.” See Luhmann, Quod Omnes Tangit,
suffice. By "action norms," Habermas means "temporally, socially, and substantively generalized behavioral expectations." By "affected persons" he means "anyone whose interests are touched by the foreseeable consequences of a general practice regulated by the norms at issue." And with the term "rational discourse," he refers to "any attempt to reach an understanding over problematic validity claims," provided that conditions permit "free processing of topics and contributions, information and reasons." Habermas adds a rider that will turn out to be important: the term "rational discourse" also "refers indirectly to bargaining processes insofar as these are regulated by discursively grounded procedures." This rider allows him to include also processes of "compromise," where discursive agreement is impossible to obtain—provided that the bargaining conditions underlying the compromise are fair. Such compromises will turn out to be important in his account of the Rechtsstaat, or constitutional state.

The other conceptual tool Habermas introduces is the idea of "the legal form." Habermas seems to mean by this term the formal characteristics of legal norms that make them specifically legal rather than moral. Habermas also refers in this context to "the legal medium." The terms "legal form" and "legal medium" seem to be synonymous for Habermas. But his use of the word "medium," together

supra note 162, at 164-65. I take up this point with respect to the "democracy principle," corollary of the discourse principle. See infra text accompanying notes 239-45.

204. BETWEEN FACTS AND NORMS, supra note 2, at 107.
205. Id. at 108.
206. Id.
207. Id. at 108, 165-66, 283.
208. He introduces the idea in a discussion of Kant's distinction between legal and moral norms. See id. at 111-12. He invokes it a second time in the context of, again, distinguishing between legal and moral norms. See id. at 118-19.
209. Id. at 119 ("The legal medium as such presupposes rights that define the status of legal persons as bearers of rights."); see id. ("[T]his legal form itself already gives rise to the privileged position that rights occupy in modern legal orders."); William Rehg, Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jürgen Habermas, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 257, 262 (referring to "what Habermas calls the 'legal medium' or 'legal form'"); see also BETWEEN FACTS AND NORMS, supra note 2, at 122 (seeming to use the terms "legal form" and "medium of law" indiscriminately).
with the unclear relation between “legal form” and “legal medium,” gets Habermas into some conceptual difficulties.

The problem with the term “medium” is that Habermas's prior writings, as well as a number of passages in Between Facts and Norms, use the term “medium” as shorthand for “steering medium.” As I mentioned briefly in Part I.D, the term “steering medium” is part of Habermas’s social-theoretical vocabulary, and it refers to money and power as “system” mechanisms that coordinate action by circumventing the process of reaching communicative agreement. As Habermas explains, his idea of a “steering medium” is a more restrictive version of what Talcott Parsons called “generalized symbolic media,” or, specialized languages for particular social subsystems (such as the economy and polity). In referring to “the legal medium,” Habermas probably means something more like Parsons’s “generalized symbolic medium” than his own “steering medium.” If that is so, then law is not a “steering medium” analogous to money and power, but instead, a “language” with a specialized vocabulary and conceptual structure that “circulates” throughout society. And if we understand the term “legal medium” in that way, then the term “legal form” should mean that which marks the legal medium as legal—the particular structure and characteristics of law that make it what it is.

Even with this conceptual clarification, Habermas's argument is difficult to follow. His initial claim is that the “[the legal medium as such [or the legal form] presupposes rights that define the status of legal persons as bearers of rights.” Habermas has in mind, in the first instance, the

210. For a more extended discussion of Habermas’s idea of “steering media,” see Baxter, supra note 7, at Part II.B.2.

211. See, e.g., Talcott Parsons, Some Problems of General Theory in Sociology, in SOCIAL SYSTEMS AND THE EVOLUTION OF ACTION THEORY at 240-41 (1977) (“Money . . . not only resembles a language, but is a very specialized language through which intentions and conditional consequences of actions are communicated.”).

212. In Theory of Communicative Action, Habermas did claim that in at least some of its operations, law functioned as a steering medium like money or power. See 2 THEORY OF COMMUNICATIVE ACTION, supra note 73, at 365-73. He repudiates this notion expressly in Between Facts and Norms. See BETWEEN FACTS AND NORMS, supra note 2, at 562 n.48.

213. BETWEEN FACTS AND NORMS, supra note 2, at 56.

214. Id. at 119. He says, in an alternative formulation, that “the general right to liberties” is “constitutive for the legal form as such.” Id. at 121.
sort of liberties he analyzes under the heading of private autonomy. But he does not mean that the legal form (or legal medium) by itself necessarily implies the panoply of rights recognized in German civil-law theory or in any particular existing legal system. What he means, instead, is that the legal form (and legal medium) presuppose a concept of legal personhood, and that the concept of legal person is one of rights-bearer, whatever the particular content of those rights might be. Habermas’s perspective here is of course abstract, but it is nonetheless familiar. American status law historically has denied full legal personhood to members of various groups by limiting or denying outright the rights available to others—whether private-law rights or rights of political participation. Those who lack the full complement of rights ordinarily granted to legal persons are, to that extent, not full legal persons. So what Habermas means is that, whatever the precise content of rights in a given legal system, the idea of modern law uses the idea of rights to define the status of persons, and legal personhood is a necessary condition for participation in legal communication. In that sense the form or medium of law implies a system of rights.

But what sort of rights? This is the point at which Habermas invokes the discourse principle. He describes three “categories” of rights that are generated “simply from the application of the discourse principle to the medium of law as such.” The first category of rights he mentions is:

1. Basic rights that result from the politically autonomous elaboration of the right to the greatest possible measure of equal individual liberties.

This category needs some parsing to be intelligible. Two aspects of Habermas’s formulation particularly need explanation. The first concerns the words “greatest possible measure of equal,” just before the words “individual liberties.” Habermas has said that the legal medium—or

215. See id. at 119 ("These rights are tailored to the freedom of choice of typical social actors; that is, they define liberties that are granted conditionally.").
216. Id. at 122. Here he seems to equate the legal medium with "the conditions for the legal form of a horizontal association of free and equal persons." Id.
217. Id.
(he sometimes says) the legal form—implies the idea of individual liberties that define the status of legal persons. Here, however, we have the proviso that there must be “the greatest possible measure of equal” individual liberties. The language in quotation marks, according to Habermas, is the contribution of the discourse principle. While he does not explain this point, he likely means that we could not expect “all possibly affected persons” to “agree as participants in [a rational discourse],” as the discourse principle would require, to a system of unequal liberties. And if equal liberties were the outcome of this discourse, then the participants would opt for the maximum of liberties compatible with the liberties of all. That, at any rate, must be Habermas’s argument.

The other part of this formulation that needs explanation is the phrase “politically autonomous elaboration of” the right to equal liberties. Just as Kant saw the right to equal liberties as a general principle that needed to be particularized, so Habermas would require “elaboration” of this same right. This first category of rights, and the categories that follow, are just “unsaturated placeholders” rather than lists of actual rights. And the words “politically autonomous” before “elaboration” suggest that the elaboration of this category is for citizens to perform rather than

218. Id. at 123.
219. Id. at 107.
220. This formulation might be more Rawlsian than Habermasian. Cf. Jürgen Habermas, Reconciliation Through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism, 92 J. PHIL. 109, 111-19 (1995) (criticizing the “design” of Rawls’s idea of the “original position”). But alternative justifications for this category of rights are not readily available. Insofar as it validates moral norms, the discourse principle takes the form of a strict universalization principle. See BETWEEN FACTS AND NORMS, supra note 2, at 116-17. So one might think that equality of legal liberties follows straight from the discourse principle. But as noted in text above, the “reference system” for legal norms is narrower—a legal community, not humanity at large. Perhaps, though, the idea is that the discourse principle imports a more limited universalization requirement for legal norms, such that within a legal community the distribution of liberties must be equal. Still, the question would remain: why the “greatest possible measure” of equal individual liberties? How does the discourse principle imply this requirement (sensible as it might be)?
221. See supra text accompanying note 174.
222. See BETWEEN FACTS AND NORMS, supra note 2, at 123-24 (“Kant’s principle of law coincides with this general right to equal liberties” and defines only “a legal code,” not the precise content of particular rights).
223. Id. at 126.
for the theorist. The reason is Habermas's idea of political autonomy. If the system of rights is to give adequate weight to citizens' political autonomy, then the precise content of those rights must be left up to citizens' discursive exercise of their political autonomy. The theorist is a "non-participant" in this politically autonomous elaboration of the right to equal liberties, and it is not for her to determine precisely what rights citizens should accord one another—unless, perhaps, the theorist is intervening in an ongoing debate in an existing society, and in that case the theorist is operating in a different phase of Habermas's project.

The second and third categories of rights—relating to membership in a legal community and to the "actionability" of rights—are, according to Habermas, "necessary corollaries" of the first category of rights. "Corollaries" may not be the right word. But he seems right that the concept of legal personhood implies both membership in a legal community and—at least as a general matter, and in modern societies—the "actionability" of rights. Here, too, Habermas includes the qualification that each category refers to rights that arise only through an exercise of citizens' political autonomy. For that reason these second and third categories, like the first, are only "unsaturated placeholders." Habermas formulates these two categories as follows:

2. Basic rights that result from the politically autonomous elaboration of the status of a member in a voluntary association of consociates under law.

3. Basic rights that result immediately from the actionability of rights and from the politically autonomous elaboration of individual legal protection.

Habermas describes briefly the sorts of rights that these second and third categories implicate. The category of membership rights establishes the distinction between those who belong and those who do not belong to the legal

---

224. Id. at 118.
225. Another way to reach this same conclusion would be to note that the concept of the "legal medium" (or "legal form") is too abstract to generate a list of particular rights. There are a variety of ways to distribute liberties without violating the idea of law.
226. BETWEEN FACTS AND NORMS, supra note 2, at 122.
227. Id. at 122.
community. The general subject matter concerns citizenship rules, immigration, and emigration. Habermas suggests that the right to emigrate must be guaranteed and voluntary, and as to immigration matters, there must be "a regulation in the equal interest of members and applicants." Habermas does not explain these conclusions, and at first they sound surprisingly substantive. But the first conclusion, concerning the right to emigrate, follows from the idea of a legal community as voluntary rather than compulsory. One cannot be said to "consent" to a legal or political order if one is not free to leave it. The requirement that immigration regulation be "in the equal interest of members and applicants" follows, presumably, from the discourse principle. Habermas has formulated that principle to provide not that all members of a community be able to agree to a particular norm, but instead that the norm be agreeable to all those affected. And regulations concerning immigration surely affect those who would choose to immigrate. Here, too, the discourse principle implies an equality of treatment.

The third category of rights, covering the "actionability" of rights and availability of "individual legal protection," requires that legal remedies be available for violations of legal rights—again, whatever those particular rights might be. Habermas has argued already that the idea of a legal norm's validity implies its adequate enforcement. The requirement of enforcement implies, in turn, that legal persons have access to independent courts that will decide disputes "impartially and authoritatively according to the law." Here, too, Habermas takes the discourse principle to impose further requirements—in this instance, procedural rights consistent with basic norms of due process and equal treatment.

These three categories of rights, Habermas says, define the private autonomy of citizens. But each category requires legal institutionalization if the rights they describe are to be effective legal rights. Habermas's description of each category has indicated that this legal institutionalization, or "elaboration" of the abstract category, must

228. Id. at 124-25.
229. Id. at 125.
230. Id.
231. See id. at 123.
engage the political autonomy of citizens. Thus the fourth category of rights comes as no surprise:

4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law.

Habermas describes this fourth category of rights as applying “reflexively” to each of the four categories, including the fourth category itself. What he means is that through the processes described in the fourth category, the rights indicated in each of the four categories can be specified, and legal norms can be generated. In this way, Habermas links political autonomy and private autonomy. Only through citizens’ exercise of their political autonomy, he argues, can citizens legitimately secure their private autonomy by law. And exercise of that political autonomy in lawmaking must “orient” itself by the rights, described in the first three categories, that establish the private autonomy of a legal community’s members. Private and public autonomy, as well as basic rights and popular sovereignty, are thus “co-original.” Each presupposes the other, and neither may be ranked above the other in analyzing the idea of legitimate law.

This reconciliation between private and public autonomy—and between basic rights and popular sovereignty—is located at an extraordinarily abstract level. At this point in Habermas’s presentation, we do not yet have the institutions of a constitutional state. Rather, what Habermas is describing is the sorts of rights that persons must accord one another if they are to establish themselves as a legal community with (and through) the medium of legitimate law. At this level of abstraction, the tension between basic rights and popular sovereignty is easy to harmonize. Our idea of legitimate law includes both terms. Exercise of popular sovereignty does not necessarily imperil basic rights, and basic rights are not necessarily an external limit on the exercise of that sovereignty.

---

232. Id.
233. Id.
234. See id. at 127.
235. See id. at 118.
The harmoniousness of Habermas's reconciliation, however, does not necessarily carry over when the system of rights is institutionalized in a constitutional state. Imagine a legislative body on the brink of enacting a statute that unquestionably would infringe upon some group's basic rights. It would be implausible to say that enactment of this statute would not be an exercise of sovereignty. Habermas might contend, sensibly enough, that such a statute would not be legitimate law, in that it would offend a basic right. But in that case, basic rights would operate as a constraint on the exercise of sovereignty. As Robert Alexy has shown, similar arguments apply if we imagine the legislators to be framing a constitution rather than a statute.\(^2\) The tension between basic rights and popular sovereignty, easily mediated in an abstract account of the "system of rights," reappears once we imagine actual legislation, whether constitution-making or enactment of ordinary statutes.

I would not expect Habermas to disagree with the above analysis.\(^3\) His point, I think, is not that his account of the system of rights has utterly resolved the tension between popular sovereignty and basic rights. That would be inconsistent with the main theme of his discourse theory of law: an inescapable and ongoing tension between facticity and validity. Habermas in fact understands this tension to be an achievement of, and criterion for, the very rationalization processes that make the discourse principle, in his view, the only persuasive principle of justification.\(^4\) What Habermas is arguing, instead, is that conceptual accounts of law that privilege basic rights over democracy, or democracy over basic rights, are misguided. The two terms,


\(^3\)Alexy points to the fact that Habermas, in describing actual constitutional orders, sees basic rights as a constraint on majoritarian law-making. See id. at 233.

\(^4\)Between Facts and Norms, supra note 2, at 26 (with the rationalization of the lifeworld, social integration depends more upon "communicative achievements of actors for whom validity and facticity . . . have parted company as incompatible"); see id at 23-24 (describing the "fusion of facticity and validity" in "archaic institutions"); cf. id. at 42 ("[T]he tension between facticity and validity . . . becomes more acute in the validity dimension of modern law."). At least apparently inconsistently, Habermas also describes the tension between facticity and validity as "'given' with the fact of the symbolic infrastructure of sociocultural forms of life." Id. at 446.
rightly understood, mutually presuppose one another in the idea of legitimate law.

The fourth category of rights, concerning citizens’ exercise of political autonomy, marks a shift in perspective. The first three categories describe, from the perspective of a “nonparticipant,”239 the “principles” by which the authors of law must “orient themselves . . . insofar as they make use of the legal medium at all.” But beginning with the political participation rights described in the fourth category, we shift, Habermas says, from the standpoint of a non-participant to that of a participant in democratic law-making processes. And here we need to speak not of the general discourse principle, but of the principle of democracy.

Habermas’s “principle of democracy” (or “democratic principle”) is a particularization of the discourse principle. Whereas the discourse principle addresses the justification of action norms in general, the democratic principle concerns only the justification of the legal norms that are to govern a particular community.240 Habermas’s formulation of this principle is extraordinarily strong: “the democratic principle states that only those laws may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted.”241

If Habermas means that legislation must receive universal assent to be legitimate, then that requirement would be excessively demanding in any world, especially the pluralistic worlds of modern societies. But Habermas qualifies and weakens this apparent requirement of universal assent. For one thing, the word “can” in his statement of the democracy principle leaves him room to maneuver. He does not say that the only legitimate laws are those that have received the citizenry’s universal assent in some factually occurring “discursive process.” Instead, he says only that if a statute is to “claim legitimacy,” then it must be one that “can” claim the assent of all in a discursive process. We need to know more about the discursive process Habermas has in mind. We know that it

239. See id. at 126.
240. Id. at 111.
241. Id. at 110. I have amended the translation, rendering Gesetze as “laws” rather than as “statutes.”
must be an idealized and counterfactual process; otherwise, all existing law would be illegitimate. But what outcomes could we expect in an idealized and counterfactual discourse? The answer depends on how much we idealize the counterfactual discourse. It would take considerable idealization, however, for the outcome to be universal assent with respect to any law—unless, that is, we understand "assent" to mean something more like "willingness to live with" rather than univocal endorsement.242

Habermas, even at this point in the development of his theory, has signaled that he might intend "assent" to mean something weaker than univocal endorsement. Recall that in stating the discourse principle, Habermas includes the possibility of bargaining and compromise.243 A compromise may be valid, Habermas allows, even if the parties reach agreement for different reasons.244 It will turn out, in his discussion of the constitutional state, that Habermas leaves considerable room for these options—to the point of acknowledging that "[c]ompromises make up the bulk of political decisionmaking."245 We will see that many of the arrangements Habermas approves in his account of the constitutional state are inconsistent with any strong reading of the "universal assent" requirement. What Habermas does with his account of the constitutional state is to displace the problem of "universal assent" from legislative outcomes to lawmaking procedures. The question will be whether that solution is compelling, or whether instead, the formulation of the democracy principle should be weakened from the outset.

Before moving to Habermas's account of the constitutional state, I should note the fifth category in the system of rights. I will have more to say about this category in the

242. Cf. Luhmann, Quod Omnes Tangit, supra note 162, at 164-65 (noting the ambiguity of the word "could" in the discourse principle's criterion that "all potentially affected persons could agree as participants in rational discourses").

243. See infra text accompanying note 346.

244. BETWEEN FACTS AND NORMS, supra note 2, at 166 (parties to compromise need not agree for the same reasons); see id. at 108; see also id. at 140 (distinguishing between "reaching understanding" (in communicative action) and bargaining or compromise).

245. Id. at 282; see also id. at 155 (acknowledging that politics includes "problems of balancing interests that cannot be generalized but call instead for fair compromises"). On the place of compromise in Habermas's account of the constitutional state, see infra text accompanying notes 345-46.
concluding section of this article, but for now I will only introduce it. While the first four categories correspond to familiar liberal rights, the fifth category takes up the “social and ecological rights” commonly associated with the welfare state. And while the first four categories are “absolutely justified,” the fifth category is justified only “relatively”—that is, only so far as social and ecological rights are necessary to guarantee exercise of the rights described in the first four categories. Habermas formulates this category as follows:

5. Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).

One question will concern how far this “relative justification” extends. Another will be whether these social and ecological rights could fairly be called “basic” to modern legal orders generally, when they are not recognized as such in American constitutional law.

C. The Constitutional State

Habermas’s reconstructive theory of the Rechtsstaat or “constitutional state,” like his reconstructive account as a whole, is keyed to the issue of modern legal orders’ legitimacy. But the reconstructive theory itself incorporates the more general tension between facticity and validity, and so it, too, has a side that corresponds to “validity” and a side that corresponds to “facticity.” The system of rights occupies the former position in Habermas’s theory, setting out the normative conditions required for any modern system of law to count as legitimate. The rights set forth in that part of Habermas’s theory are “unsaturated placeholders,” not

246. I say this with the proviso that the categories are, at this point in Habermas’s analysis, just “unsaturated placeholders,” not fully specified legal rights.
247. BETWEEN FACTS AND NORMS, supra note 2, at 123. For the connection to the welfare-state project, see id. at 77, 415; cf. id. at 410 (introducing Habermas’s attempt to recast these rights in a new “procedural[ist]” paradigm of law).
248. Id. at 123, 134.
249. Id. at 123.
concrete legal rights. That is, they are seen as the conditions that orient legitimate lawmaking, not as elements of positive law. With the transition to the principles of the constitutional state, however, Habermas considers the sorts of arrangements that would have to be set forth in positive law for a legal order to count as legitimate. And so at this point, with the idea of law's positivity before us, we move to the "facticity" side of Habermas's organizing distinction—even as we still consider the more general issue of legal legitimacy. Habermas's account of the constitutional state addresses the institutions, procedures, and mechanisms that would be required if the abstract categories of rights he has described are to be implemented concretely through positive law.

The term Rechtsstaat, translated in Between Facts and Norms as "constitutional state" or "rule of law," compounds the German words for "law" and "state." Habermas's theory of the Rechtsstaat first explores the implied connection—Habermas says an "internal connection"—between law and political power. Then, by way of explaining the link between the democratic idea that legitimates law and the operation of political power, he develops a distinction between "communicative power" and "administrative power." The idea of the democratic Rechtsstaat, or constitutional state, Habermas claims, is that citizens' communicative power is the source of legitimate law, and administrative power—or, power as a steering medium—should remain "tied" to that lawmaking power, in both the generation and application of administrative power. Habermas sees the separation of powers as a mechanism that guards against the illegitimate use of administrative power. He explicates that notion by distinguishing among different kinds of discourse appropriate to the various governmental powers.

1. The Internal Link Between Law and Political Power. Habermas has said that the validity of a legal norm implies its adequate enforcement. To that extent, law and the exercise of power are conceptually—or, as Habermas likes

250. See id. at 133, 196, 289; see also id. at 137 (law and political power are "internally connected"); id. at 336 ("internal relation between law and political power"); id. at 320 (law and political power are "internally linked").

251. Id. at 150.
to say, “internally”\textsuperscript{252}—linked. This connection of law and political power appears in the enforcement of rights through state-organized courts, with state personnel imposing sanctions to enforce courts’ judgments where necessary.\textsuperscript{253} Habermas’s reconstructive theory of the constitutional state goes further. Law and political power are linked not just through enforcement, but in the legislative process as well. Legitimate lawmaking requires democratic procedure that is established with the “help of governmental power.”\textsuperscript{254} And the executive power implements enacted legal norms through the “organized offices of a public administration.”\textsuperscript{255} In all these ways, Habermas says, “[p]olitical power is not externally juxtaposed to law but is rather presupposed by law.”\textsuperscript{256}

The relation between law and political power is reciprocal. Not only does law presuppose political power; political power, at least in a constitutional state, presupposes law. The system of state offices, through which political power is exercised, is organized through law. And political power is exercised largely through the form of law.\textsuperscript{257} Political decisions, Habermas maintains, “owe their collective bindingness to the legal form in which they are clad.”\textsuperscript{258} Law and political power thus reciprocally perform functions for one another.

Seen from a systems-theoretical point of view, Habermas says, law and politics mutually constitute one another’s “codes.” Here Habermas is flirting with Niklas Luhmann’s autopoietic theory—a surprising move, given Habermas’s frequently expressed distaste for the autopoietic (rather than Parsonsian) variant of systems theory.\textsuperscript{259} According to Luhmann, modern societies are

\textsuperscript{252} In this context, the term “internal relation” seems to mean “conceptual relation.” See id. at 449 (referring to a “conceptual or internal relation,” as opposed to a “historically contingent association”); id. at 454 (“internal relation” explained “at a conceptual level”).
\textsuperscript{253} Id. at 134.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id. at 134, 142.
\textsuperscript{258} Id. at 133.
\textsuperscript{259} See id., at 47-56, 74, 130-31, 330, 333-36, 341-53, 461, 481; see also JÜRGEN HABERMAS, Excursus on Luhmann’s Appropriation of the Philosophy of the Subject Through Systems Theory, in THE PHILOSOPHICAL DISCOURSE OF MODERNITY 368 (Frederick Lawrence trans., 1987).
differentiated into a plurality of functional subsystems, such as the economy, politics, law, and science, each of which is a self-producing and self-reproducing network of communication. Each subsystem’s communication is organized by a binary “code,” or distinction between opposed values, that demarcates the subsystem from its environment. Habermas follows Luhmann in taking law’s binary code to be the distinction between legal and illegal. This distinction, Habermas observes, is applied to particular cases in state-organized courts and enforced through governmental power. In this way, political power is constitutive for law’s binary code of legal and illegal. Habermas—like Luhmann—is much less clear on what the binary “code” for politics might be. Recalling his discussion in Theory of Communicative Action, Habermas describes the political “power code” in terms of the giving of commands. Apparently, then, the binary power code is the distinction between giving and following commands. And it is law, Habermas argues, that specifies who has the power of command and who has the obligation to follow.

Habermas’s reliance on this aspect of Luhmann’s theory is peculiar for at least three reasons. First, a system’s binary code, Luhmann argues, is what “closes” the system’s network of communication, and this idea of system closure is, elsewhere in Between Facts and Norms, the main target

As mentioned in Part I.D, infra, Habermas’s Theory of Communicative Action relied heavily on systems theory. But Habermas developed his systems-theoretical concepts through a critical reading of Talcott Parsons, not Luhmann. For an account of the Parsons-inspired systems theory that Habermas developed, and its uncertain fate in Between Facts and Norms, see Baxter, supra note 7. In my view, Luhmann’s autopoietic theory is far more powerful than the systems-theoretical conceptions Habermas developed in Theory of Communicative Action, and judicious borrowing from Luhmann’s work could improve Habermas’s “communication theory of society.” See id. at Part IV.

260. BETWEEN FACTS AND NORMS, supra note 2, at 143; Baxter, supra note 162, at 2004-09 (introducing Luhmann’s general notion of binary coding and the legal system’s legal/illegal code in particular).

261. BETWEEN FACTS AND NORMS, supra note 2, at 143.

262. See Baxter, supra note 162, at 2040, 2067-68 (describing and criticizing Luhmann’s equivocation between “government/opposition” and “governing/governed” as the code for the political system).

263. BETWEEN FACTS AND NORMS, supra note 2, at 143; cf. supra text accompanying note 137.

264. See BETWEEN FACTS AND NORMS, supra note 2, at 143; see also id. at 169 (“[L]aw is... constitutive for the power code that steers administrative processes.”).
of Habermas's anti-Luhmann polemics.\textsuperscript{265} I believe that Habermas's polemics mischaracterize Luhmann's work generally, and the idea of system closure in particular,\textsuperscript{266} but nevertheless, Habermas is appropriating an idea that, in his view, has pernicious theoretical consequences. This decision is difficult to explain. Second, because Luhmann takes the binary code to be what defines both a system's unity and its distinction from other systems, Habermas's account of the different system codes for law and politics would commit him—if he were serious about the idea of the binary code—to the position that law and politics are distinct (though closely linked) systems of communication. While Habermas does not make his view on this point entirely clear, he seems on the whole to favor treating law as part of a more general political system, not as a separate system.\textsuperscript{267} Appropriation of "binary coding," then is not easy to reconcile with Habermas's main line of argument. Third, while much in Luhmann's autopoietic theory is well worth considering—even for Habermas's purposes\textsuperscript{268}—the idea of the binary code is, for reasons I have explained elsewhere, one of the least attractive (and also I think unnecessary) aspects of his work.\textsuperscript{269}

In fact, however, Habermas does not make systematic use of Luhmann's "binary coding" idea. It appears intermittently,\textsuperscript{270} but in each instance, it can be translated into more familiar conceptions. In the passage we are now considering, the point is that law and political power reciprocally perform functions for one another. That point does not presuppose that legal or political communication is organized by a binary code.

Still, even with the notion of binary coding excised, the idea of political power needs further analysis. As Habermas points out, not all exercises of political power are legitimate—not even when they are presented in legal form.\textsuperscript{271} And so the idea of democracy, basic to law's

\begin{itemize}
\item \textsuperscript{265} See Baxter, supra note 7, at Part IV.
\item \textsuperscript{266} See id.
\item \textsuperscript{267} See id. at Part III.B.1.
\item \textsuperscript{268} See id. at Part IV (arguing that a more judicious borrowing from Luhmann's work could improve Habermas's communication theory of society).
\item \textsuperscript{269} See Baxter, supra note 162, at 2069.
\item \textsuperscript{270} See BETWEEN FACTS AND NORMS, supra note 2, at 38, 55.
\item \textsuperscript{271} See id. at 145 ("[T]he legal form as such does not suffice to legitimate the exercise of political power"); cf. id. at 40 ("[N]ormatively unfiltered interest
\end{itemize}
legitimacy, requires a differentiation in the notion of power that can help distinguish between the legitimate and illegitimate exercise of power.\textsuperscript{272} That differentiation in the notion of power between is between "communicative" and "administrative" power.

2. Communicative and Administrative Power. In contrast to his interpretation of power as command in *Theory of Communicative Action*, Habermas had developed four years earlier a notion that he called a "communications concept of power."\textsuperscript{273} What Habermas meant then, and what he means now by "communicative power," is the "motivating force" of common convictions reached through unconstrained communicative action.\textsuperscript{274} Here Habermas draws on the notion of "rational motivation" that he developed in his account of the way that mutual recognition of validity claims coordinates communicative action.\textsuperscript{275} Habermas sees the communicative power of citizens as "jurisgenerative," that is, as a way of "influenc[ing] the production of legitimate law."\textsuperscript{276} The precondition for this "jurisgenerative" power is the existence of "undeformed

\textsuperscript{272} I say "mark a distinction between" rather than "distinguish" to make clear that the idea of democracy is not by itself sufficient to classify particular exercises of power as legitimate or illegitimate. What Habermas is after here is a more general conception of what makes the exercise of power legitimate.

\textsuperscript{273} See Jürgen Habermas, *Hannah Arendt's Communications Concept of Power*, 4 SOC. RES. 3 (1977). Then and now, Habermas credits Hannah Arendt with the insight. See BETWEEN FACTS AND NORMS, supra note 2, at 146-49.

\textsuperscript{274} BETWEEN FACTS AND NORMS, supra note 2, at 147.

\textsuperscript{275} See supra text accompanying notes 16-33.

\textsuperscript{276} BETWEEN FACTS AND NORMS, supra note 2, at 147. The terms "jurisgenesis" and "jurisgenerative" are most closely associated with the work of Robert Cover. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. Rev. 4, 11, 25 (1983). Both Habermas and Cover emphasize the role of associations and groups outside of official state institutions in producing law. Habermas, however, is interested in how argumentative speech outside of formal state institutions influences the production of state law. Cover’s focus was more on the production of non-state law, and not so much through argumentation as through shared forms of life and shared narratives. From his perspective, formal state institutions, and especially courts, are "jurispathic" as well as jurisgenerative—that is, state law, armed with the power of state violence, tends to impose imperial power over competing bodies of law that develop in smaller communities. Habermas’s idea of jurisgenesis is thus decidedly more "statist" than Cover’s.
public spheres\textsuperscript{277} of political discussion that are linked to the formal institutions in which law is made.\textsuperscript{278} In turn, the precondition for undeformed public spheres is a "vibrant" civil society,\textsuperscript{279} or, network of voluntary associations that are autonomous from state control.\textsuperscript{280} These associations, Habermas maintains, are the social basis for the political public sphere.\textsuperscript{281} Habermas's idea of democracy, then, involves much more than formal governmental institutions and periodic voting rituals. It requires broad, active, and ongoing participation by the citizenry. In this sense, Habermas's theory of law and democracy is not purely state-centered.\textsuperscript{282} It depends heavily upon communication outside of formal governmental channels—communication that, if it is to be "jurisgenerative," must influence official governmental decisionmaking.\textsuperscript{283} This notion of communicative power is the basis for Habermas's reinterpretation of popular sovereignty. From a discourse-theoretical point of view, popular sovereignty means that "all political power derives from the

\textsuperscript{277} BETWEEN FACTS AND NORMS, supra note 2, at 148.
\textsuperscript{278} Id. at 185.
\textsuperscript{279} Id. at 461.
\textsuperscript{280} For Habermas's conception of civil society as a network of voluntary associations, see id. at 175, 358, 359, 367. For his requirement that civil society be independent from the state and the economic system, see id. at 269, 301, 367, 368-69.
\textsuperscript{281} Id. at 301.
\textsuperscript{282} See id. at 288 (Habermas's "proceduralist" conception of democratic process "breaks with a holistic model of society centered in the state"); see also id. at 296, 298, 372.
\textsuperscript{283} Habermas refers to these informal circuits of communication as "subjectless" and "anonymous". \textit{Id.} at 136 ("subjectless forms of communication"); \textit{id.} at 299 ("subjectless communications"); \textit{id.} at 301 ("subjectless forms of communication"); see also \textit{id.} at 171 ("anonymous circuits of communication"); \textit{id.} at 136 ("anonymous form" of popular sovereignty). The likely reason he adopts this characterization is to avoid the assumption, common in the "deliberative democracy" literature, that there is a single, unified, deliberating subject of democracy. See Edward L. Rubin, \textit{Getting Past Democracy}, 149 U. PA. L. REV. 747-50 (2001) ("The image of civil society as a whole deliberating about some issue is an unproductive metaphor driven by the premodern image of democracy."); Bohmann, supra note 141, at 914 ("[A] plausible concept of rational deliberation must somehow do justice to the complex and dispersed reality of actual public discourse under contemporary social conditions."). But see Bohmann, supra note 141, at 925-26 (arguing that the "anonymous networks of communication" formulation is an inadequate translation for "popular sovereignty").
communicative power of citizens.\textsuperscript{284} Understood at full strength, this idea of popular sovereignty would require all exercises of power to be “oriented and legitimated by the laws citizens give themselves in a discursively structured opinion- and will-formation.”\textsuperscript{285} And ideally, all relevant questions would be “processed in discourses and negotiations on the basis of the best available information and arguments.”\textsuperscript{286}

Despite the reference to “laws” that “citizens give themselves,” however, Habermas acknowledges that in political communities of any size, there can be no convocation of all the citizenry. Parliamentary bodies are indispensable.\textsuperscript{287} But what Habermas insists upon is that these bodies “must remain anchored in the informal streams of communication emerging from public spheres that are open to all political parties, associations, and citizens.”\textsuperscript{288} Only in this way can the communicative power of public discussions among citizens influence the production of legitimate law.

Habermas acknowledges further that the idea of communicative power addresses only the generation of political power, not the exercise of existing power. And even if communicative power is the source of legitimate law, and thus the source of legitimate political power, Habermas has said that the idea of a legal norm’s validity implies that the norm is adequately enforced through sanctions. The exercise of power in the form of sanctions, however, does not itself conform to the model of communicative power. Moreover, Habermas acknowledges that the idea of power as command, not power as collective will-formation, is essential to the organization and operation of governmental entities. Politics, then, cannot be reduced to the jurisgenerative operation of communicative power. “The concept of the political in its full sense,” Habermas says, “also includes the use of administrative power within the political system, as well as the competition for access to that system.”\textsuperscript{289}

“Administrative power,” the counter-concept to communicative power, is the notion of power as the

\begin{footnotesize}
\textsuperscript{284} 
\textit{Between Facts and Norms}, supra note 2, at 170.
\textsuperscript{285} Id.
\textsuperscript{286} Id.
\textsuperscript{287} Id.
\textsuperscript{288} Id. at 171.
\textsuperscript{289} Id. at 150.
\end{footnotesize}
“steering medium” of a self-regulating administrative system. This systems-theoretical conception of power appeared front and center in Theory of Communicative Action. To recall that notion: power, conceived of as official command backed by sanctions, allows actors to circumvent the process of reaching communicative agreement over contested claims to validity. Communicative power, then, develops through communicative action and discourse; administrative power circumvents both. The form of communicative power that is constitutive for democracy emerges outside the formal bureaucratic organizations; administrative power develops within those bureaucracies. The relation between administrative and communicative power is a central problem for democracy. In Habermas’s terms, how can the bureaucratic exercise of administrative power be linked to, and constrained by, citizens’ communicative power?

That is one of the questions Habermas’s theory as a whole is designed to address. His preliminary answer is general and equivocal. The idea of the Rechtsstaat, he says, is that the administrative system must be “tied to the law-making communicative power.... Administrative power should not reproduce itself only on its own terms but should only be permitted to regenerate from the conversion of communicative power.” At the same time, however, the constitutional state must avoid “disrupting the power code by interfering with the self-steering mechanism of the administrative system.” This preliminary answer moves in two directions. The first part suggests that the administrative system may not legitimately become independent of citizens’ communicative power. But Habermas adds immediately that the administrative system is “self-steering” and its “power code” must not be “interfer[ed]” with. The two prescriptions are not compatible.

290. See id. at 56 (referring to “the media of money and administrative power”); id. at 343 (referring, in the context of a discussion of systems theory, to "special languages like money or administrative power"); id. at 407 (referring to “administrative power” as the “medium for state interventions” that produces “state interventions”); id. at 469 (referring to “stubborn systemic logics of the market and administrative power”).
291. See supra Part I.D.
292. BETWEEN FACTS AND NORMS, supra note 2, at 150.
293. Id.
The problem, as I have argued elsewhere in more detail, is that Habermas's systems-theoretical concepts are incompatible with his present project: a normative theory of democracy.\(^{294}\) The concepts of “systems” and “steering media” developed in *Theory of Communicative Action* were part of a more general model of modern societies in which genuine democracy, as Habermas understands it, was literally inconceivable. The axis of that model is the distinction between system and lifeworld. On one side are the economic and administrative systems, operating through the steering media of money and power. On the other is the “lifeworld,” with its “structural components” of culture, society, and personality\(^{296}\)—or, as Habermas alternatively conceives of the lifeworld, the “communicatively structured contexts of action” that are distinct from the money- and power-driven economic and administrative systems.\(^{296}\) *Theory of Communicative Action* presents the relation between system and lifeworld systems-theoretically, as “interchange” controlled by “steering media.” But because, according to Habermas, only the economic and administrative systems have such steering media, the interchange model presents the relation between system and lifeworld as steered only by money and power.

On this conception, the lifeworld’s contribution to the administrative system cannot be the “communicative power” of a normative consensus among citizens; instead, it must be assimilated to the “steering media” of money and power. And so in Habermas’s systems-theoretical model of interchange, the lifeworld’s inputs to the administrative system are “mass loyalty” and taxes, with the administrative system outputting, in exchange, political decisions and “organizational accomplishments.”\(^{297}\) This austere model of system/lifeworld interchange has no place for the

\(^{294}\) See Baxter, *supra* note 7, at Part II.D.

\(^{295}\) See *supra* text accompanying notes 92-131.

\(^{296}\) 2 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 73, at 185; see also id. at 304 (lifeworld as “communicatively structured areas of life”); id. at 309 (lifeworld as “communicatively structured” “spheres of action”); id. at 333 (“communicatively structured life-contexts”); id. at 349 (“communicatively structured domains of action”); id. at 356 (“communicatively structured areas of action”); id. at 366 (“communicatively structured areas of action”); id. at 372 (“communicatively structured action area”).

\(^{297}\) Id. at 319-23. Habermas summarizes the “interchange” model graphically. See id. at 320 fig.39.
"jurisgenerative" communicative power Habermas now attributes to citizens' discussions in the political public sphere.

The passage from *Between Facts and Norms* that I quoted two paragraphs above—noting that systems are "self-steering," with their own "codes" that cannot be "interfer[ed] with"—carries over the idea of systems' imperviousness to normative influences. The passage is typical of Habermas's official professions of commitment to the system/lifeworld model of society. But in fact, as I argue elsewhere, the social-theoretical model Habermas develops toward the end of *Between Facts and Norms* is inconsistent with the system/lifeworld model. It had to be. Otherwise, Habermas could not maintain that communicative power may influence and constrain the exercise of administrative power.

This is not to deny that bureaucracies tend to insulate themselves from democratic influences, nor is it to deny that there may be good reasons to limit the extent of such influences. My point instead is that to describe systems as "self-steering," with "codes" that cannot be "interfer[ed] with," presents a tension as if it were a contradiction. Further—although this claim takes me beyond the scope of the present article—the conception of the political system that Habermas presents in *Between Facts and Norms* is superior to the notion of the administrative system he defended in *Theory of Communicative Action*. The more recent idea of a "system," while incompletely theorized, allows a more nuanced and balanced account of legal and political processes.

In any event, the administrative system cannot be entirely "self-steering," on Habermas's premises, because its "power code" is the product of law. Legitimate law, on Habermas's view, is both the product of democratic lawmaking and the mechanism that defines the structures of official command and obedience that Habermas calls "administrative power." Law, in other words, is a mechanism for effecting, and regulating, what Habermas calls the "conversion of communicative into administrative power."

---

298. See Baxter, supra note 7, at Part III.B-C.
299. See id. at Parts III.C, IV.
300. See *Between Facts and Norms*, supra note 2, at 169 ("legitimate law is
The particular legal techniques for constraining the official use of power that Habermas mentions are familiar: an independent and impartial judiciary bound by the rule of law, legal controls over the state administration, and the separation of powers. What is interesting in Habermas's account, however, is his explication of these familiar ideas, practices, institutions and norms through discourse theory—and in particular, through a typology of the different forms of discourse and their relation to the different forms in which political power is exercised. In the Part II.C.3 below, I analyze Habermas's typology of discourses, as well as the idea of bargaining that sits uneasily at the boundary of Habermas's discourse theory. Then, in Part II.C.4, I consider Habermas's recasting of the ways in which the constitutional state binds administrative power to communicative power.

3. The Typology of Discourse and Bargaining. I noted earlier the “discourse principle” Habermas takes to govern the process of justifying norms of action. That principle, he said, is neutral with respect to different kinds of norms (moral and legal, for example). Habermas further suggested that the general discourse principle operates differently in different kinds of discourse. Specifically, he noted in distinguishing between the “democracy principle” and “the moral principle” the different “reference systems” for legal and moral discourse—the legal community and “humanity or a presupposed republic of world citizens,” respectively.

This idea of a “reference system” is one basis for Habermas’s distinctions among the various kinds of discourse related to norms and social action. A second concerns the kinds of reasons that are acceptable in the various forms of discourse. Before his recent work on law, Habermas had settled upon a tripartite division of discourses in which “practical reason” may be employed: moral, ethical, and pragmatic. Habermas's work on law

---

generated from communicative power and the latter in turn is converted into administrative power via legitimately enacted law’); see also id. at 176, 327.

301. See supra text accompanying note 201.

302. I say “norms and social action” rather than “norms of action” because some of the forms of discourse Habermas considers relevant to law are not directly addressed to norms.

303. See JÜRGEN HABERMAS, On the Pragmatic, Ethical, and Moral Employments of Practical Reason, in JUSTIFICATION AND APPLICATION, supra
now understands legal discourse—or rather, the various kinds of legal discourse appropriate to different legal institutions and practices—as drawing upon, but irreducible to, each of these three types.

Pragmatic issues concern the selection of appropriate means for achieving given goals, or, should the goals become problematic, then the weighing of possible goals against accepted preference standards, such as efficiency, or against accepted values. Pragmatic discourses are directed toward justifying “technical and strategic recommendations.” The validity of these recommendations depends upon the accuracy of the empirical knowledge on which they depend. Habermas refers to the “purposive” employment of practical reason in pragmatic discourses.

Ethical issues arise when pragmatic preference standards or value-orientations become questionable. Habermas distinguishes between ethical deliberation at the individual and social levels. Individual ethical deliberation, which Habermas refers to as “existential” or “clinical” deliberation, concerns the significance of a choice to a particular life-project, or, to “the kind of person one is and would like to be.” This decision is not purely individual, but depends to a considerable extent upon one’s social

---

note 61, at 1, 2 [hereinafter HABERMAS, On the Pragmatic, Ethical, and Moral]. Habermas frames his analysis in this essay as the different ways an individual might intend and answer the question “What should I do?” See id. at 2, 8. Between Facts and Norms has a parallel discussion, though here framed in terms of the question “What ought we to do?”—framed, that is, from the point of view of collective rather than individual decisions. See BETWEEN FACTS AND NORMS, supra note 2, at 158. The analysis in the two discussions is largely, but not entirely, parallel.

304. BETWEEN FACTS AND NORMS, supra note 2, at 159; see also HABERMAS, On the Pragmatic, Ethical, and Moral, supra note 303, at 3 (pragmatic issues are “a matter of making a rational choice of means in the light of fixed purposes or of the rational assessment of goals in the light of existing preferences”).

305. HABERMAS, On the Pragmatic, Ethical, and Moral, supra note 303, at 10.

306. Id. at 11.

307. Id. at 2.

308. BETWEEN FACTS AND NORMS, supra note 2, at 160; HABERMAS, On the Pragmatic, Ethical, and Moral, supra note 303, at 3-4.

309. HABERMAS, On the Pragmatic, Ethical, and Moral, supra note 303, at 4; see also BETWEEN FACTS AND NORMS, supra note 2, at 96 (referring to “ethical-existential or clinical discourses”).
circumstances and the collective form of life one inhabits. Nonetheless, the ethical deliberation that takes place at the collective level—concerning not individual but collective identity—has a “different meaning.” Habermas speaks in this connection of “ethical-political questions.” Discourse aimed at establishing an “authentic” understanding of the collectivity’s identity—and realizing that identity through collective decisions and courses of action—is “ethical-political discourses.” The reference system here is a “shared form of life,” and the standard is what is “good for us,” the reflecting community.

This hyphenated conjunction of “ethical” with “political,” however, tends to obscure a basic problem for modern multicultural societies. Habermas ordinarily conceives of “ethical,” unmodified, as referring to a particular community that shares a form of life and a deep consensus over substantive values. But as Habermas notes in his criticism of “civic republican” theorists from Rousseau to Michelman, one cannot conceive of modern pluralistic societies as if they were this kind of close-knit community. The “we” who are (on Habermas’s theory) authors and addressees of legal norms are a legal community, not an ethically homogenous group.

This point has significant implications for Habermas’s notion of “ethical-political discourse.” Despite Habermas’s statement that the standard for such discourse is what is

310. HABERMAS, On the Pragmatic, Ethical, and Moral, supra note 303, at 5-6.
311. BETWEEN FACTS AND NORMS, supra note 2, at 160; see also HABERMAS, On the Pragmatic, Ethical, and Moral, supra note 303, at 15-17 (discussing the difference between the questions “What should I do?” and “What should we do?”).
312. BETWEEN FACTS AND NORMS, supra note 2, at 160.
313. See id. at 108 (ethical-political discourse aims at “justifying decisions that are supposed to express an authentic, collective self-understanding”); see also id. at 97, 161.
314. Id. at 160.
315. Id. at 161.
316. See, e.g., id. at 101-02, 267-69, 276-79.
317. See id. at 267-69, 276-79.
318. Thomas McCarthy points out that, despite recognizing ethical plurality, Habermas still refers in the singular to a legal community’s “form of life, self-understanding, and collective identity.” Thomas McCarthy, Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 130.
"good for us," differences among conceptions of the good in multicultural societies likely prevent consensus—in the sense of substantive agreement on the merits—as to at least many matters Habermas deems ethical. Further, if consensus must be the universal (or near-universal) agreement that Habermas’s discourse principle seems to require, then the problem for Habermas is more difficult still. What Habermas must develop, then, is a way in which, consistent with the discourse principle, modern societies can deal with the problem of “ethical” disagreement.

One option Habermas rejects would be to exclude, or at least radically devalue, all contributions to political discussion that presuppose the superiority of the speaker’s conception of the good. That option, Habermas claims, would bracket out ethical questions from politics and advantage the “inherited background of settled traditions.” Further, it would eliminate the possibility that discursive engagement might produce consensus as to ethical matters.

But what kind of consensus could be expected about ethical matters? To the extent that these matters are deeply rooted in competing conceptions of the good, and to the extent that these conceptions constitute the identity of communities and their members, then as Thomas McCarthy has argued, “persistent ethical disagreements” are likely. The standard that the discourse principle sets—requiring, with respect to norms, that “all possibly affected persons could agree as participants in [a] rational discourse[]”—seems unattainable. And Habermas realizes that it is.

For that reason, his response—on this issue and elsewhere—will be to reinterpret the discourse principle

319. See BETWEEN FACTS AND NORMS, supra note 2, at 308-14.
320. Id. at 309. Michel Rosenfeld notes, however, that Habermas’s “post-metaphysical” theory may have the effect of excluding, or at least devaluing, religious or otherwise “metaphysical” perspectives, as well as perspectives that reject egalitarianism. See Michel Rosenfeld, Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas’s Proceduralist Paradigm of Law, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 82, 101.
321. See McCarthy, supra note 318, at 115.
322. BETWEEN FACTS AND NORMS, supra note 2, at 107.
323. See infra text accompanying notes 331-40, 347-59.
to require not consensus as to the substantive norm in question, but instead, consensus as to the lawmaking procedures through which discourse is to take place. This is one sense in which Habermas's theory is, as he likes to say, "proceduralist." A recurring issue throughout this article, however, will be whether this proceduralist move is consistent with the discourse principle, or whether, if it is not, Habermas's statement of the discourse principle must be modified. We are not quite yet in a position to address that issue. We need the rest of Habermas's account of the various forms of discourse.

The third form of discourse in Habermas's typology is "moral discourse." Just as Habermas's use of the word "ethical" required explanation, so does his use of the word "moral." Unlike ethical (or ethical-political) discourse, moral discourse refers not to a particular community or shared form of life, but to an unlimited communication community. Moral norms, thus, are to be justified not in terms of their coherence with this or that collective form of life, but according to their consistency with "justice," where the term "justice" is to be understood in a strongly universalistic sense. On Habermas's interpretation of moral discourse, a norm is morally justified only if it expresses a "categorical" rather than "conditional" or "hypothetical" imperative. In other words, a moral norm is justified only if all those potentially affected—not just all members of a particular collectivity—could agree to it in a rational discourse. It must, then, express an entirely general interest.

324. See BETWEEN FACTS AND NORMS, supra note 2, at 151 (the democratic process institutionalizes the discourse principle "in such a way that the outcome of a discourse enjoys a presumption of rational acceptability"); id. at 285 (referring to "the intrinsically rational character of a democratic process that grounds the presumption of rational outcomes"); id. at 296 (results of democratic procedure are presumptively reasonable or fair, provided that "the flow of relevant information and its proper handling have not been obstructed").

325. See id. at 97 ("In contrast to ethical deliberations, which are oriented to the telos of my/our own good (or not misspent) life, moral deliberations require a perspective freed of all egocentrism or ethnocentrism."); see also HABERMAS, On the Pragmatic, Ethical, and Moral, supra note 303, at 12 ("Moral-practical discourses... require a break with all of the unquestioned truths of an established, concrete ethical life, in addition to distancing oneself from the contexts of life with which one's identity is inextricably interwoven.").

326. See BETWEEN FACTS AND NORMS, supra note 2, at 159-61; HABERMAS, On the Pragmatic, Ethical, and Moral, supra note 303, at 8.

327. Habermas formulates his discourse principle in terms of the agreement of "all possibly affected persons." By this quoted expression he means "anyone
As Habermas acknowledges, one consequence of conceiving of morality in this way is that norms will be justifiable only if they are extraordinarily abstract. And that raises the question as to how such abstract principles could possibly be applied. Here Habermas follows the lead of his former student, Klaus Günther, in distinguishing between discourses of justification and discourses of application. While a moral norm is justified only if it passes the discourse principle's universalization test, its application is regulated instead by a “principle of appropriateness.” Determining which of various valid norms is “appropriate” to a particular situation, and how it applies to that situation, requires, Habermas allows, consideration of “all the relevant features of the situation conceived as exhaustively as possible.” We will return to this matter in considering Habermas’s analysis of adjudication. For now it is sufficient to note that Habermas distinguishes between the justification and application of moral norms, and that he makes a parallel distinction with respect to legal norms as well.

Alongside these forms of discourse, Habermas places the idea of bargaining. With this notion, he begins to address some of the issues I have raised above. “In complex societies,” Habermas contends—that is, in societies marked by stratification, differentiation of interest positions, and a priority on self-interested action—“it is often the case that” neither moral nor ethical discourse will result in consensus. This is so, he says, “whenever it turns out that . . . the proposed regulations touch on . . . diverse interests . . . without any generalizable interest or clear priority of some one value being able to vindicate itself.” In such cases, he observes, “there remains the alternative of bargaining, that is, negotiation between success-oriented parties who are willing to cooperate.” The “aim[]” of bargaining is to resolve conflicts not resolvable through discourse. And that

whose interests are touched by the foreseeable consequences of a general practice regulated by the norms at issue.” BETWEEN FACTS AND NORMS, supra note 2, at 107.

328. See id. at 61.
330. Id. at 14.
331. BETWEEN FACTS AND NORMS, supra note 2, at 165.
332. Id.
means that the compromise the parties negotiate (1) must be preferable to no agreement at all; (2) must address the problem of free riders; and (3) must exclude exploitation, or, a situation in which some parties "contribute more to the cooperative arrangement than they gain from it."

Habermas does not make entirely clear whether these three conditions are simply an explication of what we mean by a legitimate compromise reached through bargaining, or instead, criteria that are to be applied to evaluate whether a given compromise is legitimate or illegitimate. My sense is that he means the former. Supporting this interpretation is the fact that Habermas turns immediately to the question whether bargaining is inconsistent with the discourse principle. And that, for Habermas's discourse theory, is the question whether bargaining could be considered legitimate. "[T]he discursive chain of a rational will-formation would snap at such points of compromise," Habermas says, "if the discourse principle could not be brought to bear at least indirectly on bargaining processes."

Habermas already has signaled the conclusion he will reach. In stating the discourse principle, Habermas said that the term "rational discourse" "refers indirectly to bargaining processes insofar as these are regulated by discursively grounded procedures." The relation Habermas forges between discourse and bargaining is indirect at best. Discourse, he has said, imposes "symmetry conditions": the participants must have equal opportunities to raise topics, arguments, and criticisms. The parallel in the bargaining situation is that the parties must have "equal opportunity for pressure," that is, equal bargaining power. Because generally this condition is not satisfied at the outset, procedures must be devised that will equalize the parties' opportunity for pressure. "To the extent that" these conditions are satisfied, Habermas maintains, compromises that result from bargaining are presumptively fair. But whether the procedures are adequate is

333. Id. at 166.
334. Id.
335. Id. at 108.
336. See supra text accompanying notes 59-64.
337. See BETWEEN FACTS AND NORMS, supra note 2, at 165.
338. See id.
according to Habermas a question for moral discourse.\textsuperscript{339} And so is the matter whether a given question is amenable to bargaining or whether, instead, it is a question in which generalizable interests are at stake.\textsuperscript{340} In these ways, procedures for bargaining must be "discursively grounded," as Habermas states in announcing the discourse principle. And thus although bargaining involves pressure and appeal to interests rather than to rational conviction, it is governed "indirectly" by the discourse principle.

As a general matter, this concession to bargaining rather than discourse is wise. Habermas, after all, is "reconstructing" the idea of the constitutional state. And because, as he acknowledges, the bulk of political decision-making involves compromise rather than purely discursive agreement,\textsuperscript{341} an interpretation of the constitutional state that branded bargaining as per se illegitimate would not be a plausible reconstruction.

But the reconciliation between bargaining and discourse that Habermas tries to establish raises two questions. First, the idea of bargaining suggests a refinement in the theory of action underlying Habermas's discourse theory. The basic distinction in Habermas's typology of social action, I said in Part I above, is between communicative and strategic action. Habermas's difficulties in characterizing open strategic action led him to allow that most actual interactions are a "mélange" of the two types.\textsuperscript{342} Bargaining seems a clear example of this "mélange." Habermas describes it as "success-oriented" and designed to exert influence on one's opposite number through pressure. In these respects, as Habermas says, it can be characterized as strategic interaction.\textsuperscript{343} But on the other hand, bargaining seeks to coordinate the bargainers' respective plans of action through a communicatively achieved agreement. In that respect, it resembles communicative action. Habermas, of course, could reply that bargainers do not necessarily act communicatively without reserve—in colloquial terms, they do not necessarily place all their cards on the table. Moreover, to the extent that bargainers

\textsuperscript{339} Id.
\textsuperscript{340} See id.
\textsuperscript{341} Id. at 282.
\textsuperscript{342} See supra text accompanying notes 46-47.
\textsuperscript{343} See BETWEEN FACTS AND NORMS, supra note 2, at 283.
pursue different interests, they do not reach agreement for
the same reasons, as Habermas's notion of discursive agree-
ment requires. But still, bargaining, to the extent it seeks
cooperation and a common plan, is distinct from other forms
of strategic action. Given its social significance, as well as
the place it occupies in Habermas's discourse theory of law
and democracy, Habermas likely should recognize bar-
gaining as a distinct type of rational action, irreducible
either to communicative action or to strategic action in
which cooperation and common action are not envisioned.

The second question Habermas's account of bargaining
raises is whether he can plausibly claim that specifically
moral discourse must ground and legitimate bargaining
procedures. The procedural rules governing bargaining are,
in fact, legal rather than moral norms—that is, they bind
members of a legal community, not humanity as such.
While legal norms "may not contradict moral norms," rules
governing bargaining would have to be far more
concrete and detailed than abstract moral principles. And
so for that reason, their justification would not be possible
in purely moral discourse. Perhaps Habermas means that
bargaining-related rules are applications of moral prin-
ciples. But that seems inconsistent with the way Habermas
has presented the idea of "application discourses." Such
discourses apply general norms to particular circumstances.
Bargaining rules of course apply to particular circum-
stances, but as legal rules they must be of general
applicability.

The likely reason for this slip is Habermas's anxiety
about allowing compromise procedures to be governed by
rules that themselves are likely the products of
compromise. If that were so, then "the discursive chain of a
rational will-formation would snap at such points of
compromise." Thus his statement that, while bargaining
and compromise are not themselves forms of discourse, they
are "indirectly governed" by the discourse principle.

The problem, however, is that these practices are
indirectly governed by the discourse principle only in the
sense that the governing rules presumably are the product
of a discursive lawmaking process. But that is true of any

344. See, e.g., id. at 339.
345. Id. at 230.
346. Id. at 166.
legally regulated activity, on Habermas's scheme: all legal rules, if legitimate, must be the product of discursive lawmaking. Habermas's recourse to moral discourse as the alleged source of bargaining rules is designed to avoid the conclusion that bargaining has no special connection to the discourse principle. But his argument cannot be sustained. Bargaining is not itself discourse, nor is it governed by rules that are products of moral discourse alone, nor is it "indirectly governed" by the discourse principle in any special way.

4. Binding Administrative Power to Communicative Power. This typology of discourse and bargaining is the basis for Habermas's reading of the way that the constitutional state binds administrative to communicative power. While he speaks of "legal discourse" in the singular, it turns out that the permissible scope of this discourse varies, depending upon whether we are speaking of democratic lawmaking, adjudication, or the "administration" of law more narrowly conceived. These activities differ in their legitimate access to the "different sorts of reasons" and to the "corresponding forms of communication." Habermas's reinterpretation of the separation of powers incorporates this insight.

It is easiest to begin with the function of democratic lawmaking, because lawmakers on Habermas's theory have access to the "full range" of reasons. Here, despite his lapse with respect to the grounding of bargaining and compromise, Habermas is particularly attentive to the differences between legal and moral norms that entail differences in the respective modes of justification. Moral arguments are relevant to the justification of legal norms, Habermas says, but they do not exhaust the range of permissible arguments. Legal norms govern a particular legal community, not humanity as such. They are teleological, not purely justice-oriented (in Habermas's deontological sense of justice), involving "the cooperative pursuit of collective goals and the safeguarding of collective

347. Id. at 190.
348. Id. at 192.
349. See, e.g., id. at 232 (legislation does not "rely only, not even in the first instance, on moral reasons, but on reasons of another kind as well").
goods. For that reason the justification of legal norms must be open to "ethical-political" concerns. Further, as compared to moral norms (as Habermas conceives of them), legal norms are much more concrete in content. Some legal norms respond only to the need for legal certainty. The American rule of driving on the right is the most obvious example, but other norms respond primarily to the need for certainty. Even beyond these norms, the matters law regulates are not necessarily ones upon which one could expect universal agreement, and for reasons Habermas has suggested, the possibility of compromises that balance interests cannot be excluded altogether from the legislative process. Finally, because the validity of legal norms presupposes their adequate enforcement, "pragmatic" issues may enter into legitimate lawmaking in this way as well.

In short, lawmaking implicates the various kinds of issues Habermas has distinguished—moral, ethical, and pragmatic—and accordingly, the corresponding forms of discourse all may be permissible. To mark the special character of legal justification, as well as the differences between legal and moral validity, Habermas amends slightly the tripartite division of validity claims that he introduced with the concept of communicative action. The validity claim relevant to legal norms is "legitimacy," in distinction from the claim to "rightness" proper to moral norms. The standard Habermas suggests for measuring this legitimacy is whether the norm expresses "a reasonable consensus in view of all [the various] aspects and problem types."

The fact that Habermas selects a new name for law's validity claim—legitimacy, rather than rightness—is significant. So, too, is his choice of name. We might take

350. Id. at 154.
351. Id.
352. See id. at 153-55.
353. See id. at 154-55.
354. See id. at 155.
355. I say "may be permissible" rather than "are permissible" because whether a particular form of discourse is permissible, with respect to a particular, depends upon whether that issue may be understood as pragmatic, ethical, or moral.
357. BETWEEN FACTS AND NORMS, supra note 2, at 156.
358. Id. at 155.
many legal rules to be "legitimate" but still believe they are unwise or suboptimal compared to alternatives. The term "legitimacy" suggests greater focus on procedure and origins than on substantive merit. This proceduralist turn responds to the strength with which Habermas has formulated the discourse principle. That principle, again, requires universal assent in a discursive process. Even if we understand universal assent in a somewhat relaxed manner—emphasizing the "could" in the phrase "could agree as participants in rational discourses"—the requirement still seems excessive. To name just two barriers to discursive consensus: Habermas has allowed the possibility (even necessity) of compromise over pragmatic issues, and he has said that "ethical" matters may not be susceptible either of discursive consensus or compromise. And so Habermas has to reinterpret the discourse principle, taking it to apply not so much to the substance of legal norms as to the procedure through which such norms are justified and enacted. The new term, then, is "legitimacy" rather than "rightness," and the burden of legitimacy, here as elsewhere in Habermas's theory, is borne by democratic procedure.\footnote{359. See, e.g., Jürgen Habermas, On the Internal Relation Between Law and Democracy, in THE INCLUSION OF THE OTHER 253, 259 (Ciaran Cronin & Pablo DeGrieff eds., 1998) (1996) (referring to "democratic procedure . . . which alone provides legitimating force to the lawmaking process in the context of social and ideological pluralism").}

One aspect of democratic procedure concerns the process of lawmaking within formally organized legislative bodies. As the idea of the constitutional state requires, this lawmaking process is itself legally regulated. Habermas mentions the standard issues here—periodic and secret elections with equal representation,\footnote{360. See BETWEEN FACTS AND NORMS, supra note 2, at 170, 181.} competition among political parties, committee organization, generally public deliberations, and various legislative formalities.\footnote{361. See id. at 170-71.} He does not argue that there is some uniquely correct way to address these issues. He says, instead, that these procedural matters must be "regulated in the light of the discourse principle," to ensure that "the necessary communicative presuppositions of pragmatic, ethical, and moral
discourses, on one hand, and the conditions for fair bargaining, on the other, can be sufficiently fulfilled."

In using the word "sufficiently," Habermas is acknowledging that the idealized version of rational discourse never will be fully realized within legislative bodies. The principle of majority rule, for example, is an important limit. The pressures of time and the need for action require decision rather than endless discourse. Habermas suggests that a majority vote does not necessarily mean the end of discourse, just perhaps a "caesura in an ongoing discussion" or "the interim result of a discursive opinion-forming process." But he acknowledges that legislative decisions, if revisable through new legislation, are less revisable than discursive conclusions upon which collective action does not immediately depend.

What Habermas is wrestling with here is the tension between two things he wants to affirm: his discourse principle, with its requirement of universal assent among all those affected, and the requirements of any imaginably functioning political system. Habermas wants both to argue that his discourse principle has been institutionalized, in the form of the democracy principle, and also to claim that he has "reconstructed," from a non-utopian point of view, the "self-understanding" of existing Western constitutional democracies.

This problem has come up in four contexts: (1) Habermas's acknowledgement that lawmaking requires representative government, not a discourse among all the citizenry that by itself would produce binding law; (2) his recognition that "ethical" disagreement may make discursive consensus impossible; (3) his acknowledgement that the detailed nature of legislated norms, together with the connection between legislation and interests, makes bargaining and compromise unavoidable; and (4) his recognition that the legislative procedures that are to cure the problems mentioned in (1) through (3) above are themselves not entirely consistent with an idealized notion of discourse. In short, Habermas has to rely on an idealized notion of discourse to support his "universal assent"
requirement, but that idealized notion of discourse is inconsistent with the requirements of any imaginably existing political system. In (1) through (3), Habermas has retreated from arguing that legislative outcomes must be "legitimate" in his original sense—capable of receiving the citizenry's universal assent in discourse—to arguing that democratic procedure must carry the weight of legitimation. With (4), however, he now has to confront that existing democratic procedures are themselves far from what an idealized notion of discourse would prescribe. But he cannot reject the idealized notion of discourse without rejecting the idea of universal assent that is at the heart of the discourse and democracy principles.

Ultimately, the shift to a procedural focus cannot save Habermas's discourse principle. Procedural norms are positive legal norms, and as such, they are within the scope of Habermas's discourse principle. The democracy principle—the version of the discourse principle applicable to specifically legal norms—provides that "only those [laws] may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted." Nothing in this statement exempts procedural norms, and for good reason. If procedure is to bear the weight of legal and political legitimacy, then procedural norms, above all, would have to qualify as legitimate. Given the discourse and democracy principles, that seems to require that the legal norms that constitute and regulate the democratic lawmaking process must themselves be capable of receiving the citizenry's universal assent.

We have here the same problem that prompted Habermas to retreat to procedural justification in the first place. The nuts and bolts of democratic procedure—whether to have a bicameral or unicameral legislature, the number of representatives, procedures for committee and leadership assignment, etc.—hardly seem susceptible of universal agreement in any non-idealized discourse. The maze of procedural detail, like the maze of detail in substantive legal norms, resists universal discursive consensus and

365. Id. at 110 (citation omitted).
366. Cf. McCarthy, supra note 318, at 132-33 (noting that disagreement may be expected even as to the interpretation of "such core elements of procedural impartiality as equal consideration and equal treatment").
calls, instead, for compromise at any number of points. Habermas seems to recognize this point when he notes that discourse theory cannot prescribe any set of uniquely correct procedures. He does not seem to recognize, however, that because procedural rules, too, are positive legal norms, they would be subject to the universal assent requirement of the discourse and democracy principles.

Habermas might try to stave off this conclusion by arguing that only the most general procedural arrangements are susceptible of universal agreement (even in idealized discourse), but that these arrangements suffice to get the legislative machine in motion. This argument has two problems. First, even the most basic constitutional provisions for legislative process involve considerable detail—the number of representatives, for example—and for reasons stated, universal discursive consensus on these matters seems unlikely. Habermas perhaps recognizes this point implicitly when he acknowledges that the “system of rights”—the basis for any legitimate constitutional project, and a system that includes democratic procedures within its ambit—could be realized in a number of permissible ways. The second problem with the argument that I am considering is that it demonstrates further just how little can be justified directly by Habermas’s discourse principle. Only the most general procedural arrangements could be substantively justified; all other legal norms would enjoy merely a presumption of rationality, so far as their generation was procedurally proper.

This raises the question why Habermas makes such strong claims for the discourse and democracy principles. I mean that in two senses. First, why does he formulate these principles so strongly, so that norms can be substantively justified only if they are could command universal assent in discourse? Second, why does he take the discourse and democracy principles, so formulated, to be so central to modern law, given how few legal norms can meet the demanding standard of universal assent?

As to the first question, Habermas takes “our” practices of justification to aim at universal assent, at least as a regulative ideal. Possibly this might be so with respect to scientific discourse, although I think there is much room for doubt even there. And those who, like Habermas, are committed to strict universalism in “moral” matters will perhaps be sympathetic to the idea that moral norms must
be susceptible of universal assent in an ideal discourse—
though, as Habermas notes, the consequence of this
position is a dramatic shrinking of the moral domain, with
an equally strong trend toward increasing the abstractness
of "moral" norms. But with respect to the kind of discourse
that is the stuff of democratic lawmaking, the universal
assent requirement seems not even to be a regulative ideal.
As Habermas notes, legal norms touch on interests that
may conflict sharply in modern societies, as well as group
identities and forms of life that cannot be unified through
law without strenuous dissent. 

The reasons Habermas has given for why universal consensus on substantive
lawmaking issues likely cannot be expected suggest that
the "democracy principle," as Habermas has formulated it,
is external to lawmaking discourse, not immanent within it.
Habermas's account purports to be a "reconstruction" of
modern law and democracy, but conspicuously absent from
political and legal discourses in modern societies is the idea
that a norm is justified only if all could assent in an ideal
discourse. The few instances in which unanimity is required
in actual political discourses—such as the requirement of
"unanimous consent" to revise and extend lawmakers' remarks,
or otherwise to depart from prescribed procedure—are taken to be the subject of bargain and
compromise. Such unanimity norms work, to the extent
that they do, only because each knows that the other can
sanction a refusal to assent by denying similar requests for
unanimous consent in the future. Any resulting unanimous
agreement is the result not so much of conviction with
respect to a normative validity claim as it is recognition
that the game is better played by withholding one's objection.

The second question—why does Habermas cling to the
idea of universal assent, even as his account of legislative
discourse undermines it?—likely finds its answer in
Habermas's account of the "system of rights." The criterion
Habermas sets for a reconstruction of law and democracy is
that it must account for how the addressees of law are also
its authors. The universal assent requirement is a

367. McCarthy makes this point forcefully. See id. at 139 (arguing against
the analogy to truth discourses in Habermas's analysis of ethical-political
discourse); id. at 145 (referring to "persistent ethical-political disagreements as
an "indelible feature of democratic public life").
particularly strong way of accounting for establishing this identity. If all legal norms could receive universal assent in an ideal discourse, then no one could complain that the legal order is coercive.

But Habermas's own shift to indirect or procedural legitimation, rather than direct or substantive legitimation, suggests that this defense of the "universal assent" requirement is untenable. If laws are presumptively legitimate because of their procedural pedigree, then they may well be substantively coercive—in the sense that at least some members of society would not assent to them in discourse. In shifting to procedural legitimation, Habermas recognized that as to many legislative matters, universal substantive agreement is unavailable. After that shift, the sense in which law's addressees are also its authors is that they, because of fidelity to recognized procedure, have reason to accept legislative outcomes, even if they cannot endorse them substantively. This sense in which law's addressees are also its authors doubtless is more modest than Habermas's original formulation of the discourse and democracy principles seemed to promise. But it is the most that can be sustained, given Habermas's (wise) concessions to the realities of the legislative process. The addressee/author identity, like the scope of the discourse and democracy principles themselves, has to be reassessed and reformulated to reflect Habermas's concessions about "ethical" disagreement and the necessity of bargaining and compromise in lawmaking. That identity between addressee and author is not an independent reason for supporting the excessively strong version of the discourse and democracy principles. Universal substantive assent really has no place in Habermas's theory after the proceduralist turn.\textsuperscript{368}

The contribution of Habermas's "discourse theory of law and democracy" thus is not the idea of universal discursive assent. Instead, it is Habermas's recognition that discourse—not "the discourse principle" as originally formulated—is institutionalized in the lawmaking process.

\textsuperscript{368} See Bohmann, \textit{supra} note 141, at 921-23 (arguing for replacement of the democracy principle's unanimity requirement with the notion of "deliberative majorities"); Rehg, \textit{supra} note 209, at 265 (noting that Habermas's decision to retain the requirement of universal assent in his "democratic principle" is "somewhat odd"); cf. McCarthy, \textit{supra} note 318, at 152 ("Practical rationality in the face of diversity is as much a matter of recognizing, respecting, and accommodating differences as one of transcending them.").
through legally prescribed procedures. The most novel aspect of Habermas's account is the connection between deliberation and decision in formal governmental institutions, on one hand, and informal discussion among ordinary citizens, on the other. Popular sovereignty, reinterpreted discourse-theoretically, is consistent with legislative decisionmaking in representative bodies, but only subject to an important caveat: If the citizens' communicative power is to influence lawmaking, legislative bodies must remain "porous, sensitive, and receptive to the suggestions, issues and contributions, information and arguments that flow in from a discursively structured public sphere." In part this, too, is a matter of legal regulation. Public spheres must be constitutionally protected. Habermas suggests, also, that the procedures for selecting representatives must "provide for the broadest possible spectrum of interpretive perspectives, including the views and voices of marginal groups."

With this latter suggestion, Habermas likely implies a criticism of the American system, in which the two-party framework tends to limit the range of represented views. But much of the work in ensuring that citizens' communicative power influences representative bodies depends upon the citizenry itself, not the actions of representatives. Whether political public spheres are vibrant or moribund depends in substantial part on the society's traditions and political culture. Habermas's theory of democracy places great weight on the importance of active political public spheres, and on their connection to the network of voluntary associations that Habermas calls "civil society."

Habermas's account of law and democracy, then, departs from an exclusive focus on state institutions. As he recognizes, however, the claims he makes for the

369. Cf. Rehg, supra note 209, at 266-69 (arguing that decision procedures are not necessarily to be ranked according to their degree of correspondence with the discourse principle).

370. BETWEEN FACTS AND NORMS, supra note 2, at 182. See generally id. at 181-86.

371. Id. at 171.

372. Id. at 183.

373. See id. at 302.

374. See id. at 130-31, 175, 184, 302, 317, 358, 371, 437, 461.

375. See id. at 175 (introducing the notion of civil society); see also id. at 74-75 (detailing Parsons's perspective on civil society).
importance of public spheres and civil society need to be substantiated through social theory. That is a central task of Habermas's "communication theory of society," which, as I have explained, is the supplement in Habermas's larger project to the discourse theory proper.\textsuperscript{376} For reasons of space, I will not discuss here Habermas's attempt to ground social-theoretically his ambitious normative claims; I have considered that effort in a companion article.\textsuperscript{377}

Such is Habermas's account of the ways in which administrative power is bound to communicative power with respect to legislation. This account, based in a discourse-theoretical understanding of separation-of-powers norms, extends also to the other two familiar branches of government.

Lawmaking, Habermas has said, may rely on the full range of reasons and discourses—moral, ethical, and pragmatic—in discursively justifying and enacting legal norms. Adjudication, by contrast, is limited on Habermas's theory to the application of existing norms. Habermas understands adjudication according to a civil-law model. The "cornerstone" of modern law is the statute,\textsuperscript{378} enacted by representative bodies. Habermas emphasizes the requirement of a "democratic genesis" for statutes more than did the earlier German tradition.\textsuperscript{379} But still, he sees the statute as "the foundation for individual legal claims"\textsuperscript{380} taken up in adjudication. Judicial decision, he says, involves "the application of legal statutes to individual cases."\textsuperscript{381}

The obvious question for American readers is whether this idea of adjudication is a plausible "reconstruction" (in Habermas's sense) of American practice. Common-law decisionmaking involves the application of judge-made rules, not just statutes, and further, it involves the justification of new judge-made rules, not just the application of existing rules as pregiven premises. Habermas, oddly, nowhere discusses the idea of common-law adjudication. As we will see,\textsuperscript{382} Habermas takes up Dworkin's "constructive interpretation" approach in his

\textsuperscript{376} See supra text accompanying notes 152-63.
\textsuperscript{377} See Baxter, supra note 7.
\textsuperscript{378} See \textit{Between Facts and Norms}, supra note 2, at 189.
\textsuperscript{379} See id. at 190.
\textsuperscript{380} Id. at 172.
\textsuperscript{381} Id.
\textsuperscript{382} See infra Part III.A.
testing” of the discourse theory of law against legal theory proper. That will allow Habermas to argue that in interpreting and applying existing law, judges are at the same time developing the law. But that does not address the problem that judge-made rules, even if pregiven from the individual judge’s point of view, do not have the democratic pedigree that Habermas’s theory would require.

Habermas’s reconstitutive account of the constitutional state focuses on what he calls “normative” and “systematic” arguments why adjudication must be limited to the application of existing legal norms rather than the justification and announcement of new norms.\(^{383}\) In terms of discourse theory, Habermas says, justification and application involve “different logics of argumentation.”\(^{384}\) To the extent this argument is not simply circular—assuming that adjudication involves only the application of pregiven norms—it is difficult to decipher. Habermas observes that adjudication relies upon party presentation, with the judge as “impartial representative of the legal community,” whereas “in discourses of justification there are... only participants.”\(^{385}\) That may be so, but its significance is not immediately clear. What Habermas seems to be saying is that adjudication cannot involve the justification of norms because the only participants are the interested parties and the disinterested judge. The justification and enactment of legal norms, Habermas has argued, requires the participation of the citizenry through discussion in the public sphere. Adjudication, therefore, lacks the democratic warrant Habermas’s theory would require. For that reason, it cannot involve the genesis of new norms, and it must confine itself to “a discourse of application aimed at decisions consistent over time”\(^{386}\)—or, consistent until the appropriate lawmaking power has changed the law.

Habermas’s second argument sounds similar themes. The judiciary has the coercive power of the state at its disposal to enforce its judgments. If judges were free to act as lawmakers, then they would be able to wield administrative power without connection to the communicative

\(^{383}\) See Between Facts and Norms, supra note 2, at 172. He addresses briefly the “pragmatic” reasons often given for separating lawmaking from law-applying, having to do with judicial professionalization and specialization.

\(^{384}\) Id.

\(^{385}\) Id.

\(^{386}\) Id. at 192.
power of democratic discussion. The separation of lawmaking and law-applying power is a corollary of Habermas's discourse theory of law and democracy. The conclusion is not novel—a basic argument against judge-made law always has been that it is undemocratic. What remains to be seen, though, is whether Habermas's inflection of this standard point through discourse theory solves the standard difficulties. Is the distinction between justification and application any less manipulable and unsatisfying than the distinction between making and finding the law? Is it an improvement on Dworkin's attempt to escape this choice with the notion of constructive interpretation? I will take up these issues in Part III below, where I consider Habermas's "testing" of his theory against legal theory proper, and also against the theory and practice of constitutional decisionmaking.

As should be apparent by now, Habermas intends his discourse theory as a recasting of separation-of-powers notions. One branch of government remains to be discussed—the executive branch, or as Habermas refers to it, "the administration" (Verwaltung). As one would expect, Habermas argues that there must be legal controls over the administration to prevent it from deploying administrative power in a way disconnected from communicative power. He mentions the usual such controls—the requirement of statutory authorization, ongoing legislative oversight, and judicial review. The administration may not substitute itself for the lawmaking power. That much is obvious. More difficult is Habermas's distinction between adjudication and administration, both of which seem to involve the application of democratically enacted law. Habermas admits a further difficulty: given increasing legislative reliance on general clauses and goal-oriented programs, the administration is left "considerable room for discretion." These recent developments, Habermas suggests, undermine traditional conceptions of administrative tasks as merely the technical implementation of norms established elsewhere.

387. See id. at 169.
388. See id. at 173, 187-88.
389. Id. at 173.
390. Id. at 190.
391. See id.
Discourse theory, according to Habermas, offers a way to account for the separation of administration from both legislative and judicial decisionmaking. Legislatures have access to the full range of “normative, pragmatic, and empirical reasons, including those constituted through the results of fair compromises,” provided that they access these reasons “within the framework of a democratic procedure designed for the justification of norms.” The judiciary engages in discourses of application, in the context of particular cases, and it is bound to apply enacted law. A court is not free to “make whatever use it likes of the reasons packaged in, and linked to, statutes.” Anticipating his discussion of Dworkin, however, Habermas implies that in applying law, courts may engage in constructive interpretation—or, as he later puts it, that they may “justify the individual decision by its coherence with a rationally reconstructed history of existing law.” The administration, however, is limited to “pragmatic discourses,” where the normative premises are “pregiven.” It is “not permitted to deal with normative reasons in either a constructive or reconstructive manner,” nor is it free to “follow [its] own interests or premises.” What it is to contribute is “empirically informed, purposive-rational decision making” in pragmatic issues.

Habermas’s general idea here is to account for the separation of powers not so much in terms of differences among functional tasks, or in terms of a logic of general and specific, as in terms of differences in access to reasons and kinds of discourse. From this point of view, the significance of the separation of powers is that it is “a way to secure both the priority of democratic legislation and the recoupling of administrative power with communicative power.”

This general sketch, developed through Habermas’s “reconstructive” analysis of law and democracy, is of course no substitute for detailed analysis of particular legal and political systems. Presumably Habermas would allow—as

392. Id. at 191.
393. Id. at 211.
394. Id. at 191.
395. Id. at 192.
396. Id. 186.
397. See id. at 189-92.
398. Id. at 187.
he has with respect to earlier work—that its merit depends upon whether, in the future, it proves fruitful for more empirically oriented research. In fact, the rest of Habermas's work on law seeks to bring the ideas developed reconstructively into closer contact with ideas generated through different approaches. The “communication theory of society,” which I discuss in a separate article, situates the discourse theory’s conclusions in a model of contemporary societies, testing whether those conclusions “connect[] with the social reality of highly complex societies.” And before developing that theory of society, Habermas seeks to “test and elaborate the discourse concept of law and democracy” against, first, contemporary discussions in legal theory, and second, contemporary controversies in constitutional law.

III. DISCOURSE THEORY AND THE THEORY AND PRACTICE OF ADJUDICATION

With his “testing” of the reconstructively developed discourse theory, Habermas shifts from a “philosophical” standpoint to “the perspective of legal theory proper.” From this latter standpoint, the focus is on adjudication, and in particular, on adjudication as seen from “the judge’s perspective.” Certainly, as Habermas notes, this is the dominant perspective in legal scholarship. According to Habermas, this is not simply a matter of parochialism or traditionalism, but a legitimate theoretical decision. His stated reason is as follows: “Because all legal communications refer to actionable claims, court decisions provide the perspective from which the legal system is analyzed.”

That reason does not sufficiently support a methodological commitment to court-centered legal theory.

399. See, e.g., 1 THEORY OF COMMUNICATIVE ACTION, supra note 9, at 396-400.
400. See Baxter, supra note 7.
401. Habermas, Reply to Symposium Participants, supra note 158, at 444; see id. (arguing the turn to social science is “meant to make it plausible that the reconstructed normative self-understanding of modern legal orders does not hang in mid-air”).
402. BETWEEN FACTS AND NORMS, supra note 2, at 7.
403. Id. at 195.
404. See id. at 196.
405. Id. at 196-97.
Habermas’s strategy is particularly strange given his statement, in the same general discussion, that on his approach “political legislation” is “central,” and his acknowledgement that one can analyze political legislation from the standpoint of legislators, agencies, citizens, and interest groups. Certainly one also could investigate law’s effects (or lack of effects) outside the courtroom, even if one sees law primarily as creating “actionable claims.”

But Habermas is correct that if discourse theory is to “prove itself” as a theory of law, then it must provide an account of adjudication. To be sure, adjudication need not be understood only from “the judge’s perspective.” The perspectives of lawyers, the parties, and jurors are obvious alternatives, or better, supplements. But Habermas is right that one basic question of legal theory concerns how judges do and should decide cases. That question is indeed one against which a legal theory must prove itself, even if it is not obviously and necessarily the central question of legal theory.

Habermas considers, first, the general nature of adjudication, approaching it through a critical reading of familiar perspectives that is informed by his own guiding distinction between facticity and validity. He turns, then, to the special case of constitutional adjudication.

A. Discourse Theory and Dworkin’s “Constructive Interpretation”

In the context of adjudication, the tension between facticity and validity appears as a tension between “certainty” and “legitimacy.” With the “certainty” requirement, Habermas connects not just the general need for adequate and predictable enforcement of legal standards, but also, the more particular need for consistency in judicial decisionmaking. With “legitimacy,” Habermas associates

406. Id. at 195.
407. See id. at 196.
408. Id.
409. James Bohmann, a philosopher, finds it “odd that Habermas spends so much time” discussing adjudication rather than legislation. See Bohmann, supra note 141, at 910 n.20. His different perspective probably reflects the disciplinary difference.
410. See, e.g., BETWEEN FACTS AND NORMS, supra note 2, at 197, 198.
411. See id. at 198.
the need for judicial decisions to be normatively justifiable and thus worthy of respect apart from the presence of sanctions. Habermas describes the basic problem of adjudication as follows: “[H]ow can the application of a contingently emergent law be carried out with both internal consistency and rational external justification, so as to guarantee simultaneously the certainty of law and its rightness?”

Two aspects of this formulation deserve comment. First, the word “application” reflects Habermas’s position, developed in his analysis of the separation of powers, that adjudication is about the application of legal norms, not their creation and justification. The words “external justification” express the same idea. The justification for the norms applied in judicial decisions must come from without—from the reasons “packaged in, and linked to, statutes.” Second, the references to “internal consistency” and “emergent law” express the idea that present judicial decisions link to a past and future of legal decisionmaking. The certainty requirement thus mandates consistency with past institutional history and, at the same time, prescribes that present judicial decisions must be points of connection for future judicial decisions.

With this idea of the double requirement for judicial decisionmaking as the backdrop, Habermas distinguishes his discourse-theoretical approach from three prominent theories of judicial decisionmaking. As one by now might expect, Habermas maintains that each of these theories fails to reconcile the certainty and legitimacy requirements.

According to Habermas, legal realism revokes the certainty requirement by denying that past decisions are sufficiently determinate to constrain present decision. This effectively negates “the very function of law,” which is “to stabilize expectations.” Further, Habermas argues,
realism pursues the legitimacy goal only by assimilating judicial decisionmaking to other kinds of political decision. On this view, cases are correctly decided only if the judge wisely uses her discretion to pursue utilitarian or social-welfare goals. In both respects, Habermas thinks, realists skeptically debunk the necessary “idealizing suppositions” of participants in the judicial process.\textsuperscript{418}

Legal positivists, Habermas thinks, commit a symmetrical error. According to Habermas, positivists see law as a closed system of norms, with legitimation coming only through fidelity to legally prescribed procedures. The basic norm—whether Hart’s “rule of recognition” or Kelsen’s \textit{Grundnorm}—bears the weight of legitimation, but “without itself being capable of rational justification.”\textsuperscript{419} Instead, “as part of a historical form of life, it must be factually accepted as settled custom.”\textsuperscript{420} The emphasis on identifying unambiguously what is or is not law, and the concern with “pedigree” rather than rational justification, promotes the certainty guarantee at the expense of the legitimacy or “rightness” guarantee. Positivism’s treatment of “hard cases,” Habermas argues, reflects this “priority of legal certainty.” In such cases, Habermas maintains, positivists claim that law has run out and commit the decision to judicial discretion. Here the “rightness” standard is extrinsic to law.\textsuperscript{421}

“Legal hermeneutics” fares somewhat better in Habermas’s assessment. The insight here is that a “case” is defined by the relevant norm, whose relevance criteria select some aspects of the factual situation and exclude others. The decision reached by applying the rule counts as a further development of the rule. A decision’s legitimacy derives from the ethical tradition that shapes both the judge’s “preunderstanding” of the case and the interpretive maxims that aid in application. But this connection of legitimacy to a particular tradition is insufficient in a pluralistic society, Habermas argues.\textsuperscript{422}

The encounters Habermas stages with these three theories of law do not amount to much of a “test” for

\textsuperscript{418} See id.
\textsuperscript{419} Id. at 201-02.
\textsuperscript{420} Id. at 202.
\textsuperscript{421} See id. at 202-03.
\textsuperscript{422} See id. at 199-200.
discourse theory. All three sketches are too brief to develop the theory in question, and the account of “realist” thinkers—attributing to them “a flat revocation of any guarantees of legal certainty”—is particularly crude. Habermas would have done better either to encounter the three theories in something other than cardboard-cutout form or to omit the discussion entirely. The purpose of his encounter, however, probably is not so much a “testing” of his own theory as a setup for a theory he will consider at some length: the theory of adjudication Ronald Dworkin developed in work up to and including Law’s Empire.

The connections between Dworkin’s account of adjudication and Habermas’s ideas are easy to see. Both focus on the decision of legal rather than factual issues, and both assume the “internal” perspective of the judge. Both see judicial decisionmaking as bound by the certainty and

423. One problem, of course, is that the body of work referred to as “legal realism”—or even “American legal realism”—is diverse in style of thought, subject matter, and conclusions. Habermas would have done better to select one or another “realist” rather than try to characterize “realism” generally in two paragraphs. But the idea that “realism” flatly revoked the certainty guarantee seems consistent only with Jerome Frank’s account, in Law and the Modern Mind, of the quest for legal certainty as (in part) a projection of infantile needs. See Jerome Frank, Law and the Modern Mind 46-52 (Anchor Books 1970) (1930). But much “realist” work could be seen as reinterpreting rather than “revoking” the idea of legal certainty. A characteristic argument is not that we cannot predict the outcome of most legal disputes, but instead, that such predictive capacity depends less on analysis of officially recognized black-letter legal rules than commonly has been thought. At least a significant body of “realist” work was directed toward increasing the predictability and certainty of legal rules—partly by verbal reformulation, but also by improving the information available to decisionmakers (through procedural and other changes), by finding better decisionmakers than generalist judges and juries, and to some extent, by crafting different systems of rules that would more closely track reasonable procedures in the field being regulated. This list of “realist” reform strategies suggests also that the concern for “rightness” was not simply a matter of trusting judges to take on a policymaking role. A characteristic “realist” argument was that judges always had been performing that role, but usually covertly, sometimes unconsciously, and often badly. And at least for some important “realist” thinkers, both procedural changes and incorporation of reasonable extra-legal norms could improve the rightness of adjudicative decisions.

424. William Forbath argues that a better understanding of legal-realist thinking would have improved Habermas’s account of the economic and administrative system. See William A. Forbath, Short Circuit: A Critique of Habermas’s Understanding of Law, Politics, and Economic Life, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 272, 279-83, 286.

legitimacy guarantees. Habermas, in fact, could make more of the connection between his own approach and Dworkin's theory of "constructive interpretation." The linkage is easiest to see if we consider first the "chain novel" device that Dworkin uses to illustrate judicial decisionmaking. A new chapter for a chain novel, Dworkin observes, must "fit" the prior chapters that other authors have crafted. Further, among the possible ways of continuing the story that survive some threshold test of "fit," the author must consider which "makes the work in progress best, all things considered." Dworkin, of course, notes that the two "dimensions" of interpretation—"fit" and "justification"—are not entirely separable. Questions of fit are relevant also in the second dimension of interpretation, both in the chain novel example and in the practice of judicial decisionmaking that the example illustrates.

Put in terms of judicial decisionmaking, the "fit" requirement means that a present decision must sufficiently cohere with relevant past decisions. Habermas, oddly, describes this only as a matter of justification, maintaining that Dworkin would "justify the individual decision by its coherence with a rationally reconstructed history of existing law." Perhaps he is trying to say only that, on Dworkin's theory, the degree of fit is relevant to the matter of justification. In any event, the requirement of coherence with past decisions is part of what Habermas means by adjudication's "certainty" requirement. Dworkin's second dimension of interpretation, referring to the decision's justifiability, corresponds to Habermas's "legitimacy" or "rightness" requirement. Put in terms of Habermas's overarching distinction between facticity and

426. See BETWEEN FACTS AND NORMS, supra note 2, at 203 (regarding Dworkin).
427. See DWORKIN, supra note 425, at 229-30.
428. Id. at 231.
429. Dworkin does not always describe this second dimension of interpretation as "justification," but sometimes he does. See id. at 239, 255. He refers on other occasions to the dimension of "substance" or (in discussing legal interpretation) "justice."
430. See id. at 239.
431. BETWEEN FACTS AND NORMS, supra note 2, at 211.
432. See id. at 198-99.
validity: Dworkin’s “fit” requirement treats past decisions as authoritative (“facticity”), but at the same time, he sees the present decision’s justifiability (“validity”) as not entirely reducible to its degree of fit. Neither the interpretive dimensions of fit and justification, nor the guarantees of certainty and legitimacy, collapse into one another.

Habermas is more critical, however, of Dworkin’s decision to elaborate “constructive interpretation” through the device of Hercules, the idealized judge with “superhuman intellectual power and patience” whose cogitations and decisions we witness throughout the second half of Law’s Empire. Habermas asks the obvious questions. Does Dworkin’s reliance on an idealized judicial figure indicate that the interpretive tasks he sets for ordinary judges are excessively demanding? If no judge, by definition, can equal Hercules’ capacities, then can the theory Dworkin is defending serve as even a regulative ideal? 433

Habermas approaches these issues by way of Dworkin’s reception in critical legal studies. Accordingly—and because of his own views about the central issues in adjudication—Habermas takes the basic problem to be one of indeterminacy. What reason, he asks, do we have for thinking that Dworkin-style judging would not simply substitute the political prejudices of flesh-and-blood judges, and unacknowledged influences in the judicial system’s environment, for determination by law? 434 And if the law is “shot through with contradictory principles and policies,” then could Dworkin’s judge possibly complete the “rational reconstruction” that his interpretive method requires? 435

To some extent, Habermas defends Dworkin against these charges. He notes Dworkin’s own reply, to the effect that the objections confuse rules with principles. 436 Rules, understood as concrete norms that apply directly to particular fact-situations, cannot conflict without either invalidating one of the rules or requiring an exception. Principles, by contrast, may “compete” within a coherent normative theory without the competition being a theory-

433. See id. at 212-13.
434. See id. at 213-14.
435. Id. at 216.
436. See id. at 216-17.
deeating “contradiction.” This reply is correct as far as it goes, Habermas thinks, but it can be deepened by considering Habermas's own distinction between justification and application. “[A]ll norms” except for the most rule-like rules, Habermas claims, “are inherently indeterminate” in their application. This is because most norms do not specify, in detail and in advance, the factual situations to which they do and do not apply. And so in many cases, more than one norm may be potentially applicable. A discourse of application is required to determine which valid norm is “appropriately” applied in the particular context, given all the relevant facts and circumstances. But because the relevance of facts and circumstances depends upon which norm one is considering, discourses of application require one to work back and forth between the norm and its situation of application. This uncertainty of application, however, does not affect the norms’ validity. And so the “indeterminacy” objection Habermas attributes to critical legal studies confuses justification with application, not just principles with rules.

As Habermas acknowledges, however, this reply to the indeterminacy objection does not sufficiently address the requirement of legal certainty. He makes this acknowledgement in the context of evaluating Dworkin's theory, but it applies equally to his own. The standard of “appropriateness” in discourses of application is empty. It does not assist the judge either in selecting a governing norm or in applying the norm to the factual situations that the norm illuminates. It simply tells the judge to decide the case correctly. “Appropriateness” is a term of praise rather than a criterion or instruction.

Habermas's responses to this problem are surprising. He suggests, first, that “legal certainty” is only “itself a principle that must be weighed against other principles in the case at hand.” This response seems, first, to misstate the logical status Habermas has given to “certainty.” It is

437. DWORKIN, supra note 425, at 268-71; BETWEEN FACTS AND NORMS, supra note 2, at 208-09.
438. BETWEEN FACTS AND NORMS, supra note 2, at 217.
439. Id. at 217-18.
440. See id. at 219.
441. See Robert Alexy, Jürgen Habermas's Theory of Legal Discourse, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 226, 231.
442. BETWEEN FACTS AND NORMS, supra note 2, at 220.
not a “principle,” in the sense of a general norm that, in particular cases, helps specify the justification for decision. Instead, it is one of two basic functional requirements that a legal system as a whole must satisfy: the course of decision must be sufficiently certain (i.e. predictable in view of past institutional history, with adequate enforcement), and decisions must be sufficiently justified to count as correct. Doubtless the point Habermas is trying to make is that these two requirements, which he has identified as in tension, may be traded off against each other. What he suggests is a reinterpretation of the certainty requirement that trims back its demands to a more manageable level. Again, his recourse is to procedure. Instead of focusing on the certainty of outcome, Habermas says, we should focus on the certainty of procedures. Sound procedures, he contends:

guarantee[] the certainty of law at a different level. Procedural rights guarantee each legal person the claim to a fair procedure that in turn guarantees not certainty of outcome but a discursive clarification of the pertinent facts and legal questions. Thus affected parties can be confident that in procedures issuing in judicial decisions only relevant reasons will be decisive, and not arbitrary ones.444

This reinterpretation and relocation, however, responds to neither of the reasons that motivated Habermas to postulate “certainty” as a requirement for adjudication. The “very function of law,” he said, was to “stabilize expectations.”445 That function requires predictability of outcome, not just predictability that litigation procedures will be fair. Nor does the fairness of procedures by itself guarantee continuity in a legal system’s institutional history. The question of legal certainty concerns outcomes, not procedures. While good procedures may help produce more consistent outcomes, the more salient factor seems to be the character of legal norms applied in a particular system. As we have known at least since legal process theory: “rules,” which specify their applicability and

---

443. See id. at 197 (referring to the “tension between the principle of legal certainty and the claim to a legitimate application of law”); id. at 198 (the “guarantees” of certainty and legitimacy “do not easily harmonize”).
444. Id. at 220.
445. Id. at 201.
application relatively precisely, are generally more certain in their outcome than open-ended “standards” or “principles.” It may be, as Habermas suggests in the final chapter of Between Facts and Norms, that contemporary conditions make classical ideas of legal certainty unrealizable. But then why does Habermas not make that clear at the outset of his discussion of adjudication? Why is certainty (of outcome) a basic function of law, and why is realism faulted for “revoking” the guarantee of legal certainty?

Habermas’s further response to the “indeterminacy of application” problem is no more satisfying. He suggests that legal “paradigms” can operate to limit the indeterminacy of adjudication. What he means by this term is not entirely clear. His most common usage of this term—beginning with the opening of his first chapter on adjudication and continuing throughout Between Facts and Norms—presents “paradigms” as highly abstract interpretations of a legal system as a whole. Borrowing from systems theory, he describes a legal paradigm as “something like the implicit social theory of the legal system, and hence the image this system forms of its social environment.” Understood in this way, Habermas claims, “the legal paradigm determines how basic rights and constitutional principles are to be understood and how they can be realized in the context of contemporary society.” Habermas usually identifies these paradigms in a trio of competing conceptions—with his own conception drawing from but superseding the other two. In order of historical occurrence, these are the “liberal” (or “bourgeois formal-law”) paradigm, the “social-welfare” (or “welfarist” paradigm), and his own “proceduralist” paradigm.

If Habermas has these paradigms in mind, then he has no solution to the problem of indeterminacy in application. They are far too abstract to provide guidance in concrete cases. Further, as Habermas acknowledges, these paradigms presently compete with one another, and so even if

---

446. See id. at 433, 435.
447. Id. at 194-95.
448. Id. at 195.
449. See, e.g., id. at 195, 221-22, 389-91, 409-10, 414-15, 437. Sometimes Habermas refers only to the former two paradigms, but usually when viewing them from the perspective of his own. See id. at 250-51, 401-02, 407, 418-19.
450. See Alexy, supra note 441, at 231.
any one of them provided clear guidance in a particular question, the question of paradigm selection would remain.\textsuperscript{451} Habermas's usual trio of paradigms, then, are more indeterminate in application than the legal norms they purportedly clarify.

As Habermas acknowledges in another context, the complexity of judicial decisionmaking may be reduced with less abstract "paradigms." In discussing Cass Sunstein's proposed seven "canons" for interpreting regulatory statutes, Habermas first remarks that the proposal is an "exemplary contribution to the paradigm discussion," largely because the canons cohere with the discourse theory's "radical-democratic meaning of the system of rights."\textsuperscript{452} But while Habermas agrees that "background norms" are necessary for judicial interpretation (at least in cases of ambiguity),\textsuperscript{453} and while he approves of Sunstein's proposal on the merits, he draws back from endorsing fully this solution to the problem of indeterminacy. These canons at least verge on "a politically inspired 'creation of law,"" and in that respect they offend the requirement that judicial activity be limited to discourses of application, not justification.\textsuperscript{454} Further, canons of construction, and interpretive norms more generally, tend to be the property of legal experts,\textsuperscript{455} and so they may become ideological\textsuperscript{456} and

\begin{itemize}
  \item \textsuperscript{451} See \textit{Between Facts and Norms}, \textit{supra} note 2, at 221.
  \item \textsuperscript{452} Id. at 252 (quoting Cass Sunstein, \textit{After the Rights Revolution} 170-71 (1990)). Sunstein's proposal is as follows:
    Where there is ambiguity, courts should construe regulatory statutes so that (1) politically unaccountable actors are prohibited from deciding important issues; (2) collective action problems do not subvert statutory programs; (3) various regulatory statutes are, to the extent possible, coordinated into a coherent whole; (4) obsolete statutes are kept consistent with changing developments of law, policy, and fact; (5) procedural qualifications of substantive rights are kept narrow; (6) the complex systemic effects of regulation are taken into account; and most generally, (7) irrationality and injustice, measured against the statute's own purposes, are avoided.
  \item \textsuperscript{453} See \textit{Between Facts and Norms}, \textit{supra} note 2, at 252.
  \item \textsuperscript{454} See \textit{Between Facts and Norms}, \textit{supra} note 2, at 252 (referring to "important judicial decision[s]"); see also id. (quoting Sunstein's proviso that the canons apply when the text is ambiguous).
  \item \textsuperscript{455} See \textit{id.} at 253.
  \item \textsuperscript{456} See \textit{id.} at 221, 224-25. \textit{But cf. id.} at 393 (cautioning against taking the "legal paradigm" idea as just part of "the conceptual economy of [law's] professional custodians").
  \item \textsuperscript{456} See \textit{id.} at 221.
\end{itemize}
resistant to change.\textsuperscript{457} Habermas should add that typically they are contested, both in the abstract and in their application to particular cases.\textsuperscript{458} Because they are contested, professionalized rules, Habermas could add further, interpretive canons may not materially assist in producing legal certainty: they do not guarantee substantive consistency with past cases, nor do they provide much guidance for law-conforming primary conduct.

Ultimately, Habermas addresses the indeterminacy problem through a "theory of legal discourse" that, as one by now would expect, gives pride of place to procedure. He begins this theory by renewing his objections to Dworkin's "Hercules" device. The theory is "monological," Habermas observes,\textsuperscript{469} meaning that Hercules develops his interpretations not in discourse with others—whether attorneys in the case, his fellow judges, or both—but through his own solitary cognitive efforts. "Monological" is a term of opprobrium in a discourse theory that relies on "dialogue" (or, discursive engagement) in the search for "appropriate" applications of legal norms. And so rather than "anchor the ideal demands on legal theory in . . . the ideal personality of a judge who is distinguished by her virtue and her privileged access to the truth," Habermas suggests, better to have recourse to "the political ideal of an 'open society of interpreters of the constitution.'"\textsuperscript{460}

This move, however, has little if anything to do with promoting legal certainty or reducing indeterminacy in the law's application. If the law, as applied, were what an "open society of interpreters" decided after some discursive procedure, then the distinction between adjudication and legislation in fact would be leveled out. Habermas will put the idea of the "open society" to other uses, but his invocation of that idea in addressing the indeterminacy problem makes little sense.\textsuperscript{461}

\textsuperscript{457} See id. at 221.
\textsuperscript{458} See supra text accompanying note 451.
\textsuperscript{459} BETWEEN FACTS AND NORMS, supra note 2, at 222-24.
\textsuperscript{460} Id. at 223. Andrew Arato defends this idea of a public sphere that would constrain courts, particularly in their exercise of constitutional jurisdiction, but notes that Habermas has not gone far in addressing questions of institutional design. See Andrew Arato, Procedural Law and Civil Society: Interpreting the Radical Democratic Paradigm, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 26, 32-34.
\textsuperscript{461} Habermas's contention is that to the extent indeterminacy is reduced
Besides, what Habermas addresses under the heading of “legal procedures” involves, for the most part, something other than democratic influence on legal outcomes. His aim is to show how legal procedures, especially litigation procedures, incorporate—more or less—the discourse principle.

The “more or less” qualification is important. As with legislative procedures, judicial procedures impose time and relevance constraints. Pretrial procedures, and rulings during trial, limit the issues that may be raised and the time that may be devoted to them. The parties, Habermas acknowledges, pursue interests strategically—that is, their contribution to courtroom discourse is not disinterested pursuit of the right answer but advocacy.

The burden of proof asymmetrically distributes discursive roles. Habermas sees the role of the judge as compensation for these divergences from the discourse model. “The legal discourse of the court,” Habermas writes, “is played out in a procedural-legal vacuum, so that reaching a judgment is left up to the judge’s professional ability.” In the German system, Habermas points out, the judge is required to set out the reasons for decision. In Anglo-American trials, however, jury decisions may simply be answers as to ultimate issues, with no explanation and no real checks to see whether the conclusions are discursively warranted. And as to factual matters, as Habermas notes, appellate review is sharply limited. The same is true of most ordinary trial rulings on (for example) the admission of evidence. Further, voting procedures in multimember decisionmaking bodies, whether judge or jury, may further

by “paradigms,” then better to employ paradigms that all share. But if Habermas means the trio of large-scale paradigms identified in text above, then he faces the problem of competing paradigms. If he is referring to the humbler kind of “paradigm”—canons, background norms, etc.—then his own argument suggests that ordinary citizens have little to say about such matters.

The real use of this “open society of interpreters” idea is to provide a check, called for by discourse theory’s pro-democracy tilt, in cases where courts engage in what might be considered lawmaking rather than law-application. We will see, however, that Habermas’s account of when that happens is not altogether clear. And in any event, this has nothing to do with reducing indeterminacy.

462. BETWEEN FACTS AND NORMS, supra note 2, at 235-36.
463. See id. at 235.
464. See id.
465. Id. at 237.
466. Id. at 236.
467. See id.
deviate from the discourse model. This is less true in jury
cases, perhaps, to the extent that the law requires unan-
imity or at least a strong supermajority. In cases with multi-
member judicial panels, however, a simple majority will
suffice. As with rules establishing legislative majority rule,
"consensus" among decisionmakers is a less stringent
requirement than Habermas's statement of the discourse
principle first would suggest.

To this list of limits that legal procedure imposes on the
discourse principle, one should consider also the over-
whelming percentage of cases that are settled or (in
criminal cases) plea-bargained. In such cases, we see
bargaining rather than something that meets the general
requirements of discourse. True, as I mentioned above,
Habermas's account of the constitutional state's principles
leaves room for bargaining and compromise. But it requires
that the conditions of bargaining be fair, with power more
or less symmetrically distributed. Do the conditions of legal
bargaining meet this requirement? Certainly there is an
imbalance of power in most criminal cases between pro-
secution and defense, and the same is true in many civil
cases. The requirement of appointed counsel in criminal
cases is partial compensation for the imbalance of power,
but given the realities of at least many American systems of
criminal justice, doubtless it is not full compensation.

One accomplishment of legal procedure is, as Habermas
claims, the structuring of a space in which arguments can
be exchanged and relevant information brought forward.
The requirement of judicial impartiality, and such
requirements as there may be for reasoned explanation of
judgments, compensate in part for divergences from the
discourse principle's usual requirements. But the differ-
ences between actual judicial procedures and the idealized
requirements of discourse are as important as the similari-
ties. Here, as with similar restrictions on discourse in
legislative matters, Habermas sensibly realizes that the
discourse principle, taken full-strength, would be unwork-
able. The question remains, however, whether a discourse
theory can make those concessions without systematically
revising the original statement of the discourse principle.

Habermas sees his recourse to procedure as a
reformulation of Dworkin's theory of judicial interpretation.
Rather than place "idealizing demands" on the judge, with
the rhetorical device of Hercules as superhuman intellect,
Habermas locates those demands in “the necessary pragmatic presuppositions of legal discourse.” But just as Dworkin concedes that ordinary judges do not match but can only emulate Hercules, so the procedures actually applied in adjudication can only partially realize the demands of the full-strength discourse principle.

But there is a further difference. More is not always better when it comes to realization of the discourse principle. Adjudicative procedures necessarily, and wisely, stop far short of fully institutionalizing ideal discourse requirements. Competing with the demands of the discourse principle (“validity” or “legitimacy”) are the pragmatic requirements of decisionmaking (“facticity”). Habermas is right that these are in tension. But these pragmatic requirements are not just a moment of “facticity” that limits the discourse principle. They are conditions without which no attempt to institutionalize discourse even could be made.

One further aspect of Habermas’s general theory of adjudication remains to be discussed: the status of common-law decisionmaking. A significant part of Dworkin’s analysis in Law’s Empire is devoted to that issue. But throughout the course of Between Facts and Norms, Habermas barely mentions the topic of common-law decision and never considers it systematically. One reason, likely, is Habermas’s greater familiarity with the civil-law tradition. Still, Habermas had significant contact with American legal scholars over the years, and his account of constitutional adjudication refers frequently to American constitutional practice and theory. Further, the common-law tradition is hardly unknown to German sociology of law. Max Weber discussed it, and Niklas Luhmann, Habermas’s main rival for the title of preeminent German social theorist, begins his autopoietic

468. Id. at 238.
469. See Catherine Kemp, Habermas Among the Americans: Some Reflections on the Common Law, 76 DENV. U. L. REV. 961 (1999). One place at which Habermas mentions common law is in his commentary on Dworkin. See BETWEEN FACTS AND NORMS, supra note 2, at 212-13 (describing Dworkin’s account as ranging “through individual constitutional norms, ordinary statutes, and common laws to precedents, commentaries, and other legal sources”).
470. See, e.g., 2 WEBER, supra note 146, at 641-900.
HABERMAS'S DISCOURSE THEORY

study of law by noting that he learned much from considering common-law systems.471

Habermas's account of law in fact invites consideration of common-law adjudication. As noted in Part II.C.4 above, the core principle of Habermas's theory of the constitutional state is that administrative power must be bound to the communicative power that originates in discussion among the citizenry and "circulates" through legislative bodies. Habermas recognizes that courts wield administrative power.472 In cases of statutory or constitutional interpretation—Habermas's paradigm cases of judicial interpretation—the connection to the citizenry's communicative activity and its legislative product is apparent. Not so, however, in the case of common-law decisionmaking.

The problem of squaring common-law adjudication with democratic theory is of course not unique to Habermas. But some of the usual escapes available to other thinkers are not open to Habermas. It is not enough, on his principles, to argue that the people and the legislature tacitly have approved common-law decisionmaking, retaining (and sometimes exercising) the power to override such judicial decisions. Further, even if a jurisdiction had a statute that bestowed this power on courts, this delegation of lawmaking power to courts still would be problematic for Habermas. Despite Habermas's references to an "open society" of interpreters, and despite his statements that a critical public needs to develop to evaluate court decisions,7 the fact remains that common-law courts have

471. See LUHMANN, supra note 162, at 8. In his commentary on Between Facts and Norms, Luhmann notes that Habermas places "a very traditional emphasis on legislation, thereby underestimating judicial lawmaking." Luhmann, Quod Omnes Tangit, supra note 162, at 166.
473. Cf. BETWEEN FACTS AND NORMS, supra note 2, at 440 (referring to "obligations for courts to justify opinions before an enlarged critical forum specific to the judiciary," i.e., "a legal public sphere that goes beyond the existing culture of experts and is sufficiently sensitive to make important court decisions the focus of public controversies."); id. at 280 (referring, in the context of constitutional decisions, to "the critical gaze of a robust legal public sphere—a citizenry that has grown to become a 'community of constitutional interpreters'"). For a suggestion that Habermas needs to think further about questions of institutional design, see Arato, supra note 460, at 32-34. A basic problem is that the lay public probably is less interested in the constraints Habermas would place on judicial activity and more interested in politically desirable outcomes.
few if any of the procedures that ensure public participation in legislative decisionmaking. It is not enough, in other words, for the people and their legislative representatives to tolerate common-law decisionmaking, or even to authorize it once and for all. Habermas's theory of lawmaking requires popular participation, not just tacit authorization or after-the-fact criticism.\footnote{Cf. Between Facts and Norms, supra note 2, at 120-21 (identity between law's authors and addressees not established by "moral approval in hindsight"; without participation in "politically autonomous lawmaking" we have "paternalism").}

Nor can Habermas escape the problem by noting that, in each case, judges do not make law afresh but only apply and develop the work of their judicial predecessors. Not only is the distinction between justification and application elusive—as I argue below, in discussing Habermas's theory of constitutional adjudication\footnote{See infra text accompanying notes 490-521.}—but further, at some point in this chain of common-law decisions, courts have engaged in lawmaking. And here, too, the problem is that the citizenry's communicative power has (and has had) little if anything to do with that lawmaking. The "web" of law that common-law courts make and apply is relatively unconnected to citizens' communicative power.

One option for Habermas might be to argue, straightforwardly, that common-law decisionmaking is simply illegitimate. Courts inevitably fill gaps, clarify ambiguity, and correct vaguenesses in statutes and constitutions, the argument might go, but they may not take the lead in creating legal norms. This would be a straightforward application of Habermas's distinction between justification and application, together with his separation-of-powers contention that the courts may do only the latter and not the former.

The problem, however, is that Habermas is purporting to "reconstruct" the "normative self-understanding" of modern legal orders. Some of those legal orders take common-law decisionmaking to be basic. Treating this as a "mistake"—an option in Dworkin's theory of constructive interpretation upon which Habermas remarks\footnote{Between Facts and Norms, supra note 2, at 198.}—seems implausible. The practice of common-law decisionmaking is too basic to Anglo-American jurisprudence to count as

\footnote{See id. at 212, 214.}
simply an erroneous application of the constitutional state's recognized principles.

Common-law adjudication, in short, is a serious omission from Habermas's discourse theory of law, and one not easy either to reconcile with, or exclude from as illegitimate, his account of adjudication and the separation of powers.

B. Constitutional Adjudication

Habermas's theory of constitutional adjudication rests heavily on the distinction between discourses of justification and discourses of application. The critical side of his account is directed toward the "value jurisprudence" he discerns in German constitutional practice and the paternalism he sees in some constitutional theories (especially those of the "civic republican" variety). The positive side of his discussion is to develop a "proceduralist" account of constitutional courts' legitimate role, which he develops through his critique of "liberal" and "republican" models.

1. Value Jurisprudence in Constitutional Practice. Habermas makes clear that the separation of powers does not, in his view, necessarily preclude constitutional review of legislation or settling of intragovernmental disputes. Nor, he says, does he take the "liberal" model of constitutional-court adjudication to be incontestably binding—where by "the liberal model" he means the idea that the only enforceable individual constitutional rights are "negative" rights against the state. This latter position follows from Habermas's account of the "system of rights." He introduces his five categories of basic rights prior to considering the principles of the constitutional state, taking these categories to be necessary conditions for any legal community's attempt to constitute itself through legitimate law. Nothing in Habermas's formulation implies that his categories of basic rights, when "saturated" and enacted as binding legal norms, apply only as against the state. The fourth and fifth categories,

478. See id. at 240-41, 243-44.
479. See id. at 174, 245, 249-50, 263, 269, 407.
480. See supra text accompanying note 235.
particularly—involving rights to participation in democratic lawmaking and (relatively justified) rights to “social and ecological” security—clearly envision “positive” rights. Further, the abstractness with which Habermas specifies his categories of basic rights means, as he says, that there are many different ways in which they might legitimately be implemented. The “liberal” model of the constitution is one possibility, but it is not uniquely legitimate. 481

Habermas argues, further, that the social conditions that made the liberal model attractive have eroded. The assumptions about “economic society” that underlie the liberal model, Habermas states, “no longer hold for developed, postindustrial societies in the West.” 482 The first category of rights—taking, from Kant, the idea that law must ensure “the compatibility of each one’s liberty with an equal liberty for all”—shrinks in the liberal model to a picture of negative rights against the state. And so, “[m]easured against Kant’s principle of law, it is only the shift to the social-welfare paradigm that again brings out the objective legal contents of individual liberties that have always already been implicit in the system of rights.” 483

The question, though, is how a constitutional court can legitimately enforce the system of rights—or, more properly put, enforce the version of that system that has been implemented through positive law. We know, from Habermas’s conception of the separation of powers, that the court must apply constitutional provisions rather than create law. Habermas argues, however, that the German constitutional court has tended toward the latter, and thereby has overstepped its legitimate authority.

The catchphrase Habermas uses to designate the problem is “value jurisprudence.” By that term (which he borrows from critics of the German constitutional court), 484 Habermas means the idea that the constitution is “not so

481. See BETWEEN FACTS AND NORMS, supra note 2, at 250 (“[T]he principles of the constitutional state must not be confused with one of its context-bound historical modes of interpretation.”).
482. Id.
483. Id.
484. Bernhard Schlink, German constitutional-court judge and law professor, argues that the German high constitutional court’s alleged “value-orientation” is a “myth” and “fiction.” See Bernhard Schlink, The Dynamics of Constitutional Adjudication, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 371.
much . . . a system of rules structured by principles, but . . . a ‘concrete order of values.’”\textsuperscript{485} On this view, principles express values, and where principles compete, the problem of application should be resolved by weighing and balancing the underlying values. This is a “conceptual” error, according to Habermas.\textsuperscript{486} He catalogues various differences between values and principles. Values are “teleological,” reflect “intersubjectively shared preferences,” and are only “relatively binding,” while principles are “deontological” and “absolutely binding.”\textsuperscript{487} Values “recommend,” while principles “command.”\textsuperscript{488} These conceptual differences notwithstanding, Habermas has to tread lightly here. He has, after all, allowed that through pragmatic and ethical-political discourses, values and preferences legitimately may be incorporated into legislation. So too might they be incorporated into constitutional provisions. Still, according to Habermas, “[n]o doubt values or teleological contents also find their way into law, but law defined through a system of rights domesticates, as it were, the policy goals and value orientations of the legislator through the strict priority of normative points of view.”\textsuperscript{489}

Habermas’s position has a number of difficulties. First, the distinction between justification and application on which he relies is less sharp and more malleable than he allows. This problem is particularly difficult with respect to the most general constitutional norms, such as “due process” or “equal protection,” and particularly difficult also in cases of first impression. Suppose, for example, that a court is deciding, as a matter of first impression, whether due process requires a government agency to grant a hearing before issuing a particular kind of adverse decision. Certainly one can say that the court must apply the due process clause rather than simply weigh and balance values or interests or equities. But in this case, it is unclear what it means to “apply the law.” One way to accomplish this task—and a standard way for the U.S. Supreme Court—\textsuperscript{490}is

\textsuperscript{485} \textit{Between Facts and Norms}, supra note 2, at 254.
\textsuperscript{486} Id. at 255.
\textsuperscript{487} Id.
\textsuperscript{488} See id. at 256.
\textsuperscript{489} Id.
\textsuperscript{490} The Court’s constitutional-law opinions in particular are littered with “tests” that are not expressly stated in the governing legal text. A recent example is the Court’s decision in \textit{Kyllo v. United States}, 121 S. Ct. 2038 (2001).
The question in that case was whether warrantless use of a “thermal-imaging device” to detect unusual heat patterns emanating from a residence—probative of the resident’s use of high-intensity lamps to cultivate marijuana—violated the Fourth Amendment. In an opinion written by Justice Scalia, the Court began its analysis by quoting the relevant portion of the Fourth Amendment’s text: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.” *Id.* at 2041. By itself, of course, the language does not obviously require a decision either way. The Court proceeded to justify its decision—that the police activity was unconstitutional—by relying on (what I call in the text above) “subordinate” or “auxiliary” rules that are not stated explicitly in the constitutional text. The first, found in the Court’s prior cases, was that “[w]ith few exceptions,” a “warrantless search of a home” is unreasonable and hence unconstitutional. *Id.* at 2042. The Court explained that prior decisions had treated privacy interests in the home as “at the very core” of the Fourth Amendment.” *Id.* at 2041 (quoting Silverman v. United States, 365 U.S. 505 (1961)); see also *id.* at 2043 (describing “the interior of homes” as “the prototypical . . . area of protected privacy”); *id.* at 2045 (distinguishing a case that “involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home”); *id.* at 2046 (quoting Payton v. New York, 445 U.S. 573, 590 (1980), to the effect that “the Fourth Amendment draws a firm line at the entrance to the house”).

That left open, however, the question whether what had occurred in this case was a “search” or, instead, simply observation constitutionally indistinguishable from the instances of warrantless visual surveillance that had been permitted in prior cases. See *id.* at 2042. The Court’s analysis considers four possible auxiliary rules, none explicit in constitutional text, that might determine whether a search had occurred. The first—common-law trespass doctrine—had been used “well into the 20th century,” the Court noted, but recent cases had “decoupled” the Fourth-Amendment meaning of “search” from traditional “trespass” notions. See *id.* A second was the Government’s proposed rule, endorsed by the *Kyllo* dissenters, that the distinction should be between observations (whether technologically aided or not) of a building’s exterior surface, on one hand, and “through-the-wall surveillance;” on the other. The Court rejected this proposed rule as inconsistent with prior cases and as “leav[ing] the homeowner at the mercy of advancing technology.” *Id.* at 2044. A third possible auxiliary rule, also rejected by the Court, would have distinguished between observation of “intimate details” or “private activities in private areas,” on one hand, and the observation of (for example) heat emissions as measured on the building’s surface. The Court explained: “In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.” *Id.* at 2045.

Noting the significance prior cases had given “actual [physical] intrusion into a constitutionally protected area,” *id.* at 2043 (quoting *Silverman*, 365 U.S. at 512), the Court selected a fourth possible auxiliary rule to define whether a “search” has occurred: “Where, as here, the Government uses a device that is not in general public use, to explore details of a home that would previously have been unknowable without physical intrusion, the surveillance is a “search” and is presumptively unreasonable without a warrant.” *Id.* at 2046. The Court relied not just on the idea that the Fourth Amendment gives special “sanctity” to the home, and to “details” therein, but on two further
for the court to fashion a subordinate rule or standard that not only will decide the present case but will govern a relevant category of cases in the future. For example: government employment or welfare benefits (in general or of a certain kind) are or are not "property" for purposes of due process analysis; or, for cases of a certain kind in which due process protections are triggered, the following are the minimum procedural standards that the government must observe. The court will need to provide justifications for its choice of an auxiliary rule or standard. Its justification will be convincing as legal argument only if it marshals evidence of text, history, structure, and purpose, that demonstrably connects to the more general norm or principle the court is interpreting.

The point is not that this kind of decision involves a "discourse of justification" rather than a "discourse of application." The point, instead, is that in the application of abstract principles or other general norms, justification and

considerations. The first was the idea that the Fourth Amendment must be understood to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Id. at 2043. While the Court noted cases that had applied this "criterion," see id. at 2046, it seems to come also from a more general interpretive principle: The purpose of protecting liberties with a written constitution is to ensure that those liberties, as understood at the time the Constitution was adopted, are not eroded. The Court's second consideration in selecting its "criterion" was the need to provide advance guidance to law enforcement officials as to which techniques are permitted and which are forbidden (at least without a warrant). See id. at 2046.

Kyllo, in other words, illustrates that (what I call) "auxiliary" or "subordinate" rules or standards—unstated in the governing legal text—are a standard part of deciding legal questions. None of the auxiliary rules (or standards, or criteria) considered in Kyllo is the product of democratic enactment, as Habermas's account of judicial "discourses of application" would seem to require. Yet, as I explain in text both above and below, they seem to me indispensable. I select Kyllo partly because the opinion is authored by a Justice who has made very clear that constitutional courts have no legitimate law-making function.

Obviously Habermas might respond by saying that these auxiliary rules are consistent with his idea of "discourses of application." My point is simply that they complicate greatly the distinction between "justification" and "application." The Court in Kyllo is applying a pre-given constitutional norm. In so doing, however, it creates a more particularized rule—stated in the holding quoted above—that will govern decisions in future Fourth Amendment cases. The particularized rule, which on its face lacks a clear democratic pedigree, needs to be justified. And as I argue in text, this process of justification can be seen as participating in both a "discourse of application" and a "discourse of justification," as Habermas has explicated those terms.
application, as Habermas has described them, are not entirely distinguishable. One could say, with Habermas, that the selection of a more specific auxiliary rule or standard is a matter of determining which norm "appropriately" governs in a given factual context. One could emphasize, also, that what the court is doing involves the application of a general norm in a particular case. In these respects, we have Habermas's "discourse of application." But at the same time, if the court is fashioning a more specific auxiliary rule or standard—one that (we assume) is not stated expressly in the general norm—then it is engaged in creating a new norm that will apply not just to the decision of this case but also to relevantly similar cases in the future. Not so much the particular facts of the case, as the facts that make it typify a foreseeable class of cases, would be relevant. In these respects, the court is engaging in what Habermas describes as a "discourse of justification." This analysis holds even if the court takes "original meaning" or "settled tradition" to guide its decision. That, too, amounts to the choice of an interpretive rule, in addition to any auxiliary rule or standard selected under its aegis, that presumably is not stated expressly in the constitutional provision. And so the choice of interpretive rule would require justification.

Habermas seems to recognize, at least in one passage of *Between Facts and Norms*, that the distinction between justification and application discourses, with the judiciary limited to the latter, may not be so simple to maintain. Writing in terms not limited to constitutional adjudication, Habermas acknowledges:

To the extent that legal programs are in need of further specification by the courts—because decisions in the gray area between legislation and adjudication tend to devolve on the judiciary, all provisos notwithstanding—juristic discourses of

---

491. Habermas's account of application discourses emphasizes strongly the singularity of decision. In determining which norm is appropriate to regulate a situation, he says, the notion of general interests of all affected—used in justification discourses—"take[s] second place to the particular interests of the immediately affected parties." *Between Facts and Norms*, supra note 2, at 229. Application discourses, he says, require "highly contextualistic interpretations of the situation," that "depend on the different self-understandings and worldviews of the actual participants." *Id.*
application must be visibly supplemented by elements taken from
discourses of justification.\footnote{492}

This point, however, seems to be more generally
significant than Habermas usually allows. Here Habermas
might better have followed Dworkin, from whom he borrows the idea of "constructive interpretation." "[L]aw as
integrity," Dworkin writes, "rejects as unhelpful the ancient
question whether judges find or invent law; we understand
legal reasoning, it suggests, only by seeing the sense in
which they do both and neither."\footnote{493} The same may be said of
the closely parallel distinction between applying and
justifying legal norms.\footnote{494}

To be sure, Habermas is right that—as he praises
Dworkin for recognizing—courts are not in the same
position as legislatures.\footnote{495} This of course is the real purpose
in "binding" courts, constitutional or otherwise, "to existing law,"\footnote{496} and confining them to "discourses of application."
But aside from the question whether justification and
application are sharply distinguishable, Habermas's
account of application discourses, with its standard of
"appropriateness," provides no guidance as to how, in
particular cases, one should resolve the competition among
potentially applicable principles. Habermas, clearly,
believes that principles may not be treated as if they were
mere values and straightforwardly balanced—as if the
court were a legislative body resolving conflicts among the
various values and preferences in a pluralistic society. But
what instead? Habermas suggests, at one point, that norms
have passed a "universalization test"\footnote{497} and therefore have
priority over mere values. This criterion does not work. On
Habermas's own account, the universalization test applies
only to moral norms, not to legal norms.\footnote{498} Further, his

\footnote{492. Id. at 439.}
\footnote{493. DWORKIN, supra note 425, at 225.}
\footnote{494. Cf. Frank Michelman, Family Quarrel, in HABERMAS ON LAW AND
DEMOCRACY, supra note 6, at 309, 321-22 (noting that the distinction between
application and justification is difficult in constitutional practice).}
\footnote{495. See BETWEEN FACTS AND NORMS, supra note 2, at 212-13.}
\footnote{496. Id. at 172.}
\footnote{497. Id. at 259.}
\footnote{498. See id. at 109 (in moral discourses of justification, the discourse
principle "takes the form of a universalization principle"); id. at 230 (same). But
see id. at 153-54 (distinguishing between the universalization test for justifying
analysis of the constitutional state makes clear that legal principles and rules govern only a concrete legal community, not humanity as such, and he argues further that legal principles are not necessarily susceptible of universal agreement. Legal norms are logically different from values, but the difference is not that the former necessarily have passed a universalization test. Here Habermas seems to be treating legal discourse as if it were moral discourse—notwithstanding his position that the “validity dimension” of legal norms is more complex than that of moral norms because it includes pragmatic and “ethical-political” reasons, not purely moral reasons.

Let us return to the passage, quoted above, in which Habermas acknowledges that “[n]o doubt values or teleological contents also find their way into law.” He continues by saying that “law defined through a system of rights domesticates, as it were, the policy goals and value orientations of the legislator.” What he should say is that the legislative process—whether for ordinary statutes or constitutional provisions—“domesticates” competing policy goals and conflicting values. Courts are bound by law in that they are not free to rework this domestication process afresh, as if they were legislators. Instead, they are limited to “the reasons packaged in, and linked to, statutes” (or, as the case may be, constitutional provisions). A court, Habermas says in the passage just quoted, is not free just to “make whatever use it likes” of those reasons.

But that, by itself, does not get us very far. The question is, what are the reasons that are “packaged in, and linked to, statutes” or constitutional provisions? The question is particularly acute when the norm to be interpreted is general, when the “policy goals and value orientations” are socially contested and the statutory or constitutional text is unclear, or when more than one norm is potentially applicable without clear priority of one over the other. In short, the question is one of interpretation. And Habermas has surprisingly little to say about that—

499. See supra Part II.C.4.
500. BETWEEN FACTS AND NORMS, supra note 2, at 256.
501. Id. (emphasis added).
502. Id. at 192.
503. Id.
surprisingly, that is, given the fact that he developed his account of adjudication in dialogue with Dworkin’s theory of constructive interpretation.

Habermas’s discourse theory in fact translates Dworkin’s account of adjudication-as-interpretation into a theory of the “pragmatic presuppositions of legal discourse.” The chapter of Between Facts and Norms that addresses general issues of adjudication is entitled “The Indeterminacy of Law and the Rationality of Adjudication.” The central problem for Habermas is not how judges interpret texts, but the more abstract “rationality problem” of securing, in the application of law, both “the certainty of law and its rightness.” Certainty and rightness are, for Habermas, properties of a body of law as a whole, or structural features of a legal system’s operation, not just features of particular successful judicial interpretations. Even Habermas’s summary of Dworkin’s “constructive interpretation” suggests that he may not be so interested in the details: he first collapses Dworkin’s interpretive dimension of “justification” into the dimension of “fit,” by reading Dworkin’s account of “rightness” as “coherence with a rationally reconstructed history of existing law.” And with his criticism of Dworkin’s use of the “Hercules” device, we turn away from an account that—whatever defects its “monological” quality might induce—explicates the notion of constructive interpretation through consideration of particular cases. Instead, we have a theory of the “pragmatic presuppositions of legal discourse,” in which the problem of indeterminacy is to be addressed by a theory of adjudicative procedure and “paradigms.”

504. Id. at 238; see also id. at 230 (discourse theory “captures Dworkin’s basic norm of equal concern and respect” in an account of the “pragmatic presuppositions” of argumentation).
505. Id. at 199.
506. Id. at 211.
507. See DWORKIN, supra note 425, at 15-30 (describing various well-known cases that serve as “extended examples for the various arguments and discussions of later chapters”); id. at 238-54 (Judge Hercules considers a case involving negligent infliction of emotional distress); id. at 317-337 (Hercules’s mythical colleague Hermes considers the “snail darter case” under the Endangered Species Act); id. at 337-54 (Hercules considers the snail darter case); id. at 379-92 (Hercules considers and decides Brown v. Board of Education); id. at 393-97 (Hercules decides Regents of the University of California v. Bakke).
I do not mean to suggest that nothing can be gained by analyzing the pragmatic presuppositions of legal discourse. My point is simply that it is difficult for Habermas to address the questions raised by his critique of “value jurisprudence” without a more thorough account of judicial interpretation. The criterion of “appropriateness,” relatively unelaborated in Habermas’s discussion, is not helpful. Further, Habermas equivocates between two incompatible positions. On one hand, he criticizes, as illicit “value jurisprudence,” the idea that competing principles or general norms are applied by considering and attempting to order rationally and optimize the “values”—or goals, or purposes—that they are said to express. According to Habermas, this practice, advocated by Robert Alexy, “break[s] down the fire wall” that separates norms from values and thereby threatens to establish the constitutional court as an “authoritarian agency.” In these passages, Habermas treats the competition of principles as an either/or matter. One is appropriate, and the others are inappropriate.

On the other hand, perhaps due to the emptiness of his unelaborated notion of “appropriateness” in application discourses, Habermas sometimes allows courts to do what seems practically indistinguishable from Alexy’s proposal. He describes legal norms as a “package” of reasons that constitutional courts may unpackage for purposes of applying the norm, so long as they do not assume the position of a legislator:

---

508. Klaus Günther, from whom Habermas borrows the notion of “application discourses” and “appropriateness,” has sought to develop a “logic of appropriateness argumentation.” See Klaus Günther, The Sense of Appropriateness: Application Discourses in Morality and Law 203-84 (John Farrell trans., 1993). Habermas does not discuss this elaboration of “appropriateness” in any detail.

509. Habermas takes values, as well as goals and purposes, to be “teleological,” while norms are deontological. See Between Facts and Norms, supra note 2, at 255.

510. Id. at 257-58. For a short statement of Alexy’s theory, see Alexy, supra note 441, at 229-31; for a fuller version, see Robert Alexy, Theorie Der Grundrechte (1985).

511. Between Facts and Norms, supra note 2, at 260.

512. Id. at 192; see also id. at 283 (“Legal adjudication unwraps, for the purposes of application, these variegated arguments that have already entered into the lawmaking process and provided a rational basis for the legitimacy of claims of established law.”).
The legitimating reasons available from the constitution are given to the constitutional court in advance from the perspective of the application of law . . . . The court reopens the package of reasons that legitimated legislative decisions so that it might mobilize them for a coherent ruling on the individual case in agreement with existing principles of law; it may not, however, use these reasons in an implicitly legislative manner that directly elaborates and develops the system of rights.¹³

Perhaps Habermas intends a distinction between "reasons," on one hand, and "purposes," "goals," or "values," on the other. But it is difficult to see what meaning general principles have if one bars consideration of the purposes, goals, or values these principles could be said to advance (or, on another view, were thought by their authors, or contemporaries of their authors, to advance). Further, the idea that a “fire wall” separates norms and values perhaps makes sense for “moral” norms, at least as Habermas conceives of them. Those norms are to be justified not through their coherence with a particular collective form of life, but through a strict universalization test that takes humanity as such to be the “reference system."¹⁴ Legal norms, by contrast, are justified not just in universalistic moral discourse, Habermas has said, but also through pragmatic and ethical-political discourse. As Habermas has explained, interests, values, and collective goals all are relevant, even dominant, in pragmatic and ethical-political discourse. Given this conception of legal norms' "validity basis," then, it seems peculiar to exclude, in an “application discourse” that interprets a legal norm, the very considerations that were relevant to its justification.¹⁵

Apart from his critique of value jurisprudence, Habermas recognizes this point. As I have noted, Habermas argues at least intermittently that courts must work with, and interpret, the “package” of reasons relevant to a legal norm’s justification. He also has acknowledged the point in outlining his distinction between legal and moral norms.

---

¹³ Id. at 262.
¹⁴ See supra text accompanying notes 301-02, 325-29.
¹⁵ Gunther Teubner acknowledges the various distinctions Habermas invokes between principles and values, see supra text accompanying notes 486-88, but argues that legal practice, including judicial practice, is indifferent to the distinction in its "balancing" procedures. See Gunther Teubner, De Collisione Discursum: Communicative Rationalities in Law, Morality, and Politics, in HABERMAS ON LAW AND DEMOCRACY, supra note 6, at 186.
There Habermas states that legal "discourses of justification and application" cannot focus only on the "justice" considerations of moral discourse, but "also have to be open to a pragmatic and ethical-political use of practical reason." Habermas is right that legal principles are not themselves values, goods, or collective goals. But surely the values, goods, and collective goals relevant to a principle’s justification are relevant in concretizing it for application to a particular case or in resolving a competition among competing principles.517

Habermas presents his critique of value jurisprudence as a critique of the German constitutional court’s “methodological” error.518 For reasons stated, I am not convinced by his account of proper judicial methodology. Still, apart from the methodological critique, Habermas could demonstrate that the court had in fact become an “authoritarian agency” if he could show that the court had grossly and repeatedly misinterpreted, and enforced its misinterpretation, of the German constitution.519 That would be a matter of substantive constitutional interpretation, not something that a general theory of legal discourse, with an “appropriateness” standard, could decide.

A substantive critique—however undeveloped in Habermas’s exposition—would be consistent with Habermas’s general aims. The account of judicial methodology is only part of Habermas’s more general separation-of-powers theory. The basic principle of the constitutional

516. BETWEEN FACTS AND NORMS, supra note 2, at 154 (emphasis added). No doubt Habermas is nervous about interpreting constitutional provisions as compromises among interests, so that they could be seen as deals to be enforced. But if that is his concern, it seems more plausible to argue, as a “reconstruction” of modern democracies’ “normative self-understanding,” that constitutional norms are to be interpreted in a public-regarding way, not as deals. One might or might not find this convincing, but it seems to me more plausible than Habermas’s idea of a “fire wall” between legal norms and values or collective goals.

517. Cf. Michelman, supra note 494, at 321 (“[T]he practical-institutional logic of constitutionalism precludes anything like a strict working dissociation of justification from application.”).

518. BETWEEN FACTS AND NORMS, supra note 2, at vi. The title to section 6.2 of Between Facts and Norms is “Norms versus Values: Methodological Errors in the Self-Understanding of the Constitutional Court.”

519. As very much a non-expert in German constitutional law, I express no view on this matter.
state, Habermas has said, is that the connection between communicative and administrative power must be maintained—or, more specifically, that the priority of democratic legislation, understood to include constitutional provisions along with ordinary statutes, must be preserved. From that point of view, judicial rulings that decisively change the meaning of statutes or constitutional provisions amount, in Habermas’s terminology, to the triumph of judges’ administrative power over democratically legitimate expressions of citizens’ communicative power. That concern is what animates Habermas’s claim that courts must be bound “to existing law” and his statements that a court may not “make whatever use it likes” of the reasons that are “packaged in, and linked to, statutes.”

2. The Proceduralist Model of Constitutional Courts’ Legitimate Role. Habermas develops his “proceduralist” account of constitutional courts’ role in contrast to what he characterizes as “liberal” and “republican” models of law and politics. His idea is to appropriate from each what is useful. This strategy is unsurprising: it relies on contrasts developed throughout his discourse theory of law. His account of the two “ideas that can justify modern law” connects “human rights” with liberalism and “popular sovereignty” with republicanism. In his system of rights, the categories of rights devoted to private autonomy respond to the “liberal” side of the liberal/republican divide, and the categories of rights that secure public or civic autonomy respond to the “republican” side. Critical as Habermas is of republican theories—and, I will argue, not always fairly critical—his sympathies lie closer to that side than to the liberal model.

Habermas’s sketches of both models are, as he says, “stylized.” In the liberal model, he has said, basic individual rights obtain only as negative rights against

520. BETWEEN FACTS AND NORMS, supra note 2, at 172 (emphasis omitted).
521. Id. at 192.
522. Id. at 99-100.
523. Id. at 268. Habermas explains that he is borrowing this contrast among “stylized” positions from Frank Michelman. See id. I attribute the contrast to Habermas because I find his account of Michelman’s “republicanism” suspect and because much of what he says about these models he has said elsewhere in BETWEEN FACTS AND NORMS.
state interference.524 These rights create a sphere in which individuals may pursue private ends.525 The political process involves a competitive struggle for power among strategically acting groups,526 with citizen participation, through voting, necessary primarily as a check on government, and primarily for the sake of protecting citizens' private ends.527 The measure of legitimacy is quantitative—votes, understood as the aggregation of preferences.528 In terms of Habermas's system of rights, the emphasis is much more strongly on private autonomy, with citizens' public autonomy figuring primarily as an instrument for securing private autonomy.

Given this characterization of the "liberal" model, we see immediately that Habermas cannot accept it as his own. Habermas designed his "system of rights" so that private and public autonomy would be "co-original" and would receive equal weight. If the "liberal" view is that public autonomy has value only as an instrument for securing private autonomy, then Habermas cannot accept that view. Further, Habermas's conception of citizen participation involves considerably more than just voting. He emphasizes the constitutive role of citizens' discussion in the political public sphere—constitutive for the generation of legitimate law, but constitutive also for personal and group identities. Within formal governmental institutions, Habermas has emphasized the importance of discourse, not just bargaining and compromise. The separation-of-powers theory Habermas has urged is designed not just to protect private interests from government encroachment but also to bind administrative power to citizens' communicative power.

Partly for these conceptual reasons, but partly because of changing social conditions, Habermas argues against a "liberal" conception of basic rights and their enforcement. The "classical scheme for the separation and interdependence of government branches," he says, "no longer corresponds to" the constitutional court's mission of "keep[ing] watch over just that system of rights that makes

524. See id. at 174, 245, 249-51, 263. But cf. id. at 269-70 (citizenship, on liberal view, "defined primarily by negative rights against the state and other citizens").
525. See id. at 268-69, 269-70.
526. Id. at 272.
527. See id. at 270, 298.
528. Id. at 272, 273-74.
citizens' private and public autonomy equally possible.\footnote{529} The most pertinent change in social circumstances that Habermas describes is a tendency toward greater concentration of power. And so while "liberal" models see the danger to private autonomy exclusively (or at least primarily) in government intervention, for Habermas the danger to private autonomy comes as much from "positions of economic and social power" as from the state.\footnote{530} From his perspective, the "liberal" prescription of formally equal freedoms to vote and otherwise participate cannot be sufficient. The effective exercise of "communicative and participatory rights"—public autonomy—is threatened, according to Habermas, by unequal social power.\footnote{531} Thus the task of "keep[ing] watch over" the system of rights cannot mean that the constitutional court should be attentive only to threats from the state and the infringement of formally equal liberties. In ways we will soon consider, Habermas argues that the constitutional court must be attentive to the danger that concentrated social and economic power poses to both private and public autonomy.

Habermas acknowledges similarities between the modern republican model—particularly Michelman's—and his own conception. As does Habermas, modern republicans emphasize the "procedural conditions"\footnote{532} of modern democracy that include deliberation within formal political institutions. But more characteristically, and in common with Habermas, neorepublicans see democracy's basic operations outside those formal institutions. They emphasize, Habermas notes, the importance of citizens' public autonomy,\footnote{533} with communication and participation rights "preeminent[]" among civil rights.\footnote{534} The link between the democratic process and law's legitimacy depends upon robust, potentially preference-changing, political discussion among citizens in the political public sphere.\footnote{535} And with Habermas, Michelman sees the social basis of this public sphere in the voluntary associations of civil society.\footnote{536} These
civil-social organizations occupy the "margins" of the officially organized political system. By virtue of that location, they are ideally situated to produce novel "initiatives, issues and contributions, problems and proposals." A prime role for constitutional courts, according to the neorepublican essays of Michelman and Sunstein, is the promotion of deliberative democracy, conceived as operating inside and outside formal political institutions.

These similarities between Habermas's theory of democracy and neorepublican theory—especially Michelman's version—are striking. In distancing his "proceduralist" conception from the republican view, however, Habermas works up (and in my view exaggerates) two differences. First, Habermas asserts repeatedly, neorepublican theory à la Michelman assumes a deep "ethical" consensus that "does not sit well with the conditions of cultural and societal pluralism that distinguish modern societies." For that reason, Habermas argues, neorepublican theory operates with an idealized and even premodern conception of politics. According to Habermas, neorepublican theory therefore tends to see actual politics as "fallen" and defective. And therefore, Habermas claims, republicans resort, necessarily, either to an activist constitutional court as substitute for the absent people or to a romanticized but ritualized "symbolic politics."

The first part of this diagnosis depends upon largely overlooking the "neo" in "neorepublican." Habermas places

---

537. BETWEEN FACTS AND NORMS, supra note 2, at 275 (citing Michelman, supra note 535, at 1529, 1531).
538. BETWEEN FACTS AND NORMS, supra note 2, at 275-76.
539. Id. at 279.
540. See id. at 267-68, 279 (discussing classical republican notions of politics without distinguishing Michelman's neorepublican view).
541. Id. at 277.
542. Id.

Michelman models politics in general on the symbolic politics expressed, say, in bicentennial celebrations of the Declaration of Independence. He thereby accepts the gap between these ceremonial acts, essential for the political integration of a nation of citizens, and the business of everyday political life. The tension between facticity and validity, a tension that was supposed to be stabilized within the legal medium itself, once again reappears between the ideal of an ethical republic and the harsh reality of routine politics. The form of ethical-political argumentation is all that remains as the narrow bridge between originary and "fallen" politics.

Id.
great emphasis on republicanism, unmodified, as a theory of ethically unified communities, with full exercise of citizenship to be expected only from the most virtuous members of those communities.\(^4\) He reads Michelman to continue this presupposition of strong ethical consensus.\(^5\) This reading is mistaken, in my view. Michelman explicitly poses, as a central problem for any neorepublican theory, the tension between, on one hand, traditional republicanism’s assumptions of deep consensus among members of an ethically integrated elite of a small community, and on the other hand, the modern American realities of ethical and cultural plurality.\(^5\) He inquires whether, starting from

---

543. See id. at 268 (for seventeenth and eighteenth century republicanism, “[l]aw and legal statute are secondary in comparison to the ethical life context of a polis in which the virtue of active participation in public affairs can develop and stabilize”); id. at 269 (in the republican view, “[p]olitics[] is conceived as the reflexive form of substantial ethical life—as the medium in which the members of more or less naturally emergent solidary communities become aware of their dependence on one another and, acting with full deliberation, further shape and develop existing relations of reciprocal recognition into an association of free and equal citizens”); id. at 278 (the republican tradition presupposes “the ethos of an already integrated community” with “the prior convergence of settled ethical convictions,” holding that “[o]nly virtuous citizens can do politics in the right way”).

544. See id. at 279 (“Michelman, like other ‘communitarians,’ understands citizenship not primarily in legal but in ethical terms.”); id. (Michelman’s account of political agreement presupposes “the ethical particularism characteristic of an unproblematic background consensus,” but this particularism “does not sit well with the conditions of cultural and societal pluralism that distinguish modern societies”).

545. See Michelman, supra note 535, at 1505-06:

It is certainly true that not all historical versions of republicanism have reflected the inclusory, plurality-protecting ideal that arguably characterizes the tradition at its best. It is also true that extension of the circle of citizens to encompass genuine diversity greatly complicates republican thinking about the relation between rights (or law) and morality. For if republican jurisprudence depends on jurisgenerative politics, jurisgenerative politics in turn seems to depend on the existence of a normative consensus that can hardly survive the diversification of the political community by inclusion of persons of widely and deeply differing experiences and outlooks.

What, after all can jurisgenerative politics be, if not a process of disclosing a latent, pre-existent, actual societal consensus respecting the right terms of social ordering? What are the social conditions of such an effective, pre-existent consensus? Historically, those conditions have been conceived as devices for avoiding or denying plurality in the political sphere, usually involving some combination of political hierarchy, civic regimentation, and organicist culture. Modern American political culture is militantly anti-organicist, committed to
modern conditions, his revised version of republicanism could account for how an ethically plural and interest-divided public of citizens could democratically produce law, such that each could accept that law. One might not like Michelman's answer to that question. Or one might, as I do, take the question concerning universal acceptance to be the wrong one. But Habermas is not in any position to make that latter objection. The question is exactly the one that he asks. And Habermas's accusation that Michelman assumes deep ethical consensus from the outset unfairly chains Michelman to elements of the republican tradition that he is attempting to revise.

The idea that Michelman resorts to "symbolic politics," on the order of "bicentennial celebrations of the Declaration of Independence," is baffling. In making this charge, Habermas refers specifically to Michelman's statement that a modern, large-scale, democratic political community's identity—made, by the way, not found—depends upon "remembrance" of the community's origins "in public acts of deliberate creation." But what Michelman is talking about, I think, is something closely akin to Habermas's own "reconstructive" account of how a legal community constitutes itself as a self-governing legal community, under law, with both private and public autonomy secured. Michelman's inquiry is, to be sure, historical in a way that Habermas's is not: he speaks of the origins of specifically American constitutionalism, not the principles of the constitutional state in general. But the idea of politics as

political democracy, hostile to social-role constraint, and broadly reconciled to deep and conflictual diversity of social experience and normative perspective. If any social condition defines modern American politics, plurality does. How, then, might modern American politics be jurisgenerative? What is it, in particular, that we might think that could make a jurisgenerative virtue of plurality?

Id. 546. Id. at 1526.
547. See supra text accompanying notes 363-68.
548. See, e.g., supra text accompanying notes 199-205, 240-41.
549. See, e.g., supra note 535, at 1526 (referring to "the challenge of reclaiming the idea of jurisgenerative politics from its ancient context of hierarchical, organicist, solidaristic communities for the modern context of equality of respect, liberation from ascriptive social roles, and indissoluble plurality of perspective").
550. Id. at 1508.
551. See id. at 1508-09.
periodic return to origins is not Michelman's conception. After noting that the founding of the American republic was an act of "popular self-creation," \textsuperscript{552} Michelman adds, with respect to the idea of self-governance: "Once, however, is hardly enough." \textsuperscript{555} He goes on to criticize the "myth of the Founder" in "classical republican" thinking, in which politics is a cycle between forgetting and recollecting the founder's unique virtue. \textsuperscript{554} Democratic politics for Michelman is an ongoing and uncertain matter, with a tension between the original act of popular self-creation and subsequent developments of the constitutional project. It is hardly a matter either of ritually celebrating origins and founders or of returning, without mediation, to the founders' wisdom. The notion of deliberative politics with which Michelman operates is, to be sure, idealized. But certainly the same is true for Habermas's own discourse-theoretical account of the connections between citizens' communicative power and the administrative power of the state apparatus. \textsuperscript{555}

That leaves the question of the constitutional court's legitimate authority. According to Habermas, Michelman, perhaps more than other neorepublicans, sees the danger of "constitutional-court paternalism." \textsuperscript{556} But given Habermas's interpretation of Michelman—the assumption of a deep ethical consensus and an understanding of politics only as "symbolic" politics—Habermas has to conclude that Michelman tends toward the paternalism he tries to resist. That conclusion, after all, was what was supposed to follow from Michelman's misunderstanding of ethical consensus and politics. Habermas's claim was that neorepublican theory, including Michelman's work, leaves a vacuum in the idea of deliberative democracy that requires substitution of courts for the people.

\textsuperscript{552} Id. at 1515.
\textsuperscript{553} BETWEEN FACTS AND NORMS, supra note 2, at 265.
\textsuperscript{554} Michelman, supra note 535, at 1515-18.
\textsuperscript{555} Michelman points out in a reply to Habermas that if one believed society to be totally and consensually integrated, then a cross-section of the population, not full engagement of the citizenry, would suffice. And so the alleged connection between the "deep consensus" assumption, on one hand, and republicanism's demanding notion of participation, on the other, seems lacking. Full participation makes more sense on the assumption of ethical plurality. See Michelman, supra note 494, at 314-15.
\textsuperscript{556} BETWEEN FACTS AND NORMS, supra note 2, at 278.
Habermas is on somewhat firmer ground with this conclusion than he was with the premises of his argument. As Habermas notes, Michelman recognizes that constitutional-court "activism" is suspect on his premises. In fact, Michelman sees also that any form of judicial review is difficult for him to justify. That difficulty motivates and structures his essay Law's Republic. Michelman begins with an account of the Supreme Court's decision in Bowers v. Hardwick, which relied on notions of deference to democratic legislation and "majority sentiments about...morality" to sustain application of an antisodomy criminal statute to same-sex sexual conduct. Classical republicanism, Michelman observes, would seem to speak in favor of the Bowers decision. And so, given Michelman's commitment to opposing Bowers, he needs to find resources in neorepublican theory that amend the classical republican emphasis on "normative unity." Even in his last paragraph of the essay, however—after he has presented his constitutional argument for a different result in Bowers—Michelman notes that "[t]he difficulty remains of explaining how it can be right to address such a non-demonstrative argument about the impermanent meaning of the people's law to any body other than the People." Michelman's answer to this difficulty is tentative, relying in the first instance on the idea that judges "perhaps" have some special cognitive or normative advantage:

Judges perhaps enjoy a situational advantage over the people at large in listening for voices from the margins. Judges are perhaps better situated to conduct a sympathetic inquiry into how, if at all, the readings of history upon which those voices base their complaint can count as interpretations of that history—interpretations which, however re-collective or even trans-

557. Michelman, supra note 535, at 1525 ("How...does my work-up of these implications of republican constitutionalism not end by subverting the entire practice of judicial review—implying its total subordination to popular politics—rather than by emboldening the independent spirit in which that practice sometimes is carried on?").
559. Michelman, supra note 535, at 1495.
560. Id. at 1495.
561. Id. at 1537.
formative, remain true to that history’s informing commitment to the pursuit of political freedom through jurisgenerative politics.\textsuperscript{562}

As Michelman recognizes, however, this kind of answer raises serious questions for a theory that, at its core, presents popular political engagement as jurisgenerative and the source of legal legitimacy. “[A] judicial constitutional convention,” Michelman admits, “is not equivalent—indeed it is contrary—to actual democracy.”\textsuperscript{563} Michelman’s ultimate answer is “pragmatic.” “Actual democracy is not all there is to political freedom,” he says in the essay’s final sentence, “and Hardwick is before us, appealing to law’s republic.”\textsuperscript{564}

This passage, together with a related passage that Habermas quotes,\textsuperscript{565} makes the best case for Michelman’s slippage into “constitutional-court paternalism.” But if he is guilty of that offense, he is not driven to it for the reason Habermas thinks. The passages show that Michelman precisely does not assume a deep ethical consensus that is binding on all interpreters of law. Part of his idea of “political freedom,” invoked in the last lines, is freedom from a political community’s consensus, and the passage that Habermas quotes assigns judges the task of “challeng[ing] ‘the people’s’ self-enclosing tendency to assume their own moral completion as they now are.”\textsuperscript{566}

Further, Michelman hesitates to rely on “actual democracy,” in the context of Bowers, not because he has a premodern notion of politics that both demands total engagement from a virtuous people and, for that reason, cannot be realized under modern conditions. Instead, Michelman’s concern—that “voices from the margins” will go unheeded—identifies a structural problem in majoritarian political institutions that is recognized in both

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item The passage Habermas quotes is as follows:
The Court helps protect the republican state—that is, the people politically engaged—from lapsing into a politics of self-denial. It challenges “the people’s” self-enclosing tendency to assume their own moral completion as they now are and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends.
\item \textit{Id.} at 1532, quoted in \textit{Between Facts and Norms}, \textit{supra} note 2, at 278.
\item Michelman, \textit{supra} note 535, at 1532.
\end{enumerate}
American constitutional law and constitutional theory. Whether or not Michelman is right that the Georgia statute unconstitutionally denies rights of privacy and equal citizenship is an interpretive question that can be answered only by addressing the substantive merits of Michelman's constitutional argument.

To be sure, Michelman's final paragraph betrays considerable anxiety about his constitutional argument. Voices heard from the margin are not necessarily to be given authority, and majoritarian democracy is not always to be distrusted. But Michelman is not alone in trying to sort out these difficulties. He has, in fact, the company of Habermas. Consider Habermas's initial characterization of legitimate judicial review:

[J]udicial review should refer primarily to the conditions for the democratic genesis of laws. More specifically, it must start by examining the communication structures of a public sphere subverted by the power of the mass media; go on to consider the actual chances that divergent and marginal voices will be heard and that formally equal rights of participation will be effectively exercised; and conclude with the equal parliamentary representation of all the currently relevant groups, interest positions, and value orientations. Here it must also refer to the range of issues, arguments and problems, values and interests that find their way into parliamentary deliberation and are considered in the justification of approved norms.

This passage is surprising in a number of respects. Perhaps most surprising is that Habermas offers it as an endorsing interpretation of John Hart Ely's theory of judicial review. While the main themes of Ely's "representation-reinforcing" theory come through—"clearing the channels of political change" and "facilitating the representation of minorities"—William Forbath is right that Ely "might be

567. The work of John Hart Ely is important here, particularly the part of his "representation-reinforcing theory" directed toward "facilitating the representation of minorities." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135-79 (1980). Ely's connection to Supreme Court caselaw is of course the famous footnote four. United States v. Carolene Products Co., 304 U.S. 141, 152 n.4 ("discrete and insular minorities").

568. For Michelman's substantive argument, see Michelman, supra note 535, at 1532-36.

569. BETWEEN FACTS AND NORMS, supra note 2, at 265.

570. See Ely, supra note 567, at 105-80.
amazed” to see his theory characterized in this way.\textsuperscript{571} Conclusions about exactly what Habermas would have the Supreme Court do are difficult to draw, from this or any of Habermas’s other discussions of a constitutional court’s legitimate powers.\textsuperscript{572} But the picture that emerges suggests, in Habermas’s own characterization, a “rather bold constitutional adjudication”\textsuperscript{573} that would make not just Ely but perhaps even Michelman uncomfortable.

In developing Ely’s themes of representation reinforcement, Habermas suggests that the “power of the mass media” operates to “subvert[]” the political public sphere. Elsewhere in \textit{Between Facts and Norms} he explains what he means by this charge. Concentration of editorial control in the hands of a few induces a centrist bias\textsuperscript{574} that does not facilitate the representation of “divergent and marginal voices.” Habermas criticizes also the fragmentation of issues and the presentation of politics as entertainment, as well as the accommodating response among party and political leaders to these very developments.\textsuperscript{575} While Habermas notes research suggesting that the public’s critical capacity may not be as low as often is alleged,\textsuperscript{576} he sees the “social power” of large media organizations as a

\textsuperscript{571} Forbath, \textit{supra} note 141, at 995.

\textsuperscript{572} Forbath notes, in the context of Habermas’s theory more generally, the different interpretations Habermas has received from Richard Posner and Frank Michelman:

\begin{quote}
Just how ambiguous and ambivalent—how uncertainly modest or transformative are the book’s implications for institutional change—is mirrored in two American reviews. To Richard Posner, Habermas “intimates, without quite saying, that the political process in democratic nations such as the United States and Germany is sufficiently deliberative”—a view that “will not endear him to radicals.” But for Frank Michelman, Habermas’s argument is about reconstructing a vast array of social institutions, including the workplace, the media, the welfare state, and prevailing property norms.
\end{quote}

Forbath, \textit{supra} note 141, at 998 n.27 (quoting Richard Posner, \textit{Law’s Reason}, \textit{Review of Facts and Norms}, \textit{NEW REPUBLIC}, May 6, 1996, at 28 and citing Frank Michelman, What is Constitutional Democracy? (Thomas Sealey Lecture, delivered at University of Texas Law School, 1997)). I think Michelman is clearly more right about Habermas’s views on institutional change pursued through democratic lawmaking. How much of the agenda Michelman describes can legitimately be pursued through adjudication, however, is likely another matter.

\textsuperscript{573} \textit{Between Facts and Norms}, \textit{supra} note 2, at 280.

\textsuperscript{574} \textit{Id.} at 377.

\textsuperscript{575} See \textit{id.} at 376-77.

\textsuperscript{576} See \textit{id.} at 378.
threat to "nullify[]" the "constitutionally regulated system of power"—and thus as a threat to the legitimacy of the political system and its decisions.\textsuperscript{577} Habermas does not make clear what a constitutional court is supposed to do about these problems, and in part his criticisms are directed to media organizations themselves.\textsuperscript{578} But Habermas also notes that in Germany one finds the beginnings of "constitutional regulation" that would reduce the social power of media organizations and, presumably, diminish their agenda-setting capacity. Mentioning both media self-regulation and mass-communications law,\textsuperscript{579} Habermas endorses the proposal that political and social actors would be allowed to "use" the public sphere only insofar as they make convincing contributions to the solution of problems that have been perceived by the public or have been put on the public agenda with the public’s consent. In a similar vein, political parties would have to participate in the opinion- and will-formation from the public’s own perspective, rather than patronizing the public and extracting mass loyalty from the public sphere for the purposes of maintaining their own power.\textsuperscript{580}

This proposal, however, would seem to outfit government officials with the power of selecting among speakers and the content of speech. Even with the aim of ensuring "convincing contributions" and upgrading the level of political discourse, the constitutional problem here is obvious—especially in the American context, where government selection among speakers is regarded as perhaps the chief evil addressed by the Constitution’s free-speech and free-press clauses. Certainly one can imagine a constitutional argument that would support the proposals Habermas is discussing. Whether that argument connects with the body of free-expression doctrine in this country, however, is doubtful.

Habermas, of course, does not err simply by rejecting implicitly the received wisdom of American constitutional doctrine, and \textit{Between Facts and Norms} is not intended as a

\begin{itemize}
\item \textsuperscript{577} \textit{Id.} at 386.
\item \textsuperscript{578} \textit{See id.} at 378 ("[T]he mass media ought to understand themselves as the mandatary of an enlightened public whose willingness to learn and capacity for criticism they at once presuppose, demand, and reinforce.").
\item \textsuperscript{579} \textit{Id.}
\item \textsuperscript{580} \textit{Id.} at 379.
\end{itemize}
treatise on American constitutional law. But the tension between mass-media-dominated political discussion and deliberative democracy is relatively easy to identify. What would be more interesting would be consideration, also, of the other side of the free-expression question. Habermas’s proposal raises obvious problems, and not just under prevailing American doctrine. His own theory suggests that civil-social organizations and the political public sphere need to be constitutionally protected and not dominated by government. 581 It is hardly obvious, however, that his proposal would not undermine the public sphere, albeit through state administrative power rather than through the social power of media organizations.

Habermas sounds also the second theme of Ely’s “representation-reinforcing” theory. A constitutional court’s judicial review, he says, must “consider the actual chances that divergent and marginal voices will be heard and that formally equal rights of participation will be effectively exercised.” 582 This kind of position follows from Habermas’s rejection of the “liberal” paradigm and its emphasis on purely formal equality. Disparities of social and economic power, Habermas has said, threaten full and effective participation in the democratic process, and accordingly, these disparities threaten the legitimacy of official decisionmaking. But Habermas is short on details. How should the divergence between full and actual participation be taken into account? Presumably the court is not free to rewrite legislative norms, reasoning that they would have been different had the political process been genuinely and effectively open on equal terms. But under what circumstances can it invalidate, or refuse to enforce, legislation on those grounds? Should it, instead, remand the issue to the legislature? 583 Given that social and economic power always is unequally distributed in some measure, how serious must the imbalance be to justify the court’s solicitude? The answers to these questions would help explain just how assertive Habermas’s constitutional court would be. But

581. See id. at 368-69.
582. Id. at 265.
583. This is Ely’s suggestion for the case of groups whose access to the political process, once effectively blocked, no longer is so—but who cannot reasonably be expected to exhaust their political capital on repealing outdated statutes. See ELY, supra note 567, at 169.
here, too, Habermas’s account is maddeningly short on the kind of detail that matters most.\textsuperscript{584}

Most surprising in Habermas’s account of judicial review is his reference to “equal parliamentary representation” for all “currently relevant groups, interest positions, and value orientations.”\textsuperscript{585} By “equal” he means, presumably, equal in proportion to their influence in the public sphere. But how is that influence to be measured? If, as in this country, the political system operates largely under a two-party scheme, then voting outcomes, and even public opinion polls, will be biased against smaller parties. The proportional representation system seems to need to be already in place for there to be measures adequate for implementation.

Further, and more fundamentally, how should the court go about ensuring that all currently relevant groups and positions receive parliamentary representation? Habermas doubtless is thinking here of European systems in which his ideas already are reflected in present political organization. Whether he could make the same recommendation in the very different context of American politics is doubtful. Legislation, such as the Voting Rights Act, goes some small way toward Habermas’s proposal. But it is difficult to imagine an American court, on its own, mandating proportional parliamentary representation for all “currently relevant groups, interest positions and value orientations.” The connection between this kind of representation and a laudable system of democracy is evident—though hardly indisputable. But without any firm basis in politics as it now is practiced, the power of a court to mandate this kind of change, even in the name of sound democratic procedure, seems at least doubtful. It is a long way from \textit{Baker v. Carr}’s “one person, one vote”\textsuperscript{586} ruling to a constitutionally mandated system of proportional representation for groups, interests, and value-orientations.

Habermas’s most general statement of the constitutional court’s legitimate role is that it must “keep watch over just that system of rights that makes citizens’ private

\textsuperscript{584} William Forbath reaches a similar conclusion. See Forbath, \textit{supra} note 141, at 995-96.

\textsuperscript{585} \textit{BETWEEN FACTS AND NORMS}, \textit{supra} note 2, at 265.

\textsuperscript{586} 389 U.S. 186 (1962).
and public autonomy equally possible." And this statement raises the issue that has been at least implicitly present in the preceding discussion. Habermas's reconstruction of the "system of rights" develops general categories of rights that, he says, a modern legal system must recognize if it is to be legitimate. He acknowledges, however, that there is more than one way to implement those categories of rights, and he emphasizes that the abstract categories are not enforceable legal rights until they have been "saturated" through democratic lawmaking. That means that even if we retain the idea that the "reconstruction" has some critical potential—it allows us to evaluate the relative legitimacy of particular implementations—still, Habermas cannot expect courts to do anything other than enforce the legal norms that in fact have been enacted. On Habermas's theory, courts are "bound to existing law." While a reconstructive account of the system of rights and constitutional state might be instructive in interpreting a particular legal system's legal norms, nonetheless, courts must tether their decisions not directly to that account but directly to the governing legal norms.

Thus the role of judicial review is not, strictly speaking, to "keep watch over just that system of rights that makes citizens' private and public autonomy equally possible." The role of judicial review, instead, is to keep watch over the version of the system of rights that govern in a particular legal community. The discourse theory of law is not itself a charter that is to be enforced directly. A critical account of how courts have fulfilled their mission cannot content itself with references to a reconstructive theory. Instead, it must engage directly the texts that authoritatively govern in a particular legal community. Understandably, Habermas saw that as beyond the scope of his project in Between Facts and Norms. But even on the premises of that project, critical evaluation of existing legal systems cannot avoid engaging the particular ways that—in authoritative legal texts—those systems have implemented the "system of rights" and "principles of the constitutional state."

That raises, at least in the American context, the problem of Habermas's fifth category of basic rights,

---

587. Id. at 263.
588. Id.
consideration of which I deferred. This category consists of "[b]asic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to" exercise their private and public autonomy. Even the statement of this category of rights raises a problem discussed earlier: how equal must the opportunities be made? And, given the "relative" rather than "absolute" justification of this category of rights, Habermas has to face an additional question: how close a connection should be required between new social and ecological rights, on one hand, and private and public autonomy, on the other? These questions are particularly pressing in the context of judicial review. If a court is convinced that the legislature has not done enough to implement social or ecological protection, what remedy should it order? The question is difficult because the legislative programs implementing these sorts of rights typically are detailed, with complex enforcement schemes.

The more fundamental question, however, is whether Habermas can claim plausibly to have reconstructed modern legal systems generally when the American system offers so little in the way of basic protection—i.e. constitutional protection—for social and ecological rights. True, Habermas assigns a significant role to legislatures in implementing the system of rights. But the near total absence of specific protection for these rights in American constitutional law poses a challenge to Habermas's reconstructive theory. Perhaps it is simply a mistake—a failure to recognize deeper commitments implied by the system of law that we have. But if so, then that argument would need to be made.

589. See supra text accompanying notes 246-49.
590. BETWEEN FACTS AND NORMS, supra note 2, at 123.
591. See id. at 154 ("It must be possible to interpret even ordinary legislation as serving to realize and specify the system of rights elaborated in the constitution.").
592. One version of such an argument is offered by Günter Frankenberg. See Günter Frankenberg, Why Care? The Trouble with Social Rights, 17 CARDOZO L. REV. 1365 (1996). Frankenberg objects to Habermas's treatment of social rights as justified only so far as they are necessary for private or public autonomy. He proposes that social rights be justified independently, based on notions of social solidarity and empowerment. He is clear, however, that social rights are "a project that has to stand the test of public controversy." Id. at 1385.
It is difficult to know quite what to make of Habermas's account of the constitutional court's legitimate role. His positive statements on the subject are both brief and general. A strong reading of these statements would give the constitutional court considerable latitude to remake the democratic process. Further, because Habermas sees the democratic process as threatened by inequality in social and economic power, his proceduralist theory could be understood to authorize large-scale redistribution of power. On the other hand, however, his critique of "value jurisprudence," while not strictly applicable in this context, suggests a conception of judicial restraint.

Part of the difficulty in interpreting his views may be the difference between American and German constitutional law, particularly with respect to issues of free expression and the constitutional basis for social-welfare rights. The commitments of the "proceduralist paradigm" would be easier to discern if Habermas left the level of reconstructive theorizing and, in his "testing" of the discourse theory against the world of adjudication, encountered more concretely the particular ways in which the "system of rights" and "principles of the constitutional state" have been institutionalized.

CONCLUSION

Habermas's discourse theory of law and democracy is extraordinarily ambitious. It investigates the necessary conditions of legitimacy for any modern legal order, seeing those conditions in the recognition of his "system of rights" and their implementation through the "principles of the constitutional state" that he identifies. I have taken issue with significant parts of Habermas's discourse theory: the formulation of the democracy principle to require universal assent, the thinness of his theory of judicial interpretation and the emptiness of the "appropriateness" standard for judicial application discourses, the underestimation of the affinities between his theory and Michelman's neo-

593. See Schlink, supra note 484, at 377 (arguing that without attention to the historical differences among constitutions, and the differences between German and American constitutionalism, prescriptions for constitutional-court practice can be only unhelpfully general).
republicanism, and the abstractness of his account of constitutional courts’ legitimate role.

But the reverse side of Habermas’s abstractness is his comprehensiveness of scope. He covers an extraordinary amount of ground in his work on law and democracy, ranging from a social-theoretically inspired account of modern law’s basic problematic, to an account of the categories of rights necessary for law’s legitimacy, to a recasting of separation-of-powers notions through discourse theory, to a critical account of contemporary constitutional theory and practice. Much of his project is attractive. The idea of communicative power, and the location of basic democratic processes outside formal governmental institutions—in the political public sphere and civil-social associations—are important contributions. So, too, is the emphasis on the legitimating role that procedure can play when it operates democratically. Perhaps most suggestive is the link Habermas establishes between legitimate law and a more thoroughgoing democracy.