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Towards Justice and Validity:
An Investigation into Habermas'
Theory of Legitimacy
by
Martin Boyle, B.A.

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of

Master of Arts

Department of Law
Carleton University
Ottawa, Ontario
December 11
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**Towards Justice and Validity: An Investigation into
Habermas' Theory of Legitimacy**

Submitted by

Martin Boyle, B. A. Hons.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

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January 2001**

This thesis is an investigation into Jurgen Habermas' theory of legitimacy as it applies to the legal and political realm. The following is intended to introduce the reader to the core principles, concepts, and requirements of Habermas' abstract account and practical reflections on justice and legitimacy. The more abstract content of this theory includes its general model and procedural rationalization of legal legitimacy. This is based on a circular and co-originating relationship between the principles of private autonomy and public autonomy. The more practical content of Habermas' theory that will be addressed in the following include his basis and requirements for the attainment of citizenship status in addition to his statements regarding publicity and the capabilities of religious citizens in deliberative democratic discourses.

While his theoretical reflections and procedural model render legal legitimacy attainable, the more practical content of Habermas' theory seems to hinder its potential and appeal. By offering plausible alternatives and alterations to the problematic and practical components of his theory, the following is intended to restore the lure and potential of Habermasian deliberative democracy.

Contents

Introduction	1
Chapter I	
Legal Legitimacy and the Principles of Private and Public Autonomy	6
1 Introduction	6
2 The Legitimacy of Law	11
3 The Contrasts between and Failures of Traditional Western Political Philosophies	18
4 Habermas' Alternative, Co-originating and Circular Conception of Autonomy	24
5 From Theory to Practice	28
6 In Response to Habermas' Critics	34
7 Conclusion	44
Chapter II	
Constitutional Patriotism and the Potential of Deliberative Democratic Citizenship	46
1 Introduction	46
2 A Brief History of Citizenship	50
3 The History of the Nation	55
4 Consequences of Exclusion	58
5 Constitutional Patriotism	61
5.1 The Abstract and Communicatively Based Constitution	68
5.2 The Concrete and Ethically Permeated Constitution	70
5.3 Thin Patriotism	71
5.4 Thick Patriotism	72

5.5 Thick Patriotism and Communicative Rationality	74
5.6 Communicative Rationality and the Concrete Constitution	78
6 Restoring the Priority of Legitimacy	84
7 Conclusion	91
 Chapter III	
Deliberative Democracy, Religion and The Scope of Public Autonomy	95
1 Introduction	95
2 The Separation Model	99
3 Habermas and the Public/Private Dichotomy	107
4 Deliberative Democracy and the Public Potential of Religion	111
5 Fundamentalism	120
6 The Limits of Religious Argumentation	134
7 Conclusion	144
 Conclusion	146
 Notes	149
 Bibliography	163

Introduction

Jurgen Habermas has dedicated much of his academic career to the ideal of legitimacy. His work in the field has resulted in his development of a procedure that is capable of assessing the validity and rightness of a norm or action. According to Habermas, a norm or action is legitimate when the affected parties recognize it as valid due to a series of communicative processes and reasoned engagements in the public sphere. By applying his ideals to the legal and political realm, Habermas has recently expanded the scope, range, and potential of his theory. This move has resulted in significant advancements for legal and democratic theories in addition to furthering the ideals of deliberative democracy. Habermas now claims that laws and legal norms can be recognized as legitimate based on communicative and democratic engagements which conclude with the affected parties forming agreements regarding the validity and legitimacy of laws and legal norms.

This thesis is intended to critically investigate Habermas' position regarding legal legitimacy. Within the pages that follow, the reader will be introduced to a number of crucial aspects of and some potential problems in Habermas' theory of legal legitimacy. However, the following is not intended to dissuade the reader from the ideal of legal legitimacy. Rather, it is intended to inspire and reinforce the desire to attain it. This thesis represents an attempt to advance Habermas' efforts by advocating his general position on legal legitimacy while reducing or eliminating the particular aspects of his work which may plague and limit the potential and appeal of his theory.

In order to properly engage with and analyze a theory of legal legitimacy a number of core concepts, requirements and characteristics must be addressed. First, legal legitimacy must be defined. In order to act legitimately, a model that describes and develops the essential conditions for legitimacy is required. That is, one initially requires an account of the ideal of legitimacy in order to pursue it. Second, those involved, concerned, and required to participate in this pursuit must be identified. In other words, the beneficiaries of and the participants in this pursuit of justice need to be determined. Third, one must also outline the duties, rights, and capabilities of those who are possibly involved, concerned, and affected.

Therefore, in order for the present investigation of Habermas' theory to be comprehensive and properly developed, the above characteristics, requirements, and concepts will be addressed. To begin, the reader will be introduced to Habermas' general model of legal legitimacy. This will be followed by an analysis of Habermas' reflections on the attainment of membership and participant status in a society that is regulated by his theory. Finally, this thesis will address the rights and capabilities of those individuals who are recognized as members and participants.

By analyzing Habermas' theory in this way, the following academic endeavor will shift from the abstract to the concrete. The assessment of his model of legal legitimacy is limited in that its concerns focus on the more theoretical and abstract foundations of Habermas' work; the mutually dependent and co-originating principles of private and public autonomy. Within these pages only the most fundamental premises and principles are considered. As questions of membership status and the rights and capabilities of participants are addressed, this thesis will alter its attention to the more practical and

concrete aspects of Habermas' theory. It is within these latter passages that a number of problems and limitations in Habermas' theory will be identified and addressed. These negative aspects of Habermas' more practical and concrete reflections work to reduce the appeal and potential of Habermas' theory. However, by offering alternative positions and reconstructing certain elements of Habermas' more practical and concrete stipulations, the above problems and limitations can be reduced or eliminated.

This investigation into Habermas' theory begins with the first chapter which is intended to introduce the reader to his general model and definition of legal legitimacy. It defines legal legitimacy, describes its requirements and sketches its theoretical characteristics. However, this chapter is limited to an assessment of the abstract and theoretical foundations of legal legitimacy. It does not address the practical implications, requirements and consequences of institutionalizing and developing a legal decision-making process which has been derived from a Habermasian model of legal legitimacy. As stated above, the more practical issues that arise within Habermas theory involve membership and the capabilities of members and participants. However, to ensure that they are not overlooked, these issues will be the focus of the remaining chapters. The importance of the remaining chapters cannot be overstated. This is for two reasons. The first is that these chapters determine and identify the parties involved and address their requirements and capabilities. Second, and perhaps more importantly, these chapters intend to show that as Habermas addresses certain practical situations and conditions, he may jeopardize the potential and appeal of his theory.

The second chapter essentially deals with a number of possibilities which result from Habermas' reflections on participant status and the recognition of membership in a

legitimately regulated society. Habermas' reflections on the conditions of citizenship may lead to excessive levels of exclusion in addition to constraining the scope of democratic engagements. Habermas may require potential citizens to possess an illegitimate degree of loyalty toward their constitution. The second chapter, therefore, addresses these potentially negative stipulations and attempts to rectify them by advocating a substitute ideal of citizenship which is not burdened by similarly illegitimate consequences and requirements.

The third chapter investigates the democratic freedoms and capabilities of the citizens within deliberative engagements. The citizenry's public autonomy is the primary interest of this chapter since the issues that are raised concern the way in which citizens are free to participate in addition to their abilities to influence and affect the content and results of deliberative democratic engagements. The issues of freedoms and capabilities within deliberative democratic decision-making processes will be raised by addressing the role of religious argumentation in law-making procedures and the capabilities of religious and fundamentalist citizens within a deliberative democracy. Habermas' conceptualizations of fundamentalism and valid agreements lead to the religious and fundamentalist citizenry suffering from a degree of inequality. However, these levels of inequality can be avoided by adopting an alternative interpretation of fundamentalism and advocating a substitute assessment of the merits of religious argumentation.

While a number of Habermas' more practical and concrete ideals may inhibit the pursuit of legal legitimacy, certain alterations, revisions, and clarifications can be made in order to avoid these potential hazards. Alternative requirements for membership and citizenship can be advocated in order to reduce and eliminate the unnecessary exclusions

and deliberative limitations which seem to result from Habermas' reflections regarding the conditions for participation. In addition, by reassessing the role of religious discourses in democratic engagements and the nature of fundamentalism, a procedure can be developed which ensures the equality of the religious and fundamentalist citizenry. Therefore, the ideal of legal legitimacy remains attainable. By revising a number of problems within Habermas theory we are able to take a series of significant steps closer to the realization and attainment of legal legitimacy.

Chapter I: Legal Legitimacy and the Principles of Private and Public Autonomy

1 Introduction

The concepts of freedom, liberty, democracy and justice cannot be said to be products of this age. While current political discourses often draw upon these terms and the principles they represent, their initial development predate this phase of modernity. In fact, the Enlightenment, with its vision and accounts of human emancipation and the way things *ought* to be, can be said to be a significant contributor to the development and spread of our current understandings of these principles, terms and ideals. It can also be said that much of our modern age has its roots and origins in the Enlightenment; that many of our current ideals, phenomena and practices have simply been inherited from the Enlightenment. In other words, certain particularities of our times can be attributed to, or blamed upon, the Enlightenment and its spread.

Certain academic circles regard the spread of the Enlightenment with significant pessimism. Within these circles it is claimed that modern individuals are burdened by particular problems and negative phenomena which can only be attributed to the Enlightenment and the pursuit of its ideals. In fact, such critics hold that while the Enlightenment's aspirations may have been human emancipation, its consequences are quite the opposite. Following the Second World War, Theodor Adorno and Max Horkheimer presented the claim that the Enlightenment's pursuit of rationality and freedom have led to "...new forms of irrationality and repression."¹ That is, the spread of Enlightenment ideals has lead to a form of reasoning that has engulfed most of our

systems and institutions, which creates particularly modern forms of repression rather than emancipation. According to these critics:

...the legacy of the Enlightenment was the triumph of Zweckrationalitat – purposive – instrumental – rationality. This form of rationality affects and infects the entire range of social and cultural life encompassing economic structures, law, bureaucratic administration, even the arts. The growth of Zweckrationalitat does not lead to the concrete realization of universal freedom but to the creation of an “iron cage” of bureaucratic rationality from which there is no escape.²

In addition, this proliferation of purposive and instrumental rationality coincided with the disintegration of traditional and singularly dominant worldviews. Questions of truth, normative rightness and even beauty began to, and currently still, fall under the jurisdiction of the particular fields and value spheres of science, morality and art respectively. “Thus scientific discourse, moral and legal inquiry, artistic production and critical practice are now institutionalized with the corresponding cultural systems as the concern of experts.”³

The political freedoms and capabilities of the public are claimed to face a similar fate. The legal and political realm also falls under the jurisdiction of so-called experts. Consequently, as the gap between experts and the general public increases, the potential of the public to influence legal decision-making procedures decreases. The spread of instrumental rationality has contributed to a situation where the creation of legal norms is beyond the influence of all those who are regarded as the subjects or addressees of such norms. The development of political norms and laws has become a technical field that relies on the reasoning of “experts” and renders moral and normative issues in technical terms.⁴ Therefore, while bureaucratic rationality supposedly imprisons us in an “iron

cage”, thus reducing our freedoms and liberties, we are similarly burdened by a lack of public capabilities.

Consequently, the legacy of the Enlightenment may in fact be the impoverishment of the modern life-world. According to the critics, modern individuals find themselves in an ‘iron cage’ as the gulf between experts and the general public continues to increase.

It is certainly true that the sciences on the one hand and moral and legal theory on the other have... become autonomous... And yet institutionalized scientific knowledge and the activity of moral-practical argument segregated within the legal system have become so remote from everyday life that here too the program of *elevation* implied by the Enlightenment could be transformed into that of *sublation* instead.⁵

However, the failures of the Enlightenment and the imposition of the “iron cage” are not the only problems and difficulties which face modernity. Processes of socio-cultural evolution have increased the scope, range and destructive potential of human practices and activities. Consequently, our relationships with nature and each other are problematically delicate and fragile. In terms of our relationship with nature, the spread of technologies and mass production have increased levels of pollution and toxic emissions to new and hazardous extremes.⁶ Our destructive relationship with the earth should be viewed in negative terms since our current practices are unsustainable over a significant period of time. As we bear witness to decreases in our planet’s wellbeing, the future health of the earth seems rather bleak. In addition, human relations have similarly obtained an extremely hazardous character. The most destructive century in human history has just ended, but steady technological developments and improvements in weaponry may give rise to unparalleled levels of destruction and devastation in the current century.⁷ The common thread in terms of our relationships with nature and each

other in this era, whether regarded as positive or negative, is the enormous scope and range of the consequences and risks of our activities.⁸

The difficulties which face modernity are, therefore, twofold. The emancipation promised, or at least envisioned, by the Enlightenment has not come to fruition. In fact, it is possible that the spread of the Enlightenment's ideals has decreased our freedoms and liberties. In addition, human practices and activities can lead to previously unimaginable levels of devastation, havoc and ruin. It appears that, in order to rectify the current situation and address the problems and inadequacies of modernity, we require a mechanism that is capable of establishing and protecting emancipatory rights and equally capable of curbing potentially destructive activities. The legal medium has traditionally been used to regulate human activities, relations and rights. As a mechanism of social organization, the legal medium may have the potential to address the negative phenomena that currently haunt and plague modernity. However, the current conditions and the presence of instrumental rationality has left the ability and authority to create and enforce legal norms in the hands of so-called experts. In other words, the afflictions of modernity are of such magnitude that they infect the tools which would have been capable of providing social remedies. Therefore, in order to properly address the problems and inadequacies of modernity, we must envision or develop a model of social and legal validity. We require a model of legal validity which is not plagued or hindered by instrumental rationality but, rather, open to a form of rationality that is capable of institutionalizing legitimate actions, norms and laws. That is to say, we must be able to envision a legal model which is capable of securing our emancipatory concerns, addressing the problems of modernity, and establishing valid and legitimate legal norms.

However, in order for a norm or law to be recognized as valid and legitimate, it cannot rely on its factual existence or its mere presence as a currently enacted norm or law.⁹ In order for a norm to be legitimate, it must represent an expression of the way people *ought* to live. “The important point is this: law is a system of coercible rules and impersonal procedures that also involves an appeal to reasons that all citizens should, at least ideally, find acceptable.”¹⁰

The German philosopher and social scientist, Jurgen Habermas, believes that he has developed a political and legal theory which is capable of addressing the important normative questions of the present while simultaneously securing the citizenry’s rights to self-determination and emancipation. He has therefore burdened himself with the task of providing a means for us to determine how things *ought* to be. He has envisioned a model of legal legitimacy which is capable of avoiding the dangers of instrumental rationality and provided us with a procedural theory of legal legitimacy by which we may develop valid legal norms. Habermas has developed a procedural account of legitimacy, which is based on a unique relationship between the principles of private and public autonomy, which he believes can aid us in the development of legitimate norms and laws.

In line with his earlier works, Habermas’ recent book, Between Facts and Norms, further develops his general theory of legitimacy. What distinguishes Between Facts and Norms from previous contributions to his theory of legitimacy is the attention that law now receives. This newly acquired level of attention is based on Habermas’ conceptualization of law as an intermediary between citizens and institutions that implement decisions and as the primary mechanism for organizing social integration and regulating human interactions.¹¹ The cornerstone of Habermas’ theory of legitimacy is

the discourse principle. The discourse principle (“D”) states “ Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.”¹² Essentially, what Habermas is attempting to do in Between Facts and Norms is determine how law and the ordering of a political community can be legitimate, where the addressees of law are also recognized as its authors.

2 The Legitimacy of Law

As stated above, the attention Habermas now devotes to law and the legal form is tied to law’s role in organizing modern social orders. Modern social orders are organized through a governmental or state authority. State power and the actions of the government are manifested through the creation and implementation of positive law. In an attempt to portray themselves as having a right to such authority and its use, modern states often strive to convince the public that their claims to authority and their actions and abilities are sound and valid. States will often present themselves as legitimate authorities that pass valid laws which the public should obey as a result of their implicit legitimacy. In other words, the state attempts to have itself recognized as legitimate by the public while it interferes with human relations in its efforts to organize the society. States will tend to behave in a manner that suggests their power and authority has a legitimate foundation and their ability to create laws and regulations regarding the scope of human activity is a direct consequence of their rights as *de jure* sovereigns.

However, there are a number of conditions that must be met in order for a state to attain this recognition of legitimacy. The implied and intended recognition of the validity of modern law, according to Habermas, can be found in its normative content as well as

the law-making procedures of modern societies. Norms that have the backing of the state through sanctions and that emerge from the decision-making processes of the lawmakers are expected, in accordance with Habermas' conception of legitimacy, to ensure the autonomy of the citizenry. This includes two forms of autonomy, *private autonomy* and *public autonomy*. Private autonomy involves the ability of individuals to privately pursue self-interests, personal goals and self-realization free from outside interference.

Conversely, public autonomy enables individuals to collectively participate in political procedures in the pursuit of self-determination and the cooperative ordering of the social world.¹³ Therefore, in order to attain legitimacy, the state must develop norms that work to enhance and secure the citizenry's ability to pursue their own interests. Furthermore, in order to be properly sensitive to the citizenry's public autonomy, these laws must emerge as the results of the collective uses of public autonomy in the democratic processes of self-determination.¹⁴

Habermas contends that obedience to law should not emerge merely from legal coercion but rather due to a 'performative attitude' or compliance based on an attitude of respect and a view that legal norms are legitimate. For Habermas, legitimate legal norms require the particular institutional preconditions that favour processes of self-determination. These processes enable participants to aid in the development of regulations, laws and norms; voicing their authentic positions in addition to consenting to and complying with those norms they believe to be rationally justified. By exercising their public autonomy, citizens are able to develop and attain insight regarding the laws and norms which will affect them and view their compliance as based on rational acceptance.¹⁵ Therefore, legal legitimacy is attained when a) the state establishes

sanctions that enable citizens to pursue their self-interests and secure their private autonomy; and b), the citizenry are obedient to law based on a respect for the law which emerges from their pursuit of self-determination and the utilization of their public autonomy.

But we might ask, why does Habermas find it necessary to develop a new and modern theory for the legitimation of law? As stated above, modern social orders are organized by the state through law. Such tasks of organization require the use of positive law and interference by the state into the lives and relationships of its citizens. But we are left to question whether engaging in such tasks and interfering with the lives of individuals and groups by a particular authority is legitimate and valid. Earlier it was mentioned that legitimacy was intended to be implicit in the concept of political authority; in order for the state to engage in such activities it assumes that it has the right to do so. But whether or not this assumption is correct is open to question. The belief that we are caught in an “iron cage” and under conditions of instrumental and purposive rational suggests that this assumed validity within the modern state is ill-founded. Habermas has claimed that in earlier and pre-modern societies political authority was grounded in, and found its legitimacy through, religious and metaphysical understandings of the social and physical universe. He contends that modern pluralist societies are not guided by such understandings and that the legitimacy of the state’s actions and laws cannot therefore rest on primarily religious and metaphysical views of the world.¹⁶ Under contemporary conditions the legitimacy of legal norms cannot rest upon particular religious and metaphysical world-views, nor can it rest upon a legal procedure that is “infected” by instrumental rationality.

Thus, modern law faces a legitimacy deficit. With the advancement of modernity, law has lost its sacred and religious grounding which has created a need to discover a new means to legitimate modern law.¹⁷ Modern political institutions and authorities are not equipped with foundations that are directly connected to or grounded in the citizenry's general understandings of existence, from which pre-modern and religiously based authorities have been the beneficiaries. In addition, an expert-oriented legal decision-making system is ill suited for the development of performative attitudes across the society. This problem, or legitimacy deficit, answers the question of why Habermas has occupied himself with such theorizing. He has done so to highlight and consider what is required to eliminate the ever-present legitimacy deficit that modern law faces and to develop a means through which the instrumental and coercive character of law and political authority can be grounded and viewed as legitimate under "postmetaphysical" conditions.

Habermas claims that a particular form of reasoning, that is, communicative reason, has the ability to replace the former sacred foundations of law and legitimate modern law.¹⁸ Habermas conceives of communicative reason or communicative rationality as the source of legitimate opinion-formation. Communicative reason is intended to legitimate modern law through the development of shared understandings and insights coupled with the institutionalization of norms which reflect these shared understandings through the legal medium. Communicative reason can, therefore, legitimate modern law since "[p]ositive law can no longer derive its legitimacy from a higher-ranking moral law but only from a procedure of presumptively rational opinion- and will-formation."¹⁹ According to Habermas, communicative reason has the ability to legitimate modern law

when law is understood as a mechanism that transforms communicative power into administrative power.²⁰

To understand the theoretical chain Habermas has used to link communicative reason, communicative power and administrative power in his account of legal legitimacy, we must consider each link or concept independently. *Communicative reason* refers to the ideal of the linguistic medium's abilities to provide rationally based mutual understandings among participants. "This theory starts with the socially integrating force of rationally motivating, hence noncoercive, processes of reaching understanding."²¹ In essence, through the use of language, individuals are capable of expressing validity claims that are accessible to reasoned analysis. A shared understanding is capable of being developed regarding these validity claims since, on the basis of reasoned analysis, if such claims are rationally justifiable, then others should be able to recognize this validity.²² Correspondingly, *communicative power* refers to the influences of communicatively established positions, norms and opinions over actions and institutions. In relation to our current discussions, communicative power represents the rational insight and discursively obtained resources that can possibly influence and affect the behavior of individuals and the actions of institutions.²³ In this way, communicative reason and communicative power are directly related.

As a formation of opinion and will, public discourse is not merely a cognitive exercise but mobilizes reasons and arguments that draw on citizens' interests, values, and identities. Political discourse thus brings in the citizens' actual sources of motivation and volition. It thereby generates a 'communicative power' that has a real impact on the formal decision making processes and actions that represents the final institutional expression of political "will."²⁴

Lastly, *administrative power* refers to the use of the legal medium and the power to translate opinion and will into law, thus creating legally binding decisions.²⁵

Administrative power enables a society to harness the integrative force and action coordinating abilities of law in order to institutionalize the results of rational opinion- and will-formation procedures. Therefore, through this chain of concepts, communicative reason has the ability to legitimate modern law by developing a consensus among the citizenry regarding a particular norm followed by the legal institutionalization of this norm. The use of communicative reason can potentially lead to the development of shared understandings, which, as a result of communicative power, can affect and influence actions and institutions. In the final and legislative step, political institutions can utilize the legal medium in order to develop laws and back norms that reflect the citizenry's shared understandings of these norms.

In other words, while communicating or arguing, individuals are able to raise claims, arguments, counter-claims and defenses in order to express particular positions. Through processes of rational argumentation it becomes possible for parties to realize the weaknesses and strengths of different positions and, as a result, these parties may eventually come to a consensus regarding previously disputed and contested norms. The productive ability of communicative reason is based on the recognition of valid claims raised in communication which establishes commonly held beliefs for both the speaker and hearer, creating shared understandings in terms of duties and obligations.²⁶ These understandings regarding duties and obligations can then be codified and institutionalized through law, which allows the citizens to perceive themselves as authors of law since the legally backed norms reflect their discursively established positions. This can legitimate

modern law because all those affected by these laws can abide by them based on insight and the preceding rational discourses provide the citizens with the possibility to consent to the norms that affect them. In essence, Habermas finds that collective and rational discussions aimed at resolving disputes has the ability to represent a post-metaphysical source of legitimacy for law.²⁷

The key to communicative rationality's ability to legitimate modern law is that it allows people to form a consensus regarding disputed norms through argumentation and democratic processes which enables them to obey laws and norms based on insight into the nature and content of such laws and norms. Argumentation allows people to rationally recognize what ought to be and possibly come to a consensus regarding the rightness of norms and obey those norms not simply because of coercion but because they rationally accept them. Habermas' use of communicative rationality, communicative power and administrative power in his theoretical reflections on legitimacy results in a situation where "[t]he democratic process bears the entire burden of legitimacy."²⁸ Based on the fact that Habermas' reflections on legitimacy now include questions of legal and political legitimacy, that is, the legal institutionalization of legitimate norms, his theory now extends beyond the original scope of the discourse principle. In fact, as questions of legal legitimacy have increased in significance in Habermas' theory, so too has the principle of democracy. The principle of democracy represents the conceptual basis of rational political procedures of opinion- and will-formation and it also provides the medium through which the procedure's results can be expressed and implemented. It represents the legal institutionalization of the discourse principle through a system of rights and equal participation in communicative and

legislative procedures.²⁹ Since the principle of democracy represents the institutionalization of the discourse principle it therefore bestows the legislative process with the power of legitimation.³⁰

...the principle of democracy should establish a procedure of legitimate lawmaking. Specifically, the democratic principle states that only those statutes may claim legitimacy that can meet with the assent (Zustimmung) of all citizens in a discursive process of legislation that in turn has been legally constituted. In other words, this principle explains the performative meaning of the practice of self-determination on the part of legal consociates who recognize one another as free and equal members of an association they have joined voluntarily.³¹

Communicative rationality, the discourse principle and the principle of democracy are therefore able to legitimate modern law through the development of shared understandings regarding norms and the institutionalization of these understandings through the legal medium. Modern political communities can thus conduct their affairs and organize their societies legitimately through the production and institutionalization of common convictions in open discursive procedures.

3 The Contrasts Between and Failures of Traditional Western Political Philosophy

As stated above, securing legal legitimacy requires the institutionalization of the discourse principle as represented by the principle of democracy. In order for this to occur, a system of rights that establish the parameters of the discourse must be recognized in addition to providing participants with the abilities to communicate and affect the discursive processes equally. As we shall soon discover, satisfying these requirements is perhaps Habermas' most significant contribution to modern political theory and the ideal of legitimacy. In fulfilling these demands of political legitimacy through the institutionalization of the discourse principle, Habermas has been able to

successfully and simultaneously appeal to and utilize political concepts and principles that have historically been conceptualized in contrast with one another. The system of rights, which establishes the parameters for discursive engagements, is based on principles of private autonomy. Conversely, the provisions that enable adequate or proper participation in discursive procedures are derived from principles of public autonomy. Achieving political legitimacy requires emphasizing and securing private and public autonomy equally and without conflict or tension. This is because the legitimation of modern law can only occur through the implementation of properly developed discursive procedures of opinion- and will-formation. In one significant stroke, Habermas has been able to utilize the principles of private and public autonomy in a co-operative manner in order to institutionalize the discourse principle and secure legitimacy while simultaneously eliminating the historic conceptualization of the two principles as incompatible.

Traditionally, political theorists have attributed greater significance to one principle over the other and have yet to be successful in securing legitimacy through an equal emphasis on and sensitivity to both the principles of private and public autonomy. Liberal theorists try to establish a legitimate rule of law by emphasizing individual human rights to guarantee the private autonomy that enables the citizenry to pursue their private interests and self-fulfillment with minimal outside interference. By contrast, civic republicans have emphasized popular sovereignty to develop procedures that secure the public autonomy of the citizenry and allow for collective self-determination through majoritarian democratic rule.³²

Classical liberal theory, which places emphasis on private autonomy and the sanctity of human rights, maintains that social orders must accord all their citizens the greatest possible measure of liberty. Liberty is generally defined as the absence of any deliberate constraints that may prevent a person from pursuing his or her own will. Consequently, the liberal conception of political rightness is defined by maxims that allow individuals to privately and independently pursue goals based in self-interest alone.³³ This conception of political rightness is, therefore, *process independent*. It does not require the citizenry to follow a political process to determine what is politically right or wrong. Similarly, liberal theory does not require the citizenry to recognize human rights as valid. Liberal theory has attempted to provide human rights with a foundation that is intended to justify them prior to and in the absence of any political procedure or legal authorization. Political rightness is not fulfilled, in this sense, by the legislature staying true to particular law-making procedures nor is it intended to be defined by any such procedures. Rather, the key concern of liberal human rights theory is the minimal interference with the individual's private autonomy by the state.

Since, on this view, human rights are considered independent of the legislature's procedures and outcomes, human rights and their content do not require assent or recognition by the people or the legislature to exist or be deemed valid. Traditional liberal human rights are grounded in the moral principle of the autonomy of the human person, legitimated on the ideal of the individual as sacred, and are considered to occur naturally and pre-politically.³⁴ Their natural and pre-political character works to constrain the scope of the legislature's authority and to justify limitations that are placed on the sovereign's will. The laws of the sovereign, according to liberal human rights

theory, are restricted and limited in the sense that they must correspond with the pre-political conditions regarding the sanctity of the individual and his or her autonomy, which are established by human nature and embedded in human rights.³⁵ Laws are therefore considered valid to the extent that they do not interfere with or constrain the ‘moral’ and ‘natural’ autonomy of the individual. The rightful ability to interfere with the individual’s human rights is considered to be beyond the proper authority of the state. Rights are identified as superior to political authority and seated above and beyond politics and political regimes in the hierarchical ordering of the world. States are therefore required to abide by the natural ordering of the world, staying true to their rightful scope of authority, and refraining from infringing upon the moral autonomy and inviolability of the human individual.

The attempt to justify and account for liberal and individual rights in narratives regarding human nature can be found in the works of many traditional political philosophers and theorists. Classical liberal theorists such as John Locke have presented a series of arguments regarding the natural and pre-political basis and justification of human rights. For example, Locke argued that, based on “...the state of nature...” and “...law of nature... no one ought to harm another in his life, health, *liberty* or possessions.”³⁶ (emphasis added). Such a position emphasizes the importance of human private autonomy and the naturally occurring rights to pursue private interests.

Conversely, civic republicans emphasize the public autonomy of the citizenry. For such theorists, political rightness is not satisfied by the establishment of a regime characterized by self-interested agents privately pursuing their own goals independent of the interests of the community. Rather, civic republicans advocate a *process dependent*

notion of political rightness. They contend that democratic lawmaking procedures, where individuals participate jointly, exercising their public autonomy while pursuing their common interests and forming a common majoritarian will, are fully capable of validating law.³⁷ These politically democratic procedures are necessarily opposed to individuals continually and privately pursuing their own interests because they require an orientation toward the *common* good.³⁸ In terms of this conception of political rightness, validity can only be conferred by the sovereign; nothing pre-exists, restricts or constrains the will of the majority. Only those things that result from democratic procedures and the exercise of public autonomy can be said to be valid.

Classical republican theorists were concerned more with the public autonomy of the citizenry and the authority of politically developed norms than with the ability of individuals to pursue their self-interests. The priority of the state and its political processes can be found in the works of classical political theorists such as Aristotle and Jean-Jacques Rousseau. Aristotle claimed that the authority of the state over the individual was an aspect of nature. He asserted that the individual essentially required the state in order to survive. The "...the state is by nature clearly prior to the family and to the individual, since the whole is of necessity prior to the part... The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole."³⁹ Rousseau similarly advocated the authority of the state over the individual and the importance of the common good by claiming that "a citizen owes the state all the services that he can offer it whenever the sovereign asks for them; but the sovereign for its part cannot impose on its subjects any burden which is useless to the community."⁴⁰

Each of these political theories, liberal and republican, fails to satisfy the requirements of legitimate lawmaking according to Habermas. By only emphasizing one principle, private or public autonomy, the other principle becomes marginalized, resulting in an inability to secure both principles equally. By emphasizing a morally grounded set of human rights, liberal theory works to constrain the sovereign and the citizenry's public autonomy. Since liberal human rights theory is process independent, it works to marginalize the citizenry's public autonomy and compromises their ability to rule themselves collectively and in accordance with their own will. The constraints that are placed on the citizenry's public autonomy by liberal theory leaves individuals collectively unable to question the rationality of the premises and beliefs that human rights theory is founded upon. This is problematic since liberal theory makes grand assumptions regarding the nature of humanity and the priority of the individual. These assumptions place rights beyond the authority of popular sovereignty, which leaves democratic authorities, communicative action and rational argumentation unable to question the accuracy and validity of such assumptions. Rights are placed above the sovereign and beyond assent or disapproval based on rational argumentation. Consequently, processes of argumentation are marginalized in favour of a conception of natural law that is free from rational criticisms and observations that can prove its assumptions and foundations to be inaccurate or entirely incorrect. This results in the citizenry's inability to take advantage of communicative rationality to determine the legitimate nature of private autonomy. Since rights are thus imposed upon the public, the public cannot entirely abide by liberal presuppositions based on a performative attitude or insights developed through argumentation.⁴¹ The citizenry become the subjects and

addressees of a form of law that compromises the potential of the public to become fully self-determining and the authors of law.

Civic republicans and popular sovereignty theorists, who emphasize the public autonomy of the citizenry and the fusing together of individuals into a macrosubject, face their own sets of problems by marginalizing the private autonomy of citizens. By continually emphasizing the importance of a common will it becomes possible that the less an individual reflects this common will, the more power and coercive force the state is authorized to use to ensure conformity.⁴² This type of coercive power and authority was advocated by many republican theorists, including Rousseau who stated that the state “...must have a coercive force of universal scope, in order to move and control each part in the manner most advantageous to the whole.”⁴³ Coercion into conformity also denies the ability of citizens to abide by norms and laws based on reason, insight and a performative attitude. In addition, coercion also works to restrict and interfere with an open and properly functioning discourse. Emphasizing the will of the macrosubject and marginalizing the interests of the individual fails to be properly sensitive to the individual’s private autonomy and the notion of obedience by all based upon respect and rational understanding.

4 Habermas’ Alternative, Co-originating and Circular Conception of Autonomy

Until recently, we thus have been left with theoretical traditions that satisfy and emphasize only half of the requirement of modern legitimacy. However, Habermas’ conclusions regarding the legitimacy of modern law are based on both sets of principles from which these political concepts of human rights and popular sovereignty are drawn.

That is, his position requires the securing of the citizenry's private and public autonomy to ensure that modern law can be legitimated. The project that Habermas undertakes in Between Facts and Norms is designed to develop a means for legitimating modern law by utilizing the core principles behind both popular sovereignty and human rights theories, emphasizing and securing both private and public autonomy equally. As previously introduced, in order to harness the legitimating force of communicative rationality and institutionalize the discourse principle, private autonomy rights must be utilized to establish the parameters of argumentation. In addition to these private autonomy rights, discursive participants require public autonomy rights in order to participate in the processes of argumentation. Since both are required for discursive procedures to develop and take place, private and public autonomy are of equal significance in the legitimation of modern law.

According to Habermas, the legitimating force of the discourse principle and communicative rationality can be found in the concepts of human rights and popular sovereignty. The argument that is developed in Between Facts and Norms is that there is an "internal connection" between these two principles, that private and public autonomy "co-originate" and "presuppose one another".⁴⁴ Due to their co-originality, the two must be emphasized equally. Without the establishment of discursive parameters with the recognition of private autonomy, citizens could not utilize their public autonomy to express their positions, raise claims and counter-claims or develop a shared understanding. Conversely, without public autonomy rights, the practice of self-determination could not emerge and a consensus regarding the validity of individual rights could not be established.

Habermas utilizes communicative rationality and the discourse principle in an attempt to derive public autonomy from private autonomy and, conversely, to derive private autonomy from public autonomy. In so doing, he attempts to demonstrate how private and public autonomy are co-originals, that they are conceptual equals in a circular relationship.⁴⁵ This is achieved through an understanding that finds the proper substance of subjective individual liberties (private autonomy) to be determined through the political discursive opinion- and will-formation procedures of popular sovereignty and self-determination (public autonomy). Conversely, the establishment and institutionalization of popular sovereignty's discursive procedures requires the recognition of individual freedoms, liberties and subjective rights.⁴⁶ In this way the two principles presuppose each other. One principle does not and can not properly exist without reference to the other, which makes the relationship between private and public autonomy necessarily and entirely circular or "co-original".

In order for the two principles of private and public autonomy to be conceptualized as co-original, individual rights and liberties cannot be understood as pre-political, natural, moral rights that trump the sovereign's abilities, decisions and lawmaking procedures. Rights must be understood in a different manner. This alternative conception of rights addresses the fact that when citizens want to establish a valid political authority there are certain rights that they must accord one another for this authority to take form. Citizens would have to accord each other with the individual rights that are required for engaging and participating in discursive opinion- and will-formation procedures, which would enable them to utilize the legitimating force of communicative reason.⁴⁷ To advance this alternative conception of rights, Habermas focuses on the intersubjectivity of rights. His

alternative conception of rights understands them not as the pre-political property of individuals, but as aspects of human relations based on mutual recognition of equality and as conditions for the practical implementation of communication, popular sovereignty and the exercise of public autonomy.⁴⁸ As a result, popular sovereignty cannot be viewed as a procedure to which rights are subordinated but rather as a procedure that can only emerge when citizens recognize each other with particular rights. Conversely, private autonomy rights cannot adequately gain substance or be formulated legitimately without the practical implementation of the principle of democracy, where citizens can engage in the rational opinion- and will-formation procedures to form agreements regarding the proper scope and content of individual rights. The use of their public autonomy allows the citizenry to engage in processes of argumentation to adequately define and determine the validity of subjective rights and their substance.⁴⁹ Consequently, the internal connection between, or co-originality of, private autonomy and public autonomy can be understood in terms of the institutionalization of the discourse principle as the principle of democracy which begins with the mutual recognition of individual rights that are used to establish discursive procedures. At the same time, the basis, substance and content of these and other individual rights can only be determined and grounded by the shared understandings individuals can develop through the use of their public autonomy and participation in procedures of opinion- and will-formation.⁵⁰ Thus, “Habermas argues that ‘a legal order *is* legitimate to the extent that it equally secures the co-original private and public autonomy of its citizens’. But that can only be so because ‘it *owes* its legitimacy to the forms in which alone this autonomy can express and prove itself.’”⁵¹

The required co-originality of private and public autonomy and the equal significance that is demanded by Habermas' theory of legal and political legitimacy distinguishes his political theory from that of his predecessors. Traditionally, political theorists will fail either because they utilize a system of rights that is not discursively constructed but rather is morally grounded in meta-narratives or because they emphasize a democratic procedure that is absent of any integral link to private autonomy rights. Satisfying modernity's requirement for political and legal legitimacy requires securing both private and public autonomy equally and circularly. Emphasizing one principle over the other begets failure because each principle is equally important in legitimating modern law. Therefore, a theory aimed at legitimating modern law must be sensitive to the equally important roles and contributions that individual rights and the practices of popular sovereignty play in having the addressees of law being its authors.

5 From Theory to Practice

Since we have addressed the issues of what Habermas is attempting to achieve and why he finds this necessary, we can now focus our attention on how this system can be implemented to legitimate modern law. Habermas attempts to develop a theory of legal legitimacy by building upon the discourse principle and its institutionalization as the principle of democracy where private and public autonomy co-originate and presuppose one another. To do this, he has reconstructed a system of rights that enables citizens to regulate themselves in accordance with the discourse principle and in a manner where private and public autonomy are emphasized equally and form a circular relationship. What may be interpreted as the starting point of the practical realization and

implementation of his project is the self-initiated attempt of a society to legitimately regulate itself through communicative rationality and the institutionalization of the discourse principle. In order to regulate themselves legitimately, the citizenry must freely recognize one another with a series of rights that allow discursive politics to take form.

Due to the content and nature of the discourse principle, its institutionalization and practical use involves the establishment of a system of rights. Without these rights it would be impossible to adequately utilize the discourse principle and its premises. The system of rights that emerges is an abstract set of liberties, freedoms and rights that allow the citizens of a society to collectively engage in discussions and argumentation that can potentially lead to consensus regarding the laws and norms through which they will be regulated. This abstract set of rights merely represents the basic requirements for communication among equals. These rights accord the citizenry with a degree of private autonomy. Unlike liberal theory's natural human rights, these private autonomy rights are, for the moment, entirely abstract, flexible and subject to the citizenry's public autonomy. Habermas has described these abstract rights as "...unsaturated placeholders..." and continues that "...they are thus more like legal principles that guide the framers of constitutions."⁵² Without the recognition of public autonomy these rights would remain abstract since only through the exercise of political autonomy can these abstract rights be elaborated to take concrete legal shape. However, due to the circularity of their relationship, to exercise one's political autonomy through communicative action one necessarily requires that these abstract subjective liberties are mutually recognized by the citizenry.⁵³ Herein lies the co-originality, co-dependency and circularity of public and private autonomy. Private autonomy rights establish the discursive procedures which

enable citizens to exercise their public autonomy, but the legitimate content of these private autonomy rights can only be established through these very procedures.

At this abstract level, the principles of private autonomy contained in this system of rights is not a set of rights against the state because the state has yet to take form. They only represent the application of the discourse principle to human relations. Such rights “merely” include provisions for autonomy, equality, membership and a means to remedy denials of inclusion, equality and autonomy.⁵⁴ The abstract rights that are introduced first are simply a response to the question: which rights are required in order to establish a procedure where contested norms could potentially be agreed upon by all those possibly affected in rational discourses? It seems impossible to imagine a properly functioning conversation with the goal of forming a rational consensus among those affected by its results where the participants do not recognize each other as participants that are equal and autonomous agents expressing their own positions.

It is important to recall that at this moment these rights are only conceptual and should not be equated with classical liberal rights; they do not have concrete form and should only be conceptualized as “placeholder” rights. They represent the requirements for institutionalizing the discourse principle, and as such, represent the basis of a *legal code* that can legally institute the discourse principle.⁵⁵ However, Habermas’ system of rights also includes and secures the public autonomy that enables individuals to participate in law making processes. When conjoined, the system of private and public autonomy rights is able to elaborate and develop itself, making the leap from the abstract to the concrete.⁵⁶

Habermas presents this system of rights in a stepwise fashion. However, since the private and public autonomy that is contained in this system are co-originating and capable of being expanded by reference to each other, these five steps should be viewed as circular and not as an aggregate of 1+2+3+4+5. This is due to the fact that no step is entirely independent of any other step. The private autonomy rights contained in steps 1-3 (below) enable the public autonomy rights that follow, yet the public autonomy rights contained in steps 4 and 5 (below) establish and define the legitimate content of the private autonomy rights (1-3). Understanding the system of rights as an aggregate would be to ignore the circularity and co-originality of private and public autonomy and would fail to recognize that step 5 can and will precede step 1. Habermas introduces his system of rights as follows:

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*. These rights require the following as necessary corollaries:
2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of *legal protection*.⁵⁷

These three sets of rights are intended to regulate the relationships of citizens as free and equal and, in this way, establish a degree of private autonomy that individuals recognize each other with as the addressees of law. The steps introduced as 1-3 provide a society with an abstract legal code, the very basic elements of a legal system for the ordering and organization of society, which will enable them to legally institutionalize the discourse principle. This establishes a recognition of private autonomy and membership in the legal community and a mechanism designed to address rights infringements.⁵⁸ “Without this guarantee of private autonomy, something like positive law cannot exist.

Consequently, without the classical rights of liberty that secure the private autonomy of legal persons, there is also no medium for legally institutionalizing those conditions under which citizens can first make use of their civic autonomy.”⁵⁹

The steps that are introduced as 4 and 5 of Habermas’ system of rights are designed to enable the addressees of law to become its authors. These steps enable citizens to take advantage of the legitimating ability of communicative rationality in discursive and argumentative processes. They secure the public autonomy of the citizenry and satisfy legitimacy’s requirements for procedures of popular sovereignty. The first of these public autonomy rights is: “4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law.”⁶⁰ Thus, the abstract rights contained in steps 1-3 can be elaborated through the exercise of political autonomy, developing beyond mere conditions required for the implementation of the discourse principle. Step 4 emphasizes the use of communicative rationality and the ability of the citizenry to engage in argumentative and discursive processes. These processes enable the citizenry to possibly form a consensus and shared understandings regarding norms that will be expressed through law and, therefore abide by these legal norms as a result of the insights they have obtained through rational argumentation. In other words, the deliberations and exercise of public autonomy are intended to conclude with a rational consensus, where people freely agree upon norms and abide by them based on insights attained in the discourse and not due to coercion.⁶¹

The final aspect of Habermas’ system of rights provides the groundwork for social, welfare and ecological rights that attempt to move rights from being merely formal to

substantive. These rights represent relatively justified provisions regarding an individual's ability to participate as an equal in discursive processes. "5. Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4)."⁶²

Habermas' self-referential system of rights satisfies the internal relationship between private and public autonomy. The system of rights emerges neither as a morally based, naturally existing set of rights and conditions beyond the scope of rational discourse nor as a system dedicated to the discovery of the majoritarian will independent of individual liberties. This is because these rights are not imposed upon the citizenry. The citizenry mutually recognize one another with these rights and they are fully capable of questioning and debating the legitimacy of the authority and validity of these rights. These rights are not morally based since their validity is not tied to meta-narratives or a series of assumptions regarding humanity or the sanctity of the individual. Any sense of validity that is to be accorded to these rights is rooted in shared understandings, agreements and insights as derived from communicatively based procedures of opinion- and will-formation. Therefore, the rights of equality and private autonomy in this system are not imposed as moral rights limiting and constraining the sovereign, nor are they functional instruments to assert legislative dominance.⁶³ The internal connection or circular relationship that exists between private and public autonomy becomes apparent because the establishment of a legal procedure where the addressees become the authors of law is made possible by the mutual recognition of private autonomy, equality and membership contained in steps 1-3. Furthermore, the determination and rational

justification of these subjective liberties is attained through the adequately functioning discursive procedures and exercise of public autonomy as established in steps 4 and 5. Unlike traditional political philosophies, the sovereign's will is not marginalized and constrained by subjective liberties and private autonomy because the content and validity of subjective liberties is determined by the political procedures of popular sovereignty. Conversely, individual autonomy is not subjected to domination and interference from a macrosystem or common will because the principles of private autonomy are required for the establishment of democratic procedures and are always present in the continual use of these procedures. As Kenneth Baynes puts it:

With this derivation of the system of rights securing the private and public autonomy of citizens, Habermas believes he has accounted for the legitimacy of legality. It is based neither on the legal form alone (as maintained by positivists) nor on its conformity to an extralegal set of natural rights or natural law. Rather, the legitimacy of law derives from the fact that it has a rationality of its own, secured in the mutual guarantee of private and public autonomy of citizens, that ultimately refers back to the bonding/binding illocutionary force inherent in communicative reason and action.⁶⁴

6 In Response to Habermas' Critics

Although Habermas has been able to account for the legitimacy of modern law through a co-originating system of private and public autonomy, many critics have surfaced to present a series of possible problems with his theory. In particular, there are two recent sets of criticisms which, if correct, would prove to be damaging. The first holds that it is impossible for a society to even implement a political system that adheres to Habermas' requirements for political legitimacy. The second set of criticisms claim that even if it were possible to implement such a political system, its institutionalization would be illegitimate. If either position is accurate, it would prove devastating to

Habermas' political theory of legitimacy. The devastation would be manifested in the fact that the legitimacy of law could not be accounted for. As citizens, we would be unable to legitimately determine the *ought* and act accordingly. In addition, the purported failures of the Enlightenment would haunt us still. If Habermas' theory cannot provide a practical account of the legitimacy of law we would be unable to develop legitimate norms and ill-equipped to address the problems of modernity.

Frank Michelman, a prominent critic of Habermasian deliberative democracy, has argued that regardless of how desirable Habermas' philosophy may seem, its practical implementation in politics is impossible. Michelman contends that such political philosophies are faced with a "regress problem" which immobilizes them, preventing their institutionalization and practice. His contention is that Habermas' deliberative theory of political legitimacy is characterized by a process-dependent notion of political rightness that emphasizes the continual authorship and approval of all norms by everyone. Michelman claims that such a vision of political rightness necessarily instigates an endless regression because, before a consensus can be formed, a pre-existing consensus regarding what constitutes the proper procedures and conditions in discursive procedures is required. And, a proper determination of what constitutes valid democratic procedures can only be determined by other, earlier-implemented, democratic procedures. As Michelman states, "...if it takes a legally constituted democratic procedure to bring forth valid fundamental laws, then the (valid) laws that frame this lawmaking event must themselves be the product of a conceptually prior procedural event that was itself framed by (valid) laws that must, as such, have issued in their turn from a still prior (properly) legally constituted event."⁶⁵ According to Michelman, a political

system that is based on a circularity or co-originality of private and public autonomy, while emphasizing the importance of rational acceptance, may not be able to take practical form because it is theoretically subjected to an eternal regression of consensus forming before a valid consensus of conditions and procedures can be recognized.

Kenneth Baynes has responded to Michelman's critique by arguing that Michelman's claims fail to properly address the role of private autonomy in Habermas' theory of legal legitimacy. That is, he claims that Michelman misrepresents Habermas' theory as merely republican, which fails to recognize that it is equally inspired by liberal principles. Michelman's criticisms are merely concerned with Habermas' reliance on public autonomy. It is true that both civic republicans and Habermas appeal to ideals regarding public autonomy. However, Habermas also shares similarities with liberal theorists with his appeals to private autonomy. In fact, and in contrast with civic republicans, Habermas' use of principles of public autonomy is buttressed by and entirely dependent upon principles of private autonomy. Conceptualizing Habermas' position in its relation to civic republican principles alone would ignore Habermas' liberal tendencies and his reliance on a system of private autonomy and individual rights.⁶⁶ Michelman's interpretation of democratic political rightness, rule by the people, is characterized simply by the people being the authors of law, which is a process-bound conception of political rightness. However, Habermas' theory is more complex than a simple process-bound concept of justice that is favoured by civic republicans. Habermas does draw from these ideas but, in his attempt to satisfy the requirements of legitimacy, he also utilizes liberal and human rights based conceptions of political rightness that are process independent.⁶⁷

It appears that Michelman's main contention is that Habermasian deliberative politics, in order to avoid an eternal regression, require a pre-political base, something to which politics can be anchored or from which they can emerge. Habermas has attempted to distance himself from any traditional notions of "pre-political" foundations, whether it is a set of natural rights or a prior agreement on conceptions of the good. The starting point for Habermas is the abstract and egalitarian system of rights that generate an adequate degree of fairness for discursive procedures. The key point, according to Baynes, is that these abstract rights are not intended to be determined by an earlier consensus as Michelman seems to claim. The emergence of these rights is based rather on the citizenry's active engagement in communication and argumentation. The abstract system of rights represents the requirements for individuals to engage in discussions as free and equal participants and not the content of previously formed agreements.⁶⁸ These rights are therefore independent of any earlier procedure or previously concluded consensus forming events.

The vicious spiral that Michelman has described as the regress problem cannot be said to plague Habermas' theory of political and legal legitimacy. In order for a theory to be burdened by the regress problem, its practical implementation or emergence in society must require a continually prior series of events and an eternal process of consent to establish a valid political foundation. This, of course, is not characteristic of Habermas' theory, nor the manner in which it emerges in society or its institutionalization as a political system. The private autonomy rights that establish discursive arrangements and institutionalize the discourse principle do not have an origin in previous communicative endeavors nor do they require a previously developed consensus regarding their ability to

establish the parameters of argumentative procedures. These rights are the preconditions for the establishment of egalitarian discursive procedures. In order for individuals to engage in discursive procedures as free and equal, they must be recognized as discursive participants who are free and equal. Similarly, the abstract public autonomy rights that follow have not been, nor are they required to be, determined by previously concluded discursive events. These rights merely represent an elaboration of the most elementary principles regarding active communication.

A citizenry that is to be ordered through an adherence to the principle of democracy is not required to base the implementation of this system on a series of previously developed shared understandings, which themselves were established by even earlier consensus forming events as Michelman claims. The emergence of such a system is simply based on the citizenry's mutual recognition of each other as free and equal consociates that can develop, through rational discourses, the norms and laws to which they will be subjected. By recognizing each other as equals in discursive procedures, citizens begin to harness the legitimating force of communicative rationality. Such citizens begin a process of raising claims and counter claims in a series of argumentative exchanges which may develop a consensus through the rational justification and validation of their claims. For these occurrences to take form, a previously developed shared understanding regarding communicative procedures is not necessary. Similarly, when these occurrences of mutual recognition of private and public autonomy and the discursive events that follow are coupled with communicative power and administrative power, the principle of democracy takes hold in a society and in the absence of an eternal regression of previously developed consensus forming events.

Although political theories that are exclusively rooted in civic republican ideals and a reliance upon public autonomy alone are potentially faced with a problematic eternal regression to account for their validity, a similar assessment of Habermas' theory of political and legal legitimacy is inaccurate. Habermas has based the emergence and institutionalization of his theory not on a required continual authorship that would burden his theory with an eternal regression, but rather on the preconditions of communicative action. Habermas' political system emerges only when citizens engage in political and egalitarian communication. The rights that establish the legal code and institutionalize the discourse principle emerge as the rights that enable them to participate in egalitarian discursive engagements.

Due to Habermas' emphasis on liberal notions of justice and the emergence of abstract rights based on the citizens' mutual recognition of them, his politics are not faced with an eternal regress problem as Michelman contends. There is a starting point, although abstract, that does not have to emerge from an earlier consensus, but only from the citizenry's recognition of the parameters that are required for egalitarian communicative events and their active participation in them.

Another interpretation of Habermas' recent efforts has opened the door to a different set of possible problems. This interpretation holds that his system of rights and its "logical genesis" is not consistent with his theory of legitimacy. Here, the claimed inconsistency is, in many regards, attributed to the manner in which Habermas' theory avoids the eternal regress problem. It is claimed that, since the abstract rights that establish the legal code and the parameters of egalitarian discourses do not require the prior assent of the citizenry, the citizenry are thus subordinate to law at the constitutive

moment. In other words, it is claimed that law emerges in society without its institutionalization being under discursive control. This is claimed to be inconsistent with Habermas' requirement that the addressees of law are also to be its authors. It is argued that, as a result of being subordinate to law, the citizenry is unable to contest or authorize the legal code which acts as the basis for the emergence and institutionalization of law.⁶⁹ Elias Jose Palti has contended that Habermas' procedural system of rights is not subject to public deliberations and that the institutionalization of the discourse principle does not have a discursive construction.⁷⁰ He claims that by submitting to the legal form, as a means to institutionalize the discourse principle, the citizenry suffer from a form of subordination. This conclusion is based on the premise that this act of submission is not based on the results of a legitimate and prior consensus-forming event.

Habermas has himself claimed that self-legislation and the institutionalization of the discourse principle can only be achieved through the legal medium.⁷¹ Palti has interpreted this to mean that the rights that act as a basis for the legal medium and that represent the conditions for public debate are themselves placed beyond the reach of public debate and that the emergence of the most basic premises of constitutionalism (its abstract foundations) are uncontestable.⁷² For Palti, this is highly problematic because he understands it as leaving the citizenry as the mere subjects or addressees of law and far from the ideal of the citizens simultaneously being the authors and addressees of law.

It seems that such an interpretation is too strong, conceptualizing the emergence of the abstract system of rights as concrete as a modern day constitution. But, according to Habermas' formulations, the system of rights and the legal code are supposed to be entirely abstract and open to development, interpretation and contestation in order to

prevent it from subordinating the citizenry and merely reflecting concepts of natural law and natural rights. At the constitutive moment, the rights are entirely abstract and open to contestation. These rights merely represent the presuppositions and requirements of egalitarian discourse. As such, they are completely reflexive and entirely subordinated to the discursively developed and performative will of the population. In its abstract form, questions regarding the nature of equality, autonomy and membership and how they can be distributed to best satisfy the requirements of the discourse principle are left open. For example, the definition of equality is not given. A pre-existing unitary and universally accepted conception of equality does not exist. At the constitutive moment of Habermas' politics, the citizens who wish to regulate themselves legitimately by law would mutually recognize one another with a form of equality that will enable them jointly to engage in discussions. In order for the citizens to build upon this initial recognition of abstract notions of equality and institute a legitimate interpretation of equality, the notion of equality itself will have to be subjected to communicative action and argumentation with the goal of achieving a consensus. Equality, and the other abstract private autonomy rights with which the citizenry recognize one another, must remain flexible and reflexive at the constitutive moment in order to ensure that their form and substance can be legitimated by communicative rationality and the citizenry's use of their public autonomy rights. An absence of this reflexivity and potential for debate and discussion would eliminate private and public autonomy's relationship as co-originals.

Contrary to Palti's interpretation, the dismissal of self-evident truths and the requirement that all norms be established by and legitimated through contestation and communicative rationality is extended to and includes the abstract system of rights that

forms the basis of the legal code. The rights contained in this system are the basic requirements of communication. Without recognizing each other with the general principles contained in this system people could not collectively engage in discourse. However, the content of this system is still debatable and left open for the results of discursive procedures to fill and define the abstract placeholder rights that merely represent the citizenry's mutual recognition of one another as equals within a deliberative democratic regime. Concepts of equality, membership and autonomy would require interpretation, adjustments and fine-tuning in order for the citizenry to develop a consensus regarding the content and scope of these rights.

As stated earlier, Habermas has accredited law with greater significance in Between Facts and Norms in comparison to earlier contributions to his theory of legitimacy because he conceptualizes law as having the potential to organize and coordinate social orders and human relations. In developing his theory, Habermas assumes that others will recognize this potential. Implicit in the institutionalization of the discourse principle is a particular ordering of society that is conducive to it. For a society to utilize the discourse principle it must be organized in a manner that aids in or allows the practical use of the discourse principle. Unlike Palti's claim that the discourse principle and legal form is imposed on the citizenry, Habermas' work is better interpreted to suggest that people who intend to have their society legitimately regulated will recognize law's socially integrative force and wish to utilize this force and potential. Therefore, law should not be seen as something that comes from above the citizenry but as something that emerges from them. That is, the legal form and legal code are not imposed on the citizenry. Rather, the citizenry recognize the potential of each and authorize their use.

When the citizenry is conceived of as the initiators of law, attempting to harness and direct its potential and abilities, it becomes possible to understand that the citizenry are not subordinated to law, but that they intend to authorize its use to regulate and order their society. Palti's conceptualization of law as a domineering force that is beyond the control of the citizenry misses the nature of Habermas' reflections regarding the role of law in the legitimate organization of a society. The citizenry maintain authority over law because, as participants in self-legislation and the legitimate regulation of society, the citizenry requires a means to implement their desires and decisions. Law represents an effective means or mechanism to do so, and as part of their mutual recognition of each other's abilities to regulate themselves legitimately, they intend to use a mechanism capable of performing that task. Consequently, the use of law is authorized by and represents one aspect of the citizenry's mutual recognition of each other as equals in a self-determining political unit. This, of course, means that the legal form is not a particular force that the citizenry lack control over and to which they find themselves subordinated.

In order to understand the implementation of Habermas' theory as practical politics, we must continually bear in mind that it is primarily based on a circular and co-originating relationship between private and public autonomy. This means that every aspect of the citizenry's mutually recognized requirements of legitimate deliberative democracy will, circularly, fall under the authority of their public autonomy. In addition, the legal code and the use of law as a means to institutionalize it are derived from what the citizenry have willingly and mutually recognized as rightfully required to emerge in their society. Consequently, the legal form is not imposed upon the citizenry. Rather, its

presence is authorized by the citizenry, emerging through their desires to regulate and order themselves legitimately. Therefore, since the use of law emerges from the citizenry's act of mutual recognition, coupled with the fact that its presence, implementation and scope fall under the authority of the citizenry's public autonomy, it is incorrect to perceive the citizenry as subordinate to law as Palti contends.

7 Conclusion

Given the above discussion, Habermas has been able to provide an account of legal validity that is capable of addressing the problems of modernity while addressing the failures of the Enlightenment. By focusing on our communicative abilities to develop shared understandings regarding the validity of disputed norms, Habermas has developed a theory that establishes the parameters of egalitarian discourses, through private autonomy rights, which enable individuals to utilize their public autonomy in order to abide by particular norms as a result of a performative attitude.

While the above investigations and reflections contend with Habermas' theory and model of legal legitimacy, they do so on a fairly abstract and theoretical level. Therefore, the more concrete and practical implications, requirements and consequences of this theory have not been sufficiently addressed. These practical concerns will be the content of the following chapters. The above discussions have introduced the circularity of private and public autonomy and expressed the importance of each. The chapters that follow will address practical aspects of each of these two principles as they pertain to deliberative democracy.

The second chapter will address certain practical concerns of private autonomy. That is, it will investigate the citizenship requirements of a deliberative democracy. As discussed above, private autonomy provisions establish the parameters of discursive procedures. Citizenship status has a similar function; it establishes the parameters of discourses by determining the discursive participants. However, as a result of the circularity of private and public autonomy, principles of citizenship are not limited to concerns of private autonomy alone. In deliberative democracies, being a *participating* and *active* citizen involves and requires principles of public autonomy. This second chapter addresses the possibility of citizenship requirements adversely affecting the legitimating potential of Habermas' theory of legal legitimacy.

In a similar manner, the third chapter will attempt to address practical issues and concerns regarding principles of public autonomy within a Habermasian deliberative democracy. To do so we shall address an issue that has proved to be rather contentious in many democratic theories; the role and admissibility of religious discourses within legal decision-making processes. The role and admissibility of religious discourses in Habermas' theory directly affects the citizenry's public autonomy and public capabilities. Invalid limitations on an individual's public autonomy can only work to constrain the legitimating potential of Habermas' theory. This third chapter will, therefore, address the practical issues regarding a religious individual's public autonomy rights and capabilities in order to determine the potential of Habermas' theory of legal legitimacy.

Chapter II: Constitutional Patriotism and the Potential of Deliberative Democratic Citizenship

1 Introduction

A crucial aspect of the implementation of Habermas' theory of legitimacy is the determination of the rightful participants in rational discourses dedicated to the formation of legitimate norms, actions and laws. The abstract system of rights that Habermas has developed specifically deals with this important question of inclusion. The private autonomy rights that enable the public autonomy provisions of his co-originating web of rights include provisions for the attainment of participant status and the legal recognition as a member in a political community. As established in the previous chapter, the co-originating private and public autonomy rights that are required to legitimate modern law not only have different foundations and content, they also serve differing purposes. While the liberal-inspired private autonomy principles aim to promote individual rights, they also work to establish the parameters of discursive engagements. Conversely, the republican-inspired public autonomy provisions, that determine the individual's participatory capabilities, address and focus on the content and development of discourses. The private autonomy rights determine the parameters and boundaries of potential discourses while, by focusing on the expressive capabilities of participants, public autonomy rights are concerned with the internal workings of discourses. Habermas' classification of membership as a private autonomy right is based on these later distinctions between private and public autonomy. The recognition of deliberative democratic membership is primarily concerned with how discursive procedures and events will be framed. It determines who the participants are without necessarily

focusing on how they will participate. This, of course, differs from the public autonomy rights which focus on how discourses will develop and how citizens will participate.

Although a member of a deliberative democracy will be recognized with the co-originating circle of public and private autonomy, the *status* of membership is concerned more with the establishment of discursive parameters rather than its development.

It is within this context that we shall address issues of citizenship in Habermas' theory of legitimacy. Here, the term citizenship is intended to refer to the legal or juridical status of a member which entitles an individual to the rights that are offered within a legal community. In terms of a Habermasian legal order, citizenship status recognizes the individual as the author and subject of law in addition to according the individual with the web of private and public autonomy rights and their legal protection. Due to the co-originality of these rights, the recognition of citizenship status will effect the provisions of private and public autonomy. However, since citizenship status aids in the establishment of the parameters of legal discourses it is possible to conceptualize it as a matter that is primarily concerned with an individual's private autonomy. That is to say, when concentrating on the requirements of citizenship status, we are questioning who can be recognized as *participants* rather than how they will *participate*. However, due to the circularity of private and public autonomy's relationship, citizenship status and its requirements will eventually affect the public autonomy of the citizenry.

As a result of Habermas' reliance upon civic republican and liberal theory, his analysis of citizenship draws upon the conceptions of the citizen present in both schools of thought. Similar to republican theory and emphasizing the importance of the individual's public autonomy, Habermas' conception of citizenship includes provisions that establish

the citizen as a political being. However, since liberal theory and private autonomy are equally important to Habermas' ideals of justice and legitimacy, the citizen is also the possessor of egalitarian rights. The recognition of citizenship in a political community that is inspired by Habermas' political theory is important since it establishes the basis for inclusion and provides the individual with the legal capabilities to engage in processes of argumentation. The failure to recognize an individual or group with the benefits of full membership can have a number of negative social and psychological repercussions in addition to coming at the cost of political legitimacy. If the means for determining membership leads to a level of exclusion where the addressees of laws are excluded from participating in the processes of rational argumentation that develop legitimate norms, then these norms cannot be said to be legitimate and the excluded individual's obedience to them cannot result from rational insights.

Habermas has dealt with the issue of citizenship through the concepts of the nation, national identity, affiliation and integration. The result has been that he has developed a conception of citizenship that relies on political integration in order to avoid the excessive level of exclusion or assimilation that results from integration based on cultural and ethical homogeneity. Habermas believes that a democratic constitution can adequately unite the members of a plural and cosmopolitan community and that a "patriotic" dedication to this constitution can ensure that the benefits and duties implied by the discourse principle are satisfied. He rightfully claims that a perception of political integration and an orientation toward the common good can function as a form of civic nationalism and provide the basis for the institutionalization of a legitimate deliberative democratic order.

However, Habermas' conclusions regarding citizenship and the perceptual burdens or requirements that are placed on the citizen may come at the cost of the primacy of legitimacy. These requirements may prove to restrict the focus and scope of argumentative procedures, limiting what is to be subjected to communicative rationality and, therefore, exempting certain crucial norms, principles and laws from legitimation. In addition to constraining the subject of rational argumentation, Habermas' ideals regarding these requirements of political integration and a patriotic attitude toward democratic ideals may provide a basis for excessive and illegitimate exclusion. As Habermas develops his theory of legitimacy and provides us with a valid and modern form of 'nationalism' he potentially prevents his political theory from satisfying his own definition and requirements of legitimacy. It will be argued that an orientation toward the essential precepts of the discourse principle itself and an abandonment of his potentially illegitimate stipulations regarding citizenship and "constitutional patriotism" would make his theory better-suited for the pursuit of a deliberative conception of justice and legitimacy.

In order to secure legitimacy and maintain the primacy of the discourse principle, Habermas' innovative form of nationalism, *constitutional patriotism*, can only refer to a *thin* conception of patriotism that is directed toward an understanding of the constitution as the abstract co-originating principles of private and public autonomy. Such an understanding would ensure that communicative rationality is capable of legitimating any and all norms, actions and laws; including the legitimacy of a political community's identity and political culture. By emphasizing this type of constitutional patriotism, only

those norms that have been or can be rationally justified will emerge or be considered legitimate in a given society.

2 A Brief History of Citizenship

The history of citizenship in political communities is one that is marked by a tension, or at least a separation, between liberal and republican concepts and tendencies. As we have already discovered, these political tendencies have been understood to be in competition with each other throughout the history of Western political thought. The competition between the different conceptions of the citizen is one that is primarily focused upon the separation between the public and private spheres of life. Essentially, both republican and liberal concepts of citizenship develop their ideals of the citizen by emphasizing the importance of life in the public sphere or life in the private sphere.

The classical republican definition of the citizen can be traced to the works of Aristotle and it originally identified members of the Roman and Athenian *res publica* and *polis*. Membership in these political associations involved participating in public decision-making processes to regulate the community.¹ The republican conception of citizenship, therefore, identifies citizens as political beings. Each individual that is recognized as a citizen has the potential to influence the legal matters which will affect him or her and the others within the community. Each and every citizen has the ability to rule, collectively, but each and every citizen is also ruled since the laws they help to create also apply to themselves. Accordingly, the citizen's duties were twofold: the citizen was to participate in the governance and regulation of the community and its

public affairs through elections and the holding of public office; as well, the citizen was to be obedient to the laws and regulations of the community.²

The significance of public autonomy is quite apparent in this conceptualization of the citizen. The public autonomy of the individual is primarily emphasized because the concern is with collective political participation in procedures to determine the ordering of the community. This definition of the citizen refers to the members of a political community that adhere to republican notions of political rightness: that is, an association of individuals collectively pursuing their communal interest based on the common will.³ This republican conception of the citizen has an important subjective requirement. The citizenry work to regulate the public, which implies that they must focus on the common and collective interests of the community and not their own individual and isolated interests. Since the citizens are acting to regulate their shared lifeworld, they must be able to place the public good before and above their own personal and private concerns. This requires the citizens to have a “right temper” in order to shed their own personal interests and maintain a focus on the common good.⁴

The requirement of transcending convictions of the private lifeworld exemplifies how republicans continually emphasize the importance of the public over the private. This strict separation of public and private and the emphasis on public autonomy also contributes to their conception of the citizen as a highly exclusive category and status. The requirement of a “right temper” involves the ability of the individual to make rational choices concerning the public good, to ensure that the right or most advantageous decision for the public will be made. In order to do so, the individual’s mind must be “free” and entirely independent from the interference of private concerns. Consequently,

material and social conditions regarding who could qualify as a citizen were put in place. This resulted in a high level of exclusion since certain individuals –including the poor, women, and those who did not own property –were considered incapable of maintaining an emphasis on the public and common good.

It was believed that only the male property owning heads of the households were capable of satisfying the requirements for a “right temper”. It was argued that their property ownership tied them directly to the community through its land, and therefore, secured an orientation toward the good of the community.⁵ In addition, by being the heads of their household, such men were believed to be capable of distancing themselves from the private sphere since the women and slaves could be left to tend to private matters.⁶ The result was that the status of citizenship was such an exclusive category that the majority of the society found itself in a subordinate position since they were not recognized with the benefits of citizenship status. A minority of the society’s population, the land owning male heads of the household, created the laws, rules and regulations to which the entire society was subjected.

Due to the exclusion that is sponsored by the classical republican conception of citizenship, it can only be understood to be in conflict with human rights-based conceptions of political rightness. This is because the classical republican citizenship requirements result in a denial of human equality and the proper entitlements that human rights theorists claim are based on a person’s humanity.⁷ The increasing popularity of liberal and human rights-based conceptions of political rightness contributed to a shift in the historical understanding of the citizen. The conceptual shift in the status of the citizen resulted in an understanding of the citizen as the subject of law; establishing the citizen as

an individual who is protected and regulated by law and not necessarily as the creator of law.⁸

Spurred by the emergence of the market and capitalism in modern societies as extremely significant components of the social order, the change in the conception of the citizen corresponded with an understanding of the human individual as the proprietor and possessor of material objects. Human relations were also increasingly being viewed as involving or occurring through material objects and the accumulation and maintenance of these objects. The individual's possessions, their maintenance and his or her relations with others through material objects became regulated through laws that defined the rightful scope of each individual's activities in the market. Consequently, citizenship status came to be understood as the recognition of the individual as the possessor of particular liberties and human rights. By limiting citizenship to a determination of the rightful scope of private action and defining the citizen as the subject of law, the status of citizen in a liberal context does not depend on an ability to participate in public determinations.⁹ Rather, the liberal conception of the citizen refers to the liberties and freedoms that one is accorded in order to pursue his or her own private self-interests.

Liberal rights theorists began favoring the freedom of the market, the freedom to pursue private self-interests and the ability to accumulate property, over the sole recognition of the citizen as a public decision-maker.¹⁰ The newly developed citizenship status granted the individual rights that would regulate human interactions in the private sphere, protecting one's freedom in the market and his or her ability to pursue self-interests. This form of citizenship enables individuals to claim the protection of law by pointing to an unlawful interference with their private actions.

In civic republicanism, citizenship status referred to political membership and participation within political procedures. With the development of liberal political theory and the increasing significance of the market, citizenship began to refer to liberties and freedoms one is accorded in the private sphere. For Habermas, by contrast, citizenship and membership status stands as a right that is contained in the system of abstract rights that institutionalize the discourse principle. The status of a member is originally listed among the private autonomy rights that include equal individual liberties and a means to address rights infringements.¹¹ However, membership status, in accordance with Habermas' procedural conception of legitimacy, is not limited to a mere recognition of private autonomy or a mechanism that defines the citizens as mere subjects of law. Instead, membership status in Habermas' theory equates to recognizing an individual with the co-originating system of private and public autonomy; defining the citizens as both the subject and creator of law. Due to the combination of republican and liberal tendencies on which Habermas' theory of legitimacy is based, the status of the citizen represents a guarantee to firstly, a web of individual rights that are required for egalitarian discursive engagements and secondly, the political rights that enable one to participate in the joint practices of communal regulation and self-determination.¹² The recognition of the individual as a citizen, in this sense, grants that individual a series of egalitarian rights and public autonomy rights, which in conjunction with one another enable the use of communicative rationality's legitimating force. Without the recognition of citizenship status, individuals are unable to participate in deliberative engagements, which develop the co-originating principles of public and private autonomy, and are denied the right to form agreements regarding the laws and norms that will affect and

regulate them. This is problematic since individuals that are denied the ability to participate in deliberative democratic engagements cannot possibly understand themselves to be the authors of law. This is because the web of co-originating autonomy with which members are recognized represents the requirements for egalitarian discursive engagements. Without the recognition of citizenship status and these principles of autonomy, communicative rationality's legitimating force could not be harnessed; argumentative procedures among equals could not take place. The recognition of citizenship and the rights that it entails allows for Habermas' theory and ideals to be implemented, actualized and practised.

3 A History of the Nation

According to Habermas, the concept of the nation – the affiliation and community that the citizen is a member of – has two competing definitions or ideals. The first, is the notion that the term nation denotes a pre-political community, characterized by its members sharing a common culture, language, descent or ethnicity.¹³ In this sense, nation refers to a 'people' and defines a homogeneous ethical group. The second ideal of the nation alludes to a political community, where the nation is the aggregate of citizens that are accorded with and recognized as the bearers of particular rights and duties.¹⁴ This later ideal parts with the conception of the nation as a homogeneous ethnic or cultural group since the citizenry are not necessarily linked and integrated through a common ancestry or culture. Rather, the citizenry are linked politically, through a shared future, political processes and standing under the state apparatus and its laws.

The concept of the nation as an essentially homogeneous ethnic or cultural grouping is the more classical understanding of the two.¹⁵ Its most problematic feature, in terms of political legitimacy, is the high level of exclusion that it presupposes and promotes. According to this definition of the nation, inclusion is based on the sharing of socially significant physical or cultural features and any recognition of difference may lead to a denial of membership and exclusion. Due to the high level of pluralism and difference that exists in modern communities, this definition of the nation is highly problematic. Nevertheless, Habermas claims that even with its undesirable levels of exclusion, this conception of the nation aided in the democratization of the state apparatus. The perception of cultural and ancestral homogeneity led to the development of a “collective self-identification”.¹⁶ People began to see themselves as agents within unified groups that were integrated as communities. Members of national communities started to believe themselves to be part of a unified collective and not merely isolated individuals. This form of popular consciousness established national boundaries between communities that were rooted in the stereotypes of the pre-political conception of the nation.¹⁷

Although this perception and consciousness was also the basis for excluding others and repudiating anything that was believed to be “foreign”, it became the basis for the establishment of *political communities* and the democratization of those communities.¹⁸ National self-consciousness emerged as a form of nationalism, the foundation for political activism and the formation and mobilization of social movements, which developed into the ideals of popular control over the state apparatus and the desire to invest the sovereignty of a nation in its constituents. In short, the democratization of the

nation occurred because the perception of being integrated through a shared past led to the perception of unity within a community. This sense of community, in turn, led to a dedication to the community by its members and the political activism of the citizenry.

This transformation in perception leads us to the second conception of the nation, that is, the nation as a politically integrated community. The classical connotations of the nation as a people with a shared descent or customs and culture decreased in significance as the citizens perceived themselves to be members within political units. Nations became the aggregate of citizens with rights and duties, where sovereignty is invested in the citizenry, and not simply references to common ethnic groupings. With the advancement of the nation-state, ideals of citizenship began to part company with notions of the nation being a pre-political community, replacing it with the theory of the citizenry being integrated politically and through the state apparatus.¹⁹

One element that should not be overlooked here is the perception of integration and unity within a community. This sense of integration allows individuals that share a lifeworld to recognize themselves as a community. It also provides the basis of a form of 'nationalism' that allows this perceived community to act collectively and inspires the pursuit of the common good. Whether it is based on pre-political or political factors, this subjective component of membership is one of the most important factors in the concept of the nation or political community. This subjective and perceptual component establishes the basis for the recognition of "we/us", which acts as the foundation for membership and exclusion.

4 Consequences of Exclusion

The denial of citizenship status and the exclusion of individuals or groups from the full benefits of inclusion in political communities can result in severe repercussions. First, such denials can result in personal psychological and internal damage, in terms of the excluded individual's perception of, and relation to, the self. Second, the denial of citizenship status to members of particular groups can result in overt acts of physical violence in the community and contribute to the further fragmentation of the society. Lastly, and perhaps most importantly, exclusion and the denial of full inclusion can come at the cost of political legitimacy. This third consequence of exclusion is based on a failure to meet the requirements of emphasizing the individual's private and public autonomy equally. This leads to an inability of all those affected by norms and actions to participate as equals in processes of argumentation in order to reach a rational consensus regarding such norms and actions.

The denial of citizenship status represents a failure to recognize an individual as an author of law in republican theory, the legally protected subject of law in liberal theory, or as the benefactor of a co-originating web of private and public autonomy rights in an order derived from Habermasian theory. Such denials in a particular community to individuals that reside within its boundaries or perceive themselves to be integrated within that community can cause serious psychological injury to the excluded. The damage that is caused to such individuals is manifested as an injury to their self-understanding and perception of moral self worth. Intersubjective relations characterize significant portions of communal life. Consequently, the development of an individual's self-understanding is not determined exclusively by that individual. The opinions of

others can affect how one perceives him or herself. In other words, the opinions others have of individuals or groups play an important role in how they construct their personal and collective identities or self-understandings. "The relationship between dignity and reputation is complex, but the essential idea is that our sense of identity and 'worth' depends to a significant degree upon what others think of us."²⁰ In this way, as Axel Honneth has argued, the recognition of individuals or groups as equals and citizens by the others in a community allows them to understand themselves to be the possessors of positive abilities, favorable qualities and as equals within that society or community. Conversely, a denial of citizenship status and the rights and privileges it entails amounts to the denial of the individual's or group's potential and worth to the community. This leaves those who are denied this recognition to understand themselves as lacking positive abilities and qualities or the same degree of moral accountability as the others in the society.²¹

In addition, Michel Wieviorka has demonstrated that the consequences of a denial of recognition are not limited to the internal psychological harm inflicted upon an individual's or group's dignity, identity and self-understanding. Such denials can result in the further fragmentation of societies through physical acts of violence and the promotion of group solidarity based on a difference from the rest of society. In political communities where groups and individuals find themselves subjected to exclusion, it is possible and perhaps even likely (based on the recent history of denials of the rights and privileges of citizenship) that these individuals will engage in, and be the recipients of, violent behavior.²² The rage and anger that develops from an understanding of oneself to be substantively rejected has translated into violent riots and the destruction of the self

through substance abuse and suicide.²³ Even without overt violent acts, groups that find themselves to be excluded are likely to identify themselves with, and promote group solidarity based on, those features and characteristics that differentiate themselves from the rest of the society.²⁴ The reference point that is used to develop their identity is rooted in a difference and distance from the identity of the rest of society. This may cause the group members to construct identities that work to fragment society since such group identities are derived from a lack of cohesion in society.

Most importantly, for our purposes, the denial of citizenship status can also come at the cost of political legitimacy because it constitutes a failure to recognize an individual or individuals with the full set of rights that enable communicative rationality to develop legitimate norms and laws. As argued in the previous chapter, within Habermas' theory of legitimacy, membership status and the recognition of the individual as a citizen accords the individual with the abstract and co-originating set of private and public autonomy rights. Only through an acquisition of these rights can individuals equally participate in the processes of opinion- and will-formation regarding the laws and norms that will affect them. A denial of citizenship status, and the identification of an individual or group as outside of the bounds and parameters of legal discourses, means that an individual is unable to effectively participate in these processes and is therefore unable, through rational communication and argumentation, to consent to those norms that affect them. Consequently, norms and laws that affect an excluded individual or group are potentially illegitimate and invalid since all possibly affected persons did not have the opportunity to agree to them as participants in rational discourses.²⁵ When an individual is denied the right to participate in communicative procedures he or she is left

unable to be obedient to norms and laws through rational insights. The processes of argumentation are intended both to shape an individual's will through being convinced and open norms to communicative rationality. A denial of membership prevents this from occurring. Only through the recognition of membership and the rights that it entails can Habermas' theory and ideals regarding legitimacy be actualized and put into practice.

5 Constitutional Patriotism

Habermas' ideals regarding membership, political integration and the proper basis of national identity explicitly reject the classical positions based on the belief that a nation is a culturally or ethnically homogeneous group. This is because a certain level of diversity and cultural pluralism marks many of today's political societies. The level of exclusion and the denials of citizenship rights that would (and do) occur by requiring cultural or ethical homogeneity would (and do) result in an inability of most modern political communities to satisfy Habermas' requirements of legitimacy. This is due to the fact that many individuals would be unable to participate in the communicative processes that ensure legitimacy. In addition, such a basis of integration would limit the effectiveness and potential of communicative action and communicative rationality. Therefore, Habermas contends that citizens should be integrated *politically* and understand themselves to be members of *political communities* rather than members of particular ethnic and cultural groupings alone. Although one's ethnicity and ethical-cultural heritage may aid the development of certain aspects of his or her identity, it should not be regarded as the primary mechanism for political integration. Rather, Habermas claims individuals should be united by the principles that establish and regulate their political

nation-state and political culture. As Habermas has stated, "The identity of a political community... depends primarily upon the constitutional principles rooted in a political culture and not upon an ethical-cultural form of life as a whole."²⁶

In this way, membership status and the development of a "we/us" perception is based on the dedication of the members of a society to their constitutional principles since the constitution generally establishes or reflects the political nature and political culture of a society. Therefore, according to Habermas, "[t]he political culture of a country crystallizes around its constitution."²⁷ Within the context of a society that is dedicated to deliberative democratic pursuits, the need for cultural and ethnic homogeneity in the process of collective self-identification is displaced as the citizenry are integrated through a shared political culture that is based upon communicative action. In this instance, the various identities within such multicultural and plural societies are intended to be protected from fragmentation through a common political culture based on certain democratic ideals and shared perceptions of political rightness. Solidarity and a perception of unity are developed through the recognition of a shared *political* life and the collective control over a common political fate or future. By acting through efforts to regulate their lives by democratic means, citizens within a deliberative democratic community are intended to understand themselves to be united and integrated members of a political nation-state. "Hence republicanism must learn to stand on its own feet. The central idea of republicanism is that the democratic process can serve... as a guarantor for the social integration of an increasingly differentiated society."²⁸

The form of citizenship that is required to satisfy Habermas' theory of legitimacy is of course a combination of the liberal and republican conceptions of the citizen. While the

status of citizenship determines the parameters of legal discourses, its content, practice and basis includes liberal and republican ideals. However, since his basic concerns for legitimacy involve opinion formation through communicative action coupled with the assumption that republicanism acts as the integrative force for any given deliberative democratic political community, the citizenry is burdened by certain perceptual requirements. Initially, the citizenry must perceive themselves to be integrated and united through their political culture and the republican mechanisms and democratic ideals that Habermas believes are capable of guaranteeing a sense of unity in plural societies. Secondly, and perhaps more importantly, the citizenry must adopt and develop an orientation toward the common good that is expressed through democratic pursuits. Habermas' vision of citizenship, therefore, involves a particular degree of selflessness and a level of disinterest in personal goals so that the citizens are not acting solely out of their own individual private interests or in the name of personal gain. Together these burdens imply a certain "right mindedness" because they deal specifically with the perceptions, perspectives and attitudes that the citizenry must adopt. It is also important to note that these perspectives must be adopted freely and without coercion. Consequently, as Habermas has stated, "...the legally constituted status of citizenship depends on the *supportive spirit* of a consonant background of legally noncoercible motives and attitudes of a citizenry oriented toward the common good."²⁹

The similarities between classical republicanism's "right temper" and Habermas' "supportive spirit" are apparent. As I have argued above, the republican theory of citizenship and the requirements it entails lead their conception of citizenship to be a highly exclusive category and status. In the classical sense, ensuring that an individual

had the “right temper” resulted in citizenship being a patriarchal and class-based status. The level of exclusion that resulted prevents the classical republican theory of citizenship from being legitimate in a Habermasian sense. This is because many that would be affected by the norms and actions of the political institutions that regulate their community are left unable to participate in the opinion and decision-making processes and a consensus among all those affected is, therefore, incapable of being developed. This classical republican conception of citizenship constrains the potential of communicative rationality and the ability to utilize properly inclusive discursive procedures. Consequently, a large portion of the classical republican society was left unable to display obedience to social norms and laws through rational insight. This raises the question; due to the similarities between Habermas’ and classical republicans’ subjective requirements for citizenship, do Habermas’ requirements of citizenship lead to a brand of exclusion that results in his political theory failing to meet his own standards of political legitimacy?

Habermas has distinguished himself from Aristotle and other classical republican theorists since he does not find that ownership in a society’s land and being a male head of a household act as adequate or appropriate measures for determining one’s ability to pursue common interests and to have a “supportive spirit”/“right temper”. Rather, for Habermas, the link between motives, attitudes and a dedication to democratic pursuits is a particular loyalty to the constitutional principles of a democratic political community; or, as Habermas calls it, a “constitutional patriotism.”³⁰

Habermas states that a patriotic stance toward democratic constitutional principles is capable of ensuring a supportive spirit or right mindedness among the citizenry. Through

a form of 'patriotism' toward their 'constitution', citizens are intended to develop a sense of integration based on the shared political culture that this 'constitution' establishes or reflects. In addition, by acquiring a 'patriotic' attitude toward the communicative, democratic and republican content of the 'constitution' (if we assume this to be its content), citizens are able to adopt, secure or reinforce an orientation toward the common good. Thus, Habermas intends to avoid many of the dangers and potentially illegitimate ideals that other political theorists — particularly ethnic nationalists and communitarians — have advocated. He presents us with the ideal of constitutional patriotism as a mechanism that enables the citizenry to meet the required perceptual burdens for the actualization of a legitimate deliberative democratic order. Therefore, constitutional patriotism is intended to assure a perception of political integration and ensure the necessary dedication toward the common good. This is meant to assure the necessary perception of integration and a degree of self-disinterest among the citizenry that allow for the establishment and development of a legitimate political community while avoiding the exclusionary implications and communicative limitations of ethnic nationalism.

Nevertheless, meeting the political and practical potential of the principles of discourse is limited by the fact that constitutional patriotism is an unrefined ideal. Habermas seems to be of the opinion that this ideal is of grand importance in the quest for political legitimacy, yet he has not provided us with an adequate definition or a conclusive conceptualization of "constitutional patriotism's" content and scope. He leaves us with an account of why constitutional patriotism is integral to legitimate politics but he has done little to enlighten the reader on what is meant by the terms '*constitution*'

and '*patriotism*'. Consequently, we are forced to look elsewhere in order to clarify and determine the possible definitions, content and implications of the requirements and ideal of constitutional patriotism.

We can derive, from the discussions above, that the term 'constitution' is directly tied to a community's political culture; the constitution either establishes or reflects it. In essence, the constitution is in some way the embodiment of a community's political culture. Yet, if this is the case, the specificity of the content and the constitution's degree of abstractness are still unclear. On one end of the spectrum, the constitution may be the theoretical and abstract foundations that inspire a political culture or from which the political culture has been developed. Conversely, the constitution may be the embodiment of the specific and concrete ethically permeated principles that regulate a given society and distinguish its political culture from other constitutionally established regimes. At the abstract level, and in terms of a Habermas' deliberative democratic theory, the term "constitution" could be used to represent the *abstract principles* that are required for individuals to engage in egalitarian discourses and the institutionalization of the discourse principle. The alternative definition of the term constitution would refer to the ethically permeated fundamental laws that have been generated by *particular* ethical-historical processes of a given community and work to regulate that *particular* political community. The above definitions do not exhaust the possible definitions or understandings of what may be implied by the term "constitution". However, these understandings seem appropriate since they are derived from Habermas' claims regarding the establishment of a legitimate political order and the methodology existing states have used to establish their own political orders.

In a similar fashion, we can interpret the term 'patriotism' within the context of the discussions above. By doing so, we can assume that patriotism is linked to the notion of a *supportive spirit*. In general, both terms, 'supportive' and 'patriotism', refer to an advocacy of, commitment to or loyalty toward a particular thing –in this case a 'constitution'. However, the degree and type of loyalty and commitment that patriotism implies is undetermined. Although we may not be able to exhaust the possible definitions of the term patriotism, we can address two possible interpretations which seem to reside at opposite ends of the spectrum. That is to say, we can adequately address the term patriotism by conceptualizing it as *thin* and *thick*. A thin patriotism conveys a very limited degree of commitment. As such, thin patriotism is reflexive, allowing the individual to alter or change his or her degree of commitment and the object of his or her patriotism. Thin patriotism is, therefore, an extremely low level of commitment that does not needlessly burden the individual or unnecessarily privilege the object of his or her patriotism. It is distanced from the ignorance and irrationality that has been attributed to certain understandings of patriotism³¹ and it is potentially subjected to the legitimating force of communicative rationality. Consequently, thin patriotism may be viewed as a procedural understanding of commitment and loyalty. The main concern with the thin interpretation of patriotism is that it is not the definition of patriotism that people readily accept. Generally, patriotism is understood as a much deeper level or more substantive notion of devotion.³² The alternative and opposite conception of patriotism, thick patriotism, is a much higher measure of loyalty that one may possess. Thick patriotism is not procedural, nor is it reflexive. An individual who is thickly patriotic has an aversion

to critically examining the object of his or her devotion and can be said to be afflicted by a degree of irrationality.

In order to maintain an emphasis on the deliberative conception of legitimacy *constitutional patriotism* must imply a thin level of patriotism toward a constitution that represents the abstract requirements for egalitarian argumentation. When constitutional patriotism is understood in this way, the discourse principle and the co-originating web of private and public autonomy become the primary concern. Alternative understandings of constitutional patriotism lead to higher levels of exclusion, limiting the potential of communicative rationality and the creation of a situation where certain positions become favoured prior to democratic engagements. Such alternative understandings lead to contradictions within deliberative democratic theory and work to reduce the desirability of Habermas' political ideals. In order to demonstrate that a thin patriotism toward an abstract constitution is the most advantageous conceptualization, I will consider and assess each of the four possible definitions of the term constitutional patriotism.

5.1 The Abstract and Communicatively Based Constitution

As I have identified earlier, the first potential understanding of the term 'constitution' is that of a conceptually abstract set of principles. For our purposes, the content of this type of constitution would be the principles that are required for implementing communicative rationality's legitimating force and consensus driven procedures of opinion- and will-formation. Previously, Habermas' political theory of legitimacy was referred to as involving a shift from the abstract to the concrete. With this in mind, it is quite possible that a 'constitution' can be understood as a reference to the abstract content

of Habermas' theory; that is, the theoretical exegesis of egalitarian communication as embodied in the co-originating principles of private and public autonomy that enable communicative rationality's legitimating force. When the constitution is viewed as a reference to the basis of egalitarian communication, its content becomes the principles that establish the parameters of argumentation (private autonomy rights) and the principles that determine one's ability to act according to these parameters (public autonomy rights). Therefore, this view of the "constitution" can only be understood as the abstract co-originating web of private and public autonomy rights, which Habermas has developed, in their theoretical form and prior to their institutionalization and practical implementation.

Firstly, this conception of the constitution includes the private autonomy rights that are required for individuals to engage in procedures of discursive opinion- and will-formation.³³ It is important to recall that these rights are merely the expression of egalitarian intersubjective relations and not akin to classical liberal human rights. Secondly, the content of such a constitution would include, of course, the public autonomy rights that enable individuals to utilize their communicative resources, express themselves and actively participate in discursive procedures. If this is what is implied by the term constitution in the phrase "constitutional patriotism", then the constitution is entirely abstract and conceptual and distanced from any ethically specific content since it does not have a concrete construction obtained in a historical, cultural or ethical series of events. The constitution would only embody the consequences of, or requirements for, the discourse principle's application to human relations as expressed in Habermas' co-originating system of private and public autonomy.³⁴

5.2 The Concrete and Ethically Permeated Constitution

The alternative conception of the constitution is that of the concrete formulation of a society's fundamental laws and the delineation of its particular political culture. This understanding of the term 'constitution' is based on existing national constitutions. These constitutions owe their existence to the struggles, achievements, uses of political authority and power and the specific historical occurrences in the communities they regulate. This 'constitution' is particular in its nature. Generally, these concrete constitutions establish a *particular* conception of government, designate the *particular* methods and procedures of governance and represent the *particular* principles to which life within the community will conform.³⁵

The scope of such concrete constitutions is, therefore, limited to particular ethical, cultural and political communities and their content generally reflects and embodies the "shared" conceptions of the common good within such communities. Nevertheless, this degree of particularity can influence, and is in fact tied to, a community's ethical-political self-understanding. The constitution is the concrete document that can integrate the community and it is intended to reflect their common and shared political will and culture. Under this conception of the term 'constitution', a constitution can be viewed as concrete and ethically permeated. It would embody particular and specific principles that a given society has adopted and not merely the abstract and potentially universal principles that can be used to describe the egalitarian communicative interactions of individuals regardless of their political culture.

5.3 Thin Patriotism

The thin understanding of patriotism is based on a low measure of commitment that effects or resides in one's will. Thin patriotism can, therefore, be characterized as a low level of *acceptance* of or *intent* to utilize the object of one's patriotism. A patriotism that is defined as a commitment rooted in a low level of intent or acceptance has the potential to be a degree of loyalty that can be subjected to change and rational criticism. In addition, the object of one's thin patriotism is similarly alterable and procedurally subject to change. Thin patriotism is not exempt from criticism nor does it render the patriot blind or ignorant to the nature, virtues or vices of his or her commitment. A thin patriotism is capable of being critically analyzed by the patriot as well as being the possible subject of rational discussions or communicative procedures. As such, the individual's thin patriotism is potentially procedural since it can be subjected to the critical eye and legitimating force of communicative rationality.

As a result of being subjected to reason and argumentative procedures, thin patriotism can be strengthened, legitimated and expanded to a degree of commitment beyond mere intent or acceptance. This is due to the fact that rational argumentation regarding the object of one's patriotism may legitimate this object or convince the individual of its merits and therefore energize and increase one's level of commitment to it. However, as it is potentially affected by communicative reason, thin patriotism can also be weakened and challenged by argumentation. Rational argumentation can possibly develop an understanding of one's thin patriotism and the object of that patriotism as lacking merit or virtue, causing the individual to discard his or her thin patriotism or possibly seek radical alterations to the object of this patriotism.

5.4 Thick Patriotism

The thick understanding of patriotism defines the ideal as a powerful emotional condition and high degree of loyalty. This definition represents the basis and inspiration for statements such as “my country right or wrong” and is properly understood as a form of love or devotion that is directed toward a particular thing. In this sense, patriotism can be defined as the penultimate emotion before jingoism. However, it possibly rivals jingoism’s level of irrationality. Alasdair MacIntyre has engaged in a study of the concept of patriotism in which his definition and understanding of the term is similar to that of a thick patriotism. MacIntyre stresses that patriotism stands in contrast to ideals of rationality and morality, since both of the latter rely on and emphasize the ideals of neutrality, universality, and the freedom or independence from social particularities and interests.³⁶ A thick definition of patriotism is distinct from MacIntyre’s descriptions of morality and rationality since it does not promote neutrality or universality and expresses the importance of social particularities. Thick patriotism involves the practice of elevating the object of one’s loyalty to a higher status than it would otherwise achieve, which works to free it from rational criticism.

When patriotism is described in terms of an emotional condition that is characterised by an intense love and devotion, the object of one’s patriotism is generally not subjected to scrutiny or rational criticism. The object does not receive a neutral status because such a patriot is neither neutral nor reflexive; the thick patriot is partial and devoted to the object. For example, a thickly patriotic Canadian’s emotional condition would prevent him or her from examining particular Canadian characteristics or actions in the same light as an individual who is entirely detached from Canada and harbouring no emotional ties

to Canada at all. The opinion of the former would be based on a form of love, while the opinion of the latter could be developed through rational and critical examination alone. In fact, this thick understanding of patriotism is so distanced from rational criticism that Kwame Appiah has concluded that patriots of this kind are especially sensitive and opposed to the critical examination of the object of their loyalty.³⁷ This thick conception of patriotism is therefore not procedural, at least in terms of a procedure of rational argumentation. It involves a devotion to, and an insistence on, the priority of the object of patriotism without the burden of it being rationally justifiable. It is, therefore, a strong conviction that stands in opposition to many of deliberative democracy's demands and aspirations.³⁸ Thick patriotism, the patriotism that resides in close proximity to jingoism, involves an unconditional loyalty and commitment to its object and is likely to rule out the possibility or merits of rational argumentation and criticism.

What is most troubling about a requirement of this type of patriotic virtue is that thick patriotism can obviously prove to be a vice and not a virtue. As stated above, thick patriotism is not procedural and refers to a level of loyalty and devotion to particular things. Conversely, according to Habermas' legitimacy theory, actions and norms can only be determined to be legitimate and valid if they have been, or could be, agreed upon by all those who are possibly affected by them through processes of rational argumentation where each participant is treated as an equal.³⁹ In other words, legitimacy is absent in norms and actions until such norms and actions have been rationally justified according to a specific procedure of communication and argumentation. It would therefore appear that on the basis of this sort of conception of legitimacy no limitations should be placed on criticism and rational argumentation concerning a society, its social

institutions and practices – including its constitutional fundamentals and political culture. A dedication to legitimacy through communicative action seems to establish a system where no loyalties or devotions would be able to exempt norms and laws from questioning and possible rejection to ensure that a society is established and maintained justly and legitimately.⁴⁰ Yet, as MacIntyre argues, “[p]atriotism... because it is framed in terms of the membership of some particular social community with some particular social, political, and economic structure, must exempt at least some fundamental structures of that community’s life from criticism.”⁴¹

5.5 Thick Patriotism and Communicative Rationality

Habermas’ critical theory is intended to represent a commitment to legitimacy and the development of legitimate norms and laws through criticism and rational acceptance. Conversely, emphasizing a required thick patriotism can be interpreted as a commitment to irrationality and the acceptance of norms and laws in the absence of critical engagement. As MacIntyre has suggested; “...the adherents of the morality of patriotism have condemned themselves to a fundamental irrational attitude – since the refusal to examine some of one’s fundamental beliefs and attitudes is to insist on accepting them, whether they are rationally justifiable or not, which is irrational – and have imprisoned themselves within that irrationality.”⁴² If Habermas is promoting a thick conception of patriotism in his requirements of constitutional patriotism, then the citizens of a deliberative democratic order would imprison themselves in this form of irrationality. A community that is thickly loyal to their constitution or any particular aspects of it would elevate it beyond the scope of rational criticism and, therefore, fail to legitimate it

through argumentative procedures and communicative rationality since legitimacy and communicative rationality rely on an openness to rational criticism.

By demanding a commitment to constitutional patriotism, it is possible that Habermas could be accused of appealing to two competitive or contradictory principles. Due to the fact that Habermas has left constitutional patriotism an unrefined ideal and that people typically conceptualize 'patriotism' according to a *thick* model, Habermas may be interpreted by some as promoting a thick form of patriotism. But, such a position would be contradictory since he presses for the need for a procedure that enables the citizenry to have control over, to be the authors of, the norms and laws that effect them.

Nevertheless, if he advocates a thick level of patriotism then he would contradictorily require the citizenry to be patriotic to the 'constitution', emphasizing a level of loyalty that would exempt the 'constitution' from rational criticism. This would mean that particular constitutional norms and fundamental laws (the nature and content of which still depends on how the term 'constitution' is defined) will affect the citizenry without their consent or control since they would be devoutly patriotic and committed to them.⁴³

In the final analysis, this brand of patriotism would privilege certain positions in advance of communicative procedures and outcomes since these positions are not even subjected to democratic procedures due to the fact that a thick patriotism would elevate them beyond the scope of communicative rationality. This would contradict much of the appeal of Habermas' theory of legitimacy and many of his premises regarding neutrality since certain constitutional norms would not require mutual acceptance based on the force of a better argument.⁴⁴

The criticisms Elias Jose Palti directed toward Habermas' political theory of legitimacy could be interpreted as suggesting that the citizenry would be burdened by a particular degree of thick patriotism. In Chapter One I discussed Palti's contentions that the emergence of the abstract system of rights which work to establish the legal code and institutionalize the discourse principle were not consistent with Habermas's theory of legitimacy. According to Palti, inconsistencies and contradictions emerge in Habermas' theory since certain key principles are elevated beyond the scope of rational criticism during the institutionalization of the discourse principle.⁴⁵ I argued that this interpretation was problematic because it identified the system of rights too rigidly. Palti's claims were refuted by claiming that Habermas' system of rights is, in fact, self-reflexive and open to argumentation and contestation. However, Palti's criticisms may provide an example of how some critics may interpret Habermas as requiring a thick level of patriotism. Palti argued that the establishment of a legal code necessarily subordinates the citizenry to law. It was Palti's claim that the citizenry would be unable to contest this legal code and place it under discursive control.⁴⁶ It seems that Palti envisioned the citizenry that institutionalize the discourse principle as imprisoning themselves in a form of irrationality since they must submit to the legal medium without an ability to contest or rationally criticize it. Palti's claims suggest that the citizenry must be devoutly loyal or thickly patriotic to the legal code if they wish to institutionalize the discourse principle.

Although the citizenry is intended to freely, and without coercion, recognize each other with the abstract set of rights, this understanding of Habermas' theory and constitutional patriotism would indicate that it prevents certain aspects of these abstract

rights from being legitimated. This is because the high level of devotion to the legal code prevents it from being completely reflexive or entirely dependent upon rational argumentation. A thick level of devotion and loyalty even toward Habermas' abstract and co-originating system of private and public autonomy rights (the abstract constitution) would work to subordinate the citizenry and limit the scope of their discursive possibilities. If Habermas does demand a thick patriotism of the citizenry, Palti would consequently seem to be correct in stating that the institutionalization of the discourse principle does not have a discursive construction and the legal code cannot be legitimated through processes of rational argumentation.⁴⁷ In line with Palti's criticisms, a citizenry that is burdened by a thick level of patriotism and loyalty toward even the abstract system of rights would appear to be subordinated to the legal code following its institutionalization.

A thick patriotism to the constitution as the ethically permeated set of fundamental laws would entail similar consequences. That is, certain positions and procedures would be favoured in the absence of rational criticism, which would make the concept of constitutional patriotism even more problematic. In this case, the citizenry would be devoutly loyal to certain interpretations of fundamental laws and practices, exempting these laws and practices from rational criticism and the full potential of communicative rationality. However, since a thick level of patriotism, regardless of how 'constitution' is defined, contradicts much of the appeal and the general principles of Habermas' theory, it is unlikely that he would require it of the citizenry. Although certain critics may make such suggestions, it is hard to believe that constitutional patriotism could possibly require a thick degree of loyalty.

5.6 Communicative Rationality and the Concrete Constitution

Originally, Habermas' discourse theory focused on universal validity claims. This has been his stance until recently, when he expanded his theory to include considerations of ethical-political discourses.⁴⁸ Habermas now finds ethical interpretations of the constitution to be unavoidable:

The persons who make up a nation of citizens at any given time are always embedded in a network of tradition and intersubjectively shared contexts of experience and life. Thus, every legal system is always also the expression of a particular life form and not merely a reflection of the universal features of basic rights. For this reason, constitutional principles will always be interpreted from the point of view of a nation's historical experience: the interpretation cannot be ethically neutral.⁴⁹

This makes clear that Habermas views the content of a constitution to be influenced, unavoidably, by a community's historical experiences and traditions and that it will be ethically specific. Consequently, it is possible, and perhaps likely, that Habermas uses the term 'constitution' to refer to an ethically permeated set of fundamental laws. His conception of the 'constitution' may be based on notions of concrete and particular constitutions since he seems to claim that ethical permeation is unavoidable. This suggests that the constitution to which the citizenry is expected to be 'patriotic' is that of an ethically permeated and socially specific set of fundamental norms that establishes or reflects a given community's political culture.

Since Habermas views constitutional patriotism as an appropriate mechanism of integration, the ethical interpretations of constitutional principles becomes extremely important in the development of a 'we' perspective and the status of the citizen. When discussing the nature of the ethical interpretation of constitutional principles Habermas has surmised that:

The political culture of a country crystallizes around its constitutional principles. Each national culture develops a distinctive interpretation of those constitutional principles that are equally embodied in other republican constitutions... in light of its own national history. A 'constitutional patriotism' based *on these interpretations* can take the place originally occupied by nationalism. (emphasis added).⁵⁰

Based on these statements, we may conclude that Habermas defines the constitution as the ethically permeated embodiment of a particular society's interpretation of fundamental principles. Therefore, *constitutional patriotism* refers to an unspecified level of commitment and loyalty to an ethically permeated embodiment of a society's fundamental laws and norms. It is, therefore, possible and perhaps even likely that this understanding of the term 'constitution' is problematic since it may detract from the primacy of communicative rationality's legitimating force and emphasizes identity, history and culture over democracy and the supremacy of the discourse principle.

The ethical substance of a constitution is intended, by Habermas, to represent a particular way of life, which is distinctive for each political community, and acts as the substance of political integration.⁵¹ As such, these particular ethical understandings of the constitution contribute to the development of the political and cultural identity and the communal self-understanding of a society. The 'we' perspective becomes centered on the particular political way of life each political community develops through its historically specific constitutional principles. Consequently, integration can become tied to an individual's loyalty and dedication to this particular understanding. By defining 'constitution' along these lines, constitutional patriotism seems to suggest that potential citizens are required to have an undisclosed and undetermined level of commitment to an ethically permeated political culture and constitution as opposed to a dedication to the ideal of egalitarian communication alone.

The ethical interpretation of the constitutional principles, to which the citizenry is intended to be loyal, further complicates and distorts the issues of legitimacy and integration. If the citizenry is required to be thickly patriotic then the results of communicative engagement have to conform to the *particular* and *ethically specific* way of life and governance that such a constitution embodies. This would limit the scope of rational discourses and prevent competing and non-orthodox interpretations of fundamental norms and laws from being generated within a particular community. In this way, the legitimating force of communicative rationality would be constrained and citizenship would become tied to one's ability to adopt and maintain a potentially irrational level of loyalty to a particular way of life as a consequence of its factual existence.

Even if the citizenry is burdened only by a thin understanding of patriotism, an ethically permeated understanding of the constitution can still prove to be problematic. Although a thin patriotism toward an ethically specific and concrete constitution ensures that the citizenry will be reflexive and free from the irrationality of thick patriotism, there is no reason to assume that legitimate norms, actions and laws will necessarily result. Since such a citizenry is loyal, to a degree, to an ethical constitution it cannot be said that they are therefore necessarily loyal to the ideals of consensus formation and an equal emphasis of public and private autonomy. Their reflexive loyalty may reside in the individualistic tendencies of liberal ideology and be primarily concerned with the rightful scope of personal activity in the private sphere. Conversely, their loyalty may be directed to republican concerns for majority rule alone. Either option does not *guarantee* that the citizenry will be inspired by the co-originating circle of private and public autonomy or

an emphasis on the equal significance of the two. As stated earlier, ethical constitutions are distinct from the universal principles and requirements of consensus driven egalitarian processes of opinion- and will-formation. Consequently, there is no reason to assume that an ethically specific constitution will inspire the recognition of these principles and requirements within the citizenry regardless how thin their patriotism is. In order to secure and guarantee legitimacy, the co-originating circle of private and public autonomy and the legitimating authority of a consensus must be prioritized from the beginning. Although a thin patriotism to an ethical constitution would allow the citizenry to form opinions based on rational insights, there is no evidence to suggest that ideal speech situations or legitimate communicative procedures will emerge to produce these insights.

By emphasizing a particular political culture and promoting its protection, coupled with the protection of the collective identity that it is attached to, it is possible that the priority of communicative rationality is displaced. The perceptual burdens that are required from the democratic citizen become tied to particular identities and political cultures instead of the primacy of legitimacy. This is problematic because existing ethically permeated political cultures and political integration cannot be said to be the basis of political legitimacy. It is conceivable that this understanding of constitutional patriotism (regardless of the level of loyalty it entails) can lead to a basis of exclusion where an individual is denied citizenship status, not as a result of his or her lack of commitment to communicative interaction, but based on that individual's refusal or inability to conform to an existing and ethically specific political culture. In order to maintain an emphasis on legitimacy, the focus and primary concern must always remain

on communicative rationality's legitimating force rather than the protection of an existing political culture.

The tension that exists between legitimacy and integration becomes increasingly apparent when one considers the impact that constitutional patriotism, where 'constitution' refers to an ethically specific document, has on the requirements for citizenship in terms of immigration. Habermas' statements that deal specifically with this issue reinforce the notion that he requires individuals to be 'patriotic' toward an ethically permeated constitution. The issue of immigration is extremely important because a nation's ethical-political self-understanding is directly affected by it. This is because an influx in the admittance of 'outsiders' or individuals that do not share the historically developed ethical perspectives can alter a community's ethical composition and, therefore, effect and change its self-understanding.⁵² There exists a tension between immigration and legitimacy here because, as Habermas has stated; "The democratic right of self-determination includes, of course, the right to preserve *one's own* political culture..." (emphasis added).⁵³ The concern, therefore, seems no longer with those affected by particular norms contributing to their development, but the preservation of a particular political culture, excluding or constraining individuals not because they are free from the effects of a norm, but because they can alter a community's existing self-understanding and political culture. This is consistent with the possible problems of emphasizing an ethically specific notion of the 'constitution' as discussed above. The priority of the discourse principle and communicative rationality seem to be displaced as the primary focus becomes the protection of an established identity – protecting "one's own" political culture. Here Habermas contends that individuals should be integrated

based upon the particular features of a political culture as opposed to being integrated exclusively through the importance of discursive legitimacy and a commitment to the discourse principle.

Emphasizing this basis of integration and the protection of an established political culture and ethical-political self-understanding may result in a failure to secure legitimacy. "Too great an emphasis on collective identity may come at the cost of minorities and dissidents whose civil and political rights may be impinged upon by... a sense of collective identity. Thus legitimate claims and collective identity demands... may come into conflict."⁵⁴ The status of, and right to, citizenship is no longer based on the quest for legitimacy but rather on an apparent right to exclude others and preserve an established political culture; a right to "self determination" which is simply asserted by Habermas and not constructed discursively. Participating in rational discourses regarding norms is no longer based on whether or not an individual is dedicated to communicative rationality's legitimating force, but based, in part, on whether or not such an individual will disrupt an established political culture and ethical-political self-understanding. Maintaining that a society has a right to preserve its established political culture emphasizes an exclusionary conception of integration over democratic processes and communicative action and appears to stand in contrast with the primacy of communicative legitimacy.

Habermas' restrictions on citizenship reflect a conservative side to his theory, which casts difference, and most notably cultural difference, as a threat to national unity. The conservative elements of Habermas' theory allow for the inclusion of outsiders based only on a degree of assimilation and acculturation that protects the established political

culture from harm, interference or even challenges and contestations. According to Habermas, this level of political acculturation is satisfied by a 'patriotic' attitude toward the constitution as the reflection of a particular political culture. If immigrants and those who are affected by the norms and laws of a society wish to participate in the processes of rational opinion formation in order to legitimate these norms and laws, they may do so providing they assimilate, or develop a loyalty, to the society's established political culture. In this way, the political culture is protected and the immigrants or potential participants are no longer interpreted as a threat to the national identity of the community.⁵⁵ They have conformed to this identity and political culture and no longer represent a threat to its existing characteristics.

This level of assimilation means that immigrants and potential participants are required to "[a]ssent to the principles of the constitution within the scope of interpretation determined by the ethical- political self-understanding of the citizens and the political culture of the country."⁵⁶ In this way, the identity of the community can not be interfered with since it is based on the ethical interpretations of the constitutional principles, an interpretation that Habermas requires all citizens to remain loyal to via a constitutional patriotism.

6 Restoring the Priority of Legitimacy

The apparent problem or tension that exists between membership and legitimacy is rooted in the idea that an alteration to the established political character of a community may be a negative phenomenon. For Habermas, immigrants, and all members of a community for that matter, must be 'patriotic' to the existing character of that

community. However, what makes alterations to a community's self-understanding illegitimate? It is likely that a situation where membership and citizenship status is more inclusive, primarily based on the primacy of the discourse principle alone, the ethical-political self-understanding and political culture of a community would be subject to the possibility of radical alterations. However, this should not be viewed as problematic since alterations to an established political culture and advocating a more inclusive political system do not result in a situation of political illegitimacy. Alterations to an existing ethical-political self-understanding and political culture does not render a community devoid of a political culture or the potential for legal and political legitimacy. Rather, it may establish new ones while preserving that community's capacity for self-determination and increasing that community's ability to develop legitimate norms and laws. For example:

The whites in Forsythe County who want to keep out blacks are trying to preserve a way of life that is valuable to them. To deny such communities the right to exclude does limit their ability to shape their future character and destiny, but it does not utterly destroy their capacity for self-determination... To commit ourselves to... [a more inclusive basis of citizenship] would not be to abandon the idea of communal character but to reaffirm it. It would be an affirmation of the liberal character of the community and of its commitment to principles of justice.⁵⁷

If we were to adopt a stance where legitimacy was emphasized over an ethical political culture and integration into the nation-state, it seems unlikely that a conceptualization of constitutional patriotism that requires political assimilation would emerge as a foundational principle. An emphasis on a reflexive citizenry that is inspired by consensus driven egalitarian discourses should work to prioritize democracy, argumentation and consent over a political identity and the preservation of a particular

political way of life. Under these circumstances an established political culture would not be exempt from rational criticism nor would there exist a right to preserve it based merely on the “facticity” of its existence. By emphasizing the priority of rational argumentation more consistently than Habermas has, individuals would be able to criticize all aspects of their legal and political system, including the fundamental principles of the constitution, the popular and established ethical interpretation of these principles, and the legitimacy of the established political culture. In other words, Habermas and those of us who have accepted the ideals of communicative legitimacy should emphasize and continually assert the primacy of discourse ethics’ ‘first principles’. Nothing, including one’s loyalty to current understandings of the structure of proper egalitarian discourses and communicative politics or an established political culture, should be prioritized above communicative action and consensus formation.

The use of a highly reflexive and inclusive form of constitutional patriotism should work to guarantee that discourses are properly open and unrestricted.⁵⁸ When applied to the question of immigration, instead of burdening immigrants with a level of assimilation, as Habermas’ conception of constitutional patriotism seems to do, a dialogue should be established in order to seek a consensus among the immigrants and established citizens. This type of dialogue could focus on questions and concerns regarding the legitimacy of the ‘constitution’ and the political identity of the society. The established political culture and the current interpretations of the constitutional principles within the host nation would have to be defended against the rational opposition that immigrants and others might pose.⁵⁹ If legitimacy is attained through communicative action, it would appear that an immigrant’s existing political culture and identity have just as strong a

claim to legitimacy as those of the host society since neither have been rationally consented to by all those who are possibly affected by them. Requiring an immigrant to assimilate to the ethically permeated political culture of the host society should therefore seem just as invalid or illegitimate as requiring the host society to assimilate to that of the immigrant without rationally accepting it through argumentative procedures. In order to ensure legitimacy, rational discourses should emerge when differences regarding interpretations of constitutional principles and issues of identity arise. If “[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourses”⁶⁰, then the political culture to which an individual is intended to assimilate and the constitutional interpretations to which the individual is intended to be loyal should also be subject to the same requirements of validity. Such openness has the potential to illuminate otherwise unseen and latent biases and increases the impartiality and neutrality with which Habermas is often concerned. As Veit Bader has suggested:

...one should accept the challenges of thoroughly different cultures and scrutinize the existing legal rules and practices for morally intolerable sexist, gender-bias, racist, ethnocentric, religious elements and bias. Analogous to earlier feminist scrutiny, which has exposed mountains of formally unrecognized sexism... such detailed scrutiny can be expected to demonstrate many instances of outdated and stupid ethnocentrism...⁶¹

The advocacy of the importance of legitimacy and the primacy of communicative rationality is similar to Amy Gutmann’s concerns regarding nationalism and patriotism. Gutmann argues for the primacy of democracy, stating that individuals should not display or be burdened by an allegiance to a particular ethical-political self-understanding and political identity. She claims that the more just option is “to reject the idea that our primary alliance is to any actual community, and to recognize the moral importance of being empowered as free and equal citizens of a democratic community.”⁶² She

continues by stating that “[o]ur primary moral allegiance is to justice – to doing what is right. Doing what is right cannot be reduced to loyalty to, or identification with, an existing group of human beings.”⁶³

However, Habermas’ apparent failure to properly secure legitimacy is based on a slight miscalculation of deliberative democracy’s perceptual requirements. He is correct in stating that the pursuit of legitimacy requires citizens to perceive themselves to be integrated politically, as opposed to ethnically or culturally, through democratic institutions and principles.⁶⁴ Habermas is similarly correct in stating that citizens must be committed to the ideal of democracy itself for political legitimacy to unfold.⁶⁵ Charles Taylor has supported both of these positions as he has stated that:

...democracy can only work if most of its members are convinced that their society is a common venture of considerable moment and believe it to be of such vital importance that they participate in the ways they must to keep it functioning as a democracy.⁶⁶

Habermas begins to encounter problems only through the particular mechanism he believes to be capable of securing these perceptions, that is, his particular conception of constitutional patriotism. There is some evidence, as I have shown, that his conception of patriotism is that of an undisclosed and potentially problematic degree of loyalty towards a conception of the ‘constitution’ as a community’s specific and ethically permeated set of norms, principles and laws. If this is the case, then legitimacy is not guaranteed or secured since the discourse principle may no longer be the ultimate and primarily emphasised principle.

Having said this, a form of constitutional patriotism is still required for the attainment of political legitimacy. However, a properly delineated constitutional patriotism would differ from Habermas’ by degree. The type of constitutional patriotism that is required to

secure legitimacy is a thin patriotism to the abstract co-originating principles of private and public autonomy. This brand of constitutional patriotism is capable of acting as a mechanism that enables the citizenry to satisfy both perceptual requirements for the application of the discourse principle to their communal organisation and maintaining the primacy of it. This form of constitutional patriotism, unlike the alternative understandings, would secure the priority of communicative rationality and would not contribute to unnecessary and illegitimate levels of exclusion and obstruction.

Initially, this type of constitutional patriotism assures that the community is integrated politically as opposed to being based on a homogeneous cultural or ethical community. As such, it sponsors a higher degree of inclusion that is based primarily on whether or not the individual has an intent to implement discursive democratic ideals or engage in communicative actions. The multiculturalism and pluralism that marks most modern communities would therefore be protected. This is because individuals would only be required to share a particular intent to institutionalize communicative rationality as opposed to sharing certain physical or cultural characteristics or commitment to the host society's political culture. They become integrated by the ideal of deliberative consensus formation and the acceptance of only those norms that are rationally justifiable. The individuals who share a common lifeworld become integrated through a shared intent to utilize the discourse principle and the legitimating force of communicative rationality. Since this form of constitutional patriotism is not based on a devout loyalty or an understanding of the constitution as an embodiment of a particular political culture, rational argumentation alone can form conclusions regarding whether an individual

should be recognized as a citizen and if a particular identity can be deemed legitimate. This, in turn, limits the possibility of illegitimate exclusions.

The constitution in this sense is not the expression of a specific and particular legal system that can exclude those who stand in opposition to that expression. This understanding of the constitution does not prioritise ethically permeated political cultures over the discourse principle. Here a political identity is not considered to be legitimate or deserving of protection because it factually exists. This type of constitutional patriotism requires the political culture to be deemed worthy of protection through rational consensus prior to its recognition as valid. This type of constitutional patriotism is rooted in the priority of the discourse principle, which prevents any norm, action or law from being pre-politically legitimated.

Since the 'constitution' represents the basis of egalitarian communication and a thin patriotism ensures that the citizenry intend to engage in this sort of activity remain reflexive, this form of constitutional patriotism ensures that the citizenry has an orientation toward the procedurally conceived common good. By harbouring an intent to co-operatively regulate their shared lifeworld, the citizenry cannot be understood as self-interested agents alone. They have a desire to collectively do what is right, to pursue justice and legitimacy together and not merely from their own isolated and individualistic positions. The intent to utilize communicative democratic procedures not only integrates the community, it also represents the fact that the members of that community are dedicated to the common good.

What is perhaps most important about this understanding of constitutional patriotism is that it not only secures the two perceptual burdens that are required for

institutionalizing the discourse principle, a political basis of integration and an orientation toward the common good, it also implies that the citizenry is enriched by a third perspective. A citizenry that adopts this sort of constitutional patriotism will perceive the priority of justice and legitimacy over any other norms, actions or laws. A constitutional patriotism that is based on an intent to apply the discourse principle to possibly every aspect of their intersubjective relations ensures that the commitments of the community, its institutions and identity, remain reflexive and open to change. Even the constitution and the shared political culture of the community thus remain open to criticism and possible radical alteration to their current understandings. This form of constitutional patriotism ensures that the only privileged element in society is a rational consensus and agreement.

7 Conclusion

The history of the concept of the citizen in the West is one that has highlighted the tension or separation between two political philosophies. Originally, classical republicans identified and defined the citizen as a political being. The citizen was recognized with a degree of public autonomy that allowed him to be the author of the community's laws. However, this classical conception was problematic in the sense that the status of the citizen was class-based and patriarchal. The requirements for guaranteeing that the citizenry maintained a focus on the common good represented the basis for such problems and prevented this ideal from being legitimate. This understanding was later replaced by the increasing popularity of liberal theory. The citizen became defined as the possessor of individual human rights. Liberal theory

defined the citizen as the subject of law and outlined the rightful scope of action a citizen was entitled to in the private sphere. Since Habermas' political theory involves a combination of both republican and liberal theory, the status of the citizen that is implied includes both private autonomy and public autonomy.

Similar to the history of the citizen, the concept of the nation has two competing understandings. In the classical sense, the term nation referred to ethically or culturally homogeneous groupings. The alternative understanding defines the nation as a politically integrated community. The concept of the nation is an extremely important factor in political theory and the organization of a community. It represents the basis of how individuals understand membership, who they interpret as "foreign" and who is the benefactor of the privileges and rights that citizenship status entails. Based on a particular concept of the nation, a group of individuals can develop a shared identity and a "we/us" perspective. In order to ensure legitimacy, individuals must understand themselves to be integrated politically, since cultural integration can lead to a high level of exclusion and the denial of the private and public autonomy rights that can institutionalize communicative rationality as a means to develop social norms and principles.

Habermas has recognized that his political theory must address the problems of citizenship and integration in a manner that will secure legitimacy. However, the mechanism he has adopted to do so seems to fail to secure legitimacy. Habermas' ideal of constitutional patriotism is at best an unrefined concept. Since it is unrefined, there remains the possibility that the term patriotism could represent an irrational level of commitment and loyalty. Furthermore, it is likely that the term constitution refers to an

ethically specific set of fundamental laws that are tied to a community's established political culture. If either of these two ideals is implied by constitutional patriotism, then legitimacy can not be secured. It is likely that Habermas' conception of constitutional patriotism leads to an excessive level of exclusion and unwarranted denials of private and public autonomy.

Habermas has utilized the ideal of constitutional patriotism as a means to secure the citizenry's "supportive spirit". As such, a constitutional patriotism enables individuals to perceive themselves to be integrated politically and oriented toward the common good. However, after investigating other areas of Habermas' work to clarify the possible content and implications of constitutional patriotism, it seems likely that his attempts to secure the supportive spirit, similar to classical republican attempts to secure the "right temper", could lead to illegitimate exclusions and excessive restrictions being placed on communicative action. It seems that Habermas intends the term 'constitution' to refer to a series of fundamental principles that embody a particular ethical-political self-understanding as opposed to the basic principles and requirements of egalitarian discourses. This is problematic because the political culture of the community may not be subjected to communicative rationality and therefore not required to be rationally justifiable. In addition, it is also possible that Habermas' conception of constitutional patriotism is not based on the primacy of egalitarian discourses and consensus formation alone. As a result, those individuals who do not conform to this political culture find themselves excluded or unable to contest a potentially illegitimate set of norms. Even if the citizenry is intended to have a thin and reflexive commitment toward this ethically

permeated interpretation of the constitution, it is possible that consensus driven egalitarian discourses will not emerge and take hold in the society.

Nevertheless, Habermas' conception of constitutional patriotism does not eliminate the potential of discourse ethics nor does it prevent the possibility of communicative rationality legitimately regulating a given community. By offering an alternative conception of constitutional patriotism, the unnecessary exclusions of those who do not present themselves as loyal to a community's existing political culture and ethical-political self-understanding can be removed and the priority of discourse ethics' primary principles can be restored. A reflexive understanding of constitutional patriotism, where the constitution is merely the requirements for open egalitarian discourses and patriotism is understood as a thin level of commitment, ensures that membership status, the political culture of a community and its sense of nationalism fall under the scope of communicative rationality's authority. It appears that Habermas has failed to emphasize this form of constitutional patriotism. In order to ensure that legitimacy and justice are the primary concern of any deliberative democrat, we must continually reassert the priority of communicative rationality and the discourse principle and avoid falling prey to the same mistakes that Habermas seems to have made.

Chapter III: Deliberative Democracy, Religion and the Scope of Public Autonomy

1 Introduction

To this point, our analysis of Habermas' theory of political legitimacy has covered a wide range of positions, principles and implications that are contained and required in his theory. The opening chapter discussed Habermas' position on legal legitimacy and investigated how the principles of private and public autonomy must work in a co-originating and co-dependent manner in order for legitimacy to be achieved. The principles of private autonomy are used to establish the parameters of discursive engagements while the principles of public autonomy enable participants to interact and shape the flow and results of such engagements. The preceding chapter focused on issues of citizenship and the proper requirements of citizenship in a legitimately regulated democratic society. These issues are, of course, in many ways, related to the principles of private autonomy in Habermas' theory of legitimacy. In addition to Habermas categorizing membership and citizenship status as aspects of individual liberties and private autonomy¹ we must recognize that rights of citizenship establish the parameters of discourse. Although such provisions will enable one to act as a participant and interact discursively with others, as a concept citizenship status, first and foremost, is concerned with defining *participants* rather than determining how they will *participate*. Based on a system of inclusion and exclusion, citizenship rights establish the structure of a discourse by placing limitations on its size and inclusiveness; it does not necessarily determine

what participants will say, or to which norms such participants will agree or object. The way in which citizens will participate, what the content of the discourses will be, how they will express themselves and influence the results of argumentative procedures is determined by the scope and exercise of the citizenry's public autonomy rights.

Consequently, this investigation into Habermas' theory of political legitimacy has ignored a significant set of issues. That is, the scope of the citizenry's public autonomy and their abilities to participate in discursive procedures has yet to be adequately investigated. The opening chapter discussed both the principles of private and public autonomy. However, this discussion was limited to an analysis of these principles in their abstract form and concentrated on how they interact with and rely upon one another. This left their practical, political and concrete implications, requirements and scope, insufficiently addressed. The second chapter, with its focus on citizenship, took issue with a particularly important aspect of the concrete and practical implications and requirements of private autonomy in Habermas' theory of legitimacy. Consequently, our analysis of Habermas' theory would not be complete unless we addressed particular and significant aspects of the citizenry's public autonomy and their ability to express themselves and influence the content and results of democratic engagements.

The proper scope, range and rights a citizen has to express him or herself to affect the outcomes of legal procedures has always been a concern of democratic theory. More often than not these concerns focus on what *kinds* and *types* of reasoning, reasons and discourses an individual or public system can draw from in order to contribute to the common good. Conflicts over the proper scope and range of an individual's public autonomy and the types or kinds of resources they can draw from in democratic

engagements have sparked significant debates. For the most part these debates address questions of whether or not a particular discourse and type of reasoning can be considered public. That is, whether or not it should be considered acceptable for or accessible in democratic engagements. For many, there is a belief that certain phenomena are necessarily private and irrelevant or inapplicable in determinations of the common good. Such positions advocate a public versus private dichotomy.

Public/private dichotomies are used to divide and separate particular phenomena and discourses from the private or public sphere. That is to say, these dichotomies permit only those discourses and phenomena which are defined as public to influence the public conception of the common good or the political public sphere. Conversely, only those things which have been defined as private are permitted to affect the private sphere.

Perhaps one of the most heated and longstanding debates regarding the implementation of public/private dichotomies focuses on the categorization of religious discourses. For many, religious discourses are considered strictly private. John Rawls is a leading academic who supports this view. Rawls and similar scholars contend that religious claims and beliefs should not be recognized as public; that they should not be utilized in the determination of the common good. Conversely, others contend that religious discourses should be recognized as public resources that are able to contribute to the development of legal norms. This alternative grouping includes theorists and academics such as Veit Bader and David Tracy. These authors contend, for a number of reasons, that religious discourses and religious reasoning should be endowed with a public status.

Such debates are obviously concerned with principles of public autonomy. They focus on the citizenry's rights and capabilities within discursive settings. They attempt to determine the ways in which participants are able to participate. As such, debates regarding the status of religious discourses attempt to determine the proper range, scope and capabilities of a democratic citizenry's public autonomy. Therefore, within the context of this debate, we can address the practical, concrete and potentially invalid aspects of Habermas' reflections on the principle of public autonomy and the citizenry's rights and capabilities in democratic law-making procedures.

The debate regarding the public merits and status of religious discourses is centuries old. However, since the Reformation those who advocate religion's exclusion from the political public sphere appear to have had the upper hand. Following the Reformation a separation model which removes the inputs of religious discourses from public decision making processes has gained significance and popularity. Although Habermas has never directly entered this debate, he has found himself dragged into it and is sometimes depicted as an advocate of the separation model and the denial of religious discourses' public status.

However, casting Habermas in this manner appears to be a misrepresentation of his position. It is unlikely that Habermas is an advocate of the separation model or a public/private dichotomy that is formed in the absence of a properly developed consensus. It appears that Habermas is an advocate of a democratic procedure that enables citizens to use any critical resource or discourse that is available to them in order to inspire or alter the positions and convictions of their fellow citizens. As such,

Habermas recognizes citizens with the freedom to draw upon and use religious discourses and reasons in public procedures of argumentation.

Nevertheless, Habermas has made certain discouraging statements regarding certain forms of religious beliefs. He has depicted “fundamentalists” as a social affliction and claims that they are incompatible with democratic procedures. By depicting “fundamentalists” in this manner, Habermas is claiming that they are incapable of influencing or participating in democratic engagements and, therefore, unable to adequately harness their public autonomy. In addition, particular aspects of Habermas’ theory place religious discourses in a significantly disadvantaged and unequal position. As I will argue, the requirements of a singular basis for agreement coupled with a) the declining status of religious claims in the eyes of many, and b) the fact that no single religion is shared in a pluralized society, leaves religious citizens and discourses in a disadvantaged position in democratic engagements.

However, these statements and positions that can be found in Habermas’ work are not as devastating as they may appear. Habermas may have misrepresented fundamentalist characteristics and identities. By further investigating fundamentalism, it will become apparent that there is in fact an encouraging degree of compatibility between “fundamentalists” and democratic ideals. In addition, any inequality that religious discourses and citizens may currently suffer can be addressed by allowing democratic citizens to agree for different reasons. That is to say, revising Habermas’ theory to accommodate and recognize plural agreements as legitimate can adequately address the inequalities religious citizens may face in terms of their democratic capabilities.

2 The Separation Model

As the previous chapters have displayed, Habermas' theory of political legitimacy refers to and utilizes principles found in both liberal and republican conceptions of political rightness. The liberal tendencies define membership and establish the abstract system of rights that makes egalitarian discourses possible. Conversely, the republican tendencies focus on the political community participating in public discussions to jointly determine the norms and laws by which they will be regulated. The liberal tendencies are generally associated with the individual's ability to fulfill aspirations of self-realization, while republican concerns focus on a society's communal self-determination.

The privileged tradition of Western political thought has generally identified religious belief and religious principles as a matter of personal experience, which are dependent upon private institutions and practiced in one's own private and "spare" time.² The tendency among many Western political theorists has been the identification of religion as a matter of the private sphere alone and, therefore, they have distinguished and separated it from the public sphere. Such conceptualizations have left religion outside the domain of the public political arena and impractical for the pursuits of the common good. Consequently, many traditional political theorists have reduced religion to functions outside of the public sphere and have treated it as irrelevant in democratic law-making procedures.³

This public versus private distinction or dichotomy and the removal of religion from contemporary politics are aspects of both liberal and republican thought and was initially developed in the Enlightenment period. However, following the Enlightenment this separation model became popularly perceived as an element of the proper and valid mode

of ordering a political community. Essentially, the notion that religions are private and irrelevant or invalid in relation to the public sphere became privileged in popular political thought. However, this position of privilege and popularity that the separation of church from state obtained is, more than anything else, based on the inheritance of an ideal that was meant to address the *particular* problems of a *particular* time. As such, it should not necessarily be regarded as a requirement for or an element of a valid and legitimate political order. Since the public/private dichotomy and the separation of the church and state are contingent upon a particular social history, they are limited in their critical applicability, utility and validity as a mechanism for analysis and social organization.

Religious discourses and insights were not always considered incompatible with the organization and ordering of societies. The historical metaphysical foundations of law and authority used religious discourses to legitimate the social orderings across Europe. The Western tradition of conceptualizing religion as a strictly non-public matter, and sequestering it from public determinations of the common good, began in the seventeenth and eighteenth centuries. With the Reformation of the church and the tensions and bloodshed that soon followed, it became readily apparent that religious convictions could potentially act as a source of unrestrained passion and dangerous civil strife in Europe. The level of intolerance that followed the Reformation led many to conclude that, due to the violence that was attributed to the differing religious convictions within the European societies, religion was incapable of providing a basis for the common good or functioning as a rational language of social criticism.⁴ The separation of religion and politics through the use of a public/private distinction was undertaken in an attempt to quell the situation of social unrest in Europe. This attempt to create a more tolerant and civil European

populous became the tradition in the West and formulated the basis of a privileged conception of political organization which political theorists following the Reformation have since inherited.

The particularities of Western history displayed that the establishment of a modern constitutional order required religion to be conceived of as, in many ways, a private phenomenon and eliminated as a resource in the public sphere. Those who originally promoted the separation of church and state desired a strict separation between the spheres of the secular and the religious; erecting "...a wall of separation between the garden of the church and the wilderness of the world."⁵ Religion was considered a part of an individual's belief system, a system that was to be free from state inference and techniques of state coercion. The original intention was to protect the individual's belief system from government regulation in order to avoid the religiously inspired, state-sponsored horrors that marked the European Reformation period. In an attempt to advance the rights of the individual, questions of faith were constituted as free from government direction and determined exclusively by the individual.⁶ Consequently, this separation model became popular among republican and liberal theorists alike. For republicans, it was believed that the inclusion of religious principles in democratic engagements would interfere with the community's ability to determine or develop the common good. The animosity that existed between the differing European religions following the Reformation apparently prevented the entire citizenry from recognizing a law or norm's ability to function in the equal interest of all if it had been inspired or grounded by the inputs of the established religion alone. Similarly, liberal theorists favoured the separation model but in the name of individual rights and liberties rather

than for democratic reasons. For liberals, the separation of church and state was supported by the belief that such a separation was capable of curbing the oppressive state tactics which were used in the name of religious orthodoxy.

Currently, following the birth of the 21st century and hundreds of years after the Reformation of the church, the arguments originally employed by the classical republican and liberal theorists may seem out of date and out of context. Many modern nations have witnessed a significant decrease in the willingness of the citizenry and the state to employ violent tactics to popularize the principles and beliefs of a particular religion. However, this separation model remains hegemonic. For many it is believed that enforcing a public/private dichotomy and separating religious belief from the public sphere is not without merit. Yet, currently there is a debate, with political theorists on either side, concerning the proper place of religious discourses in society. While many still object to religious influences in politics, categorizing it as a strictly private phenomenon, others have emerged to contest the long established separation model. These latter scholars claim that religious discourses should be recognized with public capabilities.

The first set of arguments against the separation of religion from the state attempt to display that the reliance upon theoretical dichotomies between the public and private spheres inadequately reflects the reality of how personal and religious particularities influence the general public and the political positions of the individual. Similar to the circular relationship between private and public autonomy, these critics suggest that the public sphere is undeniably influenced and affected by what has traditionally been regarded as strictly private phenomena, including religious beliefs and discourses. In addition, it is claimed that the neutrality and equality that is apparently developed through

utilizing such dichotomies is illusory and the practical institutionalization of this dichotomy leads to formal and substantive inequalities within the political public sphere which most dramatically affect religious and other minorities. These inequalities regarding the capabilities of religious citizens and religious discourses will be more adequately addressed later. However, suffice it to say, there is a growing belief that public/private dichotomies are applicable only in theoretical descriptions of political practices and break down in practical applications.⁷ This belief is becoming increasingly popular in circles that the classical liberal defenses of the separation model originally intended to protect, that is, among the religious communities who now seek to deconstruct the wall that separates their religious convictions from the state apparatus. “Voices within... [these] movements emphasize the impossibility of religious commitment being distinct from public life.”⁸ Their basic position holds that the public is enriched and informed by the so-called private sphere and that any tension that exists between the two is non-existent or irrelevant. It is often argued by these opponents of secularism that an individual’s conceptions of political rightness and the common good are often inspired by his or her religious commitments.

There is plenty of evidence that is readily available which suggests that religious and political values are not necessarily distinct or entirely independent of each other. Particular religious interpretations have a strong and lasting impact on the secular views of the faithful. For example, what have often been labeled as evangelical African-American churches in the United States have prominently displayed a loyalty to the American Democratic Party. Research into this pattern has shown that the political and secular stances of these religious communities are generally influenced and inspired by

their liberalist readings of the Christian Bible. Such readings and religious understandings emphasize "...God's mercy toward the poor and captive, and of his harsh judgement of the rich and powerful."⁹ This reading of the Bible lends itself to liberal political tendencies and reaffirms the lack of separation between the metaphysical and the political.¹⁰ Such an example and others like it can be used to argue for and raise awareness of the inapplicability of public and private dichotomies which do not view religion as a resource for developing an understanding of the common good.

It has also been argued that since religious commitments can influence secular opinions, reliance on a strict separation between public discourses and non-public religious discourses may not be able to bring the neutrality and equality that it is intended to achieve. Requiring individuals to reach a level of abstraction that denies any religious particularities or sacred influences may result in arbitrarily favouring individuals devoid of religious beliefs and, therefore, promoting a certain level of inequality. "Religious cultures and identities are not treated fairly by declaring that religion is a private matter or by excluding religious arguments from political or constitutional debates or from debates about constitutional essentials and basic justice."¹¹ A strict and complete separation between the religious and the political leads to the non-religious citizens of a political community being privileged over the religiously faithful. Consequently, there is a push for the public inclusion of religious discourses that equates to a demand for the reconsideration of the separation model and the supposed neutrality and equality that it promotes.¹²

Other criticisms of the separation model question the belief that religious discourses threaten democratic and republican principles. It is claimed that advocates of the

separation of religious discourses and the state ignore the fact that religious discourses may have the potential to aid a society in the development of democratic principles and a healthy civic democracy. In addition, it is claimed that these dichotomies can cause people to lose sight of how phenomenon currently defined as public can damage democratic procedures and intentions. These arguments hold that the enforcement of a strict separation between the church and state may lead to oversights regarding how non-religious and secular phenomena can also work to threaten and erode a democratic political system and that religious discourses could aid in the development of an agreement. By enforcing the removal of religious inputs from the political public sphere the priority of democracy may get lost in the shuffle; the focus turns to promote and protect the separation of the two spheres rather than promoting and protecting democracy itself.¹³ By continually focusing attention on preserving the dichotomy, one loses sight of the fact that public phenomena and secular discourses may in fact threaten democratic institutions and principles and that principles derived from religious beliefs may aid democratic intentions.

A number of philosophers and political theorists have begun to rethink the political role of religion in modern societies. In their view, particular religious claims, discourses and beliefs may have the capacity to play a stabilizing role in democratic and argumentative engagements. It is believed that religious principles can advance, promote and enhance democratic principles and democratic politics.¹⁴ The underlying claim is that a hostile and adversarial position toward religion may in fact prove to be counterproductive for democratic initiatives. Certain religious beliefs are claimed to be capable of bringing people together, promoting tolerance, inclusion and the egalitarian

rights that are required for effective communicative action.¹⁵ It is not that religious discourses *will* enrich every civil democracy but, rather, that they *may*. An aspect of the injustice of the separation model, therefore, appears to be the denial of these capabilities prior to democratic engagements.

Thus, for many reasons, it appears that deliberative democratic ideals and theories would not necessarily benefit from employing the traditional and problematic set of principles which work to define religion as a private phenomenon and separate religious discourses from the political public sphere. Initially, such a move to establish a strict separation between the church and state may seem arbitrary since the original motives behind it were the results of particular developments in specific societies and not the theoretical requirements of a universal political theory of legitimacy. Additionally, the notion that religion can be exclusively classified as private and entirely separated from the public and political realm is illusionary at best. In fact, by promoting a sufficiently inclusive model of public debate it is possible that the use of religious discourses could aid in the development of a healthy civic democracy while properly promoting the ever-important principle of equality.

3 Habermas and the Public/Private Dichotomy

Rather recently, Jurgen Habermas has been accused of calling for and promoting the use of a public versus private dichotomy which strictly separates the state from the influences of religion discourses.¹⁶ William J. Meyer has claimed that Habermas has entered the debate regarding the public role of religion as a participant who denounces the prospect of and potential for religious discourses to be endowed with any public

function. In fact, it is Meyer's contention that Habermas calls for the imposition of a separation model that would work to designate religion as a strictly private phenomenon. Meyer argues that Habermas' reflections lead to his denial of the public functions of religion and that "thus... Habermas simply reinforces the view that religion is merely a matter of private utility and not one of public truth or validity."¹⁷

Meyer begins by presenting Habermas' position as, over the course of time, having moderated in some respects. However, it is claimed that even with these changes Habermas still denies religious claims and religious discourses any public characteristics or functions. In terms of the role of religion, Meyer states that the first segment of Habermas' career is characterized by his "...complete dismissal of religion..."¹⁸ The latter segment of his career is characterized by an acceptance or recognition of religion's positive private capabilities, which is distinguished from the complete and utter rejection of the phenomenon. Nevertheless, Meyer asserts that characteristic of both phases and throughout his academic career, Habermas unequivocally rejects the public potential of religion and religious discourses and thus employs a strict separation between religion and the state.¹⁹

In large part, Meyer attributes this denial of religion's public potential and the acceptance of the public/private dichotomy, to the significance of the principle of *reflexivity* in Habermas' theory coupled with religious discourses' purported lack of reflexivity. The reflexivity of a discourse, statement or claim is generally determined by the ability of its validity to be investigated in the absence of dogmatic and coercive constraints.²⁰ A reflexive view or claim, therefore, enables its validity to be investigated discursively. The fact that Habermas' procedural conception of justice relies on the

ability of participants to communicatively contest claims and alter positions based on processes of argumentation necessarily requires claims and statements to be reflexive. Positions that express infallibility or reject the potential for alternatives, therefore, lack the proper degree of reflexivity that is required in argumentative procedures.

It is important to note that Habermas' understanding of argumentative processes of opinion- and will-formation is conditioned by the reflexivity of publicly expressed statements and claims. His ideals regarding the legitimating potential of communicative action, argumentation and consensus formation presuppose and require claims to be open to argumentative investigation and contestation. "In this way, the linguistic formation of consensus, by means of which interactions link up in space and time, remains dependent upon autonomous 'yes' and 'no' positions the communicative participants take toward *criticizable validity claims*."²¹ (emphasis added).

This demand for reflexivity, and its significance in relation to the theory of discourse ethics, can also be found in Habermas' reflections on the proper development and flow of communicative engagements which are capable of producing legitimate outcomes. In these passages Habermas has explicitly outlined legitimate argumentative procedures in three general steps. Initially, the discursive participants raise reflexive and criticizable claims regarding a disputed norm. This is followed by the participants furthering their positions with additional reflexive claims that redeem or back their original statements. Lastly, the development of a possible consensus is formed through the intersubjective recognition of the validity of the aforementioned claims and positions.²² Here, Habermas has definitively characterized the process of rational argumentation as requiring and involving the continual raising of reflexive statements. In addition, Habermas has clearly

stated that in order for arguments and statements to be compatible with his theory of justice and therefore capable of contributing in the development of a legitimate norm, they must be reflexive; their utterance can only be presented "...on the condition that they submit themselves... to the conditions of reflexivity."²³

Meyer claims that religion's public potential and public abilities are rejected by Habermas due to the fact that Habermas requires statements and claims to be reflexive while religious discourses are supposedly non-reflexive. Meyer has stated that "[p]ut simply, Habermas believes that modern communicative rationality, unlike mythologies and metaphysical worldviews, enables one to examine validity claims free from dogmatic constraints."²⁴ He then argues that Habermas is of the opinion that religious discourses necessarily inhibit public criticism and stand in opposition to the possibility of their validity being investigated discursively. As such, Meyer claims that Habermas conceives of religious discourses as being in contrast to and incompatible with the development of legitimate norms and laws through discursive processes of opinion- and will-formation.²⁵

Meyer's insistence that Habermas conceives of religious discourses as non-reflexive leads him to conclude that Habermas necessarily rejects the public potential of religious claims, statements and positions. He implies that Habermas constructs and employs a public/private dichotomy which, in many ways, reflects other republican and liberal tendencies to entirely separate religious ideals and claims from the public sphere, the state and its institutions. In a conclusive fashion, Meyer states that Habermas "...relegates religion to the private realm and confines it to the sidelines of public life."²⁶

4 Deliberative Democracy and the Public Potential of Religion

The debate which concentrates on the public role of religion essentially questions and concerns itself with the scope of the citizenry's public autonomy, their abilities to express particular positions, issues of publicity and the public use of reason. For Habermas, the principle of publicity, in many ways, reflects Kant's definition of publicity. "For Kant, publicity is expressed in 'the verdict of free and equal citizens,' who put everything to the test of 'free and open examination.'"²⁷ Similarly, Habermas has stated that "'publicity' is the common perspective from which the citizens *mutually* convince one another of what is just and unjust by the force of a better argument."²⁸ The notion of the citizenry forming a consensus through argumentation and debate is the central component of Habermas' theory of justice.

The accusations which Meyer has made against Habermas' position on religion essentially denies religious discourses the potential of being raised publicly as reasons which could possibly develop a consensus. He has stated that Habermas has relegated such discourses to the private realm to occupy a position which is outside of the limits of public discussion. This, of course, means that prior to public discussions, religious discourses have been eliminated as a potential basis for establishing a shared perspective within a society regarding a given norm's validity. The use of religious discourses in such debates and processes of argumentation is, therefore, not recognized as a public use of reason and incapable of contributing to a discursively developed verdict among a given citizenry.

These accusations suggest that, by accepting a public/private dichotomy regarding discourses and their use, Habermas places significant normative restrictions on

argumentative procedures. However, the restrictions that are being attributed to Habermas contradict many of the ideals of deliberative democracy. These restrictions limit the scope of public argumentation and the forms of reasoning which the citizenry can employ. The bracketing of religious discourses immediately appears unjust since it is established pre-discursively and in the absence of a consensus regarding the proper scope of the citizenry's public autonomy. In addition, attributing such restrictions to Habermas seems incorrect since he has stated that "I have in mind the more open procedures of an argumentative praxis that proceeds under the demanding presuppositions of the 'public use of reason' and *does not* bracket the pluralism of convictions and worldviews from the outset."²⁹ (emphasis added). Consequently, this suggests that the restrictions regarding religious discourse, which Meyer has attributed to Habermas, are entirely contrary to his theory of argumentation and the procedures of opinion- and will-formation.

The notion that Habermas has determined, in advance, that certain discourses are entirely incompatible with processes of argumentation in the public realm is inconsistent with the basis of his conception of justice. For Habermas, the public realm is not an area where citizens engage one another through previously deemed valid discourses and reasons or in which they are restricted to those discourses which have been defined as public. Habermas has defined the public sphere as the area "...in which something approaching public opinion can be formed."³⁰ Of course, this definition is absent of any normative restrictions regarding which discourses are permitted to shape such public opinions since, for Habermas, discourses and norms become public by being raised, defended and justified through processes of argumentation alone.

In moral argumentation, as in the case of ethical discourses, it must be left to the participants themselves to find concrete answers to particular cases;

it cannot be known in advance. Moral questions, like ethical questions, must be addressed from the perspective of the participants if the questions and answers are not to be robbed of their normative substance and binding force.³¹

The implementation of a separation model and the use of restrictions regarding discourses which would be available or permitted in the public realm would, therefore, promote a particular and rather acute problem for agreements developed through argumentation. By pre-discursively stripping religious citizens of their right and ability to participate in public processes of argumentation on their own terms, that is through a language that is tied to their comprehensive doctrines and through the use of religiously inspired discourses, any consequent agreement could be similarly stripped of its binding force. Such restrictions are incompatible with the goals of Habermas' theory since they would interfere with the development of a performative attitude. Therefore, the public realm must be identified as an area where the citizenry, regardless of their particular comprehensive doctrines, can engage one another regarding a disputed norm or law.³² The manner in which the citizenry defend or critique a particular norm should depend upon their particular perspectives, religious or otherwise. In order for a properly binding consensus to be formed the citizenry cannot be forced to adopt the language or a comprehensive doctrine which is possibly foreign to them. Accordingly, argumentative procedures within the public realm "...give every citizen the equal opportunity to voice his or her reasons and to reject ones offered by others; to ensure that dialogue is free and open and guided only by 'the force of the better argument.'"³³

The restrictions that would result from a denial of religious discourses' public potential would limit the perspectives from which citizens are capable of addressing disputed norms. As Habermas states, such a constraint "...neutralizes the multiplicity of

particular interpretive perspectives from the outset.”³⁴ Habermas finds such restrictions and their consequences to be in opposition to discourse ethics’ guiding principles, which aim to develop a shared perspective and agreement through argumentation alone. In response to positions that neutralize a society’s multiplicity of perspectives, Habermas states that “discourse ethics, by contrast, views the moral point of view as embodied in an intersubjective practice, which enjoins those involved to an idealizing *engagement* of their interpretive perspectives.”³⁵ As such, it is a more open and inclusive discourse that Habermas’ conception of political rightness requires, rather than a restrictive process which utilizes strict distinctions between the public and private. The status, merit and publicity of a claim or discourse, therefore, is determined only through its affirmation and justification in public discourses and not through the use of a public/private dichotomy.³⁶

Meyer’s interpretation of Habermas as refusing to recognize religious discourses as endowed with public potential or admissible in public debate, seems to have misinterpreted Habermas’ position on public argumentation and the rights or abilities of the citizenry within such processes. Citizens who are willing to submit religious claims as reasons in processes of argumentation and accept the burden of defending these claims are perfectly entitled to do so.³⁷ Citizens are not prevented from communicating or attempting to convince one another of a position through religious discourses since Habermas leaves open the possibility of religious claims being accepted on the basis of good reasons.³⁸

Equally unlikely as the notion that Habermas restricts the use of religious discourses in public procedures of opinion- and will-formation is the claim that he does so on the basis of religious discourses’ lack of reflexivity. Although the demands for reflexivity

are significant and necessary requirements for an individual's participation in processes of opinion- and will-formation, this should not be interpreted to suggest that religious discourses are incompatible with such discursive and argumentative procedures.

Positions that express a necessary incompatibility between deliberative democracy and religious inputs are ill-founded since such positions would deny the sociological reality of religion's general level of reflexivity and ability to influence and effect procedures of opinion- and will-formation. The perceived tension between communicative rationality and religious thought becomes problematic when one investigates the nature of religious belief and recognizes that religions do have a degree of the necessary reflexivity and that religious beliefs do alter through communicative struggles over authoritative interpretations and attempts to make religion socially relevant. Although it would be incorrect to argue that religious knowledge is always developed within an ideal speech situation, it would be equally incorrect to assert that religion lacks public characteristics and all qualities of modern communicative rationality.

Although certain theorists may claim that religious discourses do not possess public characteristics, "it is too often forgotten that the process of determining orthodoxy... includes attempts at achieving discursive coherence..."³⁹ In order for religions to remain socially relevant during periods of social change and to retain or increase the spiritual commitments of the faithful, religious discourses, principles and views are subject to a degree of change and discursive control. These instances of change often occur through discursive practices and engagements within the religious community. While they may appear to be non-reflexive, religious claims, principles and beliefs do indeed have a degree of reflexivity. Contrary to Meyer's assertions, religious discourses are not

necessarily burdened by dogmatic constraints which would prevent their validity from being investigated discursively since they are indeed capable of reflexivity.

Conceptualizing religion as incapable of change and as non-reflexive denies the public element of religious belief and the role religious civil society can play in the formation of religious principles and ideology. With the advancements of modernity, areas within the Muslim world have witnessed dramatic and widespread social and cultural changes within a very limited period of time. Islam remained a popular religion as these changes occurred although the context of its teachings and the society to which it was intended to relate underwent a series of widespread alterations. This is because the religion itself underwent changes in order to remain relevant and applicable to changes within the Muslim world. The alterations to the Muslim religion occurred as reactions to the spread of modernity to either accommodate its advancements or as a means to hinder and obstruct its spread and development. Either way, the religion became the center of debates and struggles and was consequently altered.

Through processes of modernization, urbanization and capitalism, changes in many Islamic societies began to challenge its traditional fundamental religious principles.⁴⁰ More often than not, the character of the society was readjusted, its identity transformed and the popular understanding of the world and society altered. A boom in oil industries, in a number of established Muslim societies, resulted in the development of new global relationships, a loss in the significance of traditional ways of life and the centralization of the state.⁴¹ In order for Islamic and Muslim religious beliefs to reflect and remain consistent with or relevant to the newly acquired perspectives, perceptions and lifeworld in general, Islam had to undertake dramatic alterations. "Islam clearly predates the oil

boom just as some forms of political Islam have emerged in the wake of the oil bust. But, the central question remains how... Muslims (radical, militant, or moderate) can make Islamic tradition speak to and interpolate the particular senses of frustration, despondency, and interest thrown up in the interstices of national economies coping with the demands of the new global economy."⁴²

What occurred in many Muslim societies was the spread of an alternative reading of the Muslim religion and society. The last twenty years has seen an increasing intensity in debates over Muslim orthodoxy and the spread of debates over religious principles, interpretations and claims. The attempts that were and are still being made to redefine and change Muslim orthodoxy through public criticism and debates in the context of rampant social, economic and political changes in Islamic societies, demonstrates the reflexivity and, therefore, the communicative and democratic potential of such religious discourses.⁴³ These processes of change are not limited to the Muslim religion alone. The contents of most religions are or have been the center of discursive strategies and struggles that resulted in either fundamental or subtle alterations.

In a recent contribution to his theory of discourse ethics and in response to many of his critics, Habermas acknowledged the level of reflexivity and fluidity within religious beliefs. Although he claims that religious discourses are distinct from other discourses, Habermas has stated that "...none of the lifeworld's segments can immunize themselves against the demands for an argumentative justification..." not even the religious segment.⁴⁴ In the same article Habermas identified concrete examples regarding the ability of established religions to be altered and how religious discourses can enter the political public sphere. He stated that in Germany, following the Second World War:

It was the Confessing Church which at that time with its acknowledgement of guilt at least attempted a new beginning... They sought renewal instead of restoration and to establish universal standards of judgement in the political public realm, with this exemplary witness and widely effective change of mentality there arose the model of a religious engagement which broke away from the conventionality and interiority of a merely private confession. With an undogmatic understanding of transcendence and faith, this engagement took seriously this-worldly goals of human dignity and social emancipation. It joined in a multivoiced arena with other forces pressing for radical democratization.⁴⁵

Elsewhere, Habermas has echoed similar sentiments regarding religion's general level of reflexivity. In these passages, Habermas has recognized the ability of religions and religious discourses' to change with society and alter its principles and claims in the face of a better argument.

The awareness is growing... that one's own religious truths must be brought into conformity with publicly recognized secular knowledge and defended before other religious truth-claims in the same universe of discourse. Like Christianity since the Reformation, traditional world-views are thus being transformed into 'reasonable comprehensive doctrines' under the reflexive pressure generated by modern life circumstances.⁴⁶

Although certain aspects of religious belief are reflexive, there are areas within religions and crucial requirements for religious belief that are not necessarily open to rational criticism and must be recognized as non-reflexive. Religious beliefs have certain principles and notions that are more authoritative and non-reflexive than others. While the religiously faithful can employ communicative rationality to alter the general shape of their religion in order to maintain its relevance in society, they do so on the basis of some "strong evaluations" that may be immune to rational examination and criticism. Whether it is a requirement of blind faith for its members, the undeniable existence of a particular deity, or the recognition of the authority of religious texts and symbols, religions' discursive and public character is often constrained. Yet, to point to the normative

principles and positions that religious belief exempts from criticism and make the claim that religion stands in complete opposition to communicative rationality, would misconceive the complexity of religion and overlook its fluidity and general reflexivity. "Religious traditions have undergone the most radical transformations over time. Divine texts may be unalterable, but the ingenuity of human interpretations are endless."⁴⁷ It is important for us to remember and recognize the sociological factors that play a significant role in religious belief and the development of religious principles. The religious symbols, texts and fundamental beliefs that are exempt from rational criticism only become socially relevant, acceptable and appealing through rational interpretation and communicative struggles over orthodoxy.⁴⁸ For the most part, religious doctrines and discourses must be recognized as reflexive since the human imagination and multiple interpretive tools can be used to determine the significance, relevance and even content of each religion's most sacred and fundamental texts and principles. Therefore, denying religion any public characteristics denies the discursive reality of religious claims and religious belief.

Contrary to the position which Meyer has attributed to him, Habermas has recognized the public potential of religious discourses. He does not invoke a public/private dichotomy or a separation of the church and state. Habermas advocates a conception of public autonomy which leaves the choice of discourses to the discretion of the citizenry and discursive participants. He does not pre-discursively determine that religious discourses are non-public and barred from public engagements. However, Habermas has expressed positions regarding particular forms of religiosity and the capabilities of religious discourses which are problematic and need to be addressed.

5 Fundamentalism

Although it can be argued that, generally, Habermas is not an opponent of the use of religious discourses in public deliberation, it must be conceded that he displays antagonistic tendencies toward particular forms of religiosity. Specifically, Habermas' position regarding fundamentalism and fundamentalists is oppositional to say the least. While the attention Habermas directs toward fundamentalists and fundamentalism is limited and lacking the level of sociological investigation and analysis one might expect from such an influential scholar, he nevertheless manages to conclude that fundamentalists are incompatible with democratic endeavors. In the course of his brief analysis of fundamentalism, Habermas provides the reader with a somewhat open-ended and ambiguous definition of the phenomenon. Although he does not provide examples of who may be considered a fundamentalist, his statements regarding the consequences of fundamentalism and the deliberative potential of fundamentalists seem politically devastating. That is, he finds fundamentalists incapable of contributing to development of legitimate norms and unable to act as participants in deliberative democratic political processes. The political devastation is the result of Habermas' construction of fundamentalists as entirely incompatible with democratic endeavors and constitutional democracies.⁴⁹

However, as I will attempt to demonstrate, Habermas' position regarding the political, public and democratic potential of fundamentalists is problem and probably inaccurate. In fact, by engaging the subject of fundamentalism on a deeper level of analysis than Habermas, we find that individuals and groups who have been, or could possibly be, regarded as fundamentalists have routinely participated in democratic engagements and

discursive pursuits of validity. In addition, as we shall come to see, Habermas' general description of fundamentalists seems to draw upon popular misconceptions of fundamentalist characteristics and identities. These misconceptions have traditionally developed popular sentiments regarding fundamentalist's incompatibility with modernity and democracy. However, these popular conceptions regarding fundamentalist characteristics are, in large part, based on fallible sociological processes which render any conclusions drawn from them rather dubious. Thus, so-called fundamentalists may not be as politically devastated by Habermas' brief reflections on their democratic potential as originally suspected. In fact, it is more likely the case that there exists a rather encouraging degree of compatibility between so-called fundamentalists and democracy, communicative rationality and the ambitions of discourse ethics.

From the outset of Habermas' investigations into fundamentalism the reader is struck by the rather bleak depiction of the prospects for this religious phenomenon in the context of modernity. The discussion begins not with a working definition of what fundamentalism is or who may properly be regarded as a fundamentalist. Rather, Habermas opens his discussion by describing the relationship between fundamentalists and constitutional democracies in a harsh and aggressive manner. Habermas asserts that fundamentalism and fundamentalists represent a source of suffering and distress in the West. He chooses not to use mild terminology that merely describes a potentially problematic scenario but adopts a language that is jarring by asserting that "...fundamentalism *afflicts* not only societies that are collapsing but even the established democracies of the West."⁵⁰ (emphasis added). Although this may be accurate, it remains unsubstantiated and, therefore, potentially false and inaccurate. However, what is most

significant regarding this statement is that it sets the tone for the remainder of Habermas' analysis of fundamentalism. By casting the phenomenon as a social affliction, Habermas depicts the relationship between fundamentalism and Western modernity in a significantly barren and somber manner since it characterizes fundamentalists as a potentially dangerous cultural "other".

In contrast to his introduction of the phenomenon, Habermas' definition of fundamentalism is developed in a manner which is essentially free of his previous aggression. He defines fundamentalism by stating that "such a practice is based on religious or historical-philosophical interpretations of the world that claim exclusiveness for a privileged way of life."⁵¹ In other words, Habermas understands fundamentalism to be a mode of being which one believes to be the singly, solely or exclusively correct way or, similarly, derived from an exclusively correct set of norms. It is through this sense of exclusivity that fundamentalism supposedly gains its problematic features and through which it becomes incompatible with democracy. Since fundamentalists perceive their beliefs and way of life as singularly correct, they are supposedly closed off from the influences of alternative beliefs and lifestyles. This, of course, would render fundamentalists conceptually rigid, dogmatic and non-reflexive. Habermas describes fundamentalism in relation to this sense of dogmatism and states that "...fundamentalist worldviews are dogmatic in that they leave no room for reflection on their relationship with other worldviews with which they share the same universe of discourse and against whose competing validity claims they can advance their positions only on the basis of reasons. They leave no room for 'reasonable disagreements.'"⁵²

As such, Habermas characterizes fundamentalists as those who believe themselves to have discovered and practice the only right way of being. His assertion is that such a perception of exclusive rightness constitutes fundamentalism and fundamentalists. This perception of living in accordance with an exclusively valid set of norms or way of life is perhaps the most important characteristic of Habermas' assessment of fundamentalism. It is through this feature that fundamentalists shelter themselves from the influences of alternative norms or changes in their way of life. Similarly, this perception supposedly prevents fundamentalists from publicly defending their views or exposing their comprehensive doctrines to public criticism. In accordance with the fundamentalists' perceived sense of exclusive rightness, alternative norms would be regarded as invalid since fundamentalists perceive themselves to have already attained the singularly valid set of norms or lifestyle.

Habermas consequently interprets fundamentalism and fundamentalists as highly problematic in plural and democratic societies. By adopting a belief that one's own mode of being is exclusively privileged, fundamentalists deny the doctrines of others a position of equality in relation to their own. Habermas has stated that "...legitimations based on religious or world-views of this sort are incompatible with the inclusion of equally entitled non-believers or persons of other persuasions."⁵³ Consequently, this inability to recognize equality in the face of difference causes fundamentalists to represent a significant obstacle for democratic processes and engagements. As discussed in the opening chapter, citizens who are willing to engage in deliberative democratic politics must mutually recognize one another with a significant degree of equality. In deliberative democratic engagements the participants and citizenry must be equal in two

respects. First, the citizenry must recognize each other as equal individuals and persons. Second, the participants must give equal consideration to the reasons and forms of reasoning which may be presented or drawn upon.⁵⁴ Categorizing fundamentalists as incapable of recognizing either or both forms of equality would lead one to conclude that fundamentalists are extremely limited in their ability or propensity to use public reasoning.

As we have previously determined, argumentative procedures which are inspired by the ideal of consensus formation require the participants and their claims to be reflexive. This required level of reflexivity is a characteristic that Habermas finds lacking within fundamentalism since he constitutes and characterizes fundamentalists as dogmatic. He has stated that fundamentalist doctrines and "...conceptions lack an awareness of the fallibility of their claims..."⁵⁵ Conversely, ideal and legitimating processes of argumentation require reflexive and non-fundamentalist worldviews and discourses that "...allow for civilized debate among convictions, in which one party can recognize the other parties as co-combatants in the search for authentic truths without sacrificing its own claims to validity."⁵⁶

Habermas' statements and conclusions regarding fundamentalists and fundamentalism can only be interpreted as injurious and damaging since they lead to a presupposition of fundamentalists' incompatibility with argumentative procedures. This injury is manifested in Habermas' refusal to recognize so-called fundamentalists as equally capable members of a democratic polity. The denial of fundamentalists' capacity is striking since it is developed pre-discursively. Habermas' claim seems to be that by definition fundamentalists are incompatible with democratic engagements and

cooperative deliberations.⁵⁷ This is because, by definition, fundamentalists are dogmatic, non-reflexive, closed to the ideal of contestation and alteration and similarly closed to recognizing the positions of nonbelievers as potentially equal to their own.

Consequently, Habermas declares fundamentalists to be incompatible with democratic procedures and thus limits their potential inclusion. "In multicultural societies the national constitution can tolerate only forms of life articulated within the medium of such non-fundamentalist traditions."⁵⁸ Their public autonomy is, therefore, limited by virtue of their fundamentalism. The fundamentalists' claims to exclusive validity and rightness supposedly close them off from discursive engagements and the exercise of their public autonomy, rendering them unable to contribute to the development of their society's norms and laws. As a result, being defined as or labeled a fundamentalist can have extremely costly consequences. Fundamentalists, based on Habermas' unsubstantiated reflections regarding their way of life and incompatibility with democracy, find their public autonomy rights denied. Habermas considers them to be a "social affliction", incompatible with democracy and consequently unable to adequately exercise their public autonomy.

Habermas is undoubtedly correct in stating that those individuals who are limited to non-reflexive discourses and fail to recognize equality in the face of difference present problems for the institutionalization and application of the discourse principle. However, his conclusions regarding the incompatibility of *so-called* "fundamentalists" with deliberative democracy may be incorrect. Individuals and groups who are widely regarded as fundamentalists have engaged in activities which defy conclusions regarding this necessary incompatibility. In fact, individuals and groups whose comprehensive

doctrines and belief systems are informed by a sense of exclusive correctness, have engaged others within reflexive discursive atmospheres and have displayed encouraging levels of compatibility with democratic ideals and communicative rationality. This, of course, suggests that so-called fundamentalists are not necessarily incompatible with deliberative democracy.

Concrete examples of “fundamentalists” compatibility with democratic ideals are widespread. For instance, certain “fundamentalists” have traditionally presented themselves in opposition to specific human rights. In particular, such groups have displayed an opposition to rights which may protect homosexuality and abortion, for example, through references to religious principles and metanarratives. Yet, during the recent international Women’s Conference in Beijing, groups that have been popularly recognized as fundamentalist, in cooperation with the Vatican, opted not to utilize potentially “outdated” religious discourses and forms of reasoning and developed sophisticated modern arguments through reflexive and differentiated discourses.⁵⁹ These religiously “fundamentalist” groups challenged positions that conflicted with their religious beliefs through the modern language of difference and equality. In doing so, they displayed the ability of so-called fundamentalist groups to adopt reasoned and reasonable positions, rejecting and deconstructing the popular notions of dogmatism and an incompatibility with democratic endeavors, which are so often attributed to them.⁶⁰

In other areas of the world, groups that are characterized and constructed as fundamentalist and therefore as incompatible with modern communicative rationality have demonstrated that these conceptions are misguided, ill-founded and inaccurate. Saudi Arabia is home to a political community that the West often identifies with the

preeminence of Islamic principles in their educational and legal systems as well as with the use of Islamic discourses by their political leaders and the social elite. Such religious trends have led to the construction and perception of Saudi Arabia as a fundamentalist society by many Western writers and thinkers.⁶¹ Similar to other perceptions regarding fundamentalism, modernist thinkers often conceptualize the Saudi society in opposition to modernity and, therefore, as incompatible with modern ideals regarding communicative action and argumentation. It is often believed that the Saudi society, as a result of its “fundamentalism”, cannot contend with modernity or processes of reasoned argumentation.

There are popular misconceptions regarding the Saudi tradition of refusing to introduce certain modern features into their society which support the conclusions regarding their incompatibility with modernity and reasonable argumentation. What is most striking about such accounts of a religious tradition resisting modernity is the assumption that such displays of resistance are illustrations of the irrationality of religious “fundamentalists”. “The implication is that this was not reasoned criticism but simply the irrational rejection of everything ‘modern’.”⁶² Attempts to reveal an inherent irrationality in such instances tend to ignore the fact that a degree of Western acculturation and the adoption of modern effects did occur in Saudi Arabia. Paved roads, medicines, particular technologies and other modern phenomena have been adopted by the Saudi’s with little or no resistance at all.⁶³ Based on the levels of Western acculturation that has occurred within the Saudi society, alternative possibilities regarding the Saudi relationship with modernity must be investigated. It is insufficient to

claim that such a society is inherently irrational or incompatible with modern effects and modern phenomena.

The rejection of certain Western and modern elements and the accumulation of others in this particular Islamic society was based on a form of intensive and vigorous social criticism within the Saudi political public sphere regarding what is socially acceptable and unacceptable. The Saudi political community has a tradition of social and political criticism that attempts to develop understandings, norms and laws through a form of communicative action.⁶⁴ This social criticism consists of both informal and institutionalized forms of argumentative and discursive exchanges. The Saudi tradition of social and political criticism supports the argument that there is no inherent contradiction or insurmountable tension between popularly regarded or so-called fundamentalists and communicative reason since their communicative engagements include and accommodate the use of religious discourses in processes of reflexive opinion- and will-formation.⁶⁵

The popular representations and claims regarding the Saudi society's purported irrationality or incompatibility with modernity should not be viewed as an anomaly in terms of how fundamentalism has been represented. In fact, religious fundamentalism and fundamentalists are often regarded as characteristically irrational and constructed in opposition to reason. In addition to their supposed incompatibility with democratic engagements, fundamentalists are popularly identified and represented through stereotypes which emphasize fundamentalists' apparent irrationality. Even Habermas' descriptions of the phenomenon employed aspects of these popular stereotypes of fundamentalist irrationality.⁶⁶ Habermas' assertion that fundamentalists lack a "...respect

for the “burdens of reason” was, in part, used to evidence his general position regarding their incompatibility with argumentative procedures and “civilized debate.”⁶⁷

However, by drawing upon aspects of the popular renditions of the fundamentalist identity and their stereotypical characteristics, Habermas’ statements regarding their consequential incompatibility with democracy may be seen as inaccurate. Identities and the supposedly necessary characteristics that accompany them are frequently the product of fallible sociological processes. The popular representations of the fundamentalist identity can be attributed to such fallible processes. Consequently, it is unlikely that any use of popular constructions of the fundamentalist identity sufficiently evidences their incompatibility with deliberative democracy. In addition, it is more than likely that in his attacks on fundamentalism Habermas has fallen prey to popular misrepresentations of fundamentalists.

Identities themselves are social constructs that work to establish boundaries and categories between groups and individuals based on perceived socially relevant characteristics that distinguish individuals and groups from one another. Through a system of inclusion and exclusion, the distinguishing characteristics that determine one’s membership in the differing social groupings are also believed to determine what it means to be a member of a particular group and help to shape the identity of the individuals that constitute a given group.⁶⁸ The significance of group membership and the construction of the identities of the individuals within a given group are not always determined internally or solely by the group members themselves. In a process of “othering”, minorities and disempowered collectivities find their identities being shaped and defined externally by dominant groups and through the voices of the dominant other.

The process of having identities constructed externally leaves open the possibility that certain individuals will be misrepresented or misinterpreted and popularly constituted with false characteristics and as a potentially dangerous cultural other. Members of minority and disempowered groups are able to construct their own identities to some degree, but, through processes of othering, they also find themselves constituted and constructed through external discourses and presentations of popular stereotypes and images. “Fundamentalists”, and other individuals with deep religious convictions, are one such disempowered minority group in the West that find their identities and the definitions of their group’s identity, in part, being constructed externally. Obviously, “fundamentalists” are not the ones promoting the dogmatic, anti-intellectual and irrational images that are routinely used to define their personalities and groupings. “Modern voices”, the discourses of the dominant Western groups and intellectuals, represent “fundamentalists” and their belief systems as entirely distinct from those of the modern West and often as an incompatible and repugnant cultural other.⁶⁹

The year 1925 seems to mark the most dramatic decline in religious fundamentalists’ ability to shape and construct their identity internally. The “Scopes Monkey Trial” that occurred in the United States during that year has been regarded by Sandra Harding as the turning point in the construction of the fundamentalist identity. She claims that this case marks a pivotal moment; where “modern” voices began a process of othering and so-called fundamentalists lost a significant degree of influence over the construction of their own identity. This case does not represent the first time that fundamentalists found themselves being described as irrational and potentially misrepresented, but it does represent the most vivid and sensational representation of them, which helped solidify

and establish the construction and current perception of fundamentalists as irrational and incompatible with modernity.

The case emerged in the United States at a time when liberal and conservative Christians, the latter of which were constituted as fundamentalists, struggled over “the” authoritative interpretation of the Bible and the curriculum used in public schools to indoctrinate the young.⁷⁰ Prior to the Scopes trial, each side, the liberal and conservative or fundamentalist Christians, were able to construct their own identities relatively autonomously and free from outside interference. Following the trial, “modern” voices and modern constructions of religious fundamentalism encapsulated fundamentalists; defining and characterizing them externally and developing a perception of fundamentalists as a problematic cultural other.⁷¹

The trial turned into a media carnival. “Fundamentalists” became represented to the rest of America and the outside world through the predominantly harsh and antagonistic voices of the print media, which generally favoured a more liberal position. Little of the coverage focused on the legal issues of the case. Rather, coverage mainly consisted of side stories that stigmatized fundamentalist Christians and their views. The trial was depicted by the press, and sent abroad, through modern liberal perspectives, which prevented these fundamentalists from communicating their opinions and positions to those outside of the case. Instead, their views and opinions were appropriated and reinscribed by their counterparts and brought to the rest of the world with a scornful liberal spin.⁷²

Through the external construction of deeply religious identity, the trial became a source of Christian fundamentalist humiliation and a display of their apparent

irrationality. It is based on these depictions of the fundamentalist identity, which have since been solidified and popularized in society, that calls are currently made by Habermas and others to exclude so-called fundamentalists from political public spheres or limit their potential within these spheres by casting them into the margins of society as a consequence of their constructed irrationality.

One problem with the process of othering through an authoritative voice is that it develops a perception within a society that the characterizations of the disempowered minority groupings are accurate or right and not the result of a fallible and unequally constituted set of social processes. Equally problematic is the fact that constructed group identities are developed and popularized under the guise of homogeneity; where each individual group member is constructed as equally possessing and sharing the characteristics that have been attributed to the group. However, it is problematic to make these assumptions and view the boundaries that separate groups as rigid and concrete. "This... view obscures the fact that cultural beliefs are not always organized in distinct compartments. The boundaries of 'us' and 'them' are often unclear and change... Furthermore, collectives are usually not culturally homogeneous, nor are the values only shared by members of the same group."⁷³

Constructing fundamentalists as an irrational other that stands in stark contrast to a modern and rational 'us' is, therefore, problematic. Although their worldviews may be enriched by metanarratives that on the surface appear to lack deliberative democracy's requirements of reflexivity, there may not be the contradiction between democracy and the deeply – fundamentally – religious that Habermas seemingly believes to result from their membership in "fundamentalist groupings" when he states that "...national

constitutions can tolerate only forms of life articulated within the medium of such non-fundamentalist traditions...”.⁷⁴ It is also entirely probable that essentializing all the members of particular and so-called fundamentalist social groupings and denying or limiting their public potential and abilities to effectively participate in discursive procedures due to their group membership, ignores the potential diversity that exists within deeply religious communities.

Habermas’ reflections on fundamentalism do not address the possibility that so-called fundamentalists may have been misrepresented or that certain individual fundamentalist group members may not relate to one another in a homogeneous manner. The premises that support Habermas’ conclusions regarding fundamentalism seem to make particular assumptions regarding the homogeneity of fundamentalist groups, which may not be able to withstand scrutiny. In fact, although fundamentalists appear to present themselves as possessing a form of “ultrastability”⁷⁵, it is possible that fundamentalist groups are marked by a degree of internal struggles over authoritative interpretations and norms. Similar to most other sociological and cultural groupings, fundamentalist group members may possess a certain degree of difference from one another which could possibly lead to processes that other “stable” groups face. For example, like most other organizations and religious affiliations, there is a degree of pluralism among the congregation and clergy of the Catholic Church. However, while the Catholic Church promotes a comprehensive doctrine that is presented as rather stable, essentializing Catholics based on official Vatican doctrine would overlook the fact that, similar to most other organizations, pluralism, difference and struggles over authoritative interpretations and understandings exists within the Church.⁷⁶ This example is not intended to prove that fundamentalist

groups are thus marked by a significant degree of pluralism and difference. Rather, it is only intended to suggest that significant unexpected internal differences may exist within certain sociological and cultural grouping that present themselves with a degree of rigidity. By recognizing that cultural and religious groups cannot be essentialized and lack an often perceived and assumed homogeneity, it would only appear pragmatic to attribute some degree of, or potential for, rational thought and argumentation to the members of so-called fundamentalist religious groupings.⁷⁷

Based on the above, it does not seem necessary for deliberative democrats to proclaim that fundamentalists are incompatible with democratic engagements. Rather, those who are identified as fundamentalists should be recognized with the ability to utilize and develop their positions through communicative action and deliberative democratic procedures. In other words, we should promote their potential and struggle to incorporate them in a political community that is dedicated to the development of legitimate laws. In fact, the above analysis has displayed that, contrary to Habermas' assertion, it is possible that a certain degree of compatibility exists between "fundamentalist" and democratic ideals and practices.

6 The Limits of Religious Argumentation

Perhaps the most damaging comments Habermas has made regarding religion and religious discourses have focused on the ability of religious discourses to influence the results of discursive engagements. These comments may seem even more significant than those regarding fundamentalism since they focus on religious discourses in general rather than being limited in scope to a segment of the population that can be regarded as

fundamentalists. As we shall see, the *damage* is based on Habermas' conceptualization of religious discourses as potentially unconvincing in plural societies. As such, religious discourses, according to Habermas, are supposedly faced with a limited ability, or a possible inability, to influence the deliberative process. Due to their inability to develop a consensus in a modern and plural society, religious discourses are consequently burdened by a degree of inequality in argumentative procedures. This inequality is not rooted in a lack of opportunity for religious citizens to express their positions through religious discourses. As stated earlier, Habermas does not support a position that constrains the ability of participants to express or voice their arguments. Yet, religious discourses are likely to be faced with a degree of inequality in terms of their ability to influence the convictions and positions of a plural citizenry. In other words, religious discourses are disadvantaged in terms of their capabilities. However, as James Bohman has stressed, there are differences between freedoms and capabilities. An equality of capabilities may be the more important of the two since it represents the "...conditions which establish the equal worth of human freedom."⁷⁸

Bohman has defined capability as the ability to translate one's opportunities and resources into effective influence in democratic procedures.⁷⁹ A lack in capabilities can lead to a situation of "political poverty".⁸⁰ Political poverty represents the inability of individuals and groups to effectively participate in democratic engagements.⁸¹ Political poverty is, of course, a negative phenomenon that should be avoided, and addressed when present, since the point of engaging in deliberation should not be merely the ability to express oneself. Rather, individuals should enter discourses with the perception and goal of being a potential contributor and on equal ground with other participants.

Furthermore, as Bohman has indicated, persistently disadvantaged citizens may fail to recognize the political system with which they are ordered and regulated as legitimate or valid.⁸²

As I shall attempt to display in the reflections that follow, Habermas' position regarding the inability or lack of potential which plagues religious discourse is based on his reflections on the nature of a proper or legitimate agreement, coupled with two social facts that face religions in modern plural societies. First, the citizens of a modern and plural societies cannot be said to share a single religious doctrine which makes it extremely unlikely for Habermas' understanding of a proper agreement to develop based on religious arguments alone. Second, Habermas categorizes religious doctrines, knowledge and discourses as pre-modern. This, consequently, leaves them devalued in terms of their justificatory potential due to processes of social evolution and modernization which have decreased religious discourses' ability to produce a proper and valid agreement in modern societies.

For Habermas, a publicly reasoned agreement must be formed with the public agreeing for the same reasons. It is not enough that citizens hold the same conclusions regarding the impact or effects of a given norm; they must also share the same positions regarding the premises and arguments which develop those conclusions.⁸³ Consequently, Habermas advocates a singular conception of public reason, where the discursive participants form agreements based on a singular set of shared arguments and reasons.⁸⁴ Public reason is singular when it requires discursive participants to come to a consensus and form an agreement "...for the *same* publicly accessible reasons."⁸⁵ Based on his own statements, Habermas' conception of a legitimate agreement is guided by such principles

of singularity, as it requires discursive participants to converge for the same reasons. He has claimed that “whereas parties can agree to a negotiated compromise for different reasons, the consensus brought about through argumentation *must* rest on *identical* reasons that are able to convince the parties in the same way.”⁸⁶ (emphasis added). This aspect of Habermas’ definition of public reason renders it a singular conception since “...he demands that the citizens converge... on the same reasons, rather than agree for different reasons.”⁸⁷

Bohman contrasts this singular norm of public reason with his conception of plural public reason. A plural conception of public reason enables discursive participants to share conclusions and form agreements for different reasons. As Bohman has stated, “...public reason is plural if a single norm of reasonableness is not presupposed in deliberation; thus agents can come to an agreement with each other for *different* publicly accessible reasons.”⁸⁸

Although Habermas may strive to affirm the plurality of cultural values, Bohman states that a singular conception of public reason may prove to be incapable of properly addressing issues of equality of capabilities in pluralized and multicultural democratic societies.⁸⁹ For example, a singular conception of public reason can work to reduce the potential of religious discourses to contribute to the development of a legitimately established and agreed upon norm or law in a plural society. As I shall argue, a singular conception of public reason in conjunction with the possible loss of a wide justificatory potential of religious discourses and the fact that no single religion is universally shared in a plural society, can have adverse affects on a religious citizen’s public potential and right to equality of capabilities. Thus, a singular conception of public reason reduces the

deliberative capabilities of those citizens whose public positions are enriched by religious principles and religious beliefs. Consequently, such religiously inspired citizens are burdened by the unlikely, if not impossible, task of influencing, developing, and contributing to a consensus by using a potentially devalued discourse amongst those who do not share their comprehensive doctrine.

However, as Bohman points out, an ideal of public reason that is properly sensitive to plurality may require a recognition of the merits of moral compromise and plural public reasoning.⁹⁰ Through such recognition it may be possible to establish and protect equality in terms of capabilities. The ideals and aspirations of deliberative democratic theory would not be adversely affected by the use of a plural conception of public reason. Plural public reason does not contradict deliberative democratic principles since, as Bohman has stated:

It is not that a singular agreement can never be reached through public justification in pluralist societies. Rather, convergence is not itself a requirement of public reason or argumentation as such, but rather an ideal of democratic citizenship. This ideal of common citizenship does not demand that all citizens agree for the same reasons, but only that they continue to co-operate and to compromise in the same process of public deliberation.⁹¹

Nevertheless, Habermas continues to advocate a singular conception of public reason despite the fact that when conjoined with the social characteristics that contribute to the devaluation of religious discourses the results are debilitating in terms of a religious citizenry's democratic potential. The first of these features that account for religious discourses lack of public potential and devaluation is based on the fact that no single religion is universally shared within a plural society. This fact makes it extremely unlikely, if not impossible, for religious citizens to contribute to or develop a society

wide consensus based on their particular and unique religious insights, principles and reasons. The influence of religiously inspired discourses is limited since a particular faith and the comprehensive doctrine it inspires is only shared within that particular religious community. When a particular doctrine, which demands the level of commitment that is characteristic of religious doctrines, is not shared within a society then that society cannot share the same attitude toward the principles and arguments such an understanding inspires. Consequently, coupling Habermas' singular conception of public reason with the fact that religious faith is not shared in plural societies, it can be concluded that religious discourses face an *extremely* challenging task of providing a single set of principles, premises and reasons to back a given norm to which all possibly affected individuals could agree.

The second set of reasons which devalue religious discourses and which Habermas uses to suggest that religious discourses would be unconvincing in procedures of argumentation are based in social evolutionary processes that have rendered religious discourses outdated and an aspect of our pre-modern past. These processes are claimed to have shifted the popular methods of reasoning, in modern societies, away from the previously privileged religious modes of thought.

The caesurae between the mythical, religious-metaphysical, and modern modes of thought are characterized by changes in the system of basic concepts. With the transition to a new stage the interpretations of the superseded stage are, no matter what their content, categorically devalued. It is not this or that reason, but the kind of reason which is no longer convincing. A devaluation of explanatory and justificatory potentials of entire traditions took place... in the modern age with the dissolution of religious, cosmological and metaphysical figures of thought. These devaluative shifts appear to be connected with socio-evolutionary transition to new levels of learning, with which the conditions of possible learning processes in the dimensions of objectivating thought, moral practical insights and aesthetic expressive capacity are altered.⁹²

Consequently, Habermas claims that processes of social evolution and social development have led to an inability of religious discourses to convince or motivate the entire populous of a modern society. Similar in fashion to psychological stages of personal development, Habermas conceives of social development occurring in a series of stages from the pre-modern to the modern. He finds religious discourses potentially unconvincing since they represent pre-modern methods of reasoning and justification. The advancement of modernity consequently stripped religion of its former authority over 'Truth' and replaced it with a form of rational criticism that appears to render religious discourses incapable of providing a legitimate and valid basis for social norms and laws.⁹³

Habermas has undeniably stated that the advancement of modernity has lead to a form of communicative reasoning which has reduced the capabilities of religious discourses. The evolution of society and the emergence of modernity, therefore, has left religious discourses in a precarious position. Habermas believes that the time when metaphysical and religious claims could account for a popular sense of validity is behind us. As society has progressed from stage to stage, the forms of reasoning and the content of the previous stages' discourses become devalued and impractical within the current stage.

Religious discourses experienced their position of privilege during a pre-modern period that was not marked by a significant degree of differentiation or specialization. However, Habermas, and others, have characterized modernity according to the high level of specialized and independent spheres of activity and knowledge within the modern social world.⁹⁴ The modern social world is not conceptualized according to a single and unitary sphere of human activity. Rather, the increasing specialization in most

areas of human thought and activity has lead to a conceptualization of modern society as the combination of multiple independent and differentiated spheres. Therefore, modern societies are not constituted by a single and vast realm, but rather by the accumulation of a variety of smaller and more particular social spheres.

What is most interesting or perhaps most important about this aspect of modernity is that these independent and differentiated spheres are governed by their own independent, specialized and differentiated rules, logics and value sets.⁹⁵ The specialization that exists within these spheres is believed to contribute to a failure of a single and undifferentiated discourse from influencing, affecting and claiming validity over the variety of independent spheres within the modern social world. As areas of human life and knowledge become increasingly specialized and particular, the differentiated spheres similarly increase their level of independence since they have to rely on and refer to their own sources of logic and value sets.⁹⁶

Religious discourses represent themselves as pre-modern, in part, due to their metaphysical nature. Religions, generally, promote all-encompassing understandings of everything within the social and physical universe. Such religious discourses present themselves as unitary discourses that can reveal the 'Truth' regarding the world and society as a complete whole. Habermas has discussed the nature of religious and metaphysical claims and shares the popular understanding of these claims as attempts to explain the vastness of existence through singular and transcending discourses. In 1984, when Habermas engaged in an elaborate project to develop and explain the theory of communicative action, he expressed his understanding of religious and metaphysical responses as statements that are concerned with "...the constitution of the world as a

whole.”⁴⁴ He also added that such forms of knowledge attempt to “...blend together... otherwise independent questions of standards and issues of being.”⁹⁷ In publications that Habermas dedicated to the nature of modern thought, he reinforced this understanding by stating that “[m]etaphysics believes it can take everything back to one... it has presented itself in its definitive forms as the doctrine of universal unity...”⁹⁸ As a result, religious discourses, as metaphysical and all-encompassing discourses, lack a position of privileged and significance in modern society. This lack of privilege for religious discourses and their particular differences from modern discourse contribute to religious discourses potentially being unable to inspire a consensus, based on a single set of reasons, within a plural modern society.

In conjunction with one another, singular public reason, religious reasoning as devalued in late modernity and the fact that no religion is universally shared, renders religious citizens potentially unequal in terms of their justificatory potential and possibly suffering from political poverty. Since religious discourses are limited in terms of their potential, religious citizens are unlikely to be capable of drawing from their comprehensive and religious doctrines to influence the results of public procedures of argumentation. These citizens would find themselves entering public discourses with comprehensive doctrines and accompanying discourses which are likely to be incapable of providing the single set of reasons that can justify any given norm. In addition, in the absence of a religious justification, it is possible that the norms to which religious citizens agree may still seem insufficient since they have not been tied to their beliefs. However, if Habermas’ theory is open to the possibility of a plural conception of public reason, these inequalities could be eliminated.

If discursive participants are capable of agreeing for different reasons, an agreement may be reached between secularists and religious citizens whose public positions are tied to their religious commitments. If a norm is recognized as valid to which all affected citizens agree without having to share a single set of reasons which back that norm, then religious participants would not have to enter discourses with an inequality of capabilities. Under these conditions, religious citizens would be capable of basing their judgements on religious resources and discourses.

Plural agreements, agreements which do not have a singularly shared basis, not only provide participants with the ability to express their beliefs, it also enables them to form agreements based on these differentiated beliefs. Plural agreements allow everyone to agree "...in light of moral values that they recognize within their own moral frameworks."⁹⁹ This, of course, enables citizens to agree to norms for religious reasons which may not be shared by others. Despite the fact that no religion is universally shared and that religious discourses have become devalued in many circles, those citizens who are influenced and inspired by religious discourses can recognize their religious discourses as equally capable of providing the basis for social norms under conditions of plural public reasoning.

Based on the possibilities of a plural conception of public reason, the disadvantages that may have originally faced religious citizens, in the context of Habermas' political theory, can be eliminated or at least reduced. Habermas has argued that the advancement of modernity has resulted in a loss of privilege for religious discourses. However, in practice this equates to an inability or extremely limited ability for religious discourses to effect the will of an entire society when justifiable norms require a singular basis of

agreement. However, a plural conception of public reason would not burden religious discourses with the task of altering or affecting the convictions of an entire citizenry. Religious discourse could, instead, be utilized to shape the opinions and convictions of the religious citizenry alone. Similarly, the absence of a singularly shared religion would not prove to be an insurmountable disadvantage for religious discourses. Religious reasons and resources would not have to inform and influence the positions of the entire citizenry since plural public reasoning does not recognize this type of justificatory potential as a requirement.

7 Conclusion

Although it would be problematic if Habermas' practical and concrete political reflections on public autonomy denied religious discourses' public characteristics and separated religious inputs from the public sphere, such a conceptualization fails to reflect his position accurately. Nevertheless, Habermas' statements regarding certain forms of religiosity and the merits of religious discourses contain negative implications regarding the citizenry's public autonomy. Habermas has stated that fundamentalists are completely incompatible with democratic procedures. This, of course, means that their ability to participate in and contribute to the results of discursive procedures is limited or non-existent. In addition, Habermas has stated that by drawing upon religious discourses, religious citizens may find the rest of the society unconvinced by their positions. This represents a limitation on the religious citizenry's discursive capabilities and places them in a position of inequality when compared with the rest of the society.

However, the damage that is possibly done to fundamentalists and religious citizens is avoidable. By further investigating fundamentalism, we may find that fundamentalists are more compatible with democratic procedures than originally perceived. It is quite possible that legitimate law-making procedures can incorporate fundamentalists as participants. That is to say, the perceived incompatibility between fundamentalists, democracy and communicative reason may be inaccurate and based on misconceptions.

In addition, by recognizing the merits of plural public reasoning, the disadvantages that religious citizens face can be reduced or eliminated. A plural basis for agreement would free religious citizens from the limitations that presently haunt religious discourses. Such citizens could agree to the validity of a norm or law for religious reasons rather than the secular reasons the rest of the society may base its agreement on.

Nevertheless, this investigation has shown that Habermas advocates a fairly broad notion of publicity. His reflections regarding the citizenry's public autonomy similarly advocate a wide range and scope for their participatory rights. It seems that it is not his intention to limit participants before they engage in discourses. That is, the validity of a statement, claim and form of reasoning is determined procedurally. However, due to the possibility of a misrepresentation of a cultural identity and the potential inequalities of capabilities that are present in Habermas' theory, the above investigation has demonstrated that there are alternatives that are capable of addressing these potential problems while remaining consistent with Habermas' general ideal of legitimacy.

Conclusion

It is quite possible that the societies in which we live can be ordered and regulated by legitimate norms and laws. In order to attain legal legitimacy, our societies' legal decision-making processes must be based on, developed through and remain consistent with the system and model of legal legitimacy that Jurgen Habermas has developed. This system is based on the ideal of the addressees of law also being its authors. This ideal is not recent. It dates back to classical republicans who emphasized the importance of the citizenry's public autonomy. However, Habermas' recent contributions to deliberative democracy and legal legitimacy distinguish his model from those of classical republicans since his theory is not limited to the mere emphasis on and priority of principles of public autonomy. In fact, Habermas advocates a system of autonomy where the principles and rights based on private and public autonomy are emphasized equally. This is because Habermas' model of legal legitimacy conceptualizes and understands these principles to be mutually dependent and co-originating.

The co-originating and circular relationship which Habermas has identified between private and public autonomy not only distinguishes his model and theory of legal legitimacy from his predecessors, but it also ensures that those norms and laws which the citizenry has agreed upon can be regarded as legitimate. Habermas believes that communicative rationality can provide a modern basis for legal legitimacy, and his procedural system ensures that only communicatively developed norms and laws receive the recognition of legitimacy.

However, Habermas' more practical and political reflections on private and public autonomy have lead him to include illegitimate requirements, consequences and

implications in his theory. Investigations into Habermas' more practical writings have shown that he potentially deviates from his model and ideals of legal legitimacy. These deviations are embodied in his advocacy of premises that can lead to excessive exclusions, invalid constraints being placed on legal discourses and the denial of discursive equality among the citizenry. For example, Habermas' practical writings on the topic of citizenship status and its attainment may excessively burden the potential citizen's level of loyalty and commitment to the society's existing political culture. These requirements would lead to invalid restrictions of access to legal discourses and limitations placed on the content and scope of these discourses. In addition, Habermas' reflections on religion may display a costly insensitivity to the religious citizenry's public autonomy rights in terms of their public capabilities.

However, what this investigation into legal legitimacy has shown is that Habermas' abstract model of legal legitimacy is capable of producing legitimate legal norms in modern societies. In addition, this investigation has shown that, even if Habermas' practical political reflections deviate from his model of legal legitimacy and sponsor potentially invalid and restrictive norms, all is not lost. We are left with the option of identifying and addressing these inadequacies in order to reduce or eliminate their effects and, therefore, retain the potential for legal legitimacy. The attainment of legal legitimacy requires a less restrictive and less constraining basis for citizenship. In addition, a recognition of the merits of plural public reason may be required to ensure that religious citizens are granted an equal standing in terms of their capabilities. In other words, by identifying potential problems in Habermas' theory of legal legitimacy and rectifying them in order to preserve the priority of his abstract model and basis of legal

legitimacy, we can harness the legitimating power of communicative rationality to establish and develop a just and legitimately regulated society.

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