

Bringing Discursive Ideals to Legal Facts: On Baxter on Habermas

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Not to mince words: Hugh Baxter's *Habermas: The Discourse Theory of Law and Democracy* (Stanford: 2011) is an excellent book. It presents very clear summaries of Habermas's complicated and comprehensive theories of society, law, democracy and constitutionalism, as well as some of the debates those theories have given rise to. Throughout the book, furthermore, Baxter clearly signals the problems he has with Habermas's work: raising pointed questions, developing convincing objections, and often developing his own alternative claims and theories to Habermas's. Baxter will be essential reading for any scholars, graduate students or law students interested in Habermas, law, and social and political theory.

One of Habermas's central aims in his 1992 magnum opus *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT: 1996, hereafter BFN) is a theory of law and politics that is adequate to both norms and facts: a theory that is in touch both with the high normative expectations we place upon legitimacy, democracy, the rule of law, rights and constitutionalism, and, with the concrete, messy and fallen realities of the actual practices and institutions that operationalize these ideals. Mediating between normative idealism and empirical skepticism is, however, no easy feat. In a nutshell, Baxter's inclinations—on many different registers, and with respect to many different issues and claims—are much more toward the empirical reality side of this mediation. A great benefit of the book is that Baxter consistently seeks to understand how—and how well—Habermas's high theoretical abstractions about law and democracy actually cash out as applied to the concrete realities of American courts and law, the U.S. Congress and administrative agencies, and everyday American political culture. And, he frequently takes Habermas to task for overly idealistic conceptions, arguing that the theory is not only too attached to normativity, but also allows the idealizations to distort or falsify the empirical analysis of legal and political realities. Rather than recapitulate Baxter's usually exemplary expositions of Habermas, I'll focus in the following on raising questions and objections about some of Baxter's own leading claims in the areas of political and legal theory.ⁱⁱ

Political Philosophy

I turn first to issues in political philosophy. While reviewing the Rawls-Habermas debate in Chapter 2, Baxter runs a *tu quoque* argument against Habermas's contention that Rawls does not sufficiently ground the egalitarian norms he builds into the original position. For Baxter the same problem befalls Habermas: the form of law, the idea of discourse among free and equal persons, and the discourse principle itself are all for Baxter merely reconstructed by Habermas out of 'our' modern practices. I agree that for Habermas the modern, individualistic 'form of law' is not itself ideally justifiable, but is simply a way of structuring interaction that we moderns happen to have contingently chosen for basically instrumental reasons. It works well to accord individuals legal rights, to make those rights actionable in courts, to distinguish between criminal wrongs and civil torts, and so on. But, with respect to the discourse principle and the egalitarian ideals it

embodies, a better interpretation of Habermas is that he claims these are not merely conceptual reconstructions of certain modern moral intuitions we happen to put into practice. Rather, they are to be justified as uniquely valid by a number of interlocking theoretical considerations, including a putatively universal analysis of the pragmatics of linguistic interaction, a genealogy of values, an argument about the performative self-contradiction of denying the practical commitments of discursive ideals, and a reconstruction of historical progress in morality that can be shown to evince a pattern of positive, directional learning. While all of this may be contestable—and has been vigorously contested in the secondary literature—it is certainly not the same as saying that Habermas has failed to give a prior justification of his leading normative ideals. My sense is that here Baxter's book would have profited by more attention to Habermas's extensive writings on moral theory from the 1980's, where a great deal of attention is paid to the other routes of justification Habermas relies on for his central normative principles.

A second contention of Baxter's is that Habermas has unfairly accused Rawls of prioritizing individual liberty over political liberty, for according to Baxter, a) the claim is not true with respect to Rawls, and b) the same can be said for Habermas's own political philosophy. With respect to Rawls, I believe Baxter's reading is not convincing. For in both *Theory of Justice* (Harvard: 1971) and the later summation *Justice as Fairness* (Harvard: 2001) it is clear that Rawls takes individual liberty as more important than political liberty.ⁱⁱⁱ Furthermore, I'd submit that political liberties are better balanced with individual liberties in Habermas than Rawls, though substantiating this would require an essay in itself. That dispute touches on a basic distinction in the substantive arrangement and content of political values between Rawls's fundamentally *liberal* theory and Habermas's fundamentally *democratic* theory. But there is also a question about the justificatory logic of the two theories: is the justification of constitutional democracy essentially individualistic or essentially democratic? Here it seems clear to me that for Habermas it's the latter. For Rawls of *Theory of Justice* and of *Justice as Fairness* it's clearly the former. There may be a question about the exact character of Rawls's *Political Liberalism* (Columbia: 1996). On some readings it's a democratic justification. But on most readings, where *Political Liberalism* is seen as merely as fixing a downstream problem of actual citizen buy-in to the more important philosophical justification of the original position and ultimately its theoretical construction achieved through reflective equilibrium with our considered convictions, Rawls is proffering an account of constitutional democracy that can convince individuals to contract into a well-ordered society for their own individual reasons, and independently of the considerations of others. Said more simply, these more mainstream readings of Rawls see the justification of the principles of justice as addressed to reasonably decent, self-interested individuals searching for mutually acceptable terms of cooperation. So I'm unconvinced that the theories of Habermas and Rawls are as close as Baxter portrays them.

Turning to Habermas's own political theory, one of the most momentous claims of Baxter's book is that that theory is, simply, too ideal to meet with reality. In particular, Baxter attacks the universal consent requirements expressed in both the discourse principle and the principle of democracy as unrealistic in "any imaginably functioning political system" (97) and as simply an incorrect 'reconstruction' of the actual ideals of democracy. Baxter is convinced that Habermas has made significant original contributions to political analysis by focusing on the normative diversity of political discourses, on formal and informal public spheres, and on embedding political theory in a rich social theory. But Baxter is wholly unconvinced by Habermas's

insistence that the ideal of consensus is somehow fundamental to, or regulative of, actual legal and political practices. “With respect to the kind of discourse that is the stuff of democratic lawmaking, the universal assent requirement seems not even to be a regulative ideal” (99). If I understand him correctly, Baxter intends to jettison the philosophical core of Habermas’s theory—its two central normative premises that are intended to justify the unique worthiness and irreplaceability of constitutional democracy—while retaining some of the elements of Habermas’s empirical analysis (suitably modified into a through-going systems theory) and allowing for some forms of (unmoored) critical engagement with current practices and institutions from the point of view of one thick conception of democracy.

This would be a very significant change of Habermas’s theory. If Baxter’s objections forced such a trimming, then Habermas would be left with a political theory useful merely for those already committed to a strongly democratic, egalitarian and leftist reading of the values of constitutional democracy. But Habermas’s theory would have little to say to those who disagreed with that reading, for instance from a strongly individualist, libertarian or communitarian bent, or from instrumentalist or minimalist conceptions of democracy. The conflict of interpretations about central values of political society would be then seen, as Weber would have it, merely as warring gods and demons. Needless to say, this conclusion is anathema to Habermas’s own self-conception of his theory.

I am not entirely clear about what Baxter’s arguments are for the objections motivating this trimming, however, and I have a different take than his on the meaning and status of the regulative ideals he attacks. Baxter’s dominant argument seems to be that it is simply unrealistic to think that there would ever be universal consent on the procedural details of democracy, such as how many legislators there should be or how to dole out committee assignments to some of them. The claim here is that the gap between the ideal of consensus and the reality of compromise and bargaining over procedural rules is too large a gap. The fallen reality of politics vitiates the claim that consensus operates in politics as a regulative ideal. But it seems to me that non-fulfillment of a regulative ideal neither vitiates the claim to a regulative ideal’s correctness nor the fact of its operation in reality. According to Kant, regulative ideals by their very nature are unrealizable in practice, even though they are capable of being approached asymptotically. Consider now Habermas’s basic assertion about argumentative pragmatics: when individuals (citizens or politicians) argue with one another, they frequently claim that their own preferred policies are the *correct* policies. When they so claim correctness, what does this claim mean? Is it a self-deluded error by agents who are merely emoting in fancy words, or can the correctness claim be reconstructed as sensible? Habermas argues that it can be reconstructed as sensible, in particular as the claim that, if we were all to talk it out in an open-ended and fully participatory discourse among all those affected by the proposed policy, there would ideally be, at the end of the day, a full agreement on one correct claim. That’s just what it means to claim that something is correct: that its correctness could be vindicated in the broadest discourse, without time constraints, among the widest universe of interested parties, bringing in all potentially relevant reasons and sorting through them all them in order to arrive at a full agreement on the one unique right answer. Surely we can never realize this ideal of an indefinitely extended discourse—especially under the time and decisional pressures of real politics—but Habermas claims that is what we implicitly mean by making the correctness claim. So Baxter’s argument that we can never realize this ideal of universal assent in actual politics is, then, not an objection to the ideal

of universal assent—it's a consequence of what it means to claim that the discourse principle is a regulative ideal in the first place.

At other points, Baxter advances other types of arguments against the consensus idealizations embedded in Habermas's principles of discourse and democracy. He notes that Habermas is skeptical of the prospects for agreement within large, complex and pluralistic societies on thick, substantive values and common goods, and so retreats to a hoped-for consensus on procedures. Sometimes Baxter seems to argue that this retreat to procedures is problematically circular, but this is a circularity that Habermas explicitly acknowledges and accommodates. At other points Baxter seems troubled by the inherent fallibilism of Habermas's position, for instance when Habermas maintains that for any legal norm, it can at most be provisionally justified: it is always open to further contestation in the light of new information or reasons. Here I detect a latent desire for a kind of foundationalism that is antithetical to Habermas's basic philosophical position. Baxter asks what legal norms could be directly justified by the discourse principle, and answers: "only the most general procedural arrangements could be substantively justified; all other legal norms would enjoy merely a presumption of rationality" (98). But on my reading of Habermas's project, the latter *mere presumption* of rationality is all that can ever be expected of any given norm's justification. All norms are eternally subject to potential defeat in the light of further discourse; no norm is foundational. That is why the discourse principle—no less than the principle of democracy—should not be understood, as Baxter sometimes does, as a foundational ground norm that other subsidiary norms can be derived from. It rather spells out the meaning of justifying a norm as valid: it specifies the procedures that, according to Habermas, we always already presuppose as soon as we make a claim that a given norm is valid. In sum, Baxter's various argument sketches against the idealization of consensus in Habermas's leading normative principles—those from unrealizability, circularity, and provisionality—are not sufficiently detailed to be convincing. Nevertheless, Baxter's particular treatment of the widely shared skepticism toward Habermas's consensus idealizations will be required reading for Habermas scholars, given Baxter's unique concrete institutional gloss on such objections.

Legal Theory

Turning now to issues in legal theory, Baxter points out that Habermas's account of adjudication is focused on statutes, while saying very little about the common law. In part this makes his theory somewhat inapplicable to American law. But more importantly for Baxter, Habermas's claim to have developed a legal theory adequate to both Germany and the United States (as well as other developed constitutional democracies) is imperiled. Most significantly, there are real problems reconciling the common law to Habermas's normative theory of the proper, democratic circulation of power. This is because the common law involves, fundamentally, judge-made law, that is, law that is created relatively independently of the communicative power of the demos as worked up through the various formal and informal public spheres. Habermas theorizes adjudication in terms of Klaus Günther's theory of application discourses, which are supposed to be quite distinct from the justification discourses that generate legal norms in the first place. But since common law and common law styles of adjudication centrally involve judge-made law, judges must unavoidably generate and justify new legal norms, as well as wield administrative power, all of which activity, however, is not directly connected to the communicative power of the citizenry affected by those norms. Hence there is a real problem of democratic legitimacy,

according to Baxter, at the heart of many legal systems; a problem which Habermas has not apparently given sufficient thought to.

I think Baxter starts a really important discussion here. The problem of judicially-generated common law and of the judicial use of common law techniques in other areas of law has not received enough attention by Habermas or most of his major interpreters. Habermas himself seems to be unperturbed by the problems, apparently on the theory that the common law can be easily overturned by legislatures, bodies with sufficient claim to democratic legitimacy in the production of new legal norms. But this potential surety of democracy is somewhat unpersuasive in practice given, at the least, the overstuffed agenda of contemporary parliamentary bodies, their incapacity for writing detailed legal code as opposed to sweeping guidelines for legal norm production by delegated agencies (and judiciaries), the pervasive path-dependent effects of judicial decisions in a complex thicket of law, and so on. Even more surprisingly, Habermas is overtly concerned by straightforwardly analogous democratic deficits afflicting the production of legal rules by administrative agencies, and he recommends rather vigorous forms of citizen oversight of the output of agencies as a solution. What he apparently proposes for the judiciary as a partial panacea is the notion of a legal discourse community, one perhaps surrounded by a legal public sphere of concerned citizens and organizations. Baxter is, I think, rightly skeptical of the democratic power of such communities in the face of judicial law making. Baxter also notes that while Habermas could simply indict common-law legal systems on democratic grounds, this would fall afoul of his commitment to reconstructing the self-understanding of modern legal systems. Baxter aptly notes the need for much more work here: “Common-law adjudication, in short, is a topic Habermas needs to address more directly. It seems inconsistent with his theory of adjudication and the idea of democratic power, yet difficult simply to dismiss within a reconstructive theory” (119). After this withering critique, the reader is unfortunately left with an open question of whether Baxter himself believes there is any way of squaring common-law rule making with democracy.

Baxter also raises important questions about Habermas’s positive theory of adjudication. Legal theorists and Habermas scholars in particular will need to attend to Baxter’s discussion of legal indeterminacy and its relationship to adjudication criteria, procedural fairness, canons of construction, legal paradigms, and legal discourse communities, although I must pass over the details here. Moving from questions of legal certainty to the legitimacy of adjudication, one will not be surprised to find that Baxter argues that Habermas has an overly idealistic account of the normative bona fides of adjudication, one insufficiently attentive to the reality of law in the courts. According to Baxter, Habermas attempts to show how litigation rules and other legal procedures can be expected to produce fair and rational outcomes, and hence can be seen as legitimate. The idea that Baxter finds particularly unconvincing is Habermas’s proposal to see these procedures as more or less sufficient ways to operationalize the discourse principle. But, as Baxter aptly points out, typical pre-trial and trial procedures fall well short of the ideal of an unconstrained discourse: litigants engage in strategic behavior, the information and reasons available before and at trial are severely constrained, there are asymmetrical discourse roles for participants, judicial panels do not operate by consensus, there is clear bargaining behavior in settlement proceedings, there are very significant power imbalances between parties, and so on. So Baxter once again finds that there is a substantial gap between reality and ideal, between fact and norm. The same question arises here again about Baxter’s critique: is it sufficient to

undermine the existence and or import of a regulative ideal in a given domain by pointing to a gap between ideal and reality? At least in the case of Habermas's proposed reconciliation of the discourse principle with the realities of adjudication, Baxter has pointed not just to differences of degree, but worrisome differences of kind. His various points of skepticism here with respect to Habermas's account of judicial decision making—along with his worries about the relevance of Habermas's legal theory to common-law systems—will be required reading for anyone who hopes to carry that part of the project forward.

A large section of chapter 3 is devoted to an exposition, critique, and testing of Habermas's theories of constitutional adjudication and judicial review from the perspective of U.S. constitutional jurisprudence. On the one hand, Baxter is quite skeptical of certain of Habermas's specific claims to have constructed a theory applicable across diverse modern constitutional democracies. On the other hand, Baxter appears quite sympathetic to the broader project of adopting a deliberative democratic approach to constitutional adjudication and argues that Habermas could be usefully appropriated by Americans to both critique specific Supreme Court decisions and doctrine and to incite new extra-judicial constitutional politics against those decisions and doctrines. I consider three issues raised in this provocative section of the book.

During a discussion of the German constitutional court, Baxter makes what strikes me as an important argument (an argument Baxter cites me as making, albeit in a different form). Recall that Habermas relies heavily on Günther's distinction between justification discourses—which produce new general norms—and application discourses—which apply already justified norms to concrete fact situations. Habermas's conception is that a constitutional court may engage in constitutional review of laws passed by democratically accountable legislatures only as long as it is merely applying the general norms that have already been justified by constitutional assemblies. To the extent that such a court engages in writing new constitutional law, it illegitimately takes over the function of justifying new norms without, however, the full participation of the demos in their role as constitutional co-authors. Illuminatingly using the example of the 2001 case of *Kyllo v. United States*, Baxter shows that the U.S. Supreme Court inevitably develops intermediate doctrinal rules to connect very abstract constitutional principles with concrete cases. Thus, the Court unavoidably must engage in justification and application discourses simultaneously in order to apply the constitutional principles to concrete cases. There can be, in short, little hope of a sharp separation between legitimate and illegitimate judicial activity that follows the Habermas/Günther distinction between justification and application, at least at the level of constitutional review. Here Baxter suggests that Habermas would have done better to grapple with Dworkin's insight that judges both find and make law at the same time. I agree with Baxter that, at least as presented in BFN, this 'merely applying norms' defense of constitutional judicial review is unconvincing—though I doubt the move to Dworkinian theory will help with the democratic objection to judicial review.

Second, Baxter interprets Habermas as arguing for a kind of proceduralist judicial review of the type advocated by John Hart Ely and Robert Dahl, but a proceduralism on steroids given the broad and diverse conditions of legitimate law making identified in Habermas's democratic theory. The proceduralist idea is that rather than attempting to enforce an objective order of natural moral rights through judicially created substantive norms of law, constitutional courts can legitimately exercise a fairly robust form of judicial review only when they act as guardians of

the procedural conditions of legitimate democratic law making. Of course, since Habermas's deliberative theory of democracy is much thicker than the thin majoritarian proceduralism endorsed by Ely and Dahl, Habermas also envisages a much more sweeping jurisdiction for the procedural guardians of the constitution. To this extent, as Baxter emphasizes, Habermas's account is quite close to the republican revival in U.S. constitutional jurisprudence forwarded by such thinkers as Frank Michelman and Cass Sunstein. Baxter also illuminatingly draws the connections between Habermas's emphasis on participatory constitutional authorship and more recent theoretical trends in the U.S.—in thinkers as diverse as Larry Kramer, Mark Tushnet, and Keith Whittington—focusing on political and popular forms, as opposed to judicial forms, of constitutional development. He also shows the relevance of Habermas's theory to debates about different ways of institutionalizing the function of constitutional review, encouraging more attention to comparative constitutionalism and especially the differences between so-called weak and strong systems of judicial review.

Third, Baxter undertakes a very interesting consideration of what Habermas's proceduralist jurisprudence might have to say about a number of areas of current U.S. constitutional doctrine. Here of course Baxter is speculating, but it is a needed kind of speculation, since the abstractions of high theory only have bite to the extent to which they relate to more specific and pointed constitutional disputes. Baxter illuminatingly compares Habermas's abstract proposals to the current state of affairs in the U.S. with respect to free speech jurisprudence and the mass media, political districting, alternative forms of political representation, and electoral campaign financing. These sections, I think, really deliver on the book's implicit promise to bend Habermas's theory more towards concrete facts and away from theoretical norms. On the one hand, they clearly demonstrate how distant Habermas's democratic ideals are from current American practice, and thus call into question Habermas's claim to have reconstructed 'our' legal and political practices—German *and* American included. On the other, they also show how those ideals can be used to critically evaluate serious democratic shortcomings in current U.S. institutions and constitutional doctrine. These parts of Chapter 3 will be, I predict, some of the most useful and illuminating sections of the book for those steeped in American law but interested in Habermas's deliberative democratic political theory.

This is an important book for legal scholars, political theorists, and devotees of Habermas alike. It contains lucid and accurate recapitulations of Habermas's project, usefully clear applications of that project to the concrete reality of American law and politics, and insightful and important criticisms that will need to be addressed in order to retain the viability of that project. Tantalizingly, it also gives us impressive glimpses of the original theory we may expect Baxter himself to continue developing into the future.

ⁱ My thanks to Hugh Baxter, Jeff Flynn, Kevin Gray, Thomas McCarthy, and Amelia Wirts for helpful feedback.

ⁱⁱ Admirably, Baxter gives serious attention to Habermas's social theory and its relationship to political philosophy and legal theory. Furthermore, Baxter begins in the book to sketch the lineaments of his own alternative social theory, own strongly influenced by Niklas Luhmann's systems theory. I have significant concerns about Baxter's account of and critiques of Habermas's social theory. In particular, I find Baxter's tendency to map the system / lifeworld

distinction onto ontologically separate spheres of institutions problematic, especially in the area of the institutions comprising the formal and informal political spheres. Given space constraints here, I develop these concerns in a longer version of this paper.

ⁱⁱⁱ Although some political liberties are indeed in Rawls' list of basic liberties, they are clearly merely instrumentally justified: the political liberties are basic only because they are important aides to securing individual liberty. See for instance section 43.3 of John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press: 2001).