

## Teoria de John Rawls

# What can we still learn from the Rawls-Habermas debate? A paradigm of political philosophy for liberal democracies

O que ainda podemos aprender com o debate Rawls-Habermas?  
Um paradigma em filosofia política para democracias liberais

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## ABSTRACT

This article argues about John Rawls' paradigm shift in contemporary political philosophy. In the article, this paradigm is defined as democratic insofar it claims, among other things, to leave enough room for democratic deliberations and citizens' political autonomy. On this specific issue, Rawls and Habermas dialogue is still particularly fruitful. Both authors believe that contemporary political philosophy must be modest in some relevant theoretical and methodological aspects but they disagree on which of these aspects should be more or less modest. This article argues that when we look for the legitimate boundaries of the contemporary political philosophy, Rawls and Habermas projects should be seen as closely complementary to one another. On the one hand, the article partially agrees with Habermas' objections to Rawls that political philosophy should not be too modest in providing orientations for the normative grounds of the political justification. On the other hand, against Habermas, the article remains on Rawls's side on the idea that political philosophy cannot be agnostic regarding the substantive and distributive issues of social justice.

**Keywords:** Rawls-Habermas debate; John Rawls; Jürgen Habermas; Political philosophy paradigm; Liberal democracy

## RESUMO

Este artigo discute a mudança de paradigma de John Rawls na filosofia política contemporânea. No artigo, esse paradigma é definido como democrático na medida em que pretende, entre outras coisas, deixar espaço suficiente para as deliberações democráticas e a autonomia política dos cidadãos. Sobre esta questão específica, o diálogo entre Rawls e Habermas ainda é particularmente fecundo. Isso porque ambos autores acreditam que a filosofia política contemporânea deve ser modesta em alguns aspectos teóricos e metodológicos relevantes, contudo discordam sobre quais desses aspectos devem ser mais ou menos modestos. Este artigo argumenta que, quando buscamos estabelecer as fronteiras legítimas na filosofia política contemporânea, os projetos de Rawls e Habermas devem ser vistos como

intimamente complementares um ao outro. Por um lado, o artigo concorda parcialmente com as objeções de Habermas a Rawls de que a filosofia política não deve ser muito modesta ao fornecer orientações para os fundamentos normativos da justificativa política. Por outro lado, contra Habermas, o artigo permanece do lado de Rawls na ideia de que a filosofia política não pode ser agnóstica quanto às questões substantivas e distributivas da justiça social.

**Palavra-Chave:** Debate Rawls-Habermas; John Rawls; Jürgen Habermas; Paradigma em filosofia política; Democracia liberal

## 1 INTRODUCTION

It is universally recognized that John Rawls' work in the mid-twentieth century ushered in a paradigm shift in political philosophy. As one of Rawls' critics, Robert Nozick, wrote in *Anarchy, State, and Utopia*<sup>1</sup>: "political philosophers now must either work within Rawls' theory or explain why not".<sup>2</sup> *A Theory of Justice* reinvented and transformed the conceptual vocabulary of political philosophy, relocating into its core the question about the nature of justice and filling the vacuum of philosophical imagination in Post-World War Two debate. In my view, Rawls' political philosophical innovation is twofold: it provides both theoretical and methodological paths which are based on a *democratic* paradigm of political philosophy. Here, for *democratic*, I mean a paradigm of political philosophy that claims to provide moral and political normative requirements and orientations for a liberal democratic society understood as a social system of cooperation among citizens who regard each other as free and equal persons. From the theoretical point of view, it means to provide a normative framework in which the leading ideas of liberty and equality are organized to justify principles of justice for orienting how to shape and regulate the basic structure of society and its major institutions. While, from a methodological point of view, it implies to endorse a non-metaphysical or post-metaphysical conception of justice and reason. In addition, Rawls' *Political Liberalism* makes explicit that a *democratic* paradigm of political philosophy includes a methodological perspective associated with a constructivist conception

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<sup>1</sup> NOZICK, **Anarchy, State, and Utopia**, 175.

<sup>2</sup> See also: MANDLE, **A Theory of Justice**, 4.

of political justice and not with comprehensive moral doctrine. It also means that political philosophy should take “men as they are” or, in other words, refer to “to persons' moral and psychological natures and how that nature works within a framework of political and social institutions”.<sup>3</sup> In this way, Rawls wants to emphasize that his political theory of justice is a *realistic utopia*. The result of what I call a *democratic* paradigm of political philosophy is to circumvent the legitimate boundaries of the discipline, which should leave enough room for democratic deliberations and citizens' political autonomy.<sup>4</sup> As a consequence, political philosophy should be *modest* in some relevant ways. In this respect, Rawls and Habermas dialogue is still particularly fruitful.

Rawls and Habermas have followed different theoretical and methodological paths, each one able to synthesize a side of the most important dichotomy in contemporary philosophical debate, such as analytic and continental, political philosophy and social philosophy, normative and critical theory. Despite the differences, their common starting point is in Kant's practical philosophy and their theoretical developments which not only brings their theories quite close, but leads to a certain convergence. Indeed, both Rawls and Habermas advance an intersubjective and procedural reformulation of moral autonomy and the categorical imperative, respectively grounded on a non-metaphysical and post-metaphysical conception. Moreover, both of them apply their conceptions of political morality to the 'basic structure' of society (even if Habermas does not explicitly adopt this term). The closeness of the two theoretical projects is proved

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<sup>3</sup> RAWLS, **Justice as Fairness**, 7.

<sup>4</sup> For example, a variety of different sets of socioeconomic scheme and political arrangement might be equally compatible with the two principles of justice. Rawls in *Justice as Fairness* identifies two ideal type social systems – property-owning democracy and liberal socialism – that satisfy the two principles of justice (while he excludes others three types: laissez-faire capitalism, welfare-state capitalism, state socialism with a command economy). For the debate about the ideal type social systems see: O'NEILL; WILLIAMSON, **Property-Owning Democracy**; EDMUNDSON, **John Rawls: Reticent Socialist**; THOMAS, **Republic of Equals**.

unequivocally by their direct dialogue.<sup>5</sup> This dialogue is indirectly continued by others authors who tried to make Rawls' and Habermas' divergences and disagreements very instructive, showing at the same time a certain complementarity of both philosophical perspectives.<sup>6</sup> Rawls-Habermas debate has been usually seen a "familial dispute".<sup>7</sup> Although it is true that Rawls and Habermas projects diverge in many aspects, I believe that we might still learn a lot if we read Rawls and Habermas projects as they work together. This line of thought has already been advanced in particular by some scholars, such Forst, Werle and Finlayson.<sup>8</sup> However, this article will focus on a specific aspect of this Rawls-Habermas 'complementary' which still remains quite under-theorized in the current debate.

Rawls and Habermas seem to disagree on the 'legitimate boundaries of the political philosophy'. Both authors believe that the discipline must be *modest* in some relevant theoretical and methodological aspects but they disagree on which of these aspects should be more or less modest. On the contrary, the intent of this article is to show that when we look for *the legitimate boundaries of the contemporary political philosophy*, their projects should be seen as a strict complement to one another in such a way that only together would they have the effect of properly defining what both authors believe to be the legitimate boundaries of political philosophy without being too modest in one or the other theoretical and methodological direction. For example, in the last decade many

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<sup>5</sup> See: HABERMAS, **Reconciliation Through the Public use of Reason**; RAWLS, **Reply to Habermas**, also reprinted in RAWLS, **Political Liberalism**. In addition, Habermas wrote a further reply to Rawls but he did not get a chance to reply in turn; see: HABERMAS, **'Reasonable' Versus 'True,' or the Morality of Worldviews**.

<sup>6</sup> BAYNES, **The Normative Grounds of Social Criticism**; MCCARTHY, **Constructivism and Reconstructivism**; FORST, **Contexts of Justice**; WERLE, **Justiça e democracia**; HEDRICK, **Rawls and Habermas, and the Claims of Political Philosophy**; FINLAYSON; FREYENHAGEN, **Habermas and Rawls**; FINLAYSON, **The Habermas-Rawls Debate**.

<sup>7</sup> HABERMAS, **Reconciliation Through the Public use of Reason**, 110.

<sup>8</sup> FORST, **Contexts of Justice**; FORST, **The Right to Justification**; WERLE, **Justiça e Democracia**; WERLE, **Construtivismo "não metafísico" e reconstrução "pós-metafísica"**; WERLE, **Razão e Democracia**; FINLAYSON, **The Habermas-Rawls Debate**.

studies, empirical and theoretical, on the current crisis of liberal democratic societies have been produced and discussed.<sup>9</sup> In this regard, our current liberal democracies seem to be affected by deep conflicts, not only over moral and political values, but also over the epistemic and empirical social reality itself. Not infrequently it seems that citizens live on different worlds. Some reject the validity of the scientific method meanwhile others use science and technology as the very source of political authority, rather than considering it an essential element for an adequate public deliberation. These are kinds of conflicts that make it very difficult to attain overlapping consensus and the stability of a democratic society. In this scenario, I am afraid that we need to normatively investigate what it means to bear the burdens of judgment and to be reasonable citizens far more than we could do it with Rawls' theory. Therefore, on this issue, a less *modest* project as that of Habermas can be very useful. On the other hand, these irreconcilable conflicts are often considered as the by-product of socio-economic crises and rising levels of material inequality.<sup>10</sup> Although it is a mistake to resort to a single phenomenon to explain the now undeniable loss of legitimacy of our liberal democracies, I believe that structural socio-economic conditions are one of the fundamental elements to be taken seriously. It seems increasingly evident that the dominant socio-economic structure, as it has developed over the past 30 years, reproduces inequalities, discrimination and inefficiencies that are incompatible with the moral and political ideals of a liberal democracy. A radical change is needed. Nonetheless, it is not sufficient to appeal and show the necessity of this radical change (as Critical Theory often merely does), but it is also indispensable to provide normative orientations for helping citizens to evaluate limits and consequences of political and socioeconomic changes in the long-run. A normative inquiry is required about, for example, the distributive principles, ideal social schemes and specific distributive

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<sup>9</sup> See: LEVITSKY; ZIBLATT, **How Democracies Die**; MOUNK, **The People vs. Democracy**.

<sup>10</sup> See: PAGE; GILENS, **Democracy in America?**; PIKETTY, **Capital and Ideology**.

devices and social policies. From this point of view, unlike Habermas, Rawls correctly extends his theory to cover these fundamental issues.

Given the restrictive topic of this article, I will focus only on those parts of Habermas' theory that are relevant for the investigation of such topic. A good start point to introduce Rawls-Habermas debate is to focus on the general critique that Habermas moves to Rawls. Forst summarizes it very well:

In short, Habermas argues that Rawls, on the one hand, does not sufficiently take into account the concept of moral autonomy because he dilutes the validity claims of the principles of justice, and, on the other hand, does not conceive of the concept of political autonomy radically enough, since the construction of principles of justice with the help of the original position anticipates too much of the actual political practice of self-determining citizens.<sup>11</sup>

This general critique is further specified in three fundamental objections. 1) The first objection concerns Rawls' risk of making his theory dependent on contingent agreement among comprehensive doctrines; thus, according to Habermas, "Rawls should make a sharper separation between questions of justifications and questions of acceptance".<sup>12</sup> This is the only way that Rawls would be able to avoid any ambiguity about the 'philosophical-normative' validity of *Political Liberalism*, and so reject objections like those advanced by Rorty and Mouffe<sup>13</sup>, according to which the capacity of separating citizens' ethical and metaphysical convictions from their political ones – the essence of the notion of reasonableness – is purely and simply a liberal virtue, and, as such, part of an internal component of the comprehensive doctrine of liberalism.<sup>14</sup> Here, the point is whether the concept of overlapping consensus has, contrary to Rawls' intention<sup>15</sup>, a function in grounding a political conception of justice. 2) The second objection concerns the liberal basic rights primacy over the democratic principle of

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<sup>11</sup> FORST, **The Right to Justification**, 88.

<sup>12</sup> HABERMAS, **Reconciliation Through the Public use of Reason**, 110.

<sup>13</sup> RORTY, **Priority of Democracy to Philosophy**; MOUFFE, **Political Liberalism**.

<sup>14</sup> For more details on this question, see: MAFFETTONE, **Political liberalism**.

<sup>15</sup> RAWLS, **Political Liberalism**, 64.

legitimation.<sup>16</sup> According to Habermas, “Rawls thereby fails to achieve his goal of bringing the liberties of moderns into harmony with the liberties of the ancients”<sup>17</sup>. In this sense, according to him, Rawls fails to capture the co-originality of basic subjective rights and popular sovereignty. 3) Finally, with the third objection Habermas directly criticizes the substantive propositions that Rawls advances with the two principles of justice. This last objection is a direct result of the first and the second objections. Once Habermas detects the source of the two previous objections in the difficulties associated, mainly, with the design of an original position, he suggests that Rawls might avoid these difficulties by operationalizing the moral point of view in a different way, namely “if he kept the procedural conception of practical reason free of substantive connotations by developing it in a strictly procedural manner”.<sup>18</sup> For this reason, Habermas leaves all substantive questions to the public use of reason and he limits himself to reconstruct the conditions of democratic deliberation. In this sense, Habermas sustains that Rawls’ political conception of justice is not purely procedural enough.<sup>19</sup> These divergences that are exemplified in Habermas’ three objections rely on different understandings of how to avoid Kantian’s metaphysical presuppositions – for Rawls and Habermas respectively through a non-metaphysical or a post-metaphysical conception – and a different methodology that Rawls defines as *constructive* and

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<sup>16</sup> This objection is linked with the problem in Rawls’ theory to conceive the basic liberties also in terms of ‘primary goods’ as well as other authentic goods, for example income and wealth, that must be fairly distributed. Since rights can be ‘enjoyed’ only being exercised, and so they cannot be assimilated to distributive goods without forfeiting their deontological meaning, the paradigm of distribution might generate difficulties for Rawls. According to Habermas, this problem cannot be solved with the priority of the first principle over the second one, and only partially by incorporating the guarantee of the fair value of liberty into the first principle because it tacitly presupposes a deontological distinction between rights and goods (HABERMAS, **Reconciliation Through the Public use of Reason**, 106).

<sup>17</sup> HABERMAS, **Reconciliation Through the Public use of Reason**, 110.

<sup>18</sup> HABERMAS, **Reconciliation Through the Public use of Reason**, 116.

<sup>19</sup> Habermas confirmed and reinforced these three objections in HABERMAS, **‘Reasonable’ Versus ‘True,’ or the Morality of Worldviews**. However, there he exposed them avoiding some misconceptions of Rawls’ theory that are, instead, present in his first article. Here I do not have the space to show the difference between the two Habermas’ articles, for a discussion on this aspect see: FINLAYSON, **The Habermas-Rawls Debate**.

Habermas as *reconstructive*.<sup>20</sup> This means that, although the procedure or device of justification of moral norms proposed by Habermas and by Rawls are based on the fundamental idea of reciprocity and both of them ensure impartiality and generality in relation to arbitrary positions in the formation of moral judgments, Habermas' discourse principle (D) is a procedure for examining the validity of the norms in discussion, meanwhile Rawls' original position is a device for the production of justified norms and so moved forward also in substantive proposals. Rawls' replies reflect this main distinction, but a careful analysis will show a certain complementarity of the two different perspectives rather than, at first insight, an apparent incompatibility.

Thus, the article is divided into three sections in which I will discuss Rawls' reply to each of these three objections. On the one hand, I believe that Rawls' reply is not satisfactory regarding the first Habermas' objection, and it is only partially satisfactory regarding the second objection. Therefore, I agree with Habermas that political philosophy cannot be too modest in terms of moral/political justifications as Rawls seems to presuppose in his *Political liberalism*, otherwise, he would not be able to develop his political conception of justice as a freestanding view. Rawls should adequately separate the two stages of his theory: the political conception of justice as a freestanding view and the idea of stability. For what concerns the first stage, Rawls seems to be unable to compellingly ground the moral justification of his 'political' conception. The risk is to conceive the term 'political' in the wrong way, involving a certain moral abstention or neutrality and grounding his political conception only on some liberal 'political' values. By contrast, I think that the term 'political' should be directly based on the principle of norm justification, like in Habermas' account. In other words, a political conception of justice represents a much stronger moral claim than what Rawls seems ready to admit to. But, besides

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<sup>20</sup> For more details about these different theoretical and methodological models, constructive and reconstructive, see respectively: RAWLS, **Kantian Constructivism in Moral Theory**; NOBRE; REPA, **Habermas e a reconstrução**; REPA, **Reconstrução e emancipação**.



that, I sustain that we should reject the third Habermas objection. Thus, on the other hand, I disagree with Habermas<sup>21</sup> that political philosophy should be less modest than Rawls' theory, focusing exclusively on the procedural aspects of the public use of reason and deriving the system of rights from the idea of its legal institutionalization, and thus leaving the substantive questions open; for example, what Rawls' two principles of justice are concerned with. The disagreement in regards to what Habermas thinks to be beyond a pure procedural theory, in particular all substantive and material issues, such as the social norms that regulate the socioeconomic distribution (more or less the content of the second principle of justice), Rawls believes that, instead, it is an intrinsic element of a procedural and relational conception. Otherwise, Habermas' discourse principle would not be able to guarantee that the process of rational opinion and will formation are not affected by the illegitimate distribution of power in whatever forms it might manifest; for example, in the form of material power. Let's me begin with Rawls' reply to the first Habermas' objection.

### **1.1 THE NORMATIVE GROUNDS OF THE POLITICAL JUSTIFICATION**

Rawls rejects the first objection by reason of the fact that Habermas' position is comprehensive while his position is limited to the political category, and only that. According to Rawls, the central idea of political liberalism is that it can be formulated independently of any particular comprehensive doctrine, religious, philosophical, or moral. Political liberalism never denies or questions these doctrines in any way, so long as they are politically reasonable. By contrast, according to Rawls, Habermas' theory of communicative action is comprehensive insofar as it gives "a general account of meaning, reference, and truth or validity both for theoretical reason and for the several forms. It rejects naturalism and

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<sup>21</sup> HABERMAS, **Moral Consciousness and Communicative Action**, 94; HABERMAS, **Reconciliation Through the Public use of Reason**, 131.

emotivism in moral argument and aims to give a full defense of both theoretical and practical reason".<sup>22</sup> Although, Rawls is right to define Habermas' moral theory as comprehensive, it is true only for a specific aspect; that is, what concerns with the *ultimate* grounds of moral obligations and, above all, the sources of moral motivations. Or in other words, the philosophical question of 'why be moral'? Surely, Habermas takes part in this kind of discussion. Indeed, since his own linguistic turn in the early 1970s, he tries to answer this question in grounding the foundation (or semi foundation) of moral theory in the ideal speech situation. For example, for Habermas, "the understanding of any basic speech act (whether an indicative or an imperative) is essentially connected to a set of validity claims and to the possibility of the hearer taking a rationally motivated 'Yes/No' position toward those claims".<sup>23</sup> This task inevitably forces him to take position about some very strong epistemological assumptions that involve terms as truth and logic coherence or validity. For this reason, he introduces the principle of universalization (U) that is an attempt to reconstruct basic moral intuitions already contained in our communicative practices. Precisely, the principle of universalization (U) means that: "all affected can accept the consequences and the side effects of its general observance can be anticipated to have for the satisfaction of everyone's interests (and these consequences are preferred to those of known alternative possibilities for regulation)".<sup>24</sup> In a certain way, Rawls tried to answer this question in the third part of a *Theory*, a part that entails those kinds of problems that he overcame or bypassed with *Political Liberalism*. The point is that Rawls believes that the answer to this kind of question leads inevitably to formulate or adopt a certain comprehensive moral/philosophical doctrine, even inevitably comprehensive metaphysical. I left open the question whether Habermas' theory of communicative action is metaphysical in grounding the source of moral motivations, or if it is

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<sup>22</sup> RAWLS, **Political Liberalism**, 376.

<sup>23</sup> BAYNES, **The Normative Grounds of Social Criticism**, 78.

<sup>24</sup> HABERMAS, **Moral Consciousness and Communicative Action**, 65.

effectively post-metaphysical and semi-transcendental as Habermas defines it. However, despite Rawls is right in sustaining that his political conception of what justice can, and perhaps must do to avoid this moral question that usually is disputed among metaphysical doctrine, Habermas' theory of communicative action aims to provide a compelling answer not only to the moral question: *why be moral?*, but also for practical/political questions in the domain of *what we owe to each other*.<sup>25</sup> The latter is exactly the domain in which Rawls' political conception of justice is placed. However, in this respect Habermas does not endorse a comprehensive (or metaphysical) conception. Indeed, we should not make the mistake of overlapping the discourse principle (D) with the principle of universalization (U). The discourse principle (D)– “just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses”<sup>26</sup> – is a principle of justification of ‘social’ norms that tries to manage our deep and extensive moral/political disagreements about those that should be our legitimate duties and rights. For this reason, the principle (D) concerns the domain of *what we owe to each other*. Now, one can share Habermas' discourse principle (D) (or others similar principle of justification) without taking a position about the *ultimate* grounds of moral obligations and the sources of moral motivations.

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<sup>25</sup> According to Scanlon's understanding, *what we owe to each other* is “a narrower domain of morality having to do with our duties to other people, including such things as requirements to aid them, and prohibitions against harming, killing, coercion, and deception” (SCANLON, **What We Owe to Each Other**, 6).

<sup>26</sup> HABERMAS, **Between Facts and Norms**, 107. Note that in the first formulation of the principle of discourse, Habermas defined it as the ‘principle of discourse ethics’, but then he realizes that in this previous formulation he has not sufficiently distinguished between the discourse principle and the moral principle (HABERMAS, **Moral Consciousness and Communicative Action**, 66). Instead, the discourse principle, as presented in *Between Facts and Norms*, “is only intended to explain the point of view from which norms of action can be impartially justified” (HABERMAS, **Between Facts and Norms**, 108-109). In this way, the discourse principle is conceptually prior to the distinction between law and morality. Thus, Habermas hopes to avoid a moralistic interpretation of law and consequent favoring of private autonomy in the form of human rights. For more details about this important change see: VOLPATO DUTRA, **Morals and Law in Habermas's ‘Tanner Lectures’**.

Therefore, the discourse principle (D) is not comprehensive in Rawls' sense since it neither answers the ethical questions of good life nor it is based on any particular comprehensive moral idea or moral value. Paradoxically, it is Rawls who could run this risk. As Forst observes, "Rawls is unable to clearly explain the moral justification of the political conception: he fluctuates between a form of justification based on an ethical-comprehensive doctrine and a freestanding moral justification".<sup>27</sup> In this sense, what Rawls calls "*pro tanto justification*" runs the risk of being considered 'comprehensive' because it simply "reconstruct[s] a substratum of intuitive ideas latent in the political culture of his society and its democratic traditions".<sup>28</sup> Unfortunately, Rawls seems to proceed properly in this way. He says that the *pro tanto*<sup>29</sup> justification takes into account only political values as fundamental ideas: "all belong to the category of the political and are familiar from the public culture of a democratic society and its tradition of interpretation of the constitution and basic laws, as well as of its leading historical documents and widely known political writing".<sup>30</sup> Rawls himself admits this limit when he says that justice as fairness "springs from and belong to the tradition of liberal thought and the larger community of political culture of democratic society".<sup>31</sup> The problem is that Rawls does not realize the normative problem that this aspect entails. The concrete doubt is whether this argument can be valid as a reasonable justification that all citizens could accept (or not reasonably reject) even for those citizens that do not share this political culture of a liberal democratic society but live in the same political community. To make this argument valid, Rawls

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<sup>27</sup> FORST, **The Right to Justification**, 96.

<sup>28</sup> HABERMAS, **Reconciliation Through the Public use of Reason**, 120. This does not mean that Habermas considers Rawls a contextualist, and indeed, Habermas reject Rory's interpretation of *Political Liberalism*.

<sup>29</sup> Rawls introduces a second and a third kind of justification: full justification and public justification (RAWLS, **Political Liberalism**). The second is carried out by an individual citizen as a member of civil society; meanwhile, the third, and last, is carried out by political society, and it works in tandem with the other three ideas with a reasonably overlapping consensus, stability for the right reason, and legitimacy. None of these other justifications seem to say something more against Habermas' objection.

<sup>30</sup> RAWLS, **Political Liberalism**, 376.

<sup>31</sup> RAWLS, **Political Liberalism**, 432.

should explicitly assume that the liberal-democracy has a normative value; otherwise this argument is adequate only for the notion of (political) legitimacy rather than for the notion of (political) justification. Maffettone defines very well the distinction between these two different notions: “in general, for justification I mean the normative force of a theoretical-political conception. For legitimacy, however, I mean the shared consensus on the institutions among the citizens of a liberal-democratic regime”.<sup>32</sup> Maffettone underlines how both notions, legitimacy and justification, are relevant, and even complementary, in political liberalism but it seems that Rawls sacrifices the latter for the sake of the former.<sup>33</sup> The risk is that the political liberalism would be considered only a political theory rather than as a theory of political justice, and therefore it would lose the normative force. For this reason, I think that Rawls cannot reject the first Habermas objection once it is well understood. Therefore, Rawls should separate the question of justification and the question of acceptance; and in doing so he needs to adequately separate the first and the second stage of exposition of his theory (which correspond respectively to the notion of political justification and that of political legitimacy or more generally the notion of stability). From this point of view, Habermas’ theoretical proposal is more compelling and rightly less modest than the one from Rawls.

## 2.1 THE CO-ORIGINALITY OF BASIC RIGHTS AND POPULAR SOVEREIGNTY

Moving onto the second objection, also in this case, Rawls’ reply is not totally satisfactory. According to Habermas, Rawls fails to harmonize the liberties of the modern with the liberties of the ancient, and he ends by giving priority to the former rather than the latter. Thus, Rawls would subordinate the democratic process and popular sovereignty to the liberal rights. According to Habermas, this

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<sup>32</sup> MAFFETTONE, **Introduzione a Rawls**, 16 [my translation].

<sup>33</sup> See: MAFFETTONE, **Political liberalism**. What is interesting is that Rawls agrees with the distinction between legitimacy and justice. Legitimacy is a weaker idea than justice and imposes weaker constraints of what can be done (RAWLS, **Political Liberalism**, 427-428).

subordination is the result of the two-stage<sup>34</sup> character of political conception of Justice as fairness by which first the representative of the parts, in the original position, select the principles of justice and only after that moves to the citizens' regular application of those same principles under the actual conditions of political life.<sup>35</sup> Rawls denies this objection providing three reasons. First, Rawls says that Habermas misunderstands what he calls the idea of *four-stage sequence* of original position which is composed of the following passages: constitutional, convention, legislation, and adjudication. Second, Rawls sustains that Habermas' idea of co-originality between human rights (or subjective rights) and popular sovereignty is implicit in the first principle of justice too. So, the first principle of justice includes and justifies simultaneously the two types of liberties: moderns and the ancients. The third reason that Rawls offers is that Habermas also cannot avoid the two stages procedure.<sup>36</sup> It is very difficult to say if Rawls' arguments are able to reject Habermas' objection because the way in which Habermas justifies the system of rights is very different than Rawls does through the first principle of justice. However, it is likely that Rawls in the first principle of justice justifies simultaneously the negative liberties and positive liberties rather than the liberties of moderns and the liberties of the ancients.<sup>37</sup> Indeed, as Forst notes, Rawls' attempt to conceive the co-originality in the first principle of justice is not the kind of co-originality that matters to Habermas, "since both of these categories of rights are understood by Rawls not as constitutive conditions for legally institutionalized democratic law-making, but are formulated as basic rights that only need political implementation".<sup>38</sup> In this respect, the source of Habermas' co-originality should

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<sup>34</sup> It does not refer to the two stages of exposition of political liberalism that I mentioned before.

<sup>35</sup> HABERMAS, **Reconciliation Through the Public use of Reason**, 128.

<sup>36</sup> RAWLS, **Political Liberalism**, 396-420.

<sup>37</sup> For the liberty of the moderns and of the ancients see CONSTANT, **The Liberty of the Ancients Compared with that of the Moderns**; and for the negative and positive liberty see BERLIN, **Two Concepts of Liberty**.

<sup>38</sup> FORST, **The Right to Justification**, 110.

be found directly in the discourse principle and in his emphasis of participants in a practical discourse.

One begins by applying the discourse principle to the general right to liberties – a right constitutive for the legal form as such – and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy. By means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape. Hence the principle of democracy can only appear as the heart of a system of rights. The logical genesis of these rights comprises a circular process in which the legal code, or legal form, and the mechanism for producing legitimate law – hence the democratic principle – are co-originally constituted.<sup>39</sup>

However, I do not need to put a conclusive word on this dispute in favor to Habermas or Rawls, but I think that, regarding the topic of this second objection, Habermas' proposal is more compelling. In particular, Habermas' project to conceive a virtuous circle between private and public autonomy, as well as between human rights and popular sovereignty maintaining a deontological perspective anchor in the discourse principle is an important point of reference.

### **3. THE SUBSTANTIVE DIMENSION OF A POLITICAL CONCEPTION OF JUSTICE**

In consideration of this third objection, I agree with Rawls in extending his political conception of justice beyond those theoretical limits that Habermas supposes should not be overcome. Moreover, I agree with Rawls when defending that his theory must be substantive, and he does not see why Habermas' view is not also substantive; or as I add, if not, it should be too.<sup>40</sup> According to Rawls, although Habermas sustains that his discourse-theoretical idea is restricted to an

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<sup>39</sup> HABERMAS, **Between Facts and Norms**, 121-122.

<sup>40</sup> RAWLS, **Political Liberalism**, 421.

analysis of the moral point of view and the procedure of democratic legitimation<sup>41</sup>, it does not mean that he can avoid relying on substantive content.

Habermas begins to use the term (social/political) 'justice' only when he combines, in *Between Facts and Norms*, his discursive moral theory with a theory of law and democracy; while in all previous texts Habermas understands the term of 'justice' in a more general meaning as universal moral norms.<sup>42</sup> The point is that when Habermas needs to move from a very abstract level to a concrete and immanent application to the scope of a post conventional democracy, he inevitably has to 'substantiate' the system of rights that satisfies the discourse principle.<sup>43</sup> According to Habermas, "this system should contain precisely the rights citizens must confer on one another if they want to legitimately regulate their interactions and life contexts by means of positive law".<sup>44</sup> Hence, Habermas introduces five fundamental categories of rights (1) to (5). The first three categories of rights generate (in *abstracto*) the legal code itself by defining the status of legal persons:

1. Basic rights that result from the politically autonomous elaboration of the right to the greatest possible measure of equal individual liberties.
2. Basic rights that result from the politically autonomous elaboration of the status of a member in a voluntary association of consociates under law.
3. Basic rights that result immediately from the actionability of rights and from the politically autonomous elaboration of individual legal protection.<sup>45</sup>

According to Habermas, these three basic categories of civil rights guarantee the private autonomy, since they "result simply from the application of the discourse principle to the medium of law as such, that is, to the conditions for the

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<sup>41</sup> Note that for Habermas *the procedure of democratic legitimation* is a synonymous of political justification. See the above-mentioned distinction offered by Maffettone (cf. MAFFETTONE, **Political liberalism**).

<sup>42</sup> FORST, **The Right to Justification**, 87-88.

<sup>43</sup> Note that when applied to law, the discourse principle has to be understood as *the principle of democracy*. In this sense, the discourse principle refers to the validity of action norms in general meanwhile the principle of democracy establishes a procedure of legitimate lawmaking. Thus, Habermas (**Between Facts and Norms**, 110) wants to mark the distinction between the principles of democracy and morality.

<sup>44</sup> HABERMAS, **Between Facts and Norms**, 122.

<sup>45</sup> HABERMAS, **Between Facts and Norms**, 122.



legal form of a horizontal association of free and equal persons".<sup>46</sup> It means that citizens become authors of their legal order only through the fourth basic category of rights which correspond to political autonomy:

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.<sup>47</sup>

These are the four categories of civil rights that allows citizens to interpret and develop their private and civic autonomy simultaneously. However, Habermas perceives that the co-originality between the popular sovereignty to the liberal rights cannot be conceived only abstractly and formally. Indeed, the status of free and equal active citizens should enable citizens to "change and expand their various rights and duties, or material legal status".<sup>48</sup> Therefore, according to him, with a view toward this goal, the four categories of civil rights imply the category of social and ecological rights:

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).<sup>49</sup>

However, Habermas conceives that only the four categories of civil rights as absolutely justified meanwhile the (5) category of social and ecological rights can be justified only in relative terms. In this sense, the co-originality between the popular sovereignty to the liberal rights justifies absolutely only the four categories of civil rights and, on the contrary, the 'social rights' are conceived only as derived from them.<sup>50</sup> Then, although Habermas conceives the fifth category of social rights as a necessary means for the genuine and effective worth of the first four

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<sup>46</sup> HABERMAS, **Between Facts and Norms**, 122.

<sup>47</sup> HABERMAS, **Between Facts and Norms**, 123.

<sup>48</sup> HABERMAS, **Between Facts and Norms**, 123.

<sup>49</sup> HABERMAS, **Between Facts and Norms**, 123.

<sup>50</sup> FORST, **The Right to Justification**, 192.

categories of rights, but the significance of this category for issues of social justice remains vague and indeterminate.<sup>51</sup>

Thus, we can observe how Habermas' theory risks to be affected by a serious problem of indeterminateness or 'formalism'. In particular, Habermas should make clear that all five fundamental categories of rights, from (1) to (5) are conceived simultaneously; otherwise he would overlook the dimension of material power; for instance, power that comes from unequal distribution of income and wealth. I think that this deficit in Habermas' theory likely depends on the three main problems. First, Habermas' intersubjective and procedural reformulation of moral autonomy and the categorical imperative in the form of the discourse principle might remain too abstract and formal. Second, Habermas' procedural model of democracy (deliberative democracy), according to which democracy is characterized by a discursive process of rational opinion and will formation in the public sphere might be too ideal and formal. Third, Habermas' conception of communicative power needs to explicitly include the dimension of material power. To avoid these problems, Habermas' theory should also be 'substantive', in a certain sense.

The first problem concerns the question is whether some objections that Hegel moves against Kant's moral philosophy also apply to the discourse principle. Habermas recognizes some important affinities with Kantian moral theory, but he tries to show the most relevant difference that allows the discourse principle to reject Hegel's objections (at least, those that Habermas considers valid).<sup>52</sup> Two aspects mark the deepest difference between the discourse principle and Kantian ethics. The first aspect concerns the reformulation of the concept of autonomy, which Kant conceived *monogically* meanwhile in Habermas the idea of autonomy is intersubjective. The second aspect is that the discourse principle replaces the Kantian categorical imperative in the procedure of moral argumentation. The consequence of this is that we have to consider the discourse principle as a

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<sup>51</sup> FORST, **The Right to Justification**, 115.

<sup>52</sup> HABERMAS, **Moral Consciousness and Communicative Action**, 195-215.

practical discourse, abandoning Kant's *noumenal* dimension. For my argument, this aspect is essential. The manner in which Habermas should conceive social rights is decisive in allowing the discourse principle not to fall into Kant's highly abstract and formal view of human being. Indeed, it is this *noumenal* view of the human being that leads Kant to underestimate the importance of material social conditions in such a way that according to him the equal treatment that all people are entitled to under the law of the state is entirely coherent with a huge inequality in possessions.<sup>53</sup> This means that what Habermas defines as "the individual's inalienable right to say yes or no to criticizable validity claims"<sup>54</sup> must be conceived as an effective and practical capacity. From this perspective, the fifth category of fundamental rights (socioeconomic rights) is intrinsically necessary to ensure that, in the process of opinion and will formation, people have the formal possibility and also substantive conditions to participate and to accept or reject the better argument. Only in this way, Habermas can avoid the same objection that is moved against Kant. Unfortunately, Habermas does not seem to include, at least explicitly, this substantive dimension in his broad theory and, in particular, in his procedural model of deliberative democracy. This aspect allows me to move to the second point.

The second element concerns with the risk that Habermas' procedural (deliberative) model of democracy might be too ideal and formal. His model of deliberative democracy characterized by "the exercise of public authority is oriented and legitimated by the laws citizens give themselves in a discursively structured opinion - and will-formation"<sup>55</sup> is an alternative to both liberal and republican models. On the one hand, Habermas' model extends the political process beyond the aggregation of individual preferences and self-interest that characterize the classical liberal model. On the other hand, Habermas' procedural

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<sup>53</sup> On this point see: JOHNSTON, **A brief history of justice**, 162. I try elsewhere (Author forthcoming) to explore how it is possible to take economic inequality seriously from a Kantian point of view.

<sup>54</sup> HABERMAS, **Moral Consciousness and Communicative Action**, 202.

<sup>55</sup> HABERMAS, **Between Facts and Norms**, 170.

model does not require deliberation that aims toward ethical consensus. Therefore, it avoids grounding the notion of popular sovereignty on the ethical substance of a specific community or a collective subject, as it happens in the republicanism. In other words, it is a model that combines a procedural account of democratic legitimacy with deliberative politics. The core element of his procedural democracy is that the principle of popular sovereignty is restated in terms of discourse theory in a way in which “all political power derives from the communicative power of citizens”.<sup>56</sup> This conception of popular sovereignty allows us to appreciate how the concept of communicative power is a central notion in Habermas’ procedural model of deliberative democracy. Habermas reformulates the concept of communicative power borrowed from Hannah Arendt. According to Habermas’ definition, “a communicative power of this kind can develop only in undeformed public spheres; it can issue only from structures of undamaged intersubjectivity found in nondistorted communication”.<sup>57</sup>

In *The Theory of Communicative Action*, Habermas distinguished between the *lifeworld* constituted by communicative action in the medium of ordinary language, and *subsystems* (market economy and administrative state) which are governed by the non-discursive and anonymous mean of money and power. In this way, these subsystems work independently of intentional actor actions. Although systemic coordination by market mechanisms and state power are indispensable for social coordination in modern societies, they tend to ‘colonize’ through their non-discursive special code (money and power) the domain of the lifeworld, eroding the solidarity that can only be achieved communicatively. Instead, in *Between Facts and Norms*, Habermas focuses on the deliberative politics that releases the normative resources of the lifeworld through the use of law in order to contend the ‘colonization of the lifeworld’ by money and administrative power; in this sense, law functions as a hinge between system and lifeworld. For this

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<sup>56</sup> HABERMAS, **Between Facts and Norms**, 170.

<sup>57</sup> HABERMAS, **Between Facts and Norms**, 148.

reason, it is central the role that the informal public sphere performs, together with the formal political system, in ensuring political legitimacy. Therefore, the normative requirements for legitimation are divided between institutionalized deliberative bodies and the informal communication of the public sphere. This means that, according to Habermas, the formal political system alone is insufficient to confer democratic legitimacy. The latter is completed and fully realized only through the normative reasons generated by an informal public sphere. The informal public sphere is not in itself an association or organization, and Habermas offers a description of its composition.

Its institutional core comprises those nongovernmental and noneconomic connections and voluntary associations that anchor the communication structures of the public sphere in the society. Civil Society and the Political Public Sphere component of the lifeworld. Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere.<sup>58</sup>

According to this conceptualization, the public sphere remains open to communication from the lifeworld contexts of communicative action and the discourse of those who are potentially affected by political decisions<sup>59</sup>. In this way, the informal public sphere, by means of communicative power can be considered an effective counter-power to the medium of money and administrative power in their process of colonization of the lifeworld. Now, as Flynn observes, although it is clear that the informal public sphere plays an essential role in 'cultivating normative reasons' and the legislative process can be viewed as the procedure for transforming arguments and reasons into law, and it explains why, from a normative point of view, the legislature is required to remain porous to the normative reasons generated in the public sphere; it is not entirely clear how the

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<sup>58</sup> HABERMAS, **Between Facts and Norms**, 366-367

<sup>59</sup> In this way, Habermas seems to answer to the objection (see: HONNETH, **The Critique of Power**) that his theory ignores the relevance of relational power and, above all, the informal spheres of social life. Indeed, the informal public sphere depends, clearly, upon the continued contributions of individuals and associations.

transmission of reasons from the informal public sphere to the formal political system would actually generate communicative power.<sup>60</sup> The most common and classical interaction is the general election in which the public determines their representatives or decides through referendums. But, two main problems arise within this form of transmission. The first “problem with associating communicative power with voting is that the act of voting itself, while it does communicate a preference, is not a particularly good example of political communication given its lack of discursivity”.<sup>61</sup> The second problem is linked with my main objection to Habermas, because the way in which communicative power is generated in the informal public opinion might be restricted by what Habermas calls social power. Habermas uses the term social power:

(...) as a measure for the possibilities an actor has in social relationships to assert his own will and interests, even against the opposition of others. Social power can both facilitate and restrict the formation of communicative power, though it does so differently than administrative power.<sup>62</sup>

As Habermas admits himself, social power can restrict the formation of communicative power in case in which, for instance if:

(...) it provides some parties with a privileged opportunity influence the political process in such a way that their interests acquire a priority not in accord with equal civil rights. Businesses, organizations, and pressure groups can, for example, transform their social power into political power by way of such interventions, whether they do so directly by influencing the administration or indirectly by manipulating public opinion.<sup>63</sup>

On the contrary, social power can facilitate the formation of communicative power when “material conditions for an autonomous exercise of equal liberties and communicative freedoms are satisfied”.<sup>64</sup> For this reason, Habermas cannot also neglect the economic material dimension. Here, we can recall the main motivation that make, according to Rawls, welfare-state capitalism incompatible with social

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<sup>60</sup> FLYNN, **Communicative Power in Habermas’s Theory of Democracy**, 444-447.

<sup>61</sup> FLYNN, **Communicative Power in Habermas’s Theory of Democracy**, 447.

<sup>62</sup> HABERMAS, **Between Facts and Norms**, 175.

<sup>63</sup> HABERMAS, **Between Facts and Norms**, 175.

<sup>64</sup> HABERMAS, **Between Facts and Norms**, 175.

justice: “it permits very large inequalities in the ownership of real property (productive assets and natural resources) so that the control of the economy and much of political life rests in few hands”.<sup>65</sup> Although, on this point, Habermas fully agrees with Rawls, what we need here is some specific ‘substantive’ normative requirements to guarantee that less advantaged citizens will not run the risk of political and economic domination.<sup>66</sup>

Some might object that I neglect that there is another less obvious form of transition between informal public sphere and the formal political system. It concerns a model of deliberative democracy that is characterized by ‘local’ or ‘thematic’ deliberative forums, authorized to make binding decisions, flanking the classical parliamentary bodies in a decentralized process of decision making. Sometimes, Habermas seems to opt for this kind of deliberative model. However, beyond the difficulty to implement this model effectively and realistically, I do not see how it can avoid the restrictive effects of social power in the formation of communicative power. Indeed, even a deliberative institutional structure of diffuse participation and deliberative practice should ensure that material conditions for an autonomous exercise of equal liberties and communicative freedoms are also satisfied in the ‘local’ and ‘thematic’ deliberative forum. For example, wealth and education affect the terms of participation and conditions of deliberation at any level. And most social goods that are relevant to the definition of social power are positional in nature; that is, goods whose value depends precisely on how much of them individuals have compared to others.<sup>67</sup>

This brief inquiry into the main normative requirements of Habermas’ procedural model of deliberative democracy allow me to conclude my argument moving to the third element that I want to emphasize; namely, Habermas’

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<sup>65</sup> RAWLS, **Justice as Fairness**, 137.

<sup>66</sup> However, in order to avoid political and economic domination, I believe that Rawls’ difference principle is not a fully equipped. In alternative, I suggest to adopt a distributive principle that is explicitly sensible to the size of economic inequality (see. Author).

<sup>67</sup> For a discussion on positional goods see: BRIGHOUSE; SWIFT, **Equality, Priority, and Positional Goods**; BEN-SHAHAR, **Positional Goods and the Size of Inequality**.

conception of communicative power needs to include the dimension of material power in its relations terms. According to Habermas, the formation of communicative power can only be linked with the communicative action of citizens in their use of their communicative freedom, which is essentially the ability of participants in discourse to take yes or no positions on validity claims. This means that:

All members must be able to take part in the discourse, even if not necessarily in the same way. Each must have fundamentally equal chances to take a position on all relevant contributions with a yes or no.<sup>68</sup>

For this reason, I sustain that the power to say *yes or no* should be ensured also in its substantive and material dimension which, for example, depends on the inequality economy between the most and the least advantaged. In other words, the asymmetry of socioeconomic positions, such as the gap between the top and the bottom of economic distribution, is something that determines (and not simply affects) the procedure of democratic justification. From this point of view, I believe that Habermas' discourse theory of deliberative democracy also should prescribe some substantive requirements of social justice, similar to those that Habermas condemns in Rawls' second principle of justice. Otherwise, Habermas' theory would be considered a pure formalistic theory, thus losing its critical force.<sup>69</sup>

## CONCLUSION

In this article, I defined Rawls' paradigm shift in contemporary political philosophy as *democratic*, insofar it claims to provide moral and political normative requirements and orientations for a liberal democratic society understood as a

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<sup>68</sup> HABERMAS, **Between Facts and Norms**, 182.

<sup>69</sup> For a similar objection see: FINLAYSON, **The Habermas-Rawls Debate**, 205-207. Forst also acknowledges that Habermas' theory, when it comes to the question of distributive justice, remains too vague and indeterminate (FORST, **The right to justification**, 114). However, I argue elsewhere (Author) that Forst's solution also suffers on a certain degree of indeterminacy (see. FORST, **The Right to Justification**, 115, 197; FORST, **Justification and Critique**, 36).



social system of cooperation among individuals who regard each other as free and equal persons. As a consequence, political philosophy should be *modest* in some relevant ways to leave enough room for democratic deliberations and citizens' political autonomy. In this respect, I believe that Rawls and Habermas dialogue is still particularly fruitful. For sure, we can still learn many fundamental lessons on Rawls-Habermas debate, but in this article I focus on a particular issue: *the legitimate boundaries of the contemporary political philosophy*. I tried to show that Habermas' project can help contemporary political philosophers to provide orientations for the normative grounds of the political justification. This is a fundamental issue of normative investigation in our current democratic pluralistic societies so much affected by sharp conflicts regarding the idea of a democratic society itself. On the other side, I agree with Rawls that political philosophy cannot be too *modest* regarding fundamental prescriptions on substantive issues of social justice. Otherwise, our normative criticisms on the current level of economic inequality, economic power concentration, and other substantive issues essential to guaranteeing citizens' social and political autonomy would lose normative force and remain highly indeterminate. In this respect, Rawls-Habermas debate also permits us to underline those elements that are necessary to realize a productive interplay between procedural and substantive justice.<sup>70</sup>

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<sup>70</sup> I argued on this view in (Author).

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