

WHEN ARE CONSTITUTIONAL RIGHTS NON-ABSOLUTE?  
*MCCUTCHEON*, CONFLICTS, AND THE  
 SUFFICIENCY QUESTION

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## INTRODUCTION

In *McCutcheon v. Federal Election Commission (FEC)*, the Supreme Court struck down the aggregate limits provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), which capped the total amount of money a donor was permitted to contribute to all candidates and political committees during a single election cycle.<sup>1</sup> Chief Justice Roberts’s four-Justice plurality opinion concluded that the provision ran afoul of free speech, because it violated the “right to participate in democracy through political contributions.”<sup>2</sup>

Why precisely was the law unconstitutional? Not simply because the law restricted political contributions; the plurality acknowledged the right to participate through contributions “is not absolute,” and that other cases had upheld contribution restrictions.<sup>3</sup> Rather, the plurality concluded the law did not further the only legitimate purpose—prevention of “*quid pro quo*’ corruption or its appearance”<sup>4</sup>—they thought could justify restricting the First Amendment right.<sup>5</sup> The four dissenting Justices thought a broader range of governmental goals could justify such restrictions—including “maintaining the integrity of our public governmental institutions”<sup>6</sup>—and that the BCRA’s aggregate limits advanced that interest.<sup>7</sup> Justice Thomas, writing in a separate concurrence, agreed that the First Amendment right implicated by the BCRA was not absolute, but thought it properly subject to strict scrutiny.<sup>8</sup>

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1. 134 S. Ct. 1434, 1437-38, 1442 (2014).

2. *Id.* at 1441. Justice Thomas’s separate concurrence provided the fifth vote that struck down the challenged provision. *Id.* at 1462 (Thomas, J., concurring).

3. *Id.* at 1441 (majority opinion).

4. *Id.*

5. *See id.* at 1442. The plurality also concluded the law did not satisfy the “closely drawn” means component of the judicial test. *See id.* at 1456 (“Quite apart from the foregoing, the aggregate limits violate the First Amendment because they are not closely drawn to avoid unnecessary abridgement of associational freedoms.” (internal quotation marks omitted)). Of course, the plurality’s means analysis was logically dependent upon its ends analysis—a different understanding of justifiable means could have readily led to the conclusion that the challenged provision was closely drawn to satisfy it.

6. *Id.* at 1467 (Breyer, J., dissenting).

7. *See id.* at 1466-67.

8. *See id.* at 1464 (Thomas, J., concurring) (“I would overrule *Buckley* and subject the aggregate limits in BCRA to strict scrutiny.”).

In short, all nine Justices agreed the constitutional right at issue was not absolute, but disagreed as to what purposes might justify the right's limitation. This Article asks a basic general question: What criteria appropriately determine what qualifies as a sufficiently important reason to limit a constitutional right? Call this the "Sufficiency Question."

The Sufficiency Question is not limited to the First Amendment, but applies generally insofar as virtually no constitutional rights are absolute under contemporary doctrine. For instance, most fundamental constitutional rights are protected by strict scrutiny and can be regulated to achieve a "compelling governmental interest."<sup>9</sup> Many constitutional rights can be regulated for even less pressing reasons—indeed, the *McCutcheon* plurality applied something less than strict scrutiny, demanding only a "sufficiently important interest."<sup>10</sup> Furthermore, even under strict scrutiny, a compelling governmental interest need not rise to the level of a *constitutional* interest. For example, under contemporary doctrine, a state's interest in fetal life is sufficiently important to allow a flat proscription of abortion after viability, despite the facts that abortion is a constitutional right and that protecting fetal life is not of a constitutional dimension.<sup>11</sup> This means that even strict scrutiny—generally recognized as the most difficult constitutional test for protecting rights—permits constitutional rights to be limited to achieve subconstitutional goals.

Surprisingly, the legal academy has given little attention to the Sufficiency Question. Though courts and scholars have spent substantial time arguing that a particular policy does or does not constitute a compelling government interest for purposes of a specific

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9. See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2548 (2014) (internal quotation marks omitted).

10. See *McCutcheon*, 134 S. Ct. at 1444. The "sufficiently important" language came from *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam). While the *McCutcheon* plurality opinion observed that the Court sometimes had equated "sufficiently important" with "compelling," the Chief Justice's plurality opinion treated *Buckley's* test as if it were a lower level of scrutiny. See *McCutcheon*, 134 S. Ct. at 1444-45; see also *id.* at 1456 (noting that the government's interest must fit the means it adopts "even when the Court is not applying strict scrutiny"). A few months after *McCutcheon* was decided, a five-Justice majority opinion authored by the Chief Justice spoke of *McCutcheon* as having "assume[d], without deciding," that "intermediate scrutiny" applied. *McCullen*, 134 S. Ct. at 2530.

11. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992).

constitutional right<sup>12</sup>—for instance, is diversity in secondary schools a compelling governmental interest sufficient to justify affirmative action’s infringements on equal protection?<sup>13</sup>—virtually no attention has been given to the properties that such justifiable rights-limiting interests must have.

It is this more general inquiry that I intend to pursue here. The first step to answering it is to understand why constitutional rights are not absolute, but sometimes may be limited. Part I addresses that question, identifying the classic arguments for “rights absolutism” and carefully analyzing Ronald Dworkin’s understanding of rights as trumps, what many believe to be the most important modern articulation of rights absolutism. Part I argues that Dworkin fails to provide an internally consistent account of rights absolutism, and that Dworkin is not best understood as a rights absolutist. Building on its critique of Dworkin, Part I then identifies three strong arguments against Rights Absolutism.

In my experience, the proposition that constitutional rights are not absolute confounds many, and leads to such questions as: Does the conclusion that a constitutional right is not absolute reduce it to a mere policy interest, and in effect undermine what it means for something to be a constitutional right? Are constitutional rights endangered if they are non-absolute? What is the point of constitutional rights if they are non-absolute?

To countermand these concerns, Part II identifies and critically evaluates six non-absolutist accounts of constitutional rights. The first four can be found in the scholarly literature: (1) John Rawls’s influential approach from *Political Liberalism*; (2) Fred Schauer’s “rights as shields;” (3) Schauer’s “rights as devaluers of non-rights interests;” and (4) Robert Alexy’s “rights as principles.” The last two are mine: (5) rights as values, the building blocks of political culture, and (6) rights as heuristics. Carefully working through these accounts provides powerful answers to the queries stated in the

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12. Or an important government interest, depending on what constitutional doctrine demands in the specific context. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) (requiring “an important or substantial government interest”).

13. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

previous paragraph, and also generates insights that will prove useful to our analysis of the Sufficiency Question.

Part III argues that the very considerations that count against Rights Absolutism strongly suggest it is neither possible nor desirable to generate principled, a priori answers to the Sufficiency Question. But an implication of Part II's analysis is that it may be possible to generate what might be called a Sufficiency Methodology—a relatively thick framework that identifies the considerations that properly inform, and the institutions that properly participate in generating, answers to the Sufficiency Question. Part III then cashes out the Sufficiency Methodology, and shows that it identifies multiple deficiencies in the *McCutcheon* majority. More than this, the Sufficiency Methodology isolates the empirical and normative factors that the Court should have considered in deciding the case.

A final point before proceeding. Though this Article discusses an array of scholars, three figure most prominently: Dworkin, Rawls, and Alexy. I focus on these scholars not because they exhaust the range of political and constitutional theorists (they clearly do not), but because all three have seriously wrestled with the questions with which this Article is engaged. Careful consideration, and critique, of their well-considered positions generates important insights and analytical concepts that will advance our appreciation of the Sufficiency Question.

## I. RIGHTS ABSOLUTISM, PAST AND PRESENT

To determine what interests can justifiably limit constitutional rights, it is helpful to ask the logically antecedent questions of whether—and if so, why—it is normatively proper to limit a constitutional right. A well-pedigreed line of American legalists forcefully argued “no”: Justice Black and Alexander Meiklejohn famously contended that constitutional rights are “absolute,” meaning they can never be limited or “open to exceptions.”<sup>14</sup> Call this Rights Absolutism.

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14. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 245-46, 253 (internal quotation marks omitted). In actuality, explaining what it would mean for a right to be “absolute” is not so simple. For an illuminating discussion of the complexities, see Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1, 2-9 (1981).

Descriptively, these absolutists lost the day doctrinally.<sup>15</sup> But normatively, explaining why constitutional rights are not absolute is not so easy—and arguably still has not been done.<sup>16</sup> Indeed, one of this generation’s most important accounts of constitutional rights, that of Ronald Dworkin, is much in the spirit of Rights Absolutism.<sup>17</sup> Identifying what is wrong with these important accounts will be the first step in addressing the Sufficiency Question.

### A. *The First Generation: Black and Meiklejohn*

To say there is something wrong with Rights Absolutism is not to suggest there is no power to the position. Quite the contrary, most of the U.S. Constitution’s text concerning rights is consistent with Rights Absolutism,<sup>18</sup> and some text literally seems to call for it.<sup>19</sup> History and political theory also can be, and have been, invoked in its support.<sup>20</sup> Rights Absolutism sits well with the conception of rights as pre-commitments intended to serve as checks on the majority. In Justice Black’s words, “the very object of adopting the First Amendment ... was to put the freedoms protected there completely

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15. Consider the doctrine of strict scrutiny, which allows regulation of even our most precious constitutional rights if there is a compelling governmental interest that is pursued in a narrowly tailored fashion, and the fact that all nine Justices in *McCutcheon* agreed the constitutional right at issue in the case was non-absolute. See generally Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007). But I should make two clarifications concerning the point above in text that constitutional absolutists lost the day doctrinally. First, when I speak of “absolute” constitutional rights, I mean absolute across the entire factual domain to which the right applies; thus while the First Amendment absolutely bars Congress from doing a number of factually specific things (for example, banning flag burning), the First Amendment is not absolute in this Article’s locution insofar as there are many types of speech that *can* be regulated. Second, this Article does not assume that all constitutional rights perform must be non-absolute—indeed the Thirteenth Amendment may be an example of an absolute constitutional right—but explains why most are not absolute.

16. Stephen Gardbaum has provided one of the few justificatory efforts, grounded in democratic theory. See Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 L. & ETHICS HUM. RTS. 78, 79-81 (2010).

17. See *infra* Part I.B.1.

18. But not all. For instance, the Fourth Amendment bans only *unreasonable* searches. U.S. CONST. amend. IV.

19. See, e.g., Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960) (“The phrase ‘Congress shall make no law’ is composed of plain words, easily understood .... [This language is nothing] less than absolute.”).

20. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (describing certain rights as “unalienable”).

out of the area of any congressional control.”<sup>21</sup> Justice Black pitted his position against that of Justices who called for “balancing”—like Justice Harlan who advocated an “appropriate weighing of the respective interests involved” when a governmental action impaired a constitutional right.<sup>22</sup> In response to the balancers, Justice Black asserted that “the First Amendment’s unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.”<sup>23</sup>

To be clear, advocates of Rights Absolutism did not claim government could never regulate speech. Rather, the First Amendment forbids abridgments of the “freedom of speech,” and Rights Absolutists argued that not all speech fell into that category. Thus, for Rights Absolutism, determining what speech government could regulate was the interpretive, definition-oriented process of ascertaining the meaning of “freedom of speech.”<sup>24</sup> If an activity lay outside that category—like, on Meiklejohn’s reading, Justice Holmes’s example of falsely shouting “fire” in a crowded theater—then government was free to regulate it.<sup>25</sup> But whatever fell within the category of “freedom of speech” was to receive “absolute” constitutional protection; it simply could not be regulated by government, with no exceptions.<sup>26</sup>

Though no Justices presently on the Court are full-throated Rights Absolutists, contemporary doctrine sometimes operates like Rights Absolutism’s definitions-based approach, flatly defining some speech to fall outside the scope of the freedom of speech.<sup>27</sup> Justice

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21. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting).

22. *Id.* at 51 (majority opinion); see also ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 31-32 (1967) (“There are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right.”).

23. *Konigsberg*, 366 U.S. at 61 (Black, J., dissenting).

24. See Meiklejohn, *supra* note 14, at 253.

25. See *id.* at 258-59 (concluding that “the First Amendment gives no protection” to the person falsely shouting “fire” in a crowded theater because such words do not relate to the “business of governing” that Meiklejohn concluded should determine the scope of the First Amendment’s coverage).

26. See *id.*

27. For an illuminating discussion of other areas of speech deemed to fall outside the First Amendment, see Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and*



Scalia's opinion for the Court in *Nevada Commission on Ethics v. Carrigan* is an example.<sup>28</sup> Nevada law prohibits state and municipal legislators from "vot[ing] upon or advocat[ing] the passage or failure of" any "matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by ... [h]is commitment in a private capacity to the interests of others."<sup>29</sup> The Court upheld the law, concluding that the regulations did not come within the scope of "freedom of speech."<sup>30</sup> Justices Kennedy and Alito each wrote separate concurrences in which they rejected that premise,<sup>31</sup> persuasively arguing that restrictions on legislators' ability to advocate and vote restricted speech for purposes of the First Amendment. Nevada's law was nonetheless constitutional, they thought, because its limitations were not "*impermissible* restrictions on freedom of speech" on account of the fact that there were sufficiently important interests.<sup>32</sup>

### B. Dworkin's Rights as Trumps

Dworkin's influential metaphor of rights as trumps appears to operate similarly to Justice Black's and Meiklejohn's approach.<sup>33</sup> Early in his career, in 1977's *Taking Rights Seriously* (TRS), Dworkin famously and influentially declared that "[i]ndividual rights are political trumps held by individuals. Individuals have rights when,

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*Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339 (2015).

28. 131 S. Ct. 2343 (2011).

29. *Id.* at 2346 (quoting NEV. REV. STAT. § 281A.420(2) (2007)). The Court understood that the statute barred legislators from "advocating ... passage or failure [of the proposal in which he has a conflict] during the legislative debate." *Id.* at 2347.

30. Justice Scalia's majority opinion provided two reasons for this conclusion. First, "legislative power ... is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.* at 2350. Second, "the act of voting [by a legislator] symbolizes nothing" and therefore is not an "act of communication" to which the First Amendment applies. *Id.*

31. See *id.* at 2352-53 (Kennedy, J., concurring); *id.* at 2354-55 (Alito, J., concurring) ("I do not agree with the opinion of the Court insofar as it suggests that restrictions upon legislators' voting are not restrictions upon legislators' speech.")

32. *Id.* at 2355 (Alito, J., concurring).

33. For scholars who have understood Dworkin's metaphor of rights as trumps this way, see Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727-28 (1998); Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 423 (1993).

for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or do, or not a sufficient justification for imposing some loss or injury upon them.”<sup>34</sup> To the extent the language of trumps connotes absoluteness—and it does for many—Dworkin can be viewed as bearing the tradition of Justice Black and Meiklejohn. But Dworkin’s approach is too subtle to justifiably equate trumps and absoluteness. Digging more deeply into Dworkin reveals that he is a faint-hearted absolutist<sup>35</sup> at most, and perhaps not even that.<sup>36</sup> A close examination of Dworkin also will allow us to better understand Rights Absolutism’s drawbacks.

Dworkin retained the trumps metaphor throughout his career, but slightly reformulated it in his later years, declaring in his penultimate book, *Justice for Hedgehogs (JFH)*, that “political rights are trumps over otherwise adequate justifications for political action.”<sup>37</sup> There is ambiguity here: Does Dworkin mean (1) that rights *always* trump justifications that otherwise would be adequate to justify regulation, or (2) that rights trump *some* justifications that otherwise would be adequate to justify regulation? There is an enormous difference between these two possibilities. The first is Rights Absolutism of the pure Justice Black and Meiklejohn sort, whereas the second admits the possibility that rights sometimes can be limited or overridden—that there can be exceptions of the sort that Meiklejohn adamantly insisted would be wrong to make. Let us call the second option Rights Non-Absolutism.

Which is the best reading of Dworkin—is he a member of the Rights Absolutist or Rights Non-Absolutist camp?<sup>38</sup> As I hope to

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34. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1977) [hereinafter DWORKIN, TRS].

35. Cf. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (identifying himself as a “faint-hearted originalist” who would not uphold a federal law authorizing flogging despite his conclusion that flogging is not cruel and unusual punishment under originalism). Justice Scalia today considers himself an “honest” originalist. See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 14, 2013, at 22, 24.

36. This is not to suggest there are presently no full-hearted absolutists. For one, see John Oberdiek, *Specifying Constitutional Rights*, 27 CONST. COMMENT. 231, 234-35 (2011 (book review)).

37. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 329 (2011) [hereinafter DWORKIN, JFH].

38. Ambiguity as to which camp Dworkin belongs is present elsewhere in *JFH*. For example, consistent with Rights Non-Absolutism, Dworkin asks “[w]hat interests of individual people could be so important as to trump *almost all* these varied other justifications?”

show, Dworkin's writings reflect two attitudes that are in tension with one another. When speaking generally and abstractly, Dworkin's approach sounded asymptotically close to Rights Absolutism.<sup>39</sup> I call this "Dworkin I." Other times, however, Dworkin adopts Rights Non-Absolutism.<sup>40</sup> I call this "Dworkin II." This Section makes two additional, and related, claims. First, even setting aside those instances of explicit Dworkin II, the Dworkin I position is riddled with internal inconsistencies. Second, Dworkin's inability to formulate a coherent Dworkin I account, along with his (periodic) forthright adoption of Dworkin II, provides important insights into why Rights Absolutism is ultimately unworkable. More specifically, Rights Absolutism's categoricalness is unsuited to the complexities of the real world; Rights Absolutism demands that too many important countervailing considerations be ignored for it to serve as a normatively reliable decision-making guide.

### 1. *Dworkin I*

When speaking abstractly about rights, Dworkin throughout his career fell back on the metaphor of "rights as trumps," a position very close to Rights Absolutism. I say "close to" because Dworkin at all times recognized the possibility of some narrow exceptions. But narrow they were, or at least appeared to be. In *TRS*, Dworkin identified two circumstances when rights-limitations may be justifiable: "although citizens have a right to free speech, the Government may *override* that right when necessary to protect the rights of others, or to prevent a catastrophe."<sup>41</sup> Revisiting the topic in *JFH*, Dworkin does not include *TRS*'s first category of rights-protection, and reformulates the second category by stating that "[a] right may

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DWORKIN, *JFH*, *supra* note 37, at 329-30 (emphasis added). But three sentences later, Dworkin seems to reflect Rights Absolutism when he asks, "[a]re any interests of particular individuals so important that they must be allowed to trump the general welfare or *any other* all-things-considered justification?" *Id.* at 330 (emphasis added).

39. *See infra* Part I.B.1.

40. *See infra* Part I.B.2.

41. DWORKIN, *TRS*, *supra* note 34, at 191 (emphasis added). Dworkin added a third circumstance—"to obtain a clear and major public benefit"—but commented that if one "acknowledged this last as a possible justification he would be treating the right in question as not among the most important or fundamental." *Id.* I discuss this third circumstance later in this Article. *See infra* text accompanying notes 86-87.

be regarded as a trump ... even though it might not trump the general good in cases of emergency: when the competing interests are grave and urgent, as they might be when large numbers of lives or the survival of a state is in question.”<sup>42</sup>

Though the absence of the first category (rights-protection) from *JFH* almost certainly is not an accident, let us for now<sup>43</sup> closely analyze what Dworkin affirmatively says rather than draw inferences from an omission. In *JFH*, Dworkin says that “cases of emergency”—when “competing interests are grave and urgent,” as when “large numbers of lives or the survival of a state is in question”—are instances where a right “might not trump the general good,” and accordingly might be limited.<sup>44</sup> The existence of even one exception when rights may be limited might suggest that Dworkin cannot be counted as a full-blooded Rights Absolutist.<sup>45</sup> Even so, emergencies are the only paradigm of exception Dworkin contemplates in *JFH*, and a so narrow exception need not disturb the conclusion that Dworkin *for the most part* views rights as trumps, and for that reason qualifies as a faint-hearted Rights Absolutist.

But the existence of even one exception is troublesome to philosophers like Dworkin. For if there is an exception for emergencies, why not for other reasons as well? This concern can help us understand what motivated Dworkin’s explanation of why emergencies can justify rights limitations: “we might say,” states Dworkin, that “*the trump gets trumped not by an ordinary justification but by a higher trump.*”<sup>46</sup> This “higher trump” argument is an important philosophical move. If successful, it permits Dworkin to be understood as a full-fledged member of the Rights Absolutism camp, insofar as he could claim that rights can never be limited for mere “justifications,” but only when there exists something of a fundamentally different nature than a justification: a “higher trump.”

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42. DWORKIN, *JFH*, *supra* note 37, at 473 n.1.

43. Dworkin’s earlier rights-protection rationale may not be consistent with the unitary view he fully embraced in *JFH*. More on this shortly. *See infra* Part I.B.1.a.

44. Dworking, *JFH*, *supra* note 37, at 473 n.1.

45. *See supra* note 35 and accompanying text. Justice Scalia has used similar language. *See, e.g.*, *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 521 (1988) (Scalia, J., concurring) (arguing that affirmative action would be justifiable, notwithstanding its equal protection harms, only to avoid “a social emergency rising to the level of imminent danger to life and limb”).

46. DWORKIN, *JFH*, *supra* note 37, at 473 n.1 (emphasis added).

But two considerations internal to Dworkin's account make this "higher trump" explanation unavailable for him. I turn to these now.

*a. Is a "Higher Trump" Conceptually Consistent with Dworkin's Framework?*

The first consideration is whether the notion of a "higher trump" is conceptually consistent with Dworkin's larger project. *JFH*'s principal thesis is that there is a "unity of value," which Dworkin understands as meaning that "there are no genuine conflicts in value."<sup>47</sup> In Dworkin's words, "If I am to sustain my main claims in this book, about the unity of value, I must deny the conflict [between values]."<sup>48</sup> The question thus becomes whether the solution Dworkin relies on to address emergencies—higher trumps—is conceptually consistent with a "unity of value" in which "there are no genuine conflicts in value."<sup>49</sup>

A right being "trumped" by a "higher trump" certainly *sounds like* a conflict. But perhaps we can reconcile higher trumps with unity of value by following Tom Scanlon's distinction between values and rights, under which rights are institutionally defined means for securing values.<sup>50</sup> On Scanlon's approach, values and rights are

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47. *Id.* at 119.

48. *Id.* Joseph Raz has shown that the concept of a "unity of value" is susceptible to multiple, inconsistent understandings. He labors to demonstrate Dworkin's specific conception of it, all the while identifying and dismissing suggestions that have been made by other Dworkin commentators, and ultimately concludes there is some irreducible ambiguity in what Dworkin meant by a unity of value. See Joseph Raz, *A Hedgehog's Unity of Value* 7 (Dickson Poon Sch. of L. Legal Stud. Res. Paper Series, Paper No. 2014-26, 2014), available at <http://perma.cc/R5BC-NE4W> (proposing that unity of value, for Dworkin, "consists in" an "interconnected and interdependent system of principles and ideas" in which the "connections constitute reasons for evaluative beliefs," and "for the inescapability of an interconnected system of beliefs of that kind").

49. DWORKIN, *JFH*, *supra* note 37, at 119.

50. See T. M. Scanlon, *Adjusting Rights and Balancing Values*, 72 *FORDHAM L. REV.* 1477, 1478 (2004). I appreciate that there is an irony in my invoking Scanlon to vindicate Dworkin insofar as Scanlon invokes the distinction between rights and values to explain why values may conflict but rights cannot. See *id.* Yet such irony does not obviate the possibility that the distinction could illuminate Dworkin's account. Further, it should be noted that nothing in my analysis here constitutes a critique of Scanlon's argument. Scanlon invoked the distinction as an aid to interpreting Rawls, not Dworkin, and my discussion here has no necessary implications vis-à-vis Scanlon's argument.

different things, and a conflict between rights therefore is not necessarily inconsistent with a unity of value.<sup>51</sup>

There is both support and counter-evidence in *JFH* for applying Scanlon's distinction as an aid for understanding Dworkin. As to support, Dworkin identifies "dignity," which comprises "the two fundamental principles" of "equal concern and respect," as the master value from which all rights are derived.<sup>52</sup> Because "[a] political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect," the "principles of dignity therefore state very abstract political rights: they trump government's collective policies."<sup>53</sup> From this foundational proposition concerning political legitimacy, Dworkin concludes that "[a]ll political rights are derivative from that fundamental one. We fix and defend particular rights by asking, in much more detail, what equal concern and respect require."<sup>54</sup>

On the basis of these passages, it seems possible to read Dworkin in light of Scanlon's distinction, differentiating between the value of dignity and the rights derived from it. But Dworkin's analysis just one paragraph later seems to undermine the distinction's capability of rescuing Dworkin's reliance on a higher trump. Dworkin identifies "liberty and equality" as "the two fundamental principles of dignity" that must be "interpret[ed] ... so that no compromise between the two is necessary; so that each complements and reinforces the other."<sup>55</sup> Continues Dworkin, "So we must reject the opinion now popular among political philosophers that liberty and equality are conflicting *values*. We hope to define equality and liberty together: not only as compatible, but as intertwined."<sup>56</sup> In other words, Dworkin treats these rights as values, and hopes to show how there is no conflict between them.

This should not be surprising. The point behind *JFH* is to integrate "political morality and justice" with "personal morality" and a "yet more general theory of what it is to live well."<sup>57</sup> The

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51. *See id.*

52. DWORKIN, *JFH*, *supra* note 37, at 330.

53. *Id.* at 330-31.

54. *Id.* at 330.

55. *Id.* at 330-31.

56. *Id.* at 331 (emphasis added).

57. *Id.* at 2, 5; *see also id.* at 7 ("So political concepts *must* be integrated with one another.

book's title explicitly indicates this: the book's subject is justice, and "Hedgehogs" is intended to set Dworkin's theory apart from Isaiah Berlin's famed arguments for the plurality of values.<sup>58</sup> It would seem, in other words, that Dworkin treats justice and constitutional rights as being continuous with values,<sup>59</sup> and he believes rights cannot genuinely conflict just as values cannot.<sup>60</sup> If so, there would not seem to be a place within his conceptual scheme for higher trumps.

There is additional evidence that Dworkin treated rights as values, and not (per Scanlon's distinction) as being distinct from values, and it is this: Dworkin sidesteps conflicts among rights in exactly the same way he erases inter-values conflicts to achieve value unity. Let us first see Dworkin's argument against values conflicts, and then turn to his treatment of rights. Dworkin's approach to (what he believes to be only) apparent value conflicts is well illustrated by his response to a hypothetical, first propounded by Richard Fallon, intended by Fallon to illustrate a conflict between the values of

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We cannot defend a conception of any of them without showing how our conception fits with and into appealing conceptions of the others. That fact provides an important part of the case for the unity of value."). *JFH* incorporates by reference the arguments made in *Sovereign Virtue* (though not *TRS*). See *id.* at 328. Dworkin similarly conflates values, principles, and rights in that work. See, e.g., RONALD M. DWORKIN, SOVEREIGN VIRTUE 354 (2000) [hereinafter DWORKIN, SV] ("Free speech and democracy are connected not instrumentally but in a deeper way, because the dignity that freedom of speech protects is an essential component of democracy rightly conceived .... We cannot hope fully to understand either free speech or democracy, or properly to interpret the First Amendment as part of the Constitution as a whole, unless we interpret those values together, trying to understand the role each plays in a full account of the other .... We treat the Constitution as constructing a distinctive form of democracy, and we assess the First Amendment as both contributing to and helping to define that form.").

58. Isaiah Berlin invokes the line of the Greek poet Archilochus that "[t]he fox knows many things, but the hedgehog knows one big thing" to famously champion the view that there is a multiplicity of values that cannot be reduced to any single one. Dworkin recites this history concerning Archilochus and Berlin on the very first page of his book, and tells us that the thesis of his book, by contrast, is that "[v]alue is one big thing." See DWORKIN, *JFH*, *supra* note 37, at 1.

59. Doing so, it should be noted, is perfectly consistent with Dworkin's understanding of values: "Values have judgmental force." *Id.* at 118.

60. See *id.* at 349 (referring to the "values" of "liberty, equality, and democracy" and stating, "we also understand how we should proceed to develop our own conceptions of these values: our own convictions about the concrete political rights they name"); *id.* at 350 ("Because we aim to interpret our two principles as mutually supporting, not conflicting, we must try to develop conceptions of equality, liberty, and democracy that support one another as well.").

kindness and honesty. Here is how Dworkin accurately restates, and then responds to, Fallons' challenge:

A colleague asks you to comment on a draft ... and you find it bad. You will be cruel if you are frank but dishonest if you are not.

...[T]he way we think further is to *further refine our conceptions of the two values. We ask whether it is really cruel to tell an author the truth. Or, whether it is really dishonest to tell him what it is in his interests to hear and no one's interest to suppress.* However we describe the process of thought through which we decide what to do, these are the questions that, in substance, we face.<sup>61</sup>

As this passage shows, Dworkin eliminates values-conflicts to achieve unity of value by adjusting the scope of each value so that one of the apparently conflicting values is inoperative, leaving only one value to cover the situation at hand. "We reinterpret our concepts to resolve our dilemma: the direction of our thought is toward unity, not fragmentation."<sup>62</sup> In Dworkin's view, "*apparent conflict is inevitable but, we can hope, only illusory and temporary.*"<sup>63</sup>

Setting aside for a moment the substance of Dworkin's claim, two observations concerning Dworkin's technique for eliminating value conflicts merit mentioning. First, Dworkin's move exactly mirrors Meiklejohn's approach to absolute rights, under which rights are definitionally adjusted so they are inapplicable to activities (like falsely shouting "fire" in a crowded theater) that government may regulate.<sup>64</sup> Second, Dworkin himself uses this scope-adjusting approach when he analyzes rights. Time and again,<sup>65</sup> Dworkin's analysis purports to eliminate conflicts between rights<sup>66</sup> by concluding

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61. DWORKIN, JFH, *supra* note 37, at 118-19 (emphasis added).

62. *Id.* at 119.

63. *Id.* at 119-20 (emphasis added).

64. *See supra* text accompanying notes 25-26.

65. Though not always, as we soon shall see.

66. *See, e.g.*, DWORKIN, JFH, *supra* note 37, at 391-92 (arguing that majority-minority districting does not impose an "automatic or necessary compromise of any genuine political value" of political equality, properly understood); DWORKIN, SV, *supra* note 57, at 404, 408 (concluding that "affirmative action ... in no way compromises the principle that student places should be awarded only on the basis of legitimate and appropriate qualifications," and that it "violates no individual rights and compromises no moral principle"); Ronald Dworkin,



that, upon more careful reflection, only one right is applicable to the situation at hand. And Dworkin's rights-unity perspective may explain *JFH*'s elimination of *TRS*'s first category of justifiable speech regulations: Dworkin's early view that "the Government may override that right when necessary to protect the rights of others" presupposes a possibility of rights conflicts that may be inconsistent with the mature Dworkin's unitary value thesis.<sup>67</sup>

In short, Dworkin consistently treats rights as he treats values, expecting unity with respect to both. This constitutes additional evidence that he does not understand rights and values to inhabit separate domains. For this reason, it is difficult to understand how the notion of a "higher trump," which he used to explain emergency cases, is conceptually consistent with the rest of *JFH*'s intellectual framework.

*b. What Qualifies as a Dworkinian "Higher Trump"?*

There is a second respect in which Dworkin's invocation of a "higher trump" rationale to justify exceptions for emergencies is not consistent with *JFH*'s larger project.

Although (as explained above), Dworkin denies there are genuine conflicts among values, he acknowledges the existence of "practical conflicts"<sup>68</sup> between values and desiderata. According to Dworkin, values have "judgmental force," whereas "desiderata" refer to "what we want but do no wrong not to have."<sup>69</sup> As examples of desiderata, Dworkin points to an individual's desire for lemonade, and a community's desire for "the most efficient transport network."<sup>70</sup> Dworkin acknowledges that desiderata "almost always conflict" with each other, and also that "[v]alues often conflict with desiderata."<sup>71</sup>

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*The Decision that Threatens Democracy*, N.Y. REV. BOOKS, May 13, 2010, available at <http://perma.cc/X8TE-9CRW> (noting that the First Amendment "guarantees a 'right' of free speech but does not specify the dimensions of that right—whether it includes a right of cigarette manufacturers to advertise their product on television, for instance, or a right of a Ku Klux Klan chapter publicly to insult and defame blacks or Jews").

67. DWORKIN, *TRS*, *supra* note 34, at 191.

68. Raz, *supra* note 48, at 12 (innovating the term "practical conflicts" to describe conflicts between values and desiderata).

69. DWORKIN, *JFH*, *supra* note 37, at 118.

70. *Id.*

71. *Id.*

Thus, Dworkin creates a three-part decision-making framework. First, there are no simple, determinate answers as to how conflicts between desiderata are to be resolved—as when someone with only one lemon wants both lemonade and a lemon tart.<sup>72</sup> Second, there *is* a very simple answer as to how conflicts between values and desiderata are to be resolved: a value categorically trumps desiderata. Third, as explained in the immediately preceding section, there are no conflicts between values, once they are appropriately understood.

Up to this point we have seen that the third part of Dworkin's decision-making rubric is heavily reliant upon definitions. Value-value conflicts are rendered impossible by adjusting the scope of values so they do not overlap, and consequently cannot conflict. It should now be evident that formal definitions also are crucial to the second part of Dworkin's decision-making rubric, where the critical task is determining whether something counts as a value or a desideratum.

With this in mind, let us look closely at an example Dworkin provides for a value-desiderata conflict. Dworkin observes that “[s]ome steps we might take to improve safety from terrorists, which we certainly desire, would compromise liberty or honor.”<sup>73</sup> On Dworkin's analysis here, “safety from terrorists” is a desiderata, while “liberty” and “honor” are values.<sup>74</sup> Dworkin acknowledges the possibility of conflict in this realm, asserting that “a nation's honor is indeed sacrificed when alleged terrorists are tortured” and implicitly accepting the possibility that torture might increase security.<sup>75</sup> But Dworkin treats this as a practical conflict, to which his framework has a straightforward, determinate answer: “There is no moral conflict in such cases ... because morality requires that we give up whatever security our dishonor would achieve.”<sup>76</sup>

But how can Dworkin be so certain that safety from terrorists is a (mere) desideratum rather than a value? Augmenting safety from terrorists is one component of saving innocent lives. Under Dworkin's framework, the question then becomes whether taking steps to save innocent lives has “judgmental force,” and therefore is

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72. *See id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

a value, or whether it is merely something “we want but do no wrong not to” do, and accordingly is just a desiderata.<sup>77</sup>

It seems not only plausible, but likely, that taking steps to save innocent lives properly qualifies as a value.<sup>78</sup> And this conclusion is fortified when we consider Dworkin’s treatment of emergency cases. There, it should be recalled, Dworkin explained that a right may not win out “when the competing interests are grave and urgent, as they might be when large numbers of lives or the survival of a state is in question.”<sup>79</sup> That circumstance, Dworkin tells us, counts as a “higher trump.”<sup>80</sup> But if saving large numbers of lives qualifies as a higher trump in the context of emergency cases, why does improving safety from terrorists not count as a value? I myself do not see an easy answer to this question. If there indeed is not one, then Dworkin’s treatment of torture is additional evidence that his reliance on a “higher trump” is in tension with other parts of his account.

## 2. Dworkin II

Though the rhetoric of trumps and higher trumps is part of Dworkin I’s wrestling with Rights Absolutism, Dworkin sometimes explicitly embraces Rights Non-Absolutism. Elsewhere in *JFH*, for example, he declares “[i]t is commonplace that no political right is absolute and that even free speech has its limits.”<sup>81</sup> *JFH* explicitly incorporates by reference his arguments in *Sovereign Virtue*, in which defending the constitutionality of a wide array of campaign finance regulations, Dworkin wrote “[a] guarantee of free speech cannot, in any case, be absolute: We cannot prohibit otherwise reasonable regulations that are necessary to protect national security

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77. *Id.*

78. To be clear, the conclusion that improving safety from terrorists qualifies as a value does not ineluctably lead to the conclusion that torture is permissible. After all, not torturing is unquestionably covered by morality. The conclusion that improving safety is a value would only mean that torturing to improve public safety, assuming for present purposes that there is such a thing, would present a genuine moral dilemma. An array of moral and empirical considerations might properly be consulted to identify a “best” resolution to the dilemma. But wishing the dilemma away through definitions would not appear to be a legitimate way forward.

79. DWORKIN, *JFH*, *supra* note 37, at 473 n.1.

80. *See id.*

81. *Id.* at 373.

or, perhaps, private reputation.”<sup>82</sup> National security perhaps can be fitted into the emergency cases discussed at length above, though private reputation surely cannot.<sup>83</sup>

Indeed, the later Dworkin seems willing to permit speech regulations for yet other reasons, stating “[w]e would be likely to sustain regulations for less urgent reasons, moreover.”<sup>84</sup> It is interesting to compare this with Dworkin’s earlier comment in *TRS* that overriding a right “to obtain a clear and major public benefit” would be “treating the right in question as not among the most important or fundamental.”<sup>85</sup> Are the less urgent reasons Dworkin thinks to be sufficient to justify restricting speech in *Sovereign Virtue* more pressing than the clear and major public benefit he declared insufficient earlier in his career in *TRS*? Or has the later Dworkin softened his views as to what countervailing interests can justify a rights limitation?

Although these are interesting questions, I do not intend to engage in a detailed exercise of Dworkinian hermeneutics to identify the most compelling interpretation, or reconstruction, of Dworkin’s views. But two related observations are important. When analyzing specific policies, Dworkin is far from a Rights Absolutist and instead contemplates an array of circumstances that can justify limitations of rights.<sup>86</sup> Accordingly, the metaphor of “rights as trumps” would appear to be substantially distortive of Dworkin’s actual views.

### C. Three Arguments Against Rights Absolutism

Having shown above that the contemporary constitutional theorist most closely associated with Rights Absolutism, Ronald Dworkin, fails to provide an internally consistent approach to Rights Absolutism, this next Subpart identifies three endemic problems with Rights Absolutism. In other words, the weaknesses

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82. DWORKIN, SV, *supra* note 57, at 367. Indeed, Dworkin dismisses out of hand the possibility of giving the First Amendment an absolute meaning, without explaining why. *See id.*

83. Private reputation is consistent with Dworkin’s observation in *TRS* that rights may be overridden to “protect the rights of others.” DWORKIN, TRS, *supra* note 34, at 191; *see also id.* at 192-93 (defending the law of defamation’s consistency with free speech in this way).

84. DWORKIN, SV, *supra* note 57, at 367 (emphasis added).

85. DWORKIN, TRS, *supra* note 34, at 191.

86. *See, e.g., supra* text accompanying notes 43-45.

in Dworkin's account are not *sui generis*, but instead are characteristic of Rights Absolutism more generally.

*1. Inter-Rights Conflicts: Rights Absolutism Wrongly Presumes that Rights Cannot Conflict*

Rights Absolutism is possible only if rights cannot conflict. After all, if rights *can* conflict, then one or both rights must give way when they conflict. And if at times rights must give way, then for that reason rights cannot be absolute. Dworkin and Meiklejohn each demonstrated how rights-conflicts, and their close analogue of values-conflicts, can be avoided: by defining rights (or values) so that a circumstance implicates only one right (or value).<sup>87</sup>

So let us now consider whether values can conflict. Think back to Professor Fallon's hypothetical concerning the colleague who hands you a draft you think to be poor.<sup>88</sup> Does this present a conflict between kindness and honesty? Or, properly understood, is it really the case that either: (1) telling the truth is not cruel; or (2) not telling your colleague what you really think is not dishonest?

The same question can be asked about rights. For instance, can freedom of the press to report on an ongoing trial potentially conflict with a defendant's right to a fair trial?<sup>89</sup> Or of particular relevance to *McCutcheon*, is there a constitutional principle of "republican legitimacy"—which presupposes background conditions that ensure the legitimacy of both elections and the decision-making of those who are elected—and might the constitutional principle of republican legitimacy conflict with free speech rights to make campaign contributions?<sup>90</sup>

Returning to our discussion of Fallon's hypothetical, value-absolutist Dworkin thought there was only an "apparent conflict," which was resolvable by adjusting the scope of truthfulness and kindness so the circumstances fit into either category (1) or (2). The alternative is that there is no way to escape the dilemma's clutches,

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87. See *supra* text accompanying notes 59-67.

88. See DWORKIN, JFH, *supra* note 37, at 118-19; see also *supra* text accompanying note 61.

89. See *Sheppard v. Maxwell*, 384 U.S. 333, 355 (1966) (finding such a conflict).

90. See generally Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371 (2012). I develop these ideas later in Part V.

because telling the truth invariably would be unkind, yet not telling your colleague what you really thought would not be honest. Admitting that conflict is inevitable does not necessarily mean there is no uniquely objective right answer. But it *would* mean there can be true dilemmas, and that in such circumstances one value—maybe both—must be compromised.

So which is it: can values conflict, or not? Does Professor Fallon's hypothetical present a dilemma, or does conflict disappear once one properly comprehends honesty and kindness?

Though there are some dissenters,<sup>91</sup> a majority of contemporary philosophers agree that values can conflict.<sup>92</sup> As applied to rights, the majority view gives rise to the conclusion that there can be genuine "Inter-Rights Conflicts."<sup>93</sup> The majority view seems correct to me for three reasons that I shall preview here and elaborate on in Part II.

The first reason is phenomenological: the notion that there can be conflicting values provides a more accurate description of reality. Life frequently presents us with irresolvable dilemmas in which there are conflicts between deeply held competing commitments.

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91. Ronald Dworkin, as discussed, is one. For another important example, see Jeremy Waldron, *What Are Moral Absolutes Like?* 6 (N.Y.U. Pub. L. & Legal Theory Working Papers, Working Paper No. 301, 2011), available at <http://perma.cc/8KU4-2VJC>.

92. See ISALAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* 83 (Henry Hardy ed., Princeton Univ. Press 2d ed. 2013) (1991) ("There are many objective ends, ultimate values, some incompatible with others," and the fact that values "are in conflict within one culture or group or in a single human being at different times—or, for that matter, at one and the same time" entails that "the notion of a plurality of values [that is] not structured hierarchically; which, of course, entails the permanent possibility of inescapable conflict between values."); Raz, *supra* note 48, at 15 ("Why does Dworkin think that the existence of a conclusive reason results from there being no conflict rather than point to the right way of reacting to a conflict?"); Alan Ryan, *The Boldness of Hedgehogs*, 58 *DISSENT*, Fall 2011, at 112, 114 ("I remain unconvinced by the underlying thesis that there is no deep conflict of values in politics.").

Having read arguments by advocates of both positions, and having myself argued with conflict-deniers for many years, I have come to doubt that one of the positions can be definitively vindicated by unassailable logic that any reasonable person is bound to accept. Nor do I believe that either position is explicable by means of cognitive or psychological deficiencies. I instead have come to believe that the different positions reflect deep psychological differences between people. The upshot is that the argument in this subsection—that rights cannot be absolute because they can conflict with other rights—may be convincing to many, but likely will not convince everybody.

93. Below I also discuss the possibility of "Intra-Right Conflicts," that is to say the possibility that a single right can generate multiple commitments that themselves conflict.

Sometimes the significance of each competing commitment can seem to be in genuine equipoise, and deciding what to do is very difficult. Other times the correct decisional path seems more clear. But in both circumstances of conflict, my decision to do “x” is accompanied by an appreciation that there has been some *cost*, insofar as I have been unable to give full force to a competing commitment. For instance, I feel bad upon sharing my critical thoughts with a colleague who has been hurt by my feedback, or I feel bad about not having been fully honest when I opt to keep some of my criticisms to myself. I do not think that deeper consideration as to what honesty and kindness *really* are will erase the dilemma by revealing that the situation in which I find myself actually implicates only one of these values.

Second, the proposition that apparent conflicts disappear once the scope of each value is properly apprehended seems ungrounded. If I decide that the colleague should not be told about the work’s flaws, why should I think that is true only because honesty’s normative pull does not reach *at all* to the circumstance at hand? More generally, why should it be expected that multiple values do not conflict? There would appear to be only two possible answers: either (1) though it might appear that there are multiple values, in fact “all” values derive from one super-value, with respect to which there cannot be a conflict (insofar as multiplicity is a precondition of conflict); or (2) values by nature fit into a harmonious whole with all other values such that there is no overlap among them and accordingly there is no possibility of conflict. Both these accounts presuppose a nonaxiomatic meta-theory of values. Neither of these meta-theoretical accounts seems compelling to me, and this is all the more so with regard to rights.

Third, the proposition that apparent value conflicts are resolved through the definitional act of determining each value’s scope misdescribes the decision-making process that leads to the judgment, making the decision-making process appear to be ad hoc (or more ad hoc than it actually is). Explaining this third reason requires an exploration of how value-conflicts may be resolved—a topic treated at substantial length in Part II.<sup>94</sup>

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94. See *infra* Part II.A.2 (discussing Rawls’s approach to conflicts among basic liberties); *infra* Part II.B.3.b (discussing Alexy’s approach to conflicts among rights and conflicts be-

*2. Right-Interest Conflicts: Rights Absolutism Wrongly Presumes that Rights Should Categorically Trump Non-Rights Interests*

Though some believe rights and values cannot conflict, all agree that rights can come into conflict with non-rights interests. Another question that divides Rights Absolutists and Rights Non-Absolutists is what to do about such conflicts: Rights Absolutists believe rights categorically trump, whereas Rights Non-Absolutists do not. I will refer to conflicts between rights and non-rights as “Right-Interest Conflicts.” The critique I offered above concerning Dworkin’s reliance on higher trumps<sup>95</sup> is an instantiation of the general argument that rights do not appropriately trump all non-rights interests, insofar as it shows that notwithstanding Dworkin’s rhetoric of rights as trumps, he was unwilling to allow rights to always trump non-rights interests. Part II further develops the proposition that rights should not categorically trump non-rights interests.

In short, the main conceptual argument on behalf of Rights Non-Absolutism may be called “The Conflicts Thesis,” and it comprises two parts: rights are not absolute (1) due to the possibility of Inter-Rights Conflicts, and (2) because rights should not categorically trump non-rights interests in Right-Interest Conflicts.

*3. Widespread Practice*

The third consideration in deciding between Rights Absolutism and Rights Non-Absolutism is that Rights Non-Absolutism is the widespread practice, both in the United States and in every other contemporary liberal democracy. Indeed, there does not appear to be a single liberal democracy that utilizes Rights Absolutism.<sup>96</sup> It is true that these facts on their own cannot constitute a normative

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tween rights and subconstitutional interests); *infra* Part IV (synthesizing an approach to resolving conflicts, which I denominate the “Sufficiency Methodology”).

95. See *supra* Part I.B.1.a.

96. See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 141 (Doron Kalir trans., 2012) (2010); Jamal Greene, *The Rule of Law as a Law of Standards*, 99 GEO. L.J. 1289, 1291 (2011) (“Many of the world’s most respected constitutional courts, including the courts of Canada, Germany, Israel, India, and South Africa, in addition to the European Court of Human Rights and the European Court of Justice, incorporate balancing into forms of proportionality analysis.”).



argument on the practice's behalf; as Hume's Law instructs, one cannot derive an ought from an is.<sup>97</sup> But Rights Non-Absolutism's universality can be coupled with three claims that may nudge the fact of Rights Non-Absolutism's universality over the threshold that separates the descriptive from the normative.

First, the practice of human and constitutional rights in today's liberal democracies has resulted in the most robust human and constitutional rights in human history. Insofar as Rights Non-Absolutism is an integral part of these regimes, their success constitutes normative evidence on behalf of Rights Non-Absolutism.

The second claim is quasi-Hayekian.<sup>98</sup> The fact that the widespread practice of Rights Non-Absolutism arose from below, in a bottom-up fashion on a country-by-country basis, is evidence of Rights Non-Absolutism's superiority to Rights Absolutism. The Hayekian approach is suspicious of top-down centralized planning, and Rights Absolutism would be associated with the disfavored top-down approach insofar as it emerges from the theorist's mind, but has not arisen on its own. And the Hayekian argument for Rights Non-Absolutism is strengthened insofar as multiple countries have independently converged on Rights Non-Absolutism.

The third claim on behalf of Rights Non-Absolutism is Burkean in character. The widespread practice of Rights Non-Absolutism constitutes an embedded custom at this point, and its longevity is itself evidence of its goodness.

To be sure, none of these arguments, alone or in combination, provides a definitive vindication of Rights Non-Absolutism. It is possible, for instance, that we are in an early historical stage of human and constitutional rights, which is superior to its predecessors but falls short of what rights ideally can be.<sup>99</sup> But the fact that Rights

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97. See DAVID HUME, A TREATISE OF HUMAN NATURE, bk. III at 302 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739). To illustrate Hume's law, slavery's existence during much of human history does not mean it ever was normatively justified. See generally DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF EMANCIPATION (2014); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1996). Applied here, Hume's law cautions us to recognize the possibility that contemporary constitutional practice might be off the mark, in need of a radical overhaul rather than rational reconstruction.

98. Cf. SCOTT J. SHAPIRO, LEGALITY 386-87 (2011) (discussing Hayekian and Burkean approaches to customary rules and practices).

99. In fact, there is a strong counterargument to this "early evolutionary stage" argument: Rights Absolutism historically has been the first way rights are conceptualized, and Rights Non-Absolutism is a later development.

Absolutism is literally inconsistent with universal practice—that Rights Absolutism declares the practice of every contemporary liberal democracy to be in deep error—must count heavily against it, and appropriately places a heavy burden of persuasion on those who advocate for Rights Absolutism and, in so doing, would have us reject the universal practice among modern liberal democracies.

## II. TWO ALTERNATIVES TO RIGHTS ABSOLUTISM

In my experience, the idea that constitutional rights may be non-absolute flusters many people. I have heard the following reactions, from legislators, seasoned lawyers, and some scholars: “If constitutional rights are not absolute, then *what are they?*”; “Does the very notion of a non-absolute constitutional rights defeat the very point of what a constitutional right is?”; “If rights can be defeated to accomplish ‘mere interests,’ then does there cease to be a difference between rights and ‘mere interests?’”

To address such concerns, this section identifies six accounts of rights under which rights are non-absolute. The first, that of John Rawls, probably is best characterized as a hybrid of Rights Absolutism and Rights Non-Absolutism. The last five are examples of unqualified Rights Non-Absolutism. Carefully working through each approach deepens appreciation of the strengths and weaknesses of each. It also will allow us to identify several ideas that will prove useful to our effort to answer the Sufficiency Question in Part III.

### A. *Hybrid Absolutism: Rawls’s Political Liberalism*

Rawls writes that “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”<sup>100</sup> These principles and ideals include Rawls’s famed two principles of justice, which are generated from behind the veil of ignorance in the original position.

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100. JOHN RAWLS, POLITICAL LIBERALISM 137 (1993).

### 1. *Three Types of Liberty*

The first principle of justice provides that “[e]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.”<sup>101</sup> The “equal basic liberties” are “specified by a list as follows: freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law.”<sup>102</sup>

For Rawls, the basic liberties identified in the first principle of justice have a “special status.”<sup>103</sup> They have “priority,” in the sense that “[t]hey have an *absolute weight* with respect to reasons of public good and of perfectionist values.”<sup>104</sup> By “absolute weight” Rawls means the basic liberties categorically trump countervailing interests (“reasons of public good”) that do not themselves rise to the level of basic liberties.<sup>105</sup>

Rawls distinguishes the basic liberties from two other types of liberty: non-basic liberties and “liberty as such.”<sup>106</sup> Non-basic liberties are “quite important,” but may be more readily regulated than the basic liberties.<sup>107</sup> “Liberty as such” refers to a general freedom from governmental restrictions on conduct.<sup>108</sup> Liberty as such is not violated so long as restrictions on conduct are created pursuant to legitimate law-making processes.

It is worth fleshing out all the implications of Rawls’s differentiation of liberty into basic liberties, non-basic liberties, and liberty as such. First, not all constitutional rights qualify as Rawlsian basic liberties; those that do not would likely count as non-basic

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101. *Id.* at 291.

102. *Id.* Rawls claims this list would be selected by people in the original position, who use a combination of inductive bottom-up reasoning (consulting the history of democratic polities for guidance in identifying the most important liberties) and top-down deductive reasoning. *See id.* at 292-93.

103. *Id.* at 294.

104. *Id.* (emphasis added).

105. *Id.* at 294-95.

106. *Id.* at 291-92.

107. *Id.* at 363. Rawls is less clear as to what circumstances justify restrictions of nonbasic liberties. *See id.* at 363-68.

108. *Id.* at 291-92.

liberties.<sup>109</sup> Because Rawls's priority rule does not apply to non-basic liberties, determining what rights are basic liberties is very important in an internal Rawlsian analysis. After all, the priority rule amounts to Rights Absolutism vis-à-vis countervailing interests that do not rise to the level of a basic liberty. Rawls hence departs considerably from contemporary U.S. practice, which permits the regulation of rights that qualify as basic liberties to achieve compelling—but subconstitutional—ends.<sup>110</sup>

Rawls's priority rule does not mean, however, that basic liberties are absolute. They may be restricted for two reasons. First, the basic liberties are "*self-limiting*."<sup>111</sup> "[T]he requirement that the basic liberties are to be the same for everyone implies that we can obtain a greater liberty for ourselves only if the same greater liberty is granted to others."<sup>112</sup> For instance, it is implausible to understand freedom of speech as including an "unimpeded access to public places and to the free use of social resources to express our political views" because extending this to everyone would be "so unworkable and socially divisive that [it] would actually greatly reduce the effective scope of freedom of speech."<sup>113</sup> Second, Rawls believes there can be conflicts *among* the basic liberties.<sup>114</sup> "Since the basic liberties may be limited when they clash with one another, none of these liberties is absolute."<sup>115</sup>

In short, Rawls provides a hybrid of Rights Absolutism and Rights Non-Absolutism, in which (1) basic liberties are absolute vis-à-vis interests that do not themselves rise to the level of a basic

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109. It is an important question as to whether the Constitution omits, or lacks the resources to have included, any of the liberties Rawls identifies as basic liberties. For further discussion, see *infra* text accompanying notes 141-51 (discussing Rawls's notion of the fair values of the political liberties, and what I have called the constitutional principle of republican legitimacy).

110. Rawls's approach might also diverge from U.S. practice in another important way: American doctrine might give Rawlsian-type priority to rights beyond those Rawls would understand to count as basic liberties. Whether this is so is an interesting question that lies beyond the scope of this Article.

111. RAWLS, *supra* note 100, at 341 (emphasis added).

112. *Id.*

113. *Id.*

114. See JOHN RAWLS, JUSTICE AS FAIRNESS 104 (Erin Kelly ed., 2d rev. ed. 2001) ("[Basic] liberties may conflict in particular cases.").

115. RAWLS, *supra* note 100, at 295.

liberty, but are not absolute insofar as (2) basic liberties are self-limiting, and (3) one basic liberty can conflict with another.

In light of this Article's earlier critique of Rights Absolutism, a question naturally arises: Does Rawls's hybrid approach avoid the problems created by Rights Absolutism? Or is Rawls's (even only) partial Rights Absolutism overly restrictive? The question is best answered by concretely considering how Rawls's approach operates, and then normatively evaluating the results. Such a bottom-up check on the soundness of Rawls's theoretical framework not only is sensible in its own right, but is called for by Rawlsian analysis. As Rawls himself states, "we can, of course, check the priority of liberty by looking for counterexamples, and consider whether, on due reflection, the resulting priority judgment can be endorsed.... [I]f careful search uncovers no counter-cases, the priority of liberty would be so far perfectly reasonable."<sup>116</sup>

In what follows, I will suggest that there indeed are counterexamples that show the absolute priority of basic liberty is not perfectly reasonable, and hence should be reworked. Carefully working through Rawls's approach will still prove helpful to our goal of answering the Sufficiency Question.

## *2. Conflicts, and Rights Non-Absolutism, Among the Basic Liberties*

To understand Rawls's approach, it is best to first consider how he addresses conflicts between basic liberties. Rawls uses two very helpful master metaphors: the basic liberties are a "family," and the goal is to establish a "scheme" of basic liberties.<sup>117</sup> Focusing on only one basic liberty at a time is problematic, Rawls tells us, because doing so "is to fail to see a constitution as a whole and to fail to

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116. RAWLS, *supra* note 114, at 105-06. This shuttling back and forth from abstract to the concrete, refining each until the theoretical generates concrete results that accord with reasonableness, is an example of the methodology that Rawls famously dubs reflective equilibrium. See generally Thomas Nagel, *Listening to Reason*, 61 N.Y. REV. BOOKS, Oct. 9, 2014, at 48-49.

117. RAWLS, *supra* note 100, at 357 ("[T]he basic liberties constitute a family, and ... it is this family that has priority and not any single liberty by itself, even if, practically speaking, one or more of the basic liberties may be absolute under certain conditions."); see also *id.* at 358 ("[T]he mutual adjustment of the basic liberties is justified on grounds allowed by the priority of these liberties as a family, no one of which is in itself absolute.").

recognize how its provisions are to be taken together in specifying a just political procedure as an essential part of a fully adequate scheme of basic liberties.”<sup>118</sup> For these reasons, the basic liberties “need to be adjusted to one another and cannot be specified individually.”<sup>119</sup>

It is worth pausing to unpack two features of Rawls’s position before proceeding further. First, it presumes that there are multiple basic liberties—that they are not all reducible to a single value.<sup>120</sup> Rawls thus stands squarely with Berlin and, it would seem, against Dworkin.<sup>121</sup> Second, Rawls instructs that it is vital to think holistically about the basic liberties. The goal is to identify a *scheme of liberties*. And a scheme, by its nature, is constituted by the interrelationship among its components.

Rawls provides substantial additional guidance regarding construction of the scheme of basic liberties. “[T]he basic liberties constitute a family, the members of which have to be adjusted to one another to guarantee the *central range of these liberties* in the *two fundamental cases*.”<sup>122</sup> Rawls does not formally define what he means by a liberty’s “central range,” but the notion of a central range seems relatively straightforward (even if its application may not be). For instance, Rawls states that regulations that do not “restrict the content of political speech ... may be consistent with its central role.”<sup>123</sup> The concept of a central range hence requires specification of a basic liberty’s foundational or animating purpose, which typically will not be a function solely, or even significantly, of interpreting the words in the Constitution that name the liberty.

Rawls has a very specific definition of the “two fundamental cases.” The list of basic liberties is generated by asking what are the “background institutional conditions necessary for the development and the full and informed exercise of the two moral powers,”<sup>124</sup> by which he means the capacities to formulate a conception of the good

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118. *Id.* at 362.

119. *Id.* at 357.

120. See DWORKIN, JFH, *supra* note 37, at 364-68.

121. See *infra* text accompanying note 58.

122. RAWLS, *supra* note 100, at 358 (emphasis added).

123. *Id.*

124. *Id.* at 309.

and a sense of justice. The two fundamental cases are the specific contexts in which the two moral powers are “exercised”<sup>125</sup>:

The first of these cases is connected with the capacity for a sense of justice and concerns the application of the principles of justice to the basic structure of society and its social policies.... The second fundamental case is connected with the capacity for a conception of the good and concerns the application of the principles of deliberative reason in guiding our conduct over a complete life.<sup>126</sup>

In other words, the fundamental cases are drawn on to determine the “significance of [each] liberty,”<sup>127</sup> for the purpose of making adjustments to each liberty that ultimately result in what Rawls calls a “fully adequate scheme” of liberties.<sup>128</sup> The adjustments that result from this process, Rawls plausibly contends, are “markedly different from a general balancing of interests which permits considerations of all kinds—political, economic, and social—to restrict these liberties, even regarding their content, when the advantages gained or injuries avoided are thought to be great enough.”<sup>129</sup>

We are now in a position to work through two examples: subversive advocacy and campaign regulation. Rawls believed political speech to be part of the central range of speech, and thought subversive advocacy to fall within the domain of political speech.<sup>130</sup> Yet Rawls concluded that government may ban subversive advocacy under certain circumstances<sup>131</sup>—if, and only if, such advocacy is directed to and likely to incite imminent and unlawful use of force.<sup>132</sup>

125. *Id.* at 334.

126. *Id.* at 332.

127. *Id.* at 332-33.

128. *Id.* at 359. Rawls explicitly distinguishes the notion of a “fully adequate scheme” of liberties, which he endorses, with a scheme that aims to maximize the liberties, which he rejects. *See id.* at 291 (rejecting the aim of generating “the most extensive total system” of liberties); *see also id.* at 331-34 (explaining why).

129. *Id.* at 358-59.

130. *Id.* at 346 (“[S]ubversive advocacy is always part of a more comprehensive political view.”). Rawls endorses Kalven’s view on this point. *See id.* This hypothesis as to freedom of speech’s central range of application exemplifies the point made above that ascertaining the central range of application calls on more than just a interpretation of the words that name the liberty in the written Constitution. *See supra* text accompanying notes 120-26.

131. RAWLS, *supra* note 100, at 348.

132. *Id.* Rawls adds the caveat that his analysis presumes “the free public use of our reason

Why is this restriction on a basic liberty permissible? The answer is that an unrestricted right to subversive advocacy may conflict with other basic liberties<sup>133</sup>: subversive advocacy could threaten “the loss of freedom of thought itself, or of other basic liberties, including ... the political liberties.”<sup>134</sup>

Interestingly, Rawls thought the conditions justifying prohibitions of subversive advocacy are unlikely to ever arise in a well-governed democratic society.<sup>135</sup> Only a “constitutional crisis of the requisite kind,” when “free political institutions cannot effectively operate or take the required measures to preserve themselves,” could justify restrictions of subversive advocacy.<sup>136</sup> By contrast, “an emergency in which there is a present or foreseeable threat of serious injury, political, economic, and moral, *or even of the destruction of the state*” would not justify restrictions on subversive advocacy.<sup>137</sup> Rawls thought the conditions justifying restrictions on political speech never have arisen in the entire history of the United States,<sup>138</sup> so as a practical matter “the free public use of our reason in questions of political and social justice would seem to be absolute.”<sup>139</sup> In other words, as regards restrictions on subversive advocacy, Rawls may take a more absolutist approach to free speech than Dworkin, for whom restrictions may be permissible when “the survival of a state is in question.”<sup>140</sup>

But Rawls was no absolutist when it came to political speech. Of particular relevance to *McCutcheon*, Rawls thought substantial

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in all matters that concern the justice of the basic structure and its social policies.” *Id.* Rawls is critical of the Supreme Court’s decisions in *Gitlow v. New York*, 268 U.S. 652 (1925), *Schenck v. United States*, 249 U.S. 47 (1919), and also of Brandeis’s concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927). See RAWLS, *supra* note 100, at 347-49.

133. See *id.* at 356 (explaining that a basic liberty may “be restricted in [its] content (as opposed to being regulated in ways consistent with maintaining a fully adequate scheme) only if this is necessary to prevent a greater and more significant loss, either directly or indirectly, to these liberties”).

134. *Id.*

135. *Id.* at 355.

136. *Id.* at 354.

137. *Id.* (emphasis added).

138. See *id.* at 355 (“Never in our history has there been a time when free political speech, and in particular subversive advocacy, could be restricted or suppressed.”).

139. *Id.* Even so, Rawls insists that “the notion of a constitutional crisis of this kind is an important part of an account of free political speech.” *Id.* at 356.

140. DWORKIN, JFH, *supra* note 37, at 473 n.1.



limits on campaign contributions were permissible.<sup>141</sup> Rawls presumed that monetary contributions to candidates counted as political speech.<sup>142</sup> But he concluded that contribution restrictions were permissible—indeed necessary—because their absence endangered another basic liberty: the “*fair value* of the equal political liberties.”<sup>143</sup> By “fair value,” Rawls meant that “the *worth* of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions.”<sup>144</sup> The fair value of the political liberties encompasses “equalizing the relative ability of citizens to affect the outcome of elections,” making it “necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage.”<sup>145</sup> Rawls believed, it should be stressed, that this “fair value” requirement applied to “the political liberties, and only these liberties.”<sup>146</sup>

Thus under Rawls’s approach, campaign finance regulation presents a conflict between basic liberties—between an unfettered right to fund candidates under free speech, on one hand, and the need to “equaliz[e] the relative ability of citizens to affect the outcome of elections” that flows from the fair value of the political liberties, on the other.<sup>147</sup> Because there is a conflict between two basic liberties, it is impossible to treat both absolutely. This conflict leaves two options: one liberty could be absolute and the other

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141. *See id.* at 357-58.

142. *See id.*

143. RAWLS, *supra* note 100, at 327 (emphasis added).

144. *Id.* (emphasis added). Rawls explicitly rejects language from *Buckley v. Valeo*, 424 U.S. 1 (1976), that featured prominently in both *Citizens United* and *McCutcheon*. RAWLS, *supra* note 100, at 360-63. Rawls sharply criticizes *Buckley*’s assertion that “[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” *Id.* at 360 (quoting *Buckley*, 424 U.S. at 48-49).

145. *Id.* at 360. Rawls distinguishes this equalizing interest from anti-corruption, and argues that it “is more fundamental than avoiding corruption and the appearance of corruption” because “without the public recognition that background justice is maintained, citizens tend to become resentful, cynical, and apathetic.” *Id.* at 363. For a similar approach, see Rosen, *supra* note 90, at 404-08, 443-48.

146. RAWLS, *supra* note 100, at 327.

147. *Id.* at 360.

limited, or both could be limited. In choosing between the two, Rawls says that basic liberties “can be restricted in their content ... only if this is necessary to prevent *a greater and more significant loss, either directly or indirectly, to [other basic] liberties.*”<sup>148</sup> If a particular context demands that both liberties are to be adjusted—what Rawls likely thought to be the ordinary circumstance—then each liberty must be adjusted so as to guarantee the central range of each.<sup>149</sup> Applied to campaign finance regulations, Rawls argues that such restrictions are necessary to protect the fair value of the political liberties.<sup>150</sup> They can simultaneously secure “the central role of free political speech and press as a basic liberty provided that the following three conditions hold”: (1) “there are no restrictions on the content of speech,” (2) the restrictions do “not impose any undue burdens on the various political groups in society and must affect them all in an equitable manner,” and (3) “considerably less restrictive and equally effective alternatives are [neither] known [nor] available.”<sup>151</sup>

### *3. Does Rawls’s Hybrid Overcome the Deficiencies of Rights Absolutism?*

Rawls’s understandings of self-limitations and conflict among basic liberties allow for substantial regulations of the basic liberties, thereby moving his framework out of the realm of pure Rights Absolutism. Even so, basic liberties are substantially protected from restriction. For that reason, much turns on what qualifies as a basic liberty. Though Rawls provides the “list” of liberties mentioned above,<sup>152</sup> Frank Michelman persuasively argues that “liberty of conscience,” one of Rawls’s basic liberties, operates as an “umbrella clause,” akin to “due-process liberty” in American constitutional

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148. *Id.* at 356 (emphasis added). Although Rawls’s formulation allows for the conclusion that a particular basic liberty should be absolute (i.e., unrestricted) in a particular context on the ground that the cost of a restriction exceeds the loss incurred to the other basic liberties in the absence of the restriction, any such determination would require a difficult comparison of incommensurable costs.

149. “[T]his kind of speech falls under the basic liberties, and while these liberties are not absolute, they can be restricted in their content.” *Id.* at 356.

150. *Id.* at 357.

151. *See id.* at 357-58.

152. *See supra* text accompanying note 104.

practice, that encompasses some basic liberties beyond those Rawls explicitly enumerates.<sup>153</sup> How expansive this—or any other—umbrella liberty might be, and the scope accorded to the other basic liberties, are of crucial importance to determining how Rawls’s system operates in practice. For example, is national security encompassed within the basic liberty of integrity of the person?<sup>154</sup> If so, then other basic liberties can be limited for its sake. More generally, as the list of basic liberties expands, the possibility of conflict between basic liberties increases, with the result that each basic liberty becomes increasingly susceptible to limitation.<sup>155</sup>

But even if an umbrella clause were to expand the basic liberties beyond those Rawls enumerated, and if one or several basic liberties were construed broadly, it is unlikely that all constitutional rights would be counted as a basic liberty. The question accordingly remains whether Rawls’s priority rule—which accounts for the way in which his system retains an absolutist component—is normatively defensible. My argument here is that even Rawls’s limited form of Rights Absolutism is problematic. And my critique proceeds via the very methodology Rawls invites, shown above, of identifying counterexamples that reveal that giving a basic liberty absolute priority is not “perfectly reasonable.”<sup>156</sup>

Consider the Rawlsian basic liberty of liberty of conscience. It encompasses, though is not exhausted by, freedom of religion.<sup>157</sup> Furthermore, liberty of conscience is not limited to belief, but necessarily extends to conduct.<sup>158</sup> The basic liberties “are the background

153. See Frank I. Michelman, *The Priority of Liberty: Rawls and “Tiers of Scrutiny,”* in *RAWLS’S POLITICAL LIBERALISM* (Thom Brooks & Martha Nussbaum eds., Columbia Univ. Press) (forthcoming 2015).

154. Rawls certainly does not seem to think so. Recall his conclusion that only a constitutional crisis of the right kind, and not merely the threat of the state’s destruction (which certainly could be expected to put some people’s lives in danger), can justify restrictions on subversive advocacy. See *supra* text accompanying notes 136-37. Nevertheless, Rawls’s view as to the specific contents of the basic liberties may well be the first word, but should not count as the last word, on the subject.

155. I shall not dig further here into this important and interesting question of what rights count as a basic liberty for two reasons: because freedom of speech most certainly does, and because this Article is primarily directed to the Sufficiency Question vis-à-vis whatever is identified as (what Rawls calls) a basic liberty.

156. See *supra* note 119 and accompanying text.

157. See Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*, 2014 U. ILL. L. REV. 737, 768-69.

158. See RAWLS, *supra* note 100, at 311 (noting that liberty of conscience embraces both

institutional conditions necessary for the development and the full and informed exercise of the two moral powers,”<sup>159</sup> and the second moral power is the capacity to formulate a conception of the good,<sup>160</sup> which includes the “capacity to ... *rationally ... pursue a determinate conception of the good.*”<sup>161</sup>

Now, it is true that Rawls’s framework easily explains why the liberty to live in accordance with one’s religious convictions cannot be absolute. For example, because a devout and sincere modern Abraham’s religious liberty to sacrifice his first-born son<sup>162</sup> would conflict with the child’s basic “liberty and integrity ... of the person,”<sup>163</sup> Rawls’s framework easily explains why the state’s murder laws can properly restrict Abraham’s liberty to offer his first-born son as a religious sacrifice.

But how would Rawls’s framework analyze the two following hypotheticals? First, consider the “Church of Humans First,” whose core doctrine understands the biblical verse to “subdue the earth”<sup>164</sup> as commanding its members to non-lethally mar all trees so as to indicate nature’s subservience to man. Second, imagine a survivalist religious sect that believed they had a religious obligation to build bunkers beneath Mount Rushmore, despite the fact that doing so would destroy that great national monument. My assumption is that readers would not think it perfectly reasonable for religious freedom to extend so far as to require that members of these two religious groups be permitted to act in accordance with these convictions, even if they were conscientiously held. But this conclusion cannot be justified under Rawls’s approach. Because limited attacks on the environment or destruction of a beloved sculpture cannot

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“belief and conduct”). For a similar conclusion, see Michelman, *supra* note 153.

159. RAWLS, *supra* note 100, at 308.

160. *Id.* at 19.

161. *Id.* at 312 (emphasis added). The conclusion that the liberty of conscience encompasses a liberty to live in accordance with one’s religious convictions flows from basic Rawlsian premises. Because people behind the veil of ignorance in the original position, or at the second stage, would recognize that persons they may represent might believe that the freedom to develop and fully exercise a conception of the good requires that they be able to live in accordance with their religious convictions, it follows that liberty of conscience must include the liberty to live in accordance with one’s religious convictions.

162. *See Genesis* 22:1-18.

163. RAWLS, *supra* note 114, at 113.

164. *See Genesis* 1:28.

convincingly be said to threaten any of the basic liberties,<sup>165</sup> the only resource Rawls would have for explaining why religious freedom does not stretch so far is that the basic liberties are self-limiting. Yet self-limitation cannot support the conclusion that the Church of Humans First and the survivalist sect can be kept from acting in accordance with their convictions. After all, persons in the original position or the second stage understand that the society is populated by people having a plurality of comprehensive views—including many different religions, some of which have many adherents and others only a few.<sup>166</sup> Under basic Rawlsian logic, people in the original position, or at the second stage, would choose a basic structure for society that allows as wide a range of comprehensive views as possible to flourish because, as Rawls famously explains:

[T]he veil of ignorance implies that the parties do not know whether the beliefs espoused by the persons they represent is a majority or a minority view. They cannot take chances by permitting a lesser liberty of conscience to minority religions, say, on the possibility that those they represent espouse a majority or dominant religion .... If the parties were to gamble in this way, they would show that they did not take the religious, philosophical, or moral convictions of persons seriously,

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165. The only plausibly relevant basic liberty would be integrity of the person, but it surely is a stretch to suggest that the Church of Humans First's actions, or that of the survivalist sect, could be so characterized.

166. Under basic Rawlsian methodology, increasingly detailed institutional arrangements for specific polities are identified by partially lifting the veil of ignorance in three stages subsequent to the original position. *See* RAWLS, *supra* note 100, at 298 (“[T]he scheme of basic liberties is not specified in full detail by considerations available in the original position. It is enough that the general form and content of the basic liberties can be outlined and the grounds of their priority understood. The further specification of the liberties is left to the constitutional, legislative, and judicial stages.”). In the second stage, which Rawls calls the “constitutional convention,” parties “know the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on.” JOHN RAWLS, *A THEORY OF JUSTICE* 196-97 (1971). At the second stage, people thus know the size of their society's population, as well as the degree of its heterogeneity, including “a knowledge of the beliefs and interests that men in the system are liable to have and of the political tactics that they will find it rational to use given their circumstances.” *Id.* at 198. Though this is a significant amount of culture-specific and time-specific information, Rawls plausibly insists that “[p]rovided they have no information about particular individuals including themselves, the idea of the original position”—by which he means its ability to serve as a heuristic to aid designing society's institutions—“is not affected.” *Id.*

and, in effect, did not know what a religious, philosophical, or moral conviction was.<sup>167</sup>

It follows that the concept of self-limitation should be applied only to practices that a person in the original position or second stage would plausibly think could be desired by a large number of persons in her society, for three linked reasons: (1) self-limitations limit the scope of a basic liberty; (2) people in the original position or second stage would not unnecessarily limit their basic liberties; and (3) a self-limitation, by its own internal logic, only need be applied to activities that everyone (or a sufficiently large number of persons in society) might want to do, absent the self-limitation. For these reasons, it would be unnecessarily restrictive of liberty of conscience—and hence violative of basic Rawlsian principles—to apply self-limitation restrictions to what people in the original position or second stage know would not be widely embraced religious practices in their society. Accordingly, the category of self-limitation cannot justify the above-discussed limits on the Church of Humans First and the survivalist sect.

If, on due reflection, we cannot endorse the judgment that the Church of Humans First must be permitted to non-lethally slash trees or the survivalists to destroy Mount Rushmore, then we have located counterexamples showing it is not perfectly reasonable to give the basic liberties an absolute priority over the public good. This would mean that even Rawls's more limited form of Rights Absolutism is undesirable, and that Rawls's conception of priority as an "absolute weight" must be reworked.<sup>168</sup> More generally, these two hypotheticals constitute additional support for the thesis that rights should not absolutely trump in the context of Right-Interest Conflicts.

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167. RAWLS, *supra* note 100, at 311.

168. See RAWLS, *supra* note 114, at 105-06 ("[W]e can, of course, check the priority of liberty by looking for counterexamples, and consider whether, on due reflection, the resulting priority judgment can be endorsed... [I]f careful search uncovers no counter-cases, the priority of liberty would be so far perfectly reasonable."). I first suggested the need for reworking Rawls's grant of absoluteness to the basic liberties in the article *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*. See Rosen, *supra* note 157, at 792-93.

### *B. Pure Rights Non-Absolutism*

Having rejected Rights Absolutism and Rawls's hybrid of Rights Absolutism and Rights Non-Absolutism, the only remaining alternative is pure Rights Non-Absolutism. This Section identifies five accounts of rights under which rights are non-absolute. The first three are already present in the scholarly literature: (1) rights as shields, (2) rights as non-right devaluers, and (3) rights as principles. The last two are my own suggestions: (4) rights as the values that are the building blocks of political culture, and (5) rights as heuristics. These accounts more accurately describe our practice of rights than does Rights Absolutism. Each account has resources to explain how rights can be meaningful without being absolute, and has implications for the Sufficiency Question.

#### *1. Rights as Shields*

In a brief but important account two decades ago, Fred Schauer proposed an intriguing master metaphor for rights: that rights function as shields rather than Dworkinian trumps.<sup>169</sup> Just as shields provide substantial, but less than absolute, protection, rights have a "susceptibility to override by a sufficient aggregation of mere interests."<sup>170</sup> Schauer recognized that his account presumed a "psychology of decision-making" in which the decision-maker can

presumptively, but not conclusively, ignore some factor, or even the universe of factors but one. She thus remains open to the possibility that some factor might be relevant in a few extraordinary cases, but still does not take it into account unless it appears to a particularly great degree. This account recognizes the potential of override by factors presumptively but not conclusively excluded from the decision-making process and so recognizes that factors normally off the table and not under active consideration may on occasion present themselves with sufficient force that they cannot be avoided.<sup>171</sup>

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169. Schauer, *supra* note 33, at 429.

170. *Id.* at 431.

171. *Id.* at 432.

As a description of contemporary American practice, Schauer's account is a substantial improvement over Rights Absolutism. After all, the doctrinal tests of strict and intermediate scrutiny, which operationalize most of our country's most important rights, do not declare that rights never can be regulated, or that they can be regulated only in the face of emergencies or catastrophes, but instead allow regulation to achieve compelling or important governmental interests.<sup>172</sup>

But as good as it is, rights as shields understates the degree of rights-regulation found in contemporary American constitutional law: overrides in the form of regulation are found far more frequently than only "on occasion."<sup>173</sup> Also, it is questionable whether Schauer's hypothesis that rights presumptively exclude non-rights interests accurately captures how rights operate in practice.<sup>174</sup> Finally, rights as shields does not explain *why* rights properly operate this way, or provide much traction in answering the Sufficiency Question.<sup>175</sup>

## 2. *Rights as Devaluers of Non-Rights Considerations*

Schauer has recently proposed yet another way of understanding rights<sup>176</sup>: "Rights do not necessarily win against non-rights considerations .... [A]nd rights do not exclude non-rights considerations. Rather, rights *devalue non-rights considerations*, such that there need to be more of such considerations in order to prevail than would be

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172. See, e.g., Fallon, *supra* note 15, at 1273. Some other constitutional rights are operationalized by legal tests that permit regulation in the pursuit of merely rational governmental interests. Preventing discrimination on the basis of a disability is one example of this.

173. Schauer, *supra* note 33, at 432.

174. Indeed, Schauer seems to reject that position in his most recent theory of rights, where he states that "rights do not exclude non-rights considerations." See Frederick Schauer, *Proportionality and the Question of Weight*, in *PROPORTIONALITY AND THE RULE OF LAW* 173, 177 & n.18 (Grant Huscroft et al. eds., 2014).

175. This is not meant to be a criticism—for Schauer's brief account did not take up this question—but only an observation.

176. Schauer, *supra* note 174, at 177 & n.18. Though Schauer's chapter was directed to proportionality analysis, a form of constitutional analysis widespread in liberal democracies but not used in the United States, his description of the nature of rights carries over to the United States, as he himself understands. See, e.g., *id.* at 176-77, 181-84 (citing two cases from the United States to illustrate and substantiate his claims concerning rights).



the case were rights not part of the picture.”<sup>177</sup> In short, “rights are typically, even if not necessarily, non-absolute,” but still “are worth more than non-rights protected interests.”<sup>178</sup>

Schauer’s rights as devaluers approach has several advantages over rights as shields. Rights-limitations are not as unusual as the rights as shields metaphor suggests. Further, that rights demand a sizable aggregation of non-rights interests to justify their limitation more accurately describes the contemporary American practice of rights than the rights as shield’s notion that rights presumptively exclude non-rights interests. Finally, rights as devaluers has a very different normative valence from rights as shields. A shield’s inadequacy to stop incoming fire is always to be bemoaned, whereas the presence of a sufficient aggregation of devalued interests to justify a right’s limitation is, well, normatively justifiable.

But as good as it is, Schauer’s rights as devaluers account gets us only so far.<sup>179</sup> It does not explain *why* rights properly function that way, and accordingly does not on its own have the resources to answer Hume’s Law<sup>180</sup> and establish that Rights Absolutism is wrong. Rights as devaluers also does not provide traction for answering the Sufficiency Question.

### 3. *Rights as Principles*

A third master metaphor for rights consistent with Rights Non-Absolutism might be called rights as principles. Understanding it requires an appreciation of the distinction between rules and principles. “Rules are applicable in an all-or-nothing fashion,”<sup>181</sup> meaning that, “[i]f a rule is valid and if its conditions of application are fulfilled, it is definitively required that exactly what it demands be done.”<sup>182</sup> “Principles, by contrast, are norms that, when relevant, are not conclusive but must be considered in reaching a decision.

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177. *Id.* at 177 n.18 (emphasis added).

178. *Id.* at 177.

179. This is not intended to be a criticism of Schauer’s short chapter in which he introduced rights as devaluers, insofar as Schauer did not aim to provide a comprehensive account there.

180. See *supra* text accompanying note 97.

181. DWORKIN, TRS, *supra* note 34, at 24.

182. Robert Alexy, *Constitutional Rights and Proportionality*, 22 REVUS 51, 52 (2014); accord ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47-48 (Julian Rivers trans., Oxford Univ. Press 2002) (1986).

Decision-makers may balance them against other considerations, and sometimes the principle does not prevail.”<sup>183</sup> “Principles have a dimension that rules do not—the dimension of weight or importance.”<sup>184</sup> Furthermore, principles may “intersect” with competing principles, and “one who must resolve the conflict has to take into account the relative weight of each.”<sup>185</sup>

In other words, principles are non-absolute. While Dworkin’s argument in *TRS* that law contains principles and rules is now widely accepted as correct, his discussion there did not primarily concern constitutional law.<sup>186</sup> The question for our purposes is whether constitutional rights may be principles. Dworkin considered the possibility, without definitively deciding, that free speech might be a principle. He recognized that such a possibility conflicted with the views of Justice Black and Meiklejohn, “who claim that the first amendment is ‘an absolute,’” that is to say, “a rule.”<sup>187</sup> In what surely will be an immensely influential work, the prominent constitutional theorist Jack Balkin contends that many of our country’s most important rights—including free exercise, free speech, and equal protection—are principles.<sup>188</sup>

Once it is accepted that constitutional rights are principles rather than rules, it automatically follows that rights are non-absolute. Furthermore, “rights as principles” likely licenses more rights-restrictions than would Schauer’s metaphor of rights as shields, and perhaps his “non-rights devaluers” as well.

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183. JACK M. BALKIN, *LIVING ORIGINALISM* 349 n.12 (2011).

184. DWORKIN, *TRS*, *supra* note 34, at 26.

185. *Id.* “Alexy argues that principles are ‘optimization conditions’: when they apply, we must try to realize them as much as possible to the extent that they are not outweighed by other relevant considerations.” BALKIN, *supra* note 183, at 349 n.12 (quoting ALEXY, *supra* note 182, at 47-48). Alexy argues that principles are optimized by proportionality analysis, and that “balancing” is one of proportionality’s three components. *See* ALEXY, *supra* note 182, at 52.

186. *See* DWORKIN, *TRS*, *supra* note 34, at 22-45 (using the concept of principles to explain common law practice of courts).

187. *Id.* at 27. To be sure, there is an uneasy relationship between rights as trumps and rights as principles.

188. BALKIN, *supra* note 183, at 6-7.

*a. Are Rights Principles?*

The crucial first question therefore is whether the premise that rights are principles is correct. The answer turns on one's theory of constitutional interpretation. A literal interpretation of constitutional text on its own seems to counsel against the conclusion that rights generally are principles. After all, the First Amendment states "Congress *shall make no law* ... prohibiting the free exercise" of religion "or abridging the freedom of speech,"<sup>189</sup> and the Fourteenth that "[n]o state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws."<sup>190</sup> To paraphrase Justice Black and Alexander Meiklejohn, this constitutional language does not instruct that freedom of speech and equal protection are relevant but non-conclusive considerations,<sup>191</sup> and probably is most naturally read as calling for Rights Absolutism.<sup>192</sup>

German constitutional theorist Robert Alexy has taken a different tack, arguing on the basis of purely conceptual analysis that rights must be principles.<sup>193</sup> Alexy rejects the view that whether rights are principles depends on positive law, and hence can vary from polity to polity. He instead claims that constitutional rights, properly understood, necessarily—and hence universally—are principles. Even without endorsing his conceptualist methodology,<sup>194</sup> it is illuminating

189. U.S. CONST. amend. I (emphasis added).

190. U.S. CONST. amend. XIV (emphasis added).

191. See *supra* Part I.A.

192. It is not precisely clear how, consistent with his methodology, originalist Jack Balkin so readily concludes that free speech, free exercise, and equal protection are principles. For a similar observation, see, for example, Andrew Koppelman, *Why Jack Balkin Is Disgusting*, 27 CONST. COMMENT. 177, 177 (2010).

193. To be more precise, Alexy argues "there exists some kind of a necessary connection between constitutional rights and proportionality analysis." Alexy, *supra* note 182, at 51. The proposition in the above text is true because proportionality analysis itself, on Alexy's argument, presumes that rights are principles. See *id.* Indeed, Alexy himself speaks interchangeably of proportionality and "principles theory." *Id.* at 57.

194. I have my doubts as to conceptual legal reasoning. See generally Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586 (2010) (reviewing SCOTT J. SHAPIRO, LEGALITY (2011)). Also, Alexy's argument is not only that constitutional rights are necessarily principles, but that they necessarily must be interpreted by means of proportionality analysis. This suggests three possibilities about constitutional rights in the United States: (1) we utilize proportionality without realizing it, (2) our methodology of rights analysis is incorrect, or (3) we do not have true constitutional rights. If none of these hold vis-à-vis contemporary United

to observe the crux of his argument. And it is this: because constitutional rights are “abstract”—meaning that “[t]hey refer *simpliciter* to objects like freedom and equality, life and property, and free speech and protection of personality”—they “*inevitably collide with other human rights* and with collective goods like protection of the environment and public safety.”<sup>195</sup> On account of these inevitable conflicts, constitutional rights “stand in need of balancing,” and hence must be principles.<sup>196</sup>

Alexy’s explanation for why rights must be principles constitutes the core conceptual justification for Rights Non-Absolutism. It is, in fact, what I earlier referred to as the Conflict Thesis: no single right can be absolute because (1) there are multiple rights, which may conflict with one another (Inter-Rights Conflicts), and (2) a right may conflict with important countervailing interests that should not be categorically trumped (Right-Interests Conflicts).<sup>197</sup>

To these, a third type of conflict can be added: conflicts within a single right, what might be called Intra-Right Conflicts.<sup>198</sup> *McCutcheon* is one such example, at least according to Justice Breyer’s dissent. Justice Breyer argued that the challenged contribution limits presented a “potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process.” This conflict, says Justice Breyer “takes place within, not outside, the First Amendment’s boundaries.”<sup>199</sup>

As will be seen shortly, Alexy advances powerful arguments on behalf of the Conflicts Thesis. But this does not mean Alexy has proven his thesis that constitutional rights must, as a conceptual

States constitutional practice, then Alexy’s form of argument, or application of his argument, is incorrect. This is not the place to fully explore these possibilities.

195. Alexy, *supra* note 182, at 61 (emphasis added).

196. *Id.*

197. *See supra* Part I.C.1-2.

198. *But see* Jeremy Waldron, *Rights in Conflict*, 99 *ETHICS* 503, 513-14 (1989) (questioning whether there can be Intra-Right Conflicts).

199. *See* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting). Justice Breyer criticized the plurality for “misunderstand[ing] the constitutional importance of the interests at stake” and for not appreciating that “constitutional interests—indeed, First Amendment interests—lie on both sides of the legal equation.” *Id.* at 1466. Affirmative action may present another Intra-Right Conflict, insofar as it pits beneficiaries’ equal protection rights against the equal protection rights of those who claim to have lost a public contract or position in school.

matter, be principles. For it does not automatically follow that rights must be principles from the fact that rights are non-absolute. Another possibility, explored in the next subsection, is that rights are values. Below, I not only identify this possibility, but argue that rights are better conceptualized as values than as principles. It nevertheless will prove to be very useful to carefully study Alexy's discussion of principles, because both principles and values have "basically the same conceptual structure"<sup>200</sup> with regard to the nature of the decision-making process they call for. So let us now turn to Alexy's method for resolving conflicts in relation to principles.

### *b. Decision-Making with Principles*

The core claims in Alexy's book *A Theory of Constitutional Rights* are that (1) rights are principles; (2) principles are to be "optimized" pursuant to a balancing of interests;<sup>201</sup> and (3) balancing is not totally discretionary, but is rationally bounded.<sup>202</sup> As we shall see, Alexy's discussion of balancing is genuinely illuminating. And while Alexy successfully fends off Habermas's critique that balancing "permits anything because it lacks rational standards,"<sup>203</sup> Habermas's broadside in effect gives Alexy license to argue against a straw man: the crucial question is not whether balancing provides *any* constraint, but *how much* it imposes.<sup>204</sup> As we shall see, balancing

200. ALEXY, *supra* note 182, at 93.

201. I simplify a bit. Alexy argues that principles trigger a three-step decision-making process that he calls proportionality. *See id.* at 66-67; *see also id.* at 397 ("[T]he three sub-principles of the principle of proportionality define what the theory or principles understands by 'optimization.'"). Alexy acknowledges that "the practical relevance" of the first step, what he calls suitability, "is rather low." Alexy, *supra* note 182, at 53. The second step, necessity, is what American constitutional jurisprudence calls a means requirement. *See id.*; *see also* ALEXY, *supra* note 182, at 66 (arguing that the necessity requirement demands "the least intrusive means"). Balancing is the third step of the proportionality analysis, what American jurisprudence calls "ends" tests, and I dub the Sufficiency Question. Insofar as means tests (step two in Alexy's proportionality test) are logically dependent on ends tests (step three of the proportionality test) and strongly context dependent, it is not surprising that the bulk of Alexy's book focuses on balancing. And hence the reason for my simplification.

202. *See* ALEXY, *supra* note 182, at 100 (arguing against the position that balancing is not "a method subject to rational control"); *id.* at 107 ("The Law of Balancing tells us what it is that has to be rationally justified. So it does not say nothing and it is not a null formula."); *id.* at 388-422.

203. *Id.* at 405 (discussing Habermas's critique that balancing "lacks rational standards").

204. Schauer makes a similar critique. *See* Frederick Schauer, *Balancing, Subsumption,*

imposes only limited constraints, and this has many important implications.

Alexy believes that principles by their nature necessitate balancing,<sup>205</sup> so to understand his notion of balancing we first must dig deeper into his understanding of principles. According to Alexy, constitutional rights are principles, and

[p]rinciples are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules.<sup>206</sup>

“Principles represent reasons which can be displaced by other reasons,”<sup>207</sup> and there are no a priori restrictions on what can count as a countervailing reason. This means that the principles that are constitutional rights can be displaced by reasons that are not of constitutional status.<sup>208</sup> In short, principles “are not *definitive* but only *prima facie* requirements.”<sup>209</sup> It follows that constitutional rights are not absolute vis-à-vis either competing constitutional or subconstitutional reasons. In this Article’s language, Alexy embraces Rights Non-Absolutism.

When there are competing principles, decisions are to be taken pursuant to the “Law of Balancing,” which provides that “[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.”<sup>210</sup> Interestingly,<sup>211</sup> Alexy’s Law of Balancing shares two features with Rawls’s method for resolving conflicts among basic

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and the Constraining Role of Legal Text, 4 LAW & ETHICS HUM. RTS. 34, 36-37 (2010).

205. See ALEXY, *supra* note 182, at 66-67.

206. *Id.* at 47-48 (footnotes omitted).

207. *Id.* at 57.

208. See *id.* at 388 (acknowledging Habermas’s critique of this very point); see also *id.* at 398 (discussing competing “principles” of freedom of profession—a constitutional right—and consumer protection, which is not a constitutional right).

209. *Id.* at 57.

210. *Id.* at 102, 401.

211. More than this, that two theorists’ very different approaches ultimately bring them to similar conclusions in itself may constitute additional evidence of their correctness.

liberties.<sup>212</sup> First, like Rawls, Alexy's approach calls for holistic reasoning as to the relevant competing considerations. The decision-maker cannot focus on only one constitutional right, but must take into account the principle emerging from the right and all counter-vailing principles.<sup>213</sup> Second, Alexy's approach, like Rawls's approach, will seldom if ever allow one principle to be wholly trumped. This is because the Law of Balancing permits increasing degrees of detriment to one principle only if there are even larger benefits to the other, and the law of diminishing marginal utility means this almost never will permit one principle to be fully displaced.<sup>214</sup>

Alexy divides the Law of Balancing into "three stages."<sup>215</sup> The first "involves establishing the degree of non-satisfaction of, or detriment to, the first principle."<sup>216</sup> The second stage establishes "the importance of satisfying the competing principle."<sup>217</sup> The third stage "establishes whether the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first."<sup>218</sup> In short, balancing requires judgments regarding the relative degrees of importance of each principle, and the intensity of interference with each principle that is generated by the activity in question.

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212. It is vital to observe a crucial difference between Alexy and Rawls. Alexy balances constitutional rights against competing constitutional and subconstitutional interests, see ALEXY, *supra* note 182, at 388-89. In comparison, Rawls's decision-making process applies only to conflicts among basic liberties. See RAWLS, *supra* note 100, at 295. That, of course, is another way of saying that Rawls adopts Rights Non-Absolutism only as among fellow basic liberties; as we saw, Rawls is an absolutist (that is, he adopts Rights Absolutism) in respect to basic liberties that run up against both non-constitutional interests and constitutional rights that count as non-basic liberties. See *supra* Part II.A. Put differently, the domain of interests to which Alexy's balancing process applies is considerably larger than Rawls's interests.

213. See ALEXY, *supra* note 182, at 102 ("The weight of principles can never be determined independently or absolutely, but that one can only ever speak of relative weight.").

214. See *id.* at 102-05. The differences between Rawls and Alexy nonetheless are profound because of the different domains to which each applies his methodology. Rawls applies this method only to conflicts among basic liberties, with the result that basic liberties can wholly displace interests grounded in non-basic liberty or liberty as such. Alexy, by contrast, allows subconstitutional reasons to count as principles that must be weighed against the principles that are grounded in constitutional rights. See ALEXY, *supra* note 182, at 102-05.

215. See ALEXY, *supra* note 182, at 401.

216. *Id.*

217. *Id.*

218. *Id.*

To better comprehend Alexy's views, it is useful to clarify what balancing does *not* mean. Balancing does *not* presume a cardinal ranking of the competing principles; for instance, a determination that free speech is worth eight units and due process only five units.<sup>219</sup> Nor does balancing presume an ordinal ranking of all principles; for example, a determination that free speech is trans-substantively more weighty than due process. As Alexy explains, "an abstract order of constitutional values, whether cardinal or ordinal, is unacceptable" because one value cannot take precedence over another in all circumstances.<sup>220</sup> An "abstract order of constitutional values"—in other words, an a priori ordering of the significance of each value—is unacceptable because it would mean that "the most trivial form of protection for privacy would justify the most serious breaches of press freedom," leading to a "tyranny of values."<sup>221</sup> Rawls, of course, disagrees: Rawlsian basic liberties take ordinal precedence over both non-basic liberties and liberty as such.<sup>222</sup>

According to Alexy, the impossibility of an a priori ranking of principles—and hence of an a priori ranking of constitutional rights—does not mean it is not possible to rationally determine what to do when one principle collides with another. What it *does* mean is that all determinations of what is to be done necessarily must take account of the factual particulars presented by the actual circumstance.<sup>223</sup> In relation to those factual particulars, Alexy believes there can be correct orderings of the competing principles.<sup>224</sup>

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219. *See id.* at 99 ("[T]he idea of a ranked order of values on a cardinal scale collapses at the problems of the metrication of the weights and intensity of realization of values or principles.... In general we can say that an order of values or principles which determines constitutional adjudication in a way that is intersubjectively binding [meaning that all rational people would have to accept] does not exist." (footnotes omitted)).

220. *Id.* at 97.

221. *Id.* at 97-98. Alexy notes that the phrase "tyranny of values" comes from noted political theorist Carl Schmitt, though he neglects to mention that Schmitt was an unrepentant Nazi.

222. *See supra* notes 103-15 and accompanying text.

223. *See ALEXY, supra* note 182, at 54 (endorsing a "Law of Competing Principles," which "reflects the character of principles as optimization requirements between which there is, first, no relation of absolute precedence, and which concern, secondly, acts and situations which are not quantifiable").

224. Alexy does not believe, however, that there is always one objectively correct answer in every case, just in some cases. *See id.* at 401-02. I further describe and critique Alexy's view later in this Article.



But because facts matter to the correct determination of which principle wins out, the *other* principle may properly prevail with only a slight change of facts:

If two principles compete ... then one of the principles must be outweighed. This means neither that the outweighed principle is invalid nor that it has to have an exception build into it. On the contrary, the outweighed principle may itself outweigh the other principle in certain circumstances. In other circumstances the question of precedence may have to be reversed. This is what is meant when it is said that *principles have different weights in different cases* and that the more important principle on the facts of the case takes precedence.<sup>225</sup>

Responding to Habermas's critique, Alexy argues that although the weight of each principle to be balanced cannot be determined a priori—but instead is fact dependent and accordingly varies depending on the particulars of each situation—it is wrong to conclude that balancing “permits anything.”<sup>226</sup> Habermas's critique that balancing is *wholly* arbitrary surely is overly broad, so defeating it is not difficult; one need only establish the relatively weak claim that balancing is not wholly arbitrary. To refute Habermas, Alexy discusses a constitutional challenge to a German law that required tobacco manufacturers to include health warnings on their products.<sup>227</sup> The companies argued that the warnings unconstitutionally interfered with their freedom of profession under article 12(1) of Germany's Basic Law.<sup>228</sup> Alexy argues that the constitutional challenge correctly failed because there were powerful (subconstitutional) reasons to include the warnings—protecting “people from health risks”—and the law imposed only a “minor interference” on the manufacturers' freedom of profession.<sup>229</sup> Alexy's general point that balancing does not “permit[] anything” must be correct, because it surely is true that some warnings requirements are so trivial that

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225. *Id.* at 50 (emphasis added).

226. *Id.* at 405.

227. *Id.* at 402.

228. *Id.*

229. *Id.*

they would have to be deemed permissible under a balancing methodology.<sup>230</sup>

Though balancing does not permit absolutely anything, a crucial question remains: how much constraint *does* balancing impose? On this, Alexy is less than clear. On the one hand, Alexy explicitly rejects the notion that “balancing leads in a rational way to one outcome in every case,”<sup>231</sup> because balancing’s component considerations “cannot be metricated [that is, quantified] in a way which leads to an intersubjectively binding calculation of the result.”<sup>232</sup> On the other hand, in response to Habermas’s critique, Alexy argues that “one outcome can be *rationally established* through the use of balancing, not in every case, *but in at least some cases.*”<sup>233</sup> But what about the *other* cases—probably the majority of instances—when one outcome *cannot* be rationally established?

Alexy does not explicitly answer this question, but we can—by building upon, though also partly rejecting, his analysis. Alexy is correct that balancing ultimately turns on judgments about “degrees of importance” and “intensity of interference” of the competing principles.<sup>234</sup> As to degrees of importance, Alexy writes, “In constitutional balancing, the question is not how important somebody thinks press freedom and national security are, but how important they *actually* are.”<sup>235</sup>

Alexy’s formulation suggests an objectively correct, perhaps universal, answer. But this seems wrong. Instead, the degree of importance of the various principles inevitably will be polity-specific. Most competing principles (such as press freedoms and national security) cannot be translated into a single meaningful scale—they cannot be “metricated,” in Alexy’s words—but instead are what philosophers call “incommensurable” considerations.<sup>236</sup> To explain,

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230. *Id.* at 405. To be clear, to say that Alexy is correct that balancing imposes some rational constraints is not the same thing as saying that the constitutional challenge should have been analyzed under a balancing methodology.

231. *Id.* at 401.

232. *Id.* at 105 (“Indifference curves illuminate the idea lying behind the Law of Balancing, but they do not offer a definitive decision-taking procedure.”).

233. *Id.* at 402 (emphasis added).

234. *Id.* at 401.

235. *Id.* at 103.

236. See Elijah Millgram, *Incommensurability and Practical Reasoning*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 151 (Ruth Chang ed., 1997) (focusing on individual decision-making under circumstances of incommensurability); Joseph Raz,

choosing between press freedom and national security is more akin to a choice between the incommensurable goods of apples and oranges than a choice between a one-dollar bill and a ten-dollar bill. That is, whereas all rational people would choose the ten-dollar bill because it is more valuable on the single scale of currency to which both pieces of parchment can be meaningfully translated, there is no such single meaningful, intersubjectively binding scale against which both apples and oranges can be measured. When competing values cannot be translated into a single intersubjectively binding meaningful scale, we cannot say that all persons would necessarily choose one option over another as a matter of rationality's demands.

But saying that rationality does not determine a decision does not mean that no predictable, determinate decision will be made. This is because rationality is not the only factor that may account for constrained, predictable decision-making. In a moment, I shall explain why this is so, but before doing that let us recognize three important implications this has for Alexy. If factors apart from rationality can constrain balancing, then Alexy's dogged focus on whether balancing is rational,<sup>237</sup> in his response to Habermas's critique that balancing is wholly ad hoc, is unnecessary, unfortunate, and distortive. Alexy's exclusive focus on rationality is unnecessary because rationality is not the only source of determinateness; unfortunate because by ignoring other constraining sources, Alexy does not provide a full response to Habermas's critique; and distortive insofar as it misdescribes the nature of the decision-making involved, and in so doing problematically narrows the scope of appropriate participants in the rendering of balancing decisions.

So what are the factors aside from rationality that can constrain balancing? The two judgments involved in balancing—degrees of importance of the competing principles and degrees of interference—require assessments of intensity. Though there cannot be

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*Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra*, at 110 (arguing that choice, not rationality, governs the selection among incommensurables); Charles Taylor, *Leading a Life*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra*, at 170, 183 (arguing that justified choice among incomparables can be made by analyzing how the competing goods fit within the "shape" of a person's life).

237. Alexy's obsession with rationality likely owes, at least in part, to his determined effort to respond to the lack of rationality criticisms of Habermas and others, and perhaps also is due to his philosophical proclivity.

intersubjectively binding intensity comparisons across incommensurable values as a matter of logic and rationality, psychologists have shown that people in the same “cultural milieu” can “intensity match” incommensurable values in ways that are “quite close” to one another.<sup>238</sup> This means that factors apart from rationality can lead to constrained decision-making concerning incommensurable values.

Interestingly, psychology’s findings fit well with philosophers’ consensus concerning incommensurability. Though logic does not impel the choice among incommensurable goods, people must make decisions among incommensurables all the time. Those decisions are not the result of cold logic, but neither are they random and unprincipled. Instead, deciding how to harmonize incommensurable commitments is a deeply subjective process that simultaneously expresses and helps to determine the nature of the decision-maker’s very character.<sup>239</sup> Just as an individual’s choices among incommensurables is a substantial determinant of who that individual is, a political community’s decisions among incommensurable principles goes far to expressing, and determining, its political culture. To the extent there is meaningful continuation of character (of both individuals and political communities) over time, there will be patterned, predictable harmonizations of competing commitments. The systematic harmonization patterns are not a result of logic, but a reflection of character’s temporal consistency.

This set of understandings gives rise to several important implications. First, the decision-making at balancing’s core does not primarily consist of logic and rationality, and so there is no reason to anticipate cross-polity convergence over time. Rather, we should not be surprised if there are enduring differences across countries in the degree of importance each attaches to principles, even if all countries concur that each of the principles is very important. Second, there may be a consensus within a single polity, at any point in time, as to the relative importance of its incommensurable political principles.<sup>240</sup> If so, balancing can generate determinate

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238. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 94 (2011). Intensity matching refers to translating two incommensurable goods onto a single scale, such that there can be consistent comparisons between the goods among a group of people.

239. See Millgram, *supra* note 236, at 168.

240. Indeed, the existence of such a core consensus is what indicates the existence of a

outcomes, or at least a bounded range of outcomes, within that political community.<sup>241</sup> And this has important institutional implications: whereas Alexy's preoccupation with rationality leads him to conclude that balancing is the domain of elite experts—judges and academics<sup>242</sup>—a far broader array of participants is appropriate if balancing involves intensely subjective judgments that reflect and constitute the character of the political community.

These points are nicely illustrated by Alexy's discussion of a satirical magazine's description of a paraplegic reserve officer as a "cripple."<sup>243</sup> A German court awarded the officer substantial damages, and this was upheld by Germany's Federal Constitutional Court.<sup>244</sup> Alexy applauds the decision, and uses it as an example of a case of balancing generating a "firm and clear" answer because of the "public humiliation and lack of respect" the magazine accorded the officer.<sup>245</sup> But would a U.S. court have come to the same conclusion? We can only speculate, because U.S. constitutional doctrine would not deploy a balancing test in this circumstance. But I am doubtful there would be so "firm and clear" an answer, even if a U.S. court used balancing because of the extraordinary importance this country attaches to free speech. Simply put, it is hard to imagine a contemporary U.S. court assessing damages against a satirical magazine for using a derogatory term to describe a military officer.<sup>246</sup>

#### *4. Rights as Values, the Building Blocks of Constitutional Culture*

Rather than Alexy's conceptualization of rights as principles, it may be more useful to understand rights as the values that are the

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meaningful political community, even if there are always some contestations.

241. This is yet another reason to reject Habermas's critique that balancing is "arbitrary."

242. See ALEXY, *supra* note 182, at 108 ("Through the balancing exercises undertaken by the judiciary and the consensus of proposed balancings of interests put forward by the academic community, over time a network of relatively concrete rules derived from constitutional rights provisions develops, which is an important foundation and a central element of legal doctrine.").

243. *Id.* at 403-04.

244. See *id.*

245. *Id.* at 404.

246. My argument here should not be understood as an endorsement of the present U.S. constitutional approach to hate speech.

building blocks of constitutional culture.<sup>247</sup> Much of Alexy's argument still would be applicable because principles and values have a similar conceptual structure for purposes of decision-making.<sup>248</sup> But the concept of values has several advantages over principles. To begin, the concept of values better signals the normative enterprise of hashing out what rights do and do not entail. And this naturally raises important institutional questions as to what societal actors appropriately participate.

Further, the notion that constitutional rights are values conceptually links constitutionalism to culture, insofar as values are crucial components of culture. Linking constitutionalism to culture sheds surprising light on many facets of constitutional practice. To dramatically compress an argument I have developed elsewhere, a host of insights concerning the operation and development of human cultures may be illuminating to constitutionalism.<sup>249</sup> For present purposes I shall identify two benefits of conceptualizing constitutionalism as a form of culture, both of which are connected to Rights Non-Absolutism.

*a. Adaptation and Growth*

Let us work with a simplified model that assumes a culture is best understood as comprising three components.<sup>250</sup> First, culture identifies a *set of values* to which its members are committed. For example, American constitutional culture determines that the Constitution (among other sources) identifies our political culture's foundational values. Second, culture is a function of the *salience* of each of these values in its members' consciousness. Salience

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247. My approach may share much with a German constitutional theorist from the Weimar era that Alexy mentions, Rudolf Smend, who thought the "substantive meaning of a Bill of Rights" lies in its attempt to create a "substantive set with a certain degree of closure, that is, a system of values or interests, or a cultural system." See ALEXY, *supra* note 182, at 93 (citation omitted).

248. See *id.* Alexy prefers the category of principles to values because principles concern "ought" whereas values concern the "good." See *id.* at 92-93. But those are the very reasons why constitutional rights are better conceptualized as being in the domain of values, for the reasons explained above in the text.

249. See Mark D. Rosen, *Beyond Interpretation: The "Cultural Approach" to Understanding Extra-Formal Change in Religious and Constitutional Law*, 2 J. LAW, RELIGION & STATE 200 (2013).

250. For a detailed defense of this model of culture, see generally *id.*

captures the fact that, as a descriptive matter, not all values chosen by a culture's authoritative value-identifying sources have equal prominence in the minds of the culture's members. For example, free speech has greater salience than the Contract Clause, which most Americans (including many lawyers) literally have never heard of. The third component is what a culture does when its values come into conflict—in other words, how a culture *harmonizes* its competing commitments. For example, a religious culture's commitments to peace might come into conflict with its commitments to proselytism or conquering its holy land. And free speech can conflict with the right to a fair trial,<sup>251</sup> or with dignity.<sup>252</sup>

In the context of constitutionalism, the third component (harmonization) presupposes Rights Non-Absolutism, and is determined by how the constitutional culture answers the Sufficiency Question. And how a culture answers the Sufficiency Question can affect the second component (salience) as well. For example, constitutional rights that can readily be limited by countervailing interests may recede from the legislature and public's minds, resulting in their having little or no salience.

Islam, Catholicism, United States constitutional law, and German constitutional law all constitute distinct cultures on this model of culture. The cultural model facilitates two related things: (1) the model accurately describes a culture at any point in time, and (2) the model recognizes how a culture may change over time. As to the first, describing any of these cultures, at any point in time, requires attentiveness to all of the model's three components. For example, President Bush's post-9/11 assertion that Koranic passages extolling peace establish that "Islam is peace" assessed Islamic culture by taking account only of component one. This is faulty reasoning, insofar as accurately describing contemporary Islamic culture also requires attentiveness to components two (peace's salience) and three (how peace is harmonized with conflicting Islamic values).<sup>253</sup> To provide another example, someone who today claimed that the core of U.S. constitutionalism is reflected in the

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251. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

252. See, e.g., ALEXY, *supra* note 182, at 403-04.

253. In fact, the understanding that culture is constituted by all three components suggests the possibility that there could be multiple Islamic cultures at any point in time. And this conclusion does not hold only for Islam.

Contract Clause, which provides that states may not impair the obligation of contracts, would be demonstrably wrong. Although the Contract Clause is part of the Constitution (component one), the Clause has low salience among the public and politicians (component two), and carries limited weight (component three) when it conflicts with countervailing subconstitutional values like pursuit of the common good.

From the fact that accurately describing a culture requires attentiveness to all three components, it follows that modulations of any one of the three can result in cultural change. For example, the Contract Clause had momentous influence in the nineteenth century—when it was the second most heavily litigated constitutional provision and was the subject of active debate when state legislators enacted statutes.<sup>254</sup> Conversely, one of today's most prominent constitutional commitments—free speech—had little salience or weight as recently as the early twentieth century, when states regularly banned speech thought to have bad effects on citizens.<sup>255</sup> To provide another example, Pope Francis's recent actions may be understood as an effort to reduce the salience presently accorded by the Church to sexual matters, and increase the salience of other Catholic values, such as humility and caring for the poor.<sup>256</sup>

Because answers to the Sufficiency Question directly affect component three (harmonization), and frequently will also affect component two (salience),<sup>257</sup> the Sufficiency Question is an important

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254. See Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 597-98 (1987).

255. See generally DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920* (1997).

256. See Laurie Goodstein, *Pope Says Church Is "Obsessed" with Gays, Abortion, Birth Control*, N.Y. TIMES, Sept. 20, 2013, at A1.

257. On the other hand, legislatures sometimes pay substantial attention to a constitutional right that is only lightly protected by judicial doctrine. For example, after the U.S. Supreme Court downgraded the judicial protection accorded to the free exercise of religion in *Employment Division v. Smith*, 494 U.S. 872 (1990), federal and state legislatures enacted laws designed to increase citizens' free exercise protections. Congress enacted the Religious Freedom Restoration Act (RFRA), which was overturned in *City of Boerne v. Flores*, 521 U.S. 507 (1997) insofar as it applied to states, and then enacted the Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc-1 to -5 (2012)). More than a dozen states have passed legislation that mirrors the federal act's restrictions of states in the RFRA that were declared beyond Congress' powers in *City of Boerne*. See generally Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).



determinant of constitutional culture. Though fully defending the proposition that modulations of salience and harmonization are normatively appropriate is beyond the scope of this Article, four observations are worth making. First, the sort of shifts in salience that I have described above may allow a culture to adapt to changing circumstances while retaining meaningful continuity with the past. Second, such modulations may permit a culture to continue to grow.<sup>258</sup> (Adaptation and growth are, of course, distinct concepts.) Third, if constitutional law is usefully understood as a form of culture, assessing the normativity of modulations of components two and three may be facilitated by cross-cultural analysis. For example, the widespread existence of such shifts across cultures may be evidence, within an empirically based epistemology, that salience and harmonization shifts are an inherent feature of culture, and perhaps of humanity. Fourth, even if everything stated in this paragraph to this point is correct, it does not follow that all modulations of components two and three are normatively legitimate. Determining what might be called the “range of permissibility” of modulations of salience and harmonization doubtless is a culture-specific enterprise.

*b. Constituting Public Culture*

A second benefit of conceptualizing constitutionalism as a form of culture is that such an approach suggests that rights should be understood not only (negatively) as limitations on government, but also (affirmatively) as constitutive parts of our political culture. Stephen Holmes’s distinction between regulative and constitutive rules is useful here:

[C]onstitutions may be usefully compared to the rules of a game and even to the rules of grammar. While *regulative* rules (for instance, “no smoking”) govern preexistent activities, *constitutive* rules (for instance, “bishops move diagonally”) make a practice possible for the first time.... Constitutions do not merely limit

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258. The concepts of “growth” and “development” presuppose a normative baseline against which salience and harmonization modulations can be determined to count as growth or development. I shall not be able to defend here the thesis that such shifts might so qualify, much less to define the normative baseline.

power; they can create and organize power as well as give it direction.... When a constituent assembly establishes a decision procedure, rather than restricting a preexistent will, it actually creates a framework in which the nation can for the first time, have a will.<sup>259</sup>

On this approach, we should think of rights as parts of the institutional structures created by the Constitution that “frame and constitute a type of decision-making procedure”<sup>260</sup> for generating law and, more generally, creating our country’s distinctive political culture. In this sense, there is a strong conceptual continuity between what is typically referred to as constitutional structure and constitutional rights because both help constitute a country’s political culture.<sup>261</sup>

Rights can play this constitutive function by helping to create a country’s political culture without being absolute. Indeed, the extent to which rights are non-absolute is one of the core determinants of a polity’s constitutional culture. For example, the fact that U.S. and German constitutional law both identify free speech as among their values<sup>262</sup> does not mean the two constitutional systems are identical. Though both constitutional systems permit regulations of speech, and hence treat free speech as a non-absolute, U.S. jurisprudence allows speech to be overridden by countervailing interests far less frequently than does Germany, which permits regulation of hate speech.<sup>263</sup> This is an illustration of the point made above that how a polity answers the Sufficiency Question is a central determinant of its political culture.

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259. JEREMY WALDRON, *LAW AND DISAGREEMENT* 275-76 (1999) (quoting STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 163-64 (1995)).

260. *See id.* at 277.

261. This is not to suggest that the distinction between constitutional structure and rights should be collapsed. For an explanation of this point, see Rosen, *supra* note 90, at 421-28.

262. *See* ERIC BARENDT, *FREEDOM OF SPEECH* 1-2 (2007).

263. For a discussion of hate speech legislation in other liberal democracies, see Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 *HARV. L. REV.* 1596, 1601-05 (2010).

### 5. Rights as Heuristics

Finally, rights may operate as what psychologists call “heuristics.”<sup>264</sup> A heuristic is a “simple procedure that helps find adequate, though often imperfect, answers to difficult questions.”<sup>265</sup> The psychologist’s claim is primarily descriptive: that the human mind in fact uses heuristics all the time. Heuristics may have been evolutionarily beneficial, facilitating quick yet reasonably accurate assessments. But even if heuristics have been (and still are) beneficial, they “sometimes lead to serious errors.”<sup>266</sup> Important recent work in psychology has been directed to classifying heuristics, recognizing the systematic errors to which they are susceptible, and considering ways that the “biases” that lead to errors can be corrected.<sup>267</sup>

In short, heuristics may be beneficial insofar as they generate helpful conclusions on the basis of simplified criteria, but they should not be treated as absolutes. Instead, sometimes the best decision should vary from what the heuristic indicates because heuristics sometimes point to wrong answers.<sup>268</sup> If rights function as heuristics, we accordingly would have an additional reason not to treat them as absolutes.

Rights may implicate two heuristics that psychologists have identified: anchoring effects and the availability heuristic. After explaining each, I will show why it is plausible to think that rights might trigger one or both.

The anchoring effect “occurs when people consider a particular value for an unknown quantity before estimating that quantity.”<sup>269</sup>

264. See KAHNEMAN, *supra* note 238, at 8-13 (explaining heuristics); cf. Cass R. Sunstein, *How Do We Know What’s Moral?*, N.Y. REV. BOOKS, Apr. 24, 2014, at 14 (suggesting that morality may be a heuristic).

265. See KAHNEMAN, *supra* note 238, at 98.

266. *Id.*

267. See generally *id.*

268. An important question is what role expertise plays in correcting the biases that lead to flawed answers. Kahneman recognizes that sometimes only experts can escape a heuristic’s biases. See *id.* at 101 (noting that “[o]nly visual artists and experienced photographers have developed the skill” necessary to escape the illusion created by the 3D heuristic). Lawyers and legislators perhaps can be analogized to visual artists and experienced photographers, insofar as lawyers and legislators seem to have a sense, not shared by the general public, that constitutional rights cannot be absolute.

269. *Id.* at 119. Anchoring effects are not limited to numbers. See *id.* at 128 (discussing the anchoring effects of initial plans).

Experimental psychology has shown that the estimates people subsequently offer “stay close to the number” that was suggested to them<sup>270</sup> (hence the metaphor of an “anchor”) for two reasons. First, the initial number has a “priming effect,” unconsciously triggering people to believe the number to be true.<sup>271</sup> Second, even if people consciously realize the initial number is incorrect, they tend to make “adjustments” from that number, and to stop adjusting when they first become uncertain, resulting in systematic underadjustment from the initial estimate.<sup>272</sup> Due to the priming and underadjustment effects, the initial number plays a substantial role in determining people’s ultimate estimates. In fact, anchoring effects are one of the “most reliable and robust results of experimental psychology.”<sup>273</sup>

The second heuristic that may be relevant to rights—the availability heuristic—refers to people’s tendency to estimate the frequency of a category by the ease with which people can retrieve specific examples of the category.<sup>274</sup> The greater ease with which instances come to mind, the more frequently people will estimate the category to occur. Relatedly, “the importance of an idea is often judged by the fluency ... with which that idea comes to mind.”<sup>275</sup>

How might the anchoring effect and availability heuristic be connected to rights? The difficult question that rights as heuristics help to answer is “what should be our governmental policy?” Rights simplify the decision-making process by isolating a subset of the

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270. *Id.* at 119.

271. *Id.* at 122; *see also id.* at 52-58 (discussing priming effects).

272. *See id.* at 120-22.

273. *Id.* at 119. Consider what happened when one group of people were asked whether the height of the tallest redwood tree was more or less than 1200 feet, and a second group was asked whether the tallest such tree was more or less than 180 feet. The group that received the high anchor gave a mean estimate of 844 feet, whereas the low anchor group provided a mean estimate of 282 feet—a difference of 562 feet. Psychologists have quantified the degree to which anchors affect ultimate estimates: on a scale in which 100 percent means people stick completely to the anchor and 0 percent means people ignore the initial estimate, the typical anchoring effect is 55 percent, as it was in the redwood example. *See id.* at 123-24. The anchoring index is measured by expressing the ratio of the differences between two estimates and the differences between the two anchors as a percentage. In the example above, the difference between the two estimates was 562 feet and the difference between the two anchors was 1020, so the anchoring index was 562/1020, or 55 percent. *Id.*

274. *See id.* at 129-30.

275. *See id.* at 142 (discussing what Cass Sunstein and Timur Kuran have called the availability cascade, and explaining why it is “an expanded notion” of the availability heuristic).

universe of normatively relevant considerations. Consider the issue at stake in *McCutcheon*. In deciding whether to enact campaign finance regulations, protecting speech may have emerged as an initial anchor.<sup>276</sup> Free speech may have had a priming effect, suggesting that “no regulation” is the correct approach and unconsciously pushing decision-makers away from limiting speech at all. Even if countervailing interests (such as securing the integrity of the electoral and legislative processes) led some decision-makers to consciously conclude that the free speech anchor’s initial estimate of “no regulation” was wrong, there may have been only modest adjustments from the initial anchor. Further, free speech is very well known, due in large part to the fact that it is a constitutional right, and for that reason may trigger the availability heuristic.<sup>277</sup> The fact that free speech readily comes to the minds of all decision-makers in the twenty-first century United States, and that it is a value to which all decision-makers necessarily are committed (unlike non-right interests, the importance of which may be open to debate among decision-makers) may enhance the importance decision-makers attach to free speech.

To say that a constitutional right may serve as an anchor or may trigger the availability heuristic is not to suggest that either of these two magnifying effects is normatively wrong. For example, only limited adjustments away from the free speech anchor of “no regulation” may be precisely what role the free speech right *should* play. In any event, this Article does not aim to establish how much of an adjustment is normatively correct, but to make the more modest point that if rights function as anchors or trigger the availability heuristic, then rights can play a real role in decision-making without being absolute.<sup>278</sup>

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276. Unlike the anchoring effects identified in most of the experiments, rights are not strictly quantitative. The concept of anchors nevertheless would seem to apply to matters that vary in intensity that cannot be objectively scaled insofar as people are able to intuitively scale intensities across diverse dimensions, and “your matches will be quite close to those of other people in your cultural milieu.” *See id.* at 92-94.

277. As discussed below, the bare fact that something is a constitutional right does not guarantee that it will have anchoring effects or trigger the availability heuristic.

278. Further, if rights engage one or more of these heuristics, then the fact that rights are non-absolute—that they can be limited to achieve subconstitutional interests—does not reduce rights to “mere interests.”

The notion that rights may serve as anchors has other interesting implications. For one, it suggests a reason for quibbling with Professor Schauer's metaphor of rights as devaluers of non-right interests: rights may not devalue non-right interests, but *enhance* rights-interests. The end result might be the same—it takes more non-rights interests to limit a rights-interest than it would take to limit a non-rights interest—but the notion of rights as interest-enhancers may better describe people's sense of what rights do, and may obviate the difficult question of why a right *devalues* a legitimate non-rights interests.

Second, rights can have an anchoring effect or trigger the availability heuristic only if a right actually comes to a person's mind. But not all rights do. As explained above, at any point in time, only a subset of the Constitution's rights are salient, and hence capable of engaging these two heuristics. For example, while the First Amendment's right to petition evidently played a substantial role in the minds of Congress and the public in our nation's first seventy-five years, it no longer does.<sup>279</sup> The same is true of the right to not have the obligation of one's contract impaired, under the Constitution's Contract Clause.<sup>280</sup> Likewise, if a constitutional right that ordinarily has strong salience is overlooked by Congress when it acts, the right will not have anchoring effects or trigger the availability heuristic. The role played by a right, in short, is not predetermined by its being ink on a parchment, but is a function of its presence in people's minds.<sup>281</sup>

### III. THE SUFFICIENCY QUESTION

Having explained the deficiencies of Rights Absolutism in Part I and explored multiple accounts of Rights Non-Absolutism in Part II, we now are set to return to this Article's central project of determining what answers satisfy the Sufficiency Question.

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279. *See generally* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE (2012).

280. *See supra* note 254 and accompanying text.

281. Finally, if rights do in fact trigger heuristics, the question remains whether the heuristics function well, or instead bias the conclusions and for that reason are in need of correction. Answering this obviously requires a normative baseline for the constitutional right against which the heuristic's operation can be measured, something beyond this Article's scope. Even so, it is crucial to recognize the need to address the question.

### A. *Intra-Right and Inter-Rights Conflicts*

The Sufficiency Question is most readily satisfied—that is to say, conditions justify a rights limitation under one of constitutional doctrines’ “ends” tests—when there is an intra-right or inter-rights conflict. After all, if a single right gives rise to conflicting commitments, or if two rights conflict, then at least one must be limited,<sup>282</sup> and so the circumstance must satisfy the Sufficiency Question.

This truism must be distinguished, however, from what might be called Sufficiency Simpliciter: the belief that an interest of constitutional dimension automatically satisfies the Sufficiency Question. It is easy to understand what gives rise to Sufficiency Simpliciter: if subconstitutional interests can be a compelling governmental interest, it may seem to follow *a fortiori* that a constitutional interest automatically qualifies as a compelling governmental interest. Justice Breyer’s dissent in *McCutcheon* appears to be an example of Sufficiency Simpliciter. Breyer argued the statutory provision at issue in *McCutcheon* presented an intra-right conflict—a conflict between “the need to permit contributions that pay for the diffusion of ideas” and “the need to limit payments in order to help maintain the integrity of the electoral process.”<sup>283</sup> From this, Breyer appears to assume that maintaining the integrity of the electoral process *ipso facto* satisfies the applicable ends test. And Breyer’s approach in *McCutcheon* tracks the operation of contemporary U.S. doctrine and, in my experience, the understanding shared by attorneys and scholars that a governmental interest that rises to a constitutional level automatically satisfies the Sufficiency Question.

Careful thought shows, however, that a countervailing constitutional interest need not automatically satisfy the Sufficiency Question. That Sufficiency Simpliciter is not axiomatic is most easily illustrated by Rawls’s framework. As we saw, Rawls believed a basic liberty could be limited if it clashed with another basic liberty, but not if it clashed with a non-basic liberty.<sup>284</sup> Since some constitutional rights qualify only as non-basic liberties, Rawls’s framework gives rise to a hierarchy of constitutional rights in which constitutional

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282. The only way to avoid this conclusion is to take a Dworkinian *JFH* approach and suggest that rights cannot conflict, which I have argued against. *See supra* Part I.C.

283. *See* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting).

284. *See supra* Part II.A.

rights derived from non-basic liberties cannot satisfy the Sufficiency Question vis-à-vis constitutional rights that arise from basic liberties.

It might be thought that Sufficiency Simpliciter at least holds true for an intra-right conflict, like the intra-First Amendment conflict Breyer identifies in his *McCutcheon* dissent. But even this softened inference is not necessarily true, as proven once again by Rawls. Rawls's concept of a liberty's "central range" of application<sup>285</sup> creates a hierarchy among different applications of a single liberty. It follows that an interest flowing from a liberty's non-central range of application should not override an interest that flows from that liberty's central range.

While Sufficiency Simpliciter does not hold within Rawls's hybrid framework (because basic liberties may not be limited for the sake of non-basic liberties), it might be posited that Sufficiency Simpliciter is necessarily true in a system of pure Rights Non-Absolutism. But even this more limited proposition is not self-evident, and in fact requires normative justification that to date has not been provided. Why? If a constitutional interest automatically counts as a compelling governmental interest<sup>286</sup> (as it seems to under current doctrine), then strict scrutiny permits regulations of constitutional right  $R_1$  so long as the government aims to achieve constitutional interest  $R_2$ , without ever analyzing the comparative importance of  $R_1$  and  $R_2$ . In other words, strict scrutiny utilizes a *unilateralist* analysis that, when determining the constitutionality of a governmental regulation that limits  $R_1$ , at no point asks courts to directly consider the permissibility of compromising  $R_1$  to achieve  $R_2$ .<sup>287</sup> But there is an alternative to such unilateralist analysis: a *multilateralist* analysis that directly considers the permissibility of benefitting  $R_2$  at the expense of  $R_1$ .<sup>288</sup> Rawls's framework sensitizes us to such

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285. See *supra* text accompanying notes 122-23.

286. The point made above in text is true not only of strict scrutiny, but all other means/ends constitutional tests, including intermediate scrutiny and the type of scrutiny actually used in *McCutcheon*.

287. For a discussion of unilateralism and multilateralism in the conflicts-of-law context, see Mark D. Rosen, *Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT'L L.J. 7, 14-16 (2010).

288. Another way to put it is that strict scrutiny at no point demands a judicial accounting of the costs to  $R_1$  of regulating to accomplish  $R_2$  as against the sum of the costs to  $R_2$  of not regulating and the savings of not having limited  $R_1$ .



a possibility, for he endorses a strict multilateralist approach that permits tradeoffs among only a subset of constitutional interests.<sup>289</sup> One can reject Rawls's predetermined hierarchy among constitutional rights without embracing unilateralism. For example, rather than the Rawlsian conclusion that  $R_1$  has strict priority over  $R_2$  in all circumstances, a methodology might undertake context-sensitive analysis that inquires whether the benefits to  $R_1$  justify the costs to  $R_2$ . Such a context-driven analysis is not only imaginable but, as explained above, basically describes Alexy's approach.<sup>290</sup>

Once one recognizes the possibility of a multilateralist analysis, a unilateralist doctrine (like Sufficiency Simpliciter) seems to be normatively suspect as applied to constitutional conflicts. After all, when a statute addresses a constitutional conflict, why should a court's assessment of the statute's constitutionality consider only one of the two constitutional interests?<sup>291</sup>

This is a powerful objection, but there is a plausible answer. Courts may not be institutionally competent to undertake a comparison of the costs and values of two constitutional rights because, as explained above, they typically are incommensurable goods. Legislatures and the executive, by contrast, may be more institutionally competent, and democratically appropriate, than courts to make such determinations.<sup>292</sup> Sufficiency Simpliciter's unilateralism thus may reflect courts' appropriate deference to the more political branches. Fully defending the merits of this proposition lies beyond

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289. To review, basic liberties can be limited only for the sake of other basic liberties, not for the sake of non-basic liberties. *See supra* Part II.A.

290. *See supra* Part II.B.3.b.

291. Against this, it might be insisted that strict scrutiny is not fairly characterized as being unilateralist since a court's decision to deploy strict scrutiny (and admittedly look only to  $R_2$  when analyzing if there is a compelling governmental interest) is preceded by the court's conclusion that the regulation implicates  $R_1$ . Thus, continues the objection, the court's analysis in fact has taken account of both  $R_1$  and  $R_2$ , and for that reason is not unilateralist. This objection is technically true, but does not address the substance of the critique of unilateralism. To see why, suppose that a governmental goal to achieve some constitutional end  $R_2$  automatically satisfies strict scrutiny's compelling governmental interest requirement. In effect, this would mean that limitations on  $R_1$  would be permissible without taking any comparative measure of the value of  $R_1$  in relation to  $R_2$ . And that, of course, is the type of unilateralist analysis that multilateralism criticizes.

292. Indeed, they do so all the time; legislating and budget writing are quintessential acts of harmonizing incommensurable commitments. *See generally* Rosen, *supra* note 287, at 18-25.

the scope of this Article.<sup>293</sup> But even if it is persuasive, its rationale would appear to apply only where the non-judicial institutions have undertaken a serious consideration of the relative costs. And this cannot be lightly assumed, particularly in our post-*Marbury* world in which the popular branches of government frequently, perhaps typically, treat responsible constitutional decision-making as the exclusive domain of the judiciary.<sup>294</sup>

The answer provided above could be applied to Justice Breyer's analysis in *McCutcheon*. If, and insofar as, the challenged contribution limitation reflected Congress's considered constitutional judgment as to how a conflict among constitutional interests should be resolved, the Court presumptively should strongly defer, unless there are strong reasons for not doing so. I explore some presumption-rebutting reasons below in the context of campaign finance regulation.<sup>295</sup>

### *B. Right-Interest Conflicts*

Last, let us turn to the question of when subconstitutional interests can satisfy the Sufficiency Question. Such interests can satisfy the Sufficiency Question under contemporary U.S. doctrine as a matter of black letter law, but are there principled criteria for determining what satisfies the Sufficiency Question? This Article's analysis has shown that there is no answer to this in the scholarly literature. Can this be corrected?

Probably not. The very considerations that explain and justify our regime of Rights Non-Absolutism—and the rejection of Rights Absolutism—strongly suggest we will be unable to locate a principled, ex ante answer to the Sufficiency Question. And this conclusion holds true as to all types of conflicts: Inter-Rights Conflicts, Intra-Right Conflicts, and Right-Interest Conflicts. In essence, a requirement that there be principled ex ante answers to the Sufficiency Question would, like Rights Absolutism, demand overly

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293. For initial steps at articulating this position, see *id.*

294. See generally Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 499-500, 504-07 (2009) (discussing the phenomenon of "judicial overhang").

295. See *infra* text accompanying notes 321-23.

specified precommitments. Three sets of considerations strongly counsel against such precommitments in the constitutional domain.

The first set reflects humans' various decision-making limitations. People may not invest the same energy when considering issues in the abstract—as must occur when they precommit—as they do when they confront issues in reality. Further, the limits on human imagination and foreseeability make it impossible to fully consider, and thereby fully analyze, all the normatively relevant circumstances presented in real situations. If either of these conditions hold, then decisions by precommitment may be inferior to decisions rendered after taking full account of all normatively relevant considerations. Finally, emotions and other inputs that cannot be adequately activated by imagination may play a vital role in decision-making.<sup>296</sup> If so, decision-making by precommitment is limited insofar as it pretermits such inputs. To be clear, these downsides of precommitment are not intended to suggest that precommitment is never appropriate, but that precommitment has costs that may be particularly problematic in the constitutional context on account of the complexity of the issues constitutions address and a constitution's expected longevity.<sup>297</sup>

The second set of factors concerns not the decision-makers, but the nature of the decision itself. The types of decisions involved in answering the Sufficiency Question may not be amenable to firm *ex ante* determination, but instead may best be rendered in the present when the challenge presents itself. If one constitutional commitment can come into tension with subconstitutional commitments, and if there is no absolute priority rule for sorting out such conflicts—in other words, if one accepts the legitimacy of Rights Non-Absolutism—then determining how the competing constitu-

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296. See generally MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001) (arguing that emotions are an aid to moral understanding).

297. Some decisions, like Ulysses's decision to tie himself to the mast, may best be made by precommitment. See JON ELSTER, *ULYSSES AND THE SIRENS* 36-37, 107 (1979). But I am strongly sympathetic to Jeremy Waldron's argument that "the panic-stricken model of Odyssean precommitment seems singularly inappropriate as a basis or template for constitutional theory." WALDRON, *supra* note 259, at 281. For a discussion of the related issue of whether courts should rule narrowly on a case-by-case basis or instead heavily rely on hypotheticals to make broad pronouncements (an approach that is sympathetic to precommitments), see Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 *UCLA L. REV.* 66, 132-40 (2013) (arguing in favor of case-by-case analysis).

tional and subconstitutional commitments are to be harmonized inevitably must be a fact-intensive, context-sensitive enterprise.<sup>298</sup> Factual particulars hence normatively matter to the harmonization process, because multiple competing commitments (some constitutional and some subconstitutional) concertedly determine the appropriate outcome, and the normative significance of each commitment may shift as facts vary.<sup>299</sup> Insofar as the precommitments called by specific *ex ante* answers to the Sufficiency Question necessarily would have to abstract away from the multitude of facts that in turn determine each commitment's normative significance, the attempt to generate specific *ex ante* answers to the Sufficiency Question is bound to generate subpar outcomes.

The third set of considerations counseling against the desirability of specific *ex ante* answers to the Sufficiency Question is independent of, but connected to, the second. I suggested above that constitutional practice may usefully be conceptualized as a form of culture, and that how a polity answers the Sufficiency Question is an important determinant of its constitutional culture.<sup>300</sup> I further suggested that modulations in the answers provided to the Sufficiency Question permit a constitutional culture to adapt and grow while maintaining genuine and meaningful connection with its past—which in fact are needs of all healthy, enduring cultures. If these propositions are correct, then important cultural needs would be put at risk if a political community tried to generate specific *ex ante* answers to the Sufficiency Question.

At this point one might wonder whether the conclusion that there cannot be specific *ex ante* answers to the Sufficiency Question resurrects the case for Rights Absolutism. After all (it might be thought), if rights are non-absolute, and if they may be limited for subconstitutional reasons that cannot be identified *ex ante*, then what are constitutional rights' practical significance? Does the combination of Rights Non-Absolutism with the conclusion that there cannot be specific *ex ante* answers to the Sufficiency Question destroy what it means for something to be a constitutional right?

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298. For a similar account of moral decision-making, see JOHN MCDOWELL, *MIND, VALUE, AND REALITY* 67-69 (1998). Alexy comes to similar conclusions. See *supra* Part II.B.2.

299. See *supra* Part II.B.3.b.

300. See *supra* Part II.B.4.b.

Certainly not. The six alternative accounts to Rights Absolutism canvassed in Part II prove this. Think back, for example, to Professor Schauer's idea of rights as devaluers of non-right considerations. If this is how rights operate, then it is descriptively untrue to say that the combination of Rights Non-Absolutism with the conclusion that there cannot be specific *ex ante* answers to the Sufficiency Question in effect reduces rights to mere interests. Similarly, rights remain significant and meaningfully distinct from mere interests under Rawls's concept of a right's central application, under which a right may be limited but not wholly disregarded. Mere interests, by contrast, can be wholly overridden by countervailing interests; there is nothing constitutionally wrong with one side absolutely losing a political battle in the legislature.

These points are well illustrated by contemporary Contract Clause doctrine. Legislatures may impair the obligation of contracts (notwithstanding the Contract Clause's absolute language), but only to achieve "significant and legitimate public purpose;" impairments that generate benefits only for "special interests" are unconstitutional.<sup>301</sup> By contrast, when the Contract Clause's protections do not apply, it is constitutionally permissible for a legislature to enact laws that benefit a "special interest" or only "particular individuals."<sup>302</sup> In other words, that the Contract Clause is non-absolute does not mean that the interests it protects are "mere interests" that can be traded off against all other interests.

And we might generalize further. The various accounts in Part II demonstrate that a constitutional right can function as a meaningful marker of special commitments, even if the right does not offer absolute protection. This conclusion is unaffected by the fact that specific *ex ante* answers cannot be provided to the Sufficiency Question.

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301. See *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12 (1983). This requirement traces back to *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), when the Court upheld Minnesota's extension of the redemption period because the "legislation was not for the mere advantage of particular individuals but for the protection of a basic interest." *Energy Reserves Grp., Inc.*, 459 U.S. at 445.

302. *Id.*

## IV. TOWARDS A SUFFICIENCY METHODOLOGY

Instead of attempting to enumerate a specific *ex ante* list of answers to the Sufficiency Question, it may be more fruitful to work to develop a decision-making methodology for answering the Sufficiency Question. In fact, Parts I and II generate many insights that properly inform what might be called the Sufficiency Methodology.

To begin, the Sufficiency Methodology presupposes the correctness of the Conflict Thesis, the proposition that multiple rights may conflict with one another or within themselves,<sup>303</sup> and that rights may conflict with important countervailing interests that the right should not categorically trump.<sup>304</sup> Resolving all these types of conflicts requires holistic analysis; considering only one right in an Inter-Rights Conflict, or just the right in a Right-Interest Conflict, would be myopic. Instead, the Sufficiency Methodology counsels that we must look to the family of rights and interests involved, appreciating that we are constructing a scheme of liberties as we harmonize the competing commitments.<sup>305</sup> And in so doing, we are simultaneously reflecting and determining the character of our polity's constitutional culture, insofar as constitutional culture is a function of much more than simply a list of commitments.<sup>306</sup>

Determining how to harmonize the competing commitments and interests is likely to be highly fact-sensitive, and we should not expect convergences across even those countries that concur on a list

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303. See RAWLS, *supra* note 114, at 104 (recognizing the possibility of conflicts between basic liberties); Alexy, *supra* note 182, at 61 (arguing that constitutional rights "inevitably collide with other human rights"); *supra* Part I.C.1.

304. See Alexy, *supra* note 182, at 61 (calling for "balancing" of rights); *supra* Part I.C.2; *supra* Part II.A.3 (critiquing Rawls's view that basic liberties categorically trump non-rights interest with the Church of Humans First and survivalist hypotheticals).

305. This proposition extends Rawls's insights regarding the resolution of resolving conflicts among basic liberties to all types of conflicts. See *supra* Part II.A.2 (discussing and praising Rawls's approach to resolving conflicts among basic liberties). The Sufficiency Methodology extends Rawls's approach because it (1) rejects Rawls's hybrid absolutism and (2) believes Rawls's notion of holistic reasoning to construct a scheme of liberties usefully applies to all conflicts once his partial absolutism is discarded. For the notion of harmonizing competing commitments, see *supra* Part II.B.4.

306. See *supra* Part II.B.4 (discussing rights as values, the building blocks of constitutional culture).

of constitutional rights and important interests.<sup>307</sup> Within a single country, though, there may be a cultural milieu that creates shared sensibilities that give rise to a bounded range of plausible harmonizations at any point in time. To be sure, there will be continuous contestations within the bounded range, and perhaps even shifts over time of the boundaries of the range of shared expectations.<sup>308</sup> But even with harmonization's invariable open-endedness, no constitutional right should be wholly compromised in any conflict.<sup>309</sup>

Finally, because answers to the Sufficiency Question are significant determinants of constitutional culture, and of how the constitutional culture adapts and grows, there should be broad rather than narrow participation in generating its answers.<sup>310</sup> The Sufficiency Methodology accordingly is not only for legal elites (like judges and scholars), but also legislatures, executives, and the public more generally. These non-judicial actors should take seriously their roles in responsibly participating in the Sufficiency Methodology, and courts appropriately defer substantially to the answers to the Sufficiency Question these actors generate when they so act.

## V. *MCCUTCHEON* REVISITED

The Sufficiency Methodology illuminates deficiencies with the majority's reasoning in *McCUTCHEON*, though on its own does not determine how the Court ultimately should have decided the case. That ultimate determination turns on empirical assessments and normative judgments that are inputs into, but not part of, the Sufficiency Methodology.

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307. This proposition flows from my critique of Alexy's obsession with rationality, and his overlooking the subjective and character-determining process of harmonization. *See supra* Part II.B.3.b.

308. *See supra* Part II.B.3.b.

309. This proposition flows both from Alexy's notion of optimization, *see supra* Part II.B.3.a, and Rawls's idea that each right has a central range of application. *See supra* Part II.A.2. Difficult application questions arise here, which I cannot explore in this Article. For a useful preliminary discussion, see Paul-Erik N. Veel, *Incommensurability, Proportionality, and Rational Legal Decision-Making*, 4 *LAW & ETHICS HUM. RTS.* 177, 200, 217 (2010).

310. *See supra* Part II.B.4 (discussing rights as values, the building blocks of constitutional culture).

The dominant flaw in the *McCutcheon* majority's analysis was its failure to appreciate the difficult conflict the case presented. The Court's analysis focused entirely on the BCRA provision's costs to free speech, without taking account of the democracy-enhancing values the BCRA sought to serve.<sup>311</sup> The majority sidestepped the hard conflict by invoking doctrine and precedent: contributions may be limited to achieve "sufficiently important" interests, but the only such interest is preventing "quid pro quo" corruption or its appearance.<sup>312</sup> By adopting so restrictive an answer to the Sufficiency Question, the *McCutcheon* Court licensed itself to ignore all the BCRA's other democracy-enhancing aims.

But how did the *McCutcheon* majority know that preventing quid pro quo corruption is the *only* answer to the Sufficiency Question? *McCutcheon* pointed to precedent, *Citizens United*.<sup>313</sup> But that just pushes the question back. How did the *Citizens United* Court know? Precedent does not answer *that* question, for earlier cases had accepted a broader array of answers to the Sufficiency Question, including several democracy-enhancing ones.<sup>314</sup>

The real answer as to how the Court concluded that preventing quid pro quo corruption was the only answer to the Sufficiency Question appears to be this: the Court knew it, and told us. And in its coming to know this, the Court apparently paid no attention to the broader range of answers that other institutions in society—most notably Congress and the President—thought satisfied the Sufficiency Question.<sup>315</sup>

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311. For a full discussion of these democracy-enhancing values, see Justice Breyer's dissent in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1467-68 (2014) (Breyer, J., dissenting); Justice Stevens' dissent in *Citizens United v. FEC*, 558 U.S. 310, 450 (2010) (Stevens, J., dissenting); and Rosen, *supra* note 90, at 442-52.

312. See *McCutcheon*, 134 S. Ct. at 1441.

313. See *id.* at 1438 (citing *Citizens United*, 558 U.S. at 360).

314. For example, in upholding the provision of the BCRA that banned national parties' involvement with soft money, the majority opinion in *McConnell v. FEC* cited to earlier cases that had recognized the legitimacy of regulations aimed at combating "undue influence on an officeholder's judgment" and "the broader threat from politicians too compliant with the wishes of large contributors." 540 U.S. 93, 95 (2003) (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)) (internal quotation marks omitted); *id.* at 143 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000)) (internal quotation marks omitted). *McConnell* also spoke of "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder." *Id.* at 153.

315. We can fairly deduce that Congress and the President thought these interests satisfied



The Sufficiency Methodology raises two basic questions about the Court's answer to the Sufficiency Question in *McCutcheon* and *Citizens United*. First, the conclusion that there is one, and only one, interest that satisfies the Sufficiency Question in this complex circumstance is surprising. The conclusion that no other countervailing consideration, or set of considerations, is sufficiently important to permit a speech limitation is equivalent to treating speech as a near absolute right in this context. Doing so is highly suspect on account of all the reasons Rights Absolutism is problematic: life is complex, and it is unusual when one value trumps virtually all others across immense landscapes of factual contexts. After all, an implication of the Conflict Thesis is that Rights Absolutism is surprising, even when the countervailing considerations are of (only) subconstitutional status.

Moreover, Rights Absolutism is downright startling when the countervailing interests themselves are of constitutional stature. And indeed, there are strong reasons to think *McCutcheon* implicated such a conflict between competing constitutional commitments. Justice Breyer raised this issue in his dissent, when he explained his view that the BCRA provision occasioned an Intra-Right Conflict within the First Amendment, pitting the contributors' speech rights against the First Amendment interest in maintaining the integrity of the democratic process.<sup>316</sup> In parallel fashion, I elsewhere have argued that campaign finance regulations guard a structural constitutional principle, independent of the First Amendment, that I have called "Republican Legitimacy." The constitutional principle of Republican Legitimacy, I argued, is derived from a three-step reasoning process: (1) the Constitution creates a federal representative government and guarantees a representative government to the states; (2) these republican governments presuppose those conditions that are necessary to republicanism's ongoing legitimacy; and (3) these preconditions themselves are of constitutional status.<sup>317</sup> Those preconditions include fair elections and, once in office, that representatives' decisions be aimed at advancing the public good

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the Sufficiency Question because although both institutions were fully aware that the BCRA affected First Amendment rights, they purposefully enacted the BCRA for the publicly stated purpose of realizing democracy-enhancing interests.

316. See *supra* text accompanying notes 283-85.

317. See Rosen, *supra* note 90, at 381-88.

rather than their self-interest.<sup>318</sup> Campaign finance regulation supports both of these constitutional preconditions, and accordingly generates a conflict between competing constitutional interests: between contributors' First Amendment rights, on the one hand, and preserving Republican Legitimacy, on the other. Analysis that considers only one of these constitutional interests—as the Court did in *Citizens United* and *McCutcheon* when it gave consideration only to free speech<sup>319</sup>—stands in deep tension with the Sufficiency Methodology's call for holistic consideration of all affected constitutional interests when deciding questions that construct our scheme of constitutional liberties.

The second question highlighted by the Sufficiency Methodology is whether the Court was right to “go it alone” in answering the Sufficiency Question, ignoring the alternative answers provided by other governmental and societal actors. The Court's lack of concern for what other institutions thought is *prima facie* problematic insofar as there is a veritable conflict between free speech and countervailing democracy-enhancing interests—conflicting incommensurable commitments that do not have a logically determined resolution, and whose harmonization is a substantial determinant of American constitutional culture. Basic democratic principles suggest that the Court ought to take the more political branches' views into account when rendering such culture-constructing decisions.

Moreover, the Court's go-it-alone approach amplifies the first concern discussed above, namely suspicion of the Court's substantive conclusion that one value appropriately trumps virtually all others across broad swaths of different factual contexts. On its own, near-absolutism is surprising, but cannot be said to be *ipso facto* normatively wrong. After all, since the harmonization of competing commitments is invariably deeply subjective and character determining, there would be nothing normatively wrong for a culture to conclude that one value always trumps countervailing considerations. But absolutism's normative valence is very different when the decision is made by one institution, in disregard of other societal institutions' contrary judgments that the harmonization of speech

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318. *See id.* at 449.

319. *See id.* at 388-99.

with competing commitments is complicated, and that, as is generally true of rights, speech does not necessarily trump all other considerations.

Yet even in this circumstance, it cannot definitively be said that the Court was normatively wrong to have acted as it did. A normative assessment of go-it-aloneism turns on a constitutional culture's understanding of each institution's appropriate roles, which might sometimes include a role for the Court to be at the vanguard of that culture's harmonization decisions.

But how often should the Court be at the vanguard? The intrinsically subjective nature of harmonization determinations, and their being substantial determinants of our constitutional culture, must count as strong reasons for presuming that the Court's harmonization determinations should be made in consultation with the judgments of other societal actors. Why, after all, should the Court's judgments concerning matters so central to determining the character of our constitutional culture be privileged over the judgments of all other societal institutions?<sup>320</sup> Meaningful deference to the more representative institutions' harmonization judgments seems appropriate as a matter of democratic theory. Further, meaningful deference to the more popular institutions' judgments seems particularly appropriate in relation to campaign finance. The BCRA addressed matters that Congress thought interfered with the functioning of our representative democracy, and surely members of the elected branches are better situated than courts to understand the dynamics, and pathologies, of money in politics.

Against these strong grounds for presumptive deference, there would appear to be only two possible justifications for overriding the presumption and going it alone. The first is a theory that courts have superior appreciation for free speech (perhaps rights more generally) than does Congress or the President. This empirical, perhaps conceptual, claim is an input into—but is independent of—the Sufficiency Methodology. While the claim accordingly falls outside this Article's scope, a few brief observations are in order. First, there are reasons to be skeptical of it as a conceptual matter.<sup>321</sup> As to the empirical, while there is evidence that modern

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320. For a similar argument, see WALDRON, *supra* note 263, at 211-31, 255-81.

321. Congress appears to have played the role of responsible interpreter of our Constitution

congresses sometimes (perhaps typically) act as if making constitutional judgments is the exclusive prerogative of courts, this is not always so, and does not appear to hold true vis-à-vis campaign finance regulation. In that context, there has been sustained congressional attention to constitutional considerations, and bipartisan agreement over multiple generations that campaign finance regulation is constitutional.<sup>322</sup>

The second possible justification is that the political branches' judgments cannot be trusted in the specific context of campaign finance regulation. In fact, several Justices who constituted the *Citizens United* majority had suggested this in past decisions, including the majority opinion's author, Justice Kennedy.<sup>323</sup> On this view, the public has been fooled. Rather than advancing the public good, campaign finance laws are a ploy by which sitting members of Congress seek to entrench themselves, for challengers typically are less known to the public than incumbents and hence more harmed than incumbents by campaign finance restrictions. Justice Kennedy did not explicitly invoke this incumbency-protection attribution in *Citizens United*, but the Sufficiency Methodology suggests that either this, or the broader claim sketched above about judicial superiority in appreciating free speech, are the only possible justifications for the Court's go-it-alone approach to near-absolutism. Accordingly, the Court should have given one or both these justifications a forthright—and convincing—defense.<sup>324</sup> Because neither *Citizens United* or *McCutcheon* did so, the Sufficiency Methodology suggests that the Court has not adequately justified its go-it-aloneism, and hence has not even offered a defense of its narrow and singular answer to the Sufficiency Question. I am skeptical it

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for much of this nation's history. *See generally* DAVID CURRIE, *THE CONSTITUTION IN CONGRESS* (1997). For an extended discussion of legislature's capacities to make judgments as to the content of constitutional rights, see WALDRON, *supra* note 263, at 255-81. I recognize that I am only scratching the surface of this claim here in this Article.

322. *See Citizens United v. FEC*, 558 U.S. 310, 432-41 (2010) (Stevens, J., dissenting) (recounting this country's history of campaign finance regulation over the past hundred years).

323. *See, e.g.,* *McConnell v. FEC*, 540 U.S. 93, 247-50 (2003) (Scalia, J., concurring in part and dissenting in part); *id.* at 306-07 (Kennedy, J., concurring in part and dissenting in part); *see also* Rosen, *supra* note 90, at 451-52 (discussing this approach).

324. I have suggested elsewhere the heavy burden that those advancing incumbency-protection rationales appropriately have: their claim should require serious empirical support, and should not be satisfied by mere armchair speculation. *See* Rosen, *supra* note 90, at 451-52.

can successfully do either, though that conclusion admittedly rests on considerations external to the Sufficiency Methodology.

Finally, if, over time, the Court is unable to convince the rest of society of the normative correctness of its go-it-alone harmonization determination—all the more so of an inherently suspect conclusion, like that one right is virtually absolute—it is hard to escape the conclusion that the Court should relent. This suggests that whether U.S. society comes to accept the correctness of *Citizen United*'s virtual rights-absolutism itself will be a relevant datum to deciding the propriety of the Court's go-it-aloneism, and of the narrow answer to the Sufficiency Question it unilaterally adopted in the domain of campaign finance regulation.

