COMMENTARY

WHY THE LIBERAL STATE CAN PROMOTE MORAL IDEALS AFTER ALL

Stephen A. Gardbaum*

I. INTRODUCTION

The opposition between liberals and their critics has been either the explicit or the underlying theme of the major debates in legal and constitutional theory during the past decade. Critiques of liberalism have appeared in myriad guises and contexts — the glorification of nomos; the multifaceted attacks on the liberal theory and practice of law contained in critical legal studies; feminist writings, and critical race theory; and most recently, the “republican revival” in constitutional theory. Despite this genuinely broad range of critical perspec-

* Assistant Professor, Northwestern University School of Law. Oxford University, B.A. (Hons.), 1980; University of London, M.Sc., 1985; Columbia University, Ph.D. (Political Science), 1989; Yale Law School, J.D., 1990. I would like to thank Bruce Ackerman, Robert Amdur, Tim Christenfeld, Owen Fiss, and Michael Perry for their helpful comments on earlier versions of this essay.

1 See Cover, The Supreme Court, 1982 Term — Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983) (comparing the moral homogeneity and law-creating, or “jurisgenerative,” characteristics of certain insular religious and redemptive communities (“paideic”) with the law-killing, or “jurispathic,” imperial oversight of the alien and morally empty liberal state).

2 For the forms and scope of the attack, see, for example, R. Unger, Knowledge and Politics (1975); Kennedy, The Structure of Blackstone's Commentaries, 28 Buffal0 L. Rev. 209 (1979); and Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781 (1983).


5 See, e.g., Michelman, The Supreme Court, 1985 Term — Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986) [hereinafter Michelman, Forward]; Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985); Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984) [hereinafter Sunstein, Naked Preferences]. These earlier works of the “republican revival” were full-blooded critiques of liberalism. Now that the familiar urge of legal scholarship to add synthesis to thesis and antithesis has begun to take hold in this area, these direct assaults on liberalism have been qualified, and the residue of republican claims are now being presented in the hybrid form of “liberal republicanism.” See Michelman, Law's Republic, 97 Yale L.J. 1493 (1988); Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988).
tives, the general thrust and parry that these critiques have generated with their liberal opponent has had a remarkably uniform character.

The central organizing idea in the contemporary characterization of liberalism, by both liberals and their critics, has been the neutrality of the state toward moral ideals, or, to use the more current phrase, conceptions of the good life. The kind of neutrality in question goes beyond a purely procedural conception, such as the impartial and consistent application of legal rules prescribed by Herbert Wechsler. It is a substantive conception, requiring state neutrality among theories of what is valuable in life. Thus, according to this view, the state must remain neutral not only with respect to religious conceptions and ways of life, as the establishment and free exercise clauses are often taken to mandate, but also with respect to, and among, secular conceptions.

Liberals have defended as both descriptively and normatively valid this substantive state neutrality toward conceptions of the good. One

6 Although it is true that the picture of liberalism drawn by its various contemporary critics has sometimes been mere caricature, see, e.g., R. Dworkin, Law’s Empire 440 n.19 (1986), the crucial point is that, whatever else may be inaccurate in the critical portrait, their identification of liberalism with the neutral state is a position strongly affirmed by many of the most prominent liberals themselves.


There are, however, some notable exceptions. Among liberal theorists who believe that the state can and should promote moral ideals are Joseph Raz, see J. Raz, The Morality of Freedom (1986), and William Galston, see Galston, Defending Liberalism, 76 Am. Pol. Sci. Rev. 621 (1982).


8 What exactly is meant by state neutrality in this substantive sense varies among the view’s proponents. Although all acknowledge that complete neutrality of effect or outcomes among conceptions of the good is impossible in practice, some neutralists argue that it is the aims or purposes of state action that must be neutral, while others argue that it is rather the justification of state action, that is, the state must justify its actions (including non-neutral ones) without assuming the superiority of any conception. For discussion of these distinctions, see De Marneffe, Liberalism, Liberty, and Neutrality, 19 Phil. & Pub. Aff. 3, 253–55 (1999); and Rawls, The Priority of Right and Ideas of the Good, supra note 6, at 260–64.

Whatever the definition of neutrality (neutral aims or neutral justification), this Commentary focuses on the answers given by neutralists to the quite separate question of why the state must be neutral in the first place — the justification of neutrality. Because the answers to this question of justification are independent of (do not vary with) the answers given to the question of meaning and because this Commentary argues that the justifications proffered by neutralists do not succeed, there is no need to decide here between the two definitions of neutrality.

9 For the locus classicus of this position, see Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 2–6 (1961).
group of critics — republicans and others influenced by Robert Cover\textsuperscript{10} — has accepted the accuracy of the descriptive claim and has waged its antiliberal campaign at the normative level, claiming that liberal neutrality is a shallow political ideal.\textsuperscript{11} Republicanism holds that the ends of government should be richer and more extensive; in particular, the state should promote the primacy of public over private life and inculcate civic virtue among its citizens.\textsuperscript{12}

A second group — comprising important strands within critical legal studies, feminism, and critical race theory\textsuperscript{13} — has attacked liberalism on both fronts. First, these critics argue that the liberal state is not neutral at all, but rather uses the rhetoric of neutrality to promote, legitimate, and defend a way of life that is built upon class, sex, and race inequality.\textsuperscript{14} Second, they claim that in any event, the neutrality of the state is a false political ideal; the state (understood as the people defined politically) should promote meaningful freedom and equality by breaking down and regulating those social structures and hierarchies — both public and private — that keep some in chains.

As a result of this dominant contemporary characterization of liberalism by both its advocates and critics, the underlying debate between them has tended to take the following general form: either the state cannot engage in the pursuit of moral ideals (liberalism) or it can (perfectionism).\textsuperscript{15} This Commentary argues, first, that the prevailing dichotomy of “liberalism versus perfectionism” is a false one, and second, that the ready acceptance by liberals of the neutral state represents a serious conceptual and strategic error.

As a conceptual matter, acceptance of the neutral view means that those who believe that moral ideals can and should be promoted through politics are locked out of the liberal camp, regardless of the content of the ideals they wish the state to pursue. Yet it is precisely the content of the values pursued (and not merely the desire to pursue any of them) that defines the actual opposition between liberals and their critics. Within the terms of the contemporary debate, belief in the political promotion of even the most traditional of liberal values, such as autonomy, equality, human dignity, and tolerance, places one in the same nonliberal camp as belief in the promotion of such different first order values as community and civic virtue.

From a strategic perspective, the flip side of the neutral characterization of liberalism is an acceptance of its opponents’ most effective

\textsuperscript{10} See sources cited supra notes 1 & 5.
\textsuperscript{11} See, e.g., Sunstein, Naked Preferences, supra note 5, at 1692–93.
\textsuperscript{12} See, e.g., Michelman, Foreword, supra note 5, at 18–19.
\textsuperscript{13} See sources cited supra notes 2–4.
\textsuperscript{14} See, e.g., C. Mackinnon, supra note 3, at 161–70.
\textsuperscript{15} For Joseph Raz, perfectionism involves the claim that the state is “duty-bound to promote the good life.” J. Raz, supra note 6, at 426.
claim: that liberalism is devoid of moral substance. This acceptance cedes vast and unnecessary rhetorical ground to antiliberals by allowing them to attack liberalism for moral emptiness — a charge that, once made and regardless of its target, is hard to dislodge because of its broad intuitive appeal.

Whatever the relative merits of the various liberal and nonliberal substantive values, accepting that the battle lines are drawn between neutrality and perfectionism is misleading and only serves the antiliberal cause. In fact, there is a viable liberal alternative to the neutral state. Despite the nearly hegemonic view to the contrary, neutralists simply have not won the right to exclusive representation of the liberal case. As they stand, the proffered justifications of neutrality leave far too many gaps to be compelling. This Commentary highlights those gaps by explaining the structure of political perfectionism and the prima facie case in its favor (Part II), identifying and clarifying the two arguments for liberal neutrality that are thought to have rebutted this case (Part III), and then assessing the merits of each (Parts IV and V). It concludes that liberals are not constrained by any internal requirement of state neutrality. Consequently, they can support the policy agendas of those critical movements that are inspired by and consistent with the goals of furthering and strengthening the substantive liberal values of freedom, equality, and human dignity.

II. The Structure of Political Perfectionism

The structure of the general argument for political perfectionism (whether of the liberal or nonliberal variety) is as follows: (a) one way of life is better than others; (b) as a result, the state should promote it.

In fact, this common structure not only expresses the general case for perfectionism, but also a presumptive or prima facie case for it. If the proposition “X is a good way of life” is true, this is itself a (prima facie) reason for promoting X and, a fortiori, a reason for the state — among other entities — to promote it too.16

On its own, proposition (a) — that one way of life is better than others — has no particular political implications, and certainly none that are necessarily antiliberal. Indeed, several versions of liberalism have asserted the truth of this proposition — those of Locke, Kant, and Mill,17 to name only three.

16 Liberal neutralists who rely on the “fact of pluralism” argument, see infra p. 1357, seek to rebut this prima facie case by giving affirmative reasons why the state should be excluded from the duty to promote a good way of life. By contrast, liberal neutralists who rely on the “truth of pluralism” argument, see infra p. 1356, challenge the existence of a prima facie case by denying the premise that one way of life is better than others.

17 See I. KANT, What is Enlightenment?, in KANT’S POLITICAL WRITINGS 54 (H. Reiss ed.
Moreover, Kant and Mill, who saw some version of personal autonomy as the superior way of life, also affirmed proposition (b), that the state should promote this conception of the good. But to do so, they argued, the state must remain neutral with respect to all other particular values, for autonomy requires that the individual freely choose her ends and not be coerced into them. In this case, autonomy and coercion are incompatible. Thus, the positions of Kant and Mill represent non-neutral defenses of neutrality; the state seeks to promote a particular way of life by means of its neutrality. This may be termed instrumental or weak neutrality, or neutrality as a means.

Among contemporary thinkers, Joseph Raz takes this argument one step further when he claims that such instrumental neutrality is not—or at least is no longer—an effective means of achieving autonomy. He argues that the state must now promote the autonomous way of life non-neutrally by guaranteeing that certain valuable options are made available to its citizens.  

It is also possible both to affirm proposition (a) and to deny proposition (b)—that is, to deny that the superiority of one way of life is a sufficient reason for the state to promote it. Locke provides the classic example of such a position, which he derives from the specific way of life he thought superior—namely, serving God. Given his assumption that coercion is the distinctive means of political power, believing in and serving God is an end that politics cannot promote, for belief and coercion are incompatible.

A second example of political perfectionism is the contemporary political theory of communitarianism associated with, among others, Alasdair MacIntyre and Michael Sandel. Very briefly put, communitarianism advances the "communal" way of life as better than (or rationally superior to) the "liberal" and claims that, as a result, politics should be structured to promote it.

170); J. Locke, A Letter Concerning Toleration 81 (M. Montuori ed. 1963) (1st ed. 1689); J.S. Mill, On Liberty, in Three Essays 5, 69–91 (1975) (1st ed. 1859). For Locke, service of God is the superior way of life; for Kant, it is the autonomous way of life; and for Mill, the experimental.

18 See J. Raz, supra note 6, at 425–29.

19 See J. Locke, supra note 17, at 19 ("[Political] power consists only in outward force . . . ").


21 This extremely brief account of political communitarianism, including the claim that Sandel and MacIntyre share the same general conception and vision, is both conclusory and controversial. I have developed my account at much greater length elsewhere. See S. Gardbaum, Liberalism and the Claims of Community (1990) (unpublished manuscript on file at the Harvard Law School library).
Historically and analytically, there are two liberal responses to this communitarian claim. First, as we have already seen, the liberalism associated with Kant and Mill accepts both general perfectionist propositions (a) and (b) but ascribes a different content to the rationally superior way of life from the communitarian, namely some version of personal autonomy. The dispute is thus between two perfectionist theories, each prescribing a different moral ideal.

The second liberal response to the communitarian claim, unlike the first, expresses a "formal" rather than a "substantive" justification of liberalism — namely, that of liberal neutrality.22 Liberalism is justified precisely because it does not aim to promote any particular way or ways of life at all, but is genuinely neutral among them. This claim thus expresses a strong form of neutrality, or neutrality as an end.23

Two quite different arguments have been advanced recently to justify this strong neutral position in its general opposition to political perfectionism, whether of the liberal or communitarian variety.24 These two arguments, however, have not been clearly identified or distinguished,25 as they must be before their merits can be assessed.

III. TWO ARGUMENTS FOR LIBERAL NEUTRALITY

A. The Truth of Pluralism

The first of the two arguments for the neutrality of the state, as an end and not merely as a means, is that of the incommensurability of conceptions of the good and ways of life built upon them. In essence, this "truth of pluralism" or "incommensurability" argument denies the first proposition of the prima facie case for perfectionism:

22 This distinction between the formal and substantive justifications of liberalism has been pointed out by William Galston. See Galston, supra note 6, at 621.

23 In general, communitarianism is more essentially directed against the neutral version of liberalism than against the perfectionist version. Communitarians and liberal perfectionists disagree only about the content of the better way of life, and not about the role of politics or the relationship between politics and morality. The political communitarian sees in the liberal perfectionist not moral emptiness, but moral error. Indeed, seen in this light, it is perhaps strange that two political theories as structurally dissimilar as "liberalism as neutrality" and "liberalism as perfectionism" are seen as versions of the same political theory.

24 The formal structure of the two arguments for neutrality requires that they be arguments against not only political communitarianism, but against all perfectionist political theories, including liberal perfectionism.

25 For example, in his article Defending Liberalism, supra note 6, Galston identifies the truth of pluralism argument, but not the fact of pluralism argument. Instead, he presents as a second argument for liberal neutrality the Kantian view that "[n]eutral is justified because it is the practical expression of this priority of freedom over the good." Id. at 622. This fails to distinguish between neutral and non-neutral justifications of neutrality, or neutrality as an end and as a means.
that one way of life can be said to be better than another. It holds that it is impossible to rank competing views of the good life and thus impossible to say that one is better than another. Consequently, there is nothing for the state to promote.

Incommensurability means that, in principle, there can be no knowledge as to the superiority of one way of life over another. There can be no ranking of competing conceptions because there is no common currency by which to evaluate them. Max Weber was referring to this idea when he wrote, "[w]hat man will take upon himself the attempt to 'refute scientifically' the ethic of the Sermon on the Mount?" More recently it has been expressed by Isaiah Berlin and strongly affirmed by Steven Lukes and Bruce Ackerman, who both take the further step of linking incommensurability with state neutrality.

Incommensurability must be distinguished from two other positions for which it might easily be mistaken, both of which do rank conceptions of the good. These are relativism, which limits the scope or "jurisdiction" of any particular ranking of values to a given moral territory, and subjectivism, which holds that, looked at "objectively" (from a "God's eye view"), any conception is necessarily as good as any other — that is, all notions of the good are ranked equally.

26 Raz defines incommensurability as follows: "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value." Raz, supra note 6, at 322 (citation omitted). For a general discussion of the concept of incommensurability, see id. at 321–66. See also Pildes & Anderson, Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121, 2145–65 (1990) (arguing that choices among incommensurable values can still be rationally criticized).


28 Berlin argues against the monistic belief in an ultimate or final solution, as follows: [H]uman goals are many, not all of them commensurable . . . . To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle, perform.

29 See Lukes, Making Sense of Moral Conflict, in LIBERALISM AND THE MORAL LIFE 127, 139 (N. Rosenblum ed. 1989) (arguing that "modernity . . . renders incommensurability inescapable").

30 See B. ACKERMAN, supra note 6, at 11 ("While everybody has an opinion about the good life, none can be known to be superior to any other.").

31 Incommensurability must be distinguished because the acceptance of subjectivism or relativism is seen as an unnecessarily high price to pay for neutrality; both minimize the role of reason in moral discourse and deny the existence of genuine moral conflict. See infra p. 1359. Moreover, it is unclear why subjectivism in particular would result in neutrality rather than, for example, unconstrained majoritarianism. See infra note 42.

32 For our purposes, it does not matter which of the following more particular claims subjectivism is interpreted to involve: (1) only the individual can choose which preexisting values are binding on her; (2) individual choice itself creates value; or (3) there are no values.

33 As Raz explains the difference, "[s]aying that [two options] are of equal value is passing a judgment about their relative value, whereas saying that they are incommensurate is not." J. Raz, supra note 6, at 324.
Unlike subjectivism, the incommensurability argument does not deny an operative role for reason in moral discourse. Rather, it denies that *conclusive* reasons exist for adopting any one way of life. There is a plurality of rationally valid conceptions of the good, and no single one that must be recognized by all persons so far as they are rational. Reasonable people can disagree.

B. The Fact of Pluralism

The second argument for liberal neutrality results from what is claimed to be the inescapable modern social *fact* (as distinct from the *truth*) of pluralism: three even if one way of life can be said to be better than others, the state must be neutral among them because no actual consensus exists concerning which way of life is best. This argument (like Locke's) does not in principle deny the general perfectionist proposition (a), but it does deny (b) — that the superiority of one conception of the good is sufficient reason for the state to promote it.

The fact of pluralism argument holds that, given the modern impossibility of general agreement on any particular conception of the good, the only choices available to the state are either neutrality among competing ideals or coercive imposition of moral ideals upon dissenters. The latter option is rejected on the basis of the principle that the ends for which political power is used must be justified to those subject to it. In addition, the fact of pluralism argument holds that state promotion of particular conceptions of the good undermines the limited political (i.e., not moral) consensus necessary for a stable structure of social cooperation.

Thus, in the context of modern Western societies, even if one way of life is rationally superior to others, its truth endows it with no self-executing political legitimacy in the absence of agreement as to its superiority. The essence of the argument is that the fact of pluralism alone, without the further claim of the truth of pluralism, requires neutrality; the absence of agreement, and not of truth, is the crucial factor from the perspective of politics.

---

34 “This diversity of doctrines — the fact of pluralism — is not a mere historical condition that will soon pass away; it is, I believe, a permanent feature of the public culture of modern democracies.” Rawls, *The Idea of an Overlapping Consensus*, supra note 6, at 4.

35 See infra note 51.


37 This argument is supported in its essentials by Dworkin, Nagel, Larmore, and Rawls. See sources cited supra note 6. Larmore says that “[t]his ideal [of political neutrality] demands only that so long as some view about the good life remains disputed, no decision of the state can be justified on the basis of its supposed intrinsic superiority or inferiority.” C. LARMORE, supra note 6, at 47. Rawls states:

it is no longer reasonable to expect us to reach political agreement on a general and comprehensive doctrine as a way of reaching political agreement on constitutional essentials, unless, of course, we are prepared to use the apparatus of the state as an instrument
The fact of pluralism argument for neutrality is essentially (although not necessarily only) pragmatic. It states that, in the absence of agreement about conceptions of the good, a political society based on any particular conception will be both coercive and unstable over time. It will be coercive because the state's promotion of that conception will constrain the choices, and thus the freedom, of dissenting individuals; unstable, because the political balance supporting a promoted conception may change over time, resulting in pressure for fundamental changes in the ends pursued.

The claim is that in our context, a separate political conception of justice is required with scope not over the whole of life, but over the basic structure of society. A limited political consensus must be constructed in the absence of philosophical agreement (not truth) about the good life.

We can now turn to the central part of this Commentary, an examination of the merits of the two separate contemporary arguments that claim to justify strong liberal neutrality: the “truth of pluralism” — or incommensurability — argument on the one hand (in the next Part), and the “fact of pluralism” argument on the other (in Part V). In both cases, two issues must be separated. First, is either the incommensurability of conceptions of the good or the “fact of pluralism,” true? Second, does state neutrality follow from, or is it a reasonable response to, the truth of either (or both)?

IV. THE TRUTH OF PLURALISM ARGUMENT

A. Is The Argument Coherent?

The first question concerns the very coherence of the concept of incommensurability as a basis for neutrality. The truth of pluralism argument attempts to provide the grounds for excluding from the political realm claims concerning the superiority of particular conceptions of the good. If the essential thesis were false — if at least some conflicts concerning conceptions of the good are rationally resolvable — then a proponent of political perfectionism (whether liberal or communitarian) could argue that her particular conception, although admittedly disputed and controversial, is nonetheless rationally and demonstrably superior to its rivals, just as she would need to have done without the incommensurability argument. The success of the truth of pluralism argument depends upon the inability to make such a case.

of oppression. If we are not prepared to do that, we must, as a practical matter, look for what I have called a political conception of justice.

Rawls, The Idea of an Overlapping Consensus, supra note 6, at 13 n.21 (emphasis in original).

38 See supra p. 1355.
Thus, unless all conflicts among moral ideals are also incommensurable ones, the substantive debate over the superiority of a given conception could not be excluded from political discourse. The following argument seeks to show that it is implicit in the very concept of incommensurability itself that not all comprehensive moral conflicts are incommensurable ones. If successful, this argument would render incommensurability a self-contradictory basis for state neutrality, for this is precisely what the argument built upon it denies.

Incommensurability ensures the reality of moral conflict; there are claims about which reasonable people can disagree. If conceptions of the good are incommensurable with each other, it follows that a genuine plurality of moral ideals exists, a plurality that is not merely the result of false consciousness, distortion, ideology, or irrationality. In other words, incommensurability means that values are not all necessarily consistent with each other; there need not be one correct answer to every moral conflict.

In contrast, relativism and subjectivism both deny the reality of moral conflict. Relativism dissolves genuine moral conflict by claiming that truths are exclusively local; apparently conflicting principles do not in fact conflict, because none of the individual truths has any application across its own moral boundary or "jurisdiction." Moral conflicts, like conflicts of law, arise when more than one jurisdiction and set of rules apply to a given issue. Relativism denies the existence of such overlapping jurisdictions. Subjectivism dissolves moral conflict by claiming that moral values are not supported by reasons at all, so that one moral "preference" is always as good as any other. Thus, whereas relativism states that there are moral values, but there can be no conflicts among them, subjectivism states that there may be conflicts, but not moral ones.

Incommensurability means not that one value is always as good as any other (which is to rank them), but rather that no common currency exists by which to rank the conflicting values. Thus, the

39 For the purposes of this Commentary, an incommensurable conflict is one in which the opposing moral ideals cannot be compared.
40 Much of the argument in this section and in section C was provoked by an article by Steven Lukes. See Lukes, supra note 29.
41 See supra p. 1356.
42 Both Robert Bork with his "Equal Gratification Clause," Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 9-11 (1971), and Chief Justice William Rehnquist, see Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 704-06 (1976), base their "interpretivism," or original intent analysis, on subjectivism of the "moral skepticism" variety, which holds that personal preferences are all that exist. For them, it is precisely because reason has no autonomous role (no truth) in moral and political matters that the judiciary is, by definition, simply imposing its preferences on society when it overrules the preferences of a majority. Consequently, Bork and Rehnquist argue that only a majority can bind itself to exceptions to majority rule.
claim that there is a plurality of values that rational people can affirm, that there is no one rationally compelling way of life, is not an irrationalist one. There is the possibility of genuine moral conflict — real conflict between genuinely moral claims.

But this rationalist position must imply that some ways of life (those that have good supporting reasons and are not merely preferences) are rationally superior to others. If incommensurable values are those about which reasonable people could disagree, this implies that some conceptions are relatively unreasonable. To say that there is a plurality of conceptions of the good life which fully rational persons can hold is not to say that any such conception is as good as any other, or that rational people could not agree that some conceptions are better than others. Some values must be irrational if reason is the standard by which incommensurable values are identified and if incommensurability is to be differentiated from subjectivism or relativism.

To put this point in a slightly different way: for the notion of incommensurability to ground the reality of moral conflict, it must distinguish itself from relativism and subjectivism. It does so by appealing to reasons that support particular moral conceptions of the good life and to the idea that there is no one rational outcome. But there must be a finite number of such outcomes, or some that are relatively irrational. Incommensurability thus appeals to reason to defeat the challenge to the existence of genuine moral conflict posed by both subjectivism and relativism.

It follows that, in principle, it must sometimes be possible to say that one way of life is rationally superior to another; otherwise the incommensurability thesis fails to defeat the challenge. But this is all the proponent of perfectionism needs, not to be ruled out in principle, to be able to reach the merits of her case. It is precisely this state of affairs that the truth of pluralism argument, like all neutralist arguments, aims to prevent. For this reason, the incommensurability thesis cannot provide a coherent grounding for neutrality.

This argument also leads to a second reason why the concept of incommensurability, as relied upon by the truth of pluralism argument, is incoherent. As we have seen, in order to maintain the reality of moral conflict and distinguish itself from subjectivism and relativism, the concept of incommensurability utilizes the criterion of reason to determine the membership of the group of incommensurable ideals. But this is to provide a common currency, a yardstick by means of which ideals can be ranked. Once the common currency of reason is allowed in, the ideals in question are by definition no longer incommensurable with each other. What is more, the possibility that one conception will prove to be more rational than others cannot be ruled out in principle. Equal ranking (itself incompatible with the idea of
the impossibility of assigning relative value altogether) would thus be a contingent, and not a necessary, outcome.

B. Does Neutrality Follow from the Truth of Pluralism?

Even if one concedes the coherence of the notion of incommensurability as applied to conceptions of the good, the next question to arise is whether state neutrality follows from the truth of pluralism. Why might the lack of a rationally superior way of life require that the state should foster none of the particular conceptions? The claim is certainly not self-evident; Weber, for example, seems to have denied such a result.\(^4\)

Incommensurability does not generally appear to require political neutrality. Outside the sphere of comprehensive morality, conflicts between competing values often arise that have no one rational outcome, and yet the state is not required to remain neutral among them. For example, the following pairs all represent political and economic values or goals about whose priority reasonable people can disagree: economic growth and conservation of natural resources, specialization and self-sufficiency, current and future consumption, expenditure on space exploration and welfare programs. Yet incommensurability does not compel state neutrality in these instances. To the contrary, the competition between these values and goals constitutes the very substance of politics.

What then is special about notions of the good? Why can a majority, or its representative, decide outcomes in these areas but not in that of comprehensive morality? There may in fact be satisfactory answers to this question, or relevant differences between such examples and conceptions of the good. But these answers or differences are not readily apparent, and the burden of proof resting on advocates of the truth of pluralism argument requires, at the very least, that they be provided.

Thomas Nagel has suggested two answers to this question. First, if government does not act in relation to certain conflicts, nobody else can. And yet something must be done; to permit none of the alternatives to be put into effect is not a practical possibility.\(^4\) The problem with this answer, as Nagel himself seems not to deny, is that though this may be true of some incommensurable conflicts, such as those over the death penalty and possession of nuclear weapons, it is not true of all, particularly those in the spheres of economics and

\(^4\) See M. Weber, supra note 27, at 152 ("[T]he ultimately possible attitudes toward life are irreconcilable, and hence their struggle can never be brought to a final conclusion. Thus it is necessary to make a decisive choice." (emphasis added)).

\(^4\) See Nagel, supra note 6, at 233–34.
social justice.\textsuperscript{45} Nagel's response therefore fails to state the general difference between incommensurable moral and nonmoral values.

Nagel's second answer is of more theoretical interest. He argues that there is "objective common ground"\textsuperscript{46} — a common, objective method of reasoning and justification, or agreement on what types of reasons should count — among these nonmoral issues, but not among conflicts concerning conceptions of the good, which ultimately reduce to subjective belief.\textsuperscript{47} This answer, however, undermines the incommensurability argument it is intended to support. The truth of pluralism argument expressly denies that notions of the good are subjective; it holds that there are rational grounds for each of the incommensurable conceptions. Without such grounds, the incommensurability thesis would merge into subjectivism, preventing the possibility of both fruitful, reasoned dialogue and genuine moral conflict.

Unlike the incommensurability thesis, subjectivism does rank notions of the good; it ranks \textit{all} notions, both rational and irrational, equally.\textsuperscript{48} Subjectivism claims that reason plays no role whatsoever in normative discourse, and not merely, as the incommensurability thesis holds, that reason may sometimes fail to provide a conclusive solution. On the basis of Nagel's second argument, the truth of pluralism argument would lose its independent status and collapse into the fact of pluralism argument, which focuses on the fact that individuals hold conflicting views and not on the rational content and standing of those views.

Thus, neither of Nagel's suggestions succeeds in establishing a general difference between incommensurable moral and nonmoral values. Further, as we have seen, the state regularly chooses between and promotes incommensurable nonmoral values. Given these facts, proponents of neutrality have not proved that neutrality follows from the incommensurability thesis.

\textbf{C. What Is the Scope of the Resulting Neutrality?}

What would be the scope of any such resulting neutrality? Among exactly what positions would the state have to be neutral? In particular, if the incommensurability of conflicting conceptions of the good life requires the state to remain neutral among these ideals, must not every state remain neutral, regardless of its citizens' actual beliefs?

\textsuperscript{45} Neoclassical economics, for instance, presumes that such decisions would be made by the aggregation of private decisions through the mechanism of the market. Whether actors other than the government \textit{should} decide incommensurable economic conflicts is, of course, another matter.

\textsuperscript{46} Nagel, \textit{supra} note 6, at 232.

\textsuperscript{47} See id. at 231-34.

\textsuperscript{48} See \textit{supra} pp. 1356, 1359.
Incommensurability is a matter of irresolvable conflict between moral claims, not between moral agents. If true, incommensurability would be an epistemological fact, not an empirical or political one. If neutrality is the necessary response to this epistemological state, no empirical fact about the subjective or intersubjective beliefs of a particular set of moral agents — such as the citizenry — could affect this response.\textsuperscript{49}

This last point begins to make clear that a significant difference exists not only between the reasons relied upon by the two arguments for neutrality — the truth of pluralism and the fact of pluralism — but also between the type and scope of neutrality that results from each.

For example, unlike the fact of pluralism argument discussed below, the incommensurability argument cannot be guaranteed to accommodate the idea of impartiality. Impartiality requires a certain standpoint among conceptions held by given agents, a standpoint that allows their beliefs to be justified politically only by reasons that are external, or objective, to them. One consequence of the claim that it is the incommensurability of moral outlooks that requires neutrality among them is that the state need only be neutral among incommensurable values, and not necessarily among all comprehensive moral values held by its citizens.

The truth of pluralism argument concerns itself with that type of moral conflict in which competing moral claims cannot be compared or ranked, where there is no rational outcome to the conflict. In contrast, there are other moral conflicts which do have a rational outcome, where the conflicting moral claims, though genuine and binding, can be evaluated.\textsuperscript{50} For example, when two moral obligations conflict with each other, in the sense that it is not possible to fulfill both — such as an obligation created by promising to be at place X at a given time and an obligation to come to the aid of a crash victim that arises en route to X — it may make perfect sense to conclude that one course of action is the right one to take and that failure to reach that conclusion is to engage in faulty moral reasoning. In light of this distinction, the truth of pluralism argument, which requires political neutrality only among incommensurable moral values, would not prevent the state from promoting one side or the other in cases of rationally resolvable moral conflicts.

\textsuperscript{49} Because it denies the political relevance of all empirical facts, this argument, if correct, would constitute an extreme form of the tyranny of philosophy over politics and the democratic process that Barber and Walzer warn against. See B. Barber, The Conquest of Politics 17, 205 (1988); Walzer, Philosophy and Democracy, 9 Pol. Theory 379, 383, 397 (1981).

\textsuperscript{50} Much recent work in moral philosophy has examined the distinctions between different types of moral conflict. See, e.g., S. Hampshire, Morality and Conflict 140–69 (1983); C. Larmore, supra note 6, at 131–53; B. Williams, Moral Luck 71–82 (1981).
A second contrast between the scope of neutrality resulting from the truth and fact of pluralism arguments is provided by the idea of toleration, traditionally viewed as a fundamental liberal value. Incommensurability requires neutrality only among those values about which reasonable people could disagree, about which there is no rational outcome. But what about the values held by unreasonable people, those values that reasonable people could agree were inferior or less valuable? The incommensurability argument implies that such values need not be tolerated. And yet, the very concept of toleration surely implies the right to be wrong. Moreover, by privileging rational over irrational ideals in the first place, the state's neutrality is once again seen to be extremely limited.

Thus, the neutrality resulting from the incommensurability thesis is narrow in scope; it guarantees neither impartiality nor toleration. This neutrality is significantly more limited than that resulting from the fact of pluralism argument, where agreement and not truth is central and where even moral outlooks that can be said to be rationally inferior carry equal political (if not philosophical) weight.

In sum, the analysis of the truth of pluralism argument has produced three conclusions. First, the notion of incommensurability appealed to by neutralists requires that not all comprehensive moral conflicts are rationally unresolvable. It must be possible for some ways of life to be rationally superior to others, for if not, what role is reason playing at all? This very condition, however, renders the argument incoherent as a purported justification for neutrality, since it is precisely what the truth of pluralism argument denies. Second, advocates of the truth of pluralism argument have provided no compelling reason for thinking that state neutrality follows from, or is the most reasonable response to, the incommensurability of conceptions of the good. Third, the truth of pluralism argument would at best justify only a narrow form of neutrality, between values which are strictly incommensurable and not simply controversial. This limited neutrality in no way guarantees state impartiality or tolerance.

V. THE FACT OF PLURALISM ARGUMENT

The fact of pluralism argument for strong neutrality holds that, given the fact of pluralism (regardless now of the truth of any of the conceptions), only two options are available to the state: either neutrality among the conflicting ideals, or coercive imposition on those who do not share the one or ones promoted. And, given this choice, a liberal state must opt for neutrality.

Neutrality is claimed to be the required option for two reasons. The first and more important one is that coercion is inconsistent with the need to justify to those subject to it the ends for which political
power is used.\textsuperscript{51} The second is that in the pluralist setting the promotion of a comprehensive conception of the good would raise practical concerns for the stability of the political structure. In this way, liberal neutrality is claimed to be the only political theory that accommodates the fact of pluralism.\textsuperscript{52}

Whether the fact of pluralism is true is not controversial. Perfectionists in general, both liberals and communitarians, will happily concede the fact of pluralism — whether or not there can be said to be a better way of life, people in fact hold diverse views of the good. Indeed, far from undermining their position, perfectionists can claim that this diversity of beliefs is precisely why the state has the affirmatory duty to foster rationally superior ways of life. Without the state's help and guidance, people left to their own devices will not be in a position to lead the most valuable life available to them.\textsuperscript{53}

What is controversial is the claim that neutrality results from the fact of pluralism. Since by itself, the mere fact of pluralism has indeterminate implications for state neutrality, the weight of the argument for neutrality rests upon the claim that, between neutrality and coercion as responses to the fact of pluralism, there is no choice but to opt for neutrality. Thus, we must now assess the reasoning taking us from pluralism to coercion, and from coercion to the absolute priority of neutrality.

\textsuperscript{51} Larmore and Dworkin derive this requirement of justification from the principles of "equal respect" and "treatment as equals," respectively. C. LARMORE, supra note 6, at 67 ("A commitment to treating others with equal respect forms the ultimate reason why in the face of disagreement we should keep the conversation going, and to do that, of course, we must retreat to neutral ground."); Dworkin, supra note 6, at 64 ("Since the citizens of a society differ in their conceptions [of the good], the government does not treat them as equals if it prefers one conception to another . . . ."). It has been argued (and denied) that such principles are not neutral, but rather depend on a substantive conception of the good, namely equality. See C. LARMORE, supra note 6, at 65–66; Galston, supra note 6, at 625–26. However, because this justification requirement can instead be seen as a normative principle based on the neutral presumption of human rationality, this debate need not be resolved here.

\textsuperscript{52} Rawls puts the entire argument as follows:

A public and workable agreement on a single general and comprehensive conception of the good could be maintained only by the oppressive use of state power. Since we are concerned with securing the stability of a constitutional regime, and wish to achieve free and willing agreement on a political conception of justice that establishes at least the constitutional essentials, we must find another basis of agreement than that of a general and comprehensive doctrine.

\textsuperscript{53} A version of this argument, positing the necessary educational and moral role of political institutions, is explicit in Hegel, Mill, and Rousseau. See G. HEGEL, THE PHILOSOPHY OF RIGHT 261 (T. Knox trans. 1942) (1st ed. 1821); J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 30–40 (1962) (1st ed. 1861); J. ROUSSEAU, THE GOVERNMENT OF POLAND ii (W. Kendall ed. 1972) (1st ed. 1772). It is also the basis of MacIntyre's rejection of modern politics. See A. MACINTYRE, AFTER VIRTUE, supra note 29, at 256–63. On the side of liberal perfectionism, Raz makes an analogous argument for the necessary role of the state in enabling people to live valuable lives. See J. RAZ, supra note 6, at 205–06.
A. Justification and Coercion

To move from the justification of political power to neutrality, advocates of this argument would have to reason as follows: (1) the ends of political power must be justified to those subject to it, and coercion is the opposite of such justification; (2) promotion of a moral ideal is necessarily coercive; (3) therefore neutrality is the only reasonable response to the fact of pluralism.

I challenge both premises of this argument — first, that promotion of a moral ideal, in the absence of consensus, necessarily involves the use of coercion; and second, that such coercion is, as a matter of principle, never justified. Neutralists relying on this argument have tended to assume that the use or threat of coercion ends the argument. In the case of politics, however, it can never do so.

1. The Necessity of Coercion. — In relation to conceptions of the good, coercion can take two major forms. In the first, the state positively requires people to affirm the conception that it is seeking to promote. This is the form that Rawls has in mind when he argues that, given the fact of pluralism, state coercion is the only method of reaching "political agreement" on a single conception of the good. The second method of coercion is to repress a disfavored way of life; examples might include the outlawing of religion in the pre-Gorbachev Soviet Union and the criminalization of marijuana in the United States.

It is true that the liberal conception of politics sees the use or threat of legitimate coercion as the distinctive means of politics, exercised by the state to regulate conflict. Such conflict (whether "material" or "ideal") is viewed as a permanent feature of human association, and politics is the permanent solution to this problem.

Although coercion is the distinctive means of political power, it is not the exclusive means. Acknowledging the role of state coercion in the liberal conception of politics does not imply that every act of the

---

54 See sources cited supra note 37.
55 This is the terminology of Weber. See, e.g., Weber, The Social Psychology of the World Religions, in From Max Weber, supra note 27, at 267, 280 ("Not ideas, but material and ideal interests, directly govern men's conduct."). The distinctive aspect of the contemporary liberal view of politics is to transform the object of interpersonal conflict from that of material (often self-) interest, as in the case of Hobbes and Locke, to that of "ideal interests" or comprehensive conceptions of the good. This change, however, does not abolish the centrality of conflict.
56 These two themes of conflict and the coercive power of the state as a regulatory mechanism are the common themes of liberal politics from Hobbes, through Mill and Weber, to Rawls and Nagel. Nagel says that "in politics ... we are all competing to get the coercive power of the state behind the institutions we favor." Nagel, supra note 6, at 215. And he describes "the special conditions which are the province of political theory" as "the imposition of burdens, the exercise of coercion to ensure compliance with a uniform set of requirements, and the demand for support of the institutions that impose those requirements and exercise that coercion." Id. at 223.
state is coercive. Coercion is one method by which the state can promote a moral ideal — the most extreme to be sure — but not the only one. Promoting way of life X does not necessarily mean either that all citizens are positively required to affirm X or that the state must repress way of life Y. It should not have been necessary for critical legal studies\(^5^7\) to remind us of the importance of Gramsci's insight that coercion is only the most overt, and generally the least efficient, instrument of political power.\(^5^8\)

The state can promote or foster a particular way of life in a number of noncoercive ways. For example, the establishment clause's prohibition against state promotion of religious ways of life\(^5^9\) is not limited to coercive means of promotion. Thus, such noncoercive ways of promoting religion as tax breaks\(^6^0\) and financial aid\(^6^1\) for parochial schools and placing a crèche in a courthouse\(^6^2\) have been found unconstitutional.

One way to approach the claim that state promotion of a moral ideal is necessarily coercive is to ask why society does not coerce citizens whenever they are on the losing side of a majority vote. Certainly on such occasions, the ends for which state power is being utilized have not been justified to the dissenter. Proponents of neutrality may respond by invoking some version of the standard theory of representative democracy. As long as the political process does not systematically exclude a citizen's claim or voice, the citizen is not coerced if the majority decides not to accede to that claim. If the majoritarian principle is not thought to involve coercion in other spheres of political activity, however, why is it thought to do so in the sphere of moral ideals?

2. The Justification of Coercion. — I now turn to the second premise of the fact of pluralism argument: that coercion is never justified. Neutralists present the fact of pluralism argument as if a showing that the use or threat of coercion is necessarily involved establishes their case without further argument. It does not. Neutralists need to present arguments that show either why, in general, the use or threat of coercion automatically extinguishes the justification for state action (that is, why coercion is always wrong), or alternatively, why coercion is wrong in the particular context of conceptions of the good.

---


\(^{59}\) “Congress shall make no law respecting an establishment of religion . . . .” U.S. Const. amend. I.


It is not very difficult to show that neutralists believe that state coercion is justified in certain cases, so that their objection cannot be to the use of coercion as such. After all, what type of state would the neutral state be if it could never use coercion? For example, in the case of a burglar caught in a life-threatening trap, if a property owner were to refuse to either unlock the trap or hand over the key to the police, very few neutralists would stand firm in defense of private property rights and against the coercive taking of the key. More generally, if pressed, neutralists would admit that coercion is justified to secure and maintain the ends of political association as they see them, such as the protection and security of life, liberty, and property.

Consequently, one response available to perfectionists is to call attention to the liberal acceptance of coercion and claim that, even if the state's promotion of a valuable way of life were coercive, such coercion would be justified in the same way as it is justified in liberal political society. After all, if the mere lack of consensus triggers the necessity of coercion, then coercion is involved every time anyone disagrees with the state over any matter. Why does promoting moral ideals uniquely involve coercion? If coercion is justified in order to maintain the ends of the neutral version of liberal political association, why is it not also justified to secure different or more extensive ends? Where should the line be drawn?

One response of liberal neutralists might focus on the amount of coercion required to secure ends more extensive than the neutral ones. But once neutralists abandon their position that coercion automatically renders state action unjustified and begin to talk about the amount of coercion, they open a whole new can of worms. As I have frequently noted, neutralists do not address their position merely to political communitarians, but to political perfectionists generally, including liberal perfectionists. By keeping the issue of coercion at the abstract level, neutralists can group all their opponents together and then point to unacceptable examples of perfectionist political states — such as, say, the Massachusetts of The Scarlet Letter to imply that the amount of coercion involved in promoting particular moral ideals would be the same in all cases.

One may agree with neutralists that the amount of coercion required to promote "illiberal moralism" would be intolerable, however, without also agreeing that the amount of coercion required to promote other "moralisms" would be similarly unacceptable. It is precisely this weighing process that neutralists hope to avoid by lumping all perfectionists together and discussing coercion in general terms.

---

63 For this example, I am indebted to Joseph Raz.
64 See supra pp. 1359, 1365 & note 24.
Coercion per se is not the issue here. The real issues are first, the ends for which coercion is used, and second, the amount of coercion involved. Neutralists have yet to present reasons why, given the likely amount of coercion involved in promoting liberal ideals (assuming for now that they are "true"), we should still agree that the fact of pluralism argument for neutrality is a compelling one.

In fact, it is entirely unclear why the need to use coercion always trumps the goal of promoting moral ideals, especially true or valuable ones (which the fact of pluralism must hold is irrelevant). What about the abolition of slavery? Or the use of troops to desegregate schools in the face of fierce white resistance? Surely no bright-line prohibition is possible.

Whether coercion is justified must be determined contextually, depending on such factors as the ideals in question, what is at stake, the consequences of acting or not acting in a given situation, and the amount of coercion involved. Within liberal societies, the amount of coercion generally involved in promoting such "domestic" moral ideals as autonomy, equality, and human dignity is not always great, and often much less than that involved in importing "foreign" ideals into a previously homogeneous moral culture. The model of the Bolshevik Party implanting and fostering the value of communism in Czarist Russia should not tyrannize our minds on this issue.

B. The Stability of the Political Structure

As we have seen, the second reason for neutrality advanced by the fact of pluralism argument is the idea that state promotion of a comprehensive conception of the good will undermine the stability of the political structure. Accordingly, stability requires that such controversial items be taken off the political agenda.

Certainly, state promotion of moral ideals can be highly controversial and, in certain cases, can threaten the basic structure of political association. Once again, the abolition of slavery in the United States comes to mind, as do contemporary battles over race and sex equality. The recent events in Eastern Europe also highlight the fragility of the political order and the human cost and suffering resulting from its collapse.

However, there is little reason to believe that the depth of controversy surrounding state promotion of policies in such noncomprehen-

---

66 See supra pp. 1357, 1364.
67 Rawls suggests that this can be achieved by constitutionalizing comprehensive conceptions so that they are protected from majority voting and thereby become "part of the public charter of a constitutional regime and not a suitable topic for on-going political debate and legislation." Rawls, The Idea of an Overlapping Consensus, supra note 6, at 14 n.22. As the American experience with abortion demonstrates, however, the notion that delegating such matters to judges takes them off the political agenda does not always hold true.
sive morality areas as war and foreign policy, substantive equality of opportunity, direct taxation, or the distribution of income and wealth would be significantly less threatening to the stability of the political order. Yet the state is presumably entitled to act non-neutrally in such areas. If this is so, how can the stability thesis provide independent support for neutrality? That is, the stability thesis might provide an argument for requiring state neutrality among all controversial issues, whether concerning comprehensive morality or not. This conclusion would of course require the virtual dismantling of the state. Quite apart from the reluctance of most liberal neutralists to go this far, one cannot derive such a position from an argument based on the fact of pluralism.

Moreover, granting priority to stability over valuable moral ideals, as does the fact of pluralism argument, is closer to conservative than to liberal political thought. One should not forget that, historically, conservatism was a (late eighteenth and early nineteenth century) response to the radical and destabilizing nature of liberal political theory. As E. P. Thompson has said, "stability, no less than revolution, may have its own kind of Terror."

VI. CONCLUSION

Communitarianism — probably the single most useful label for the various critiques of liberalism that have dominated contemporary legal, constitutional, and political discourse — is a variant of political perfectionism. One strategy adopted by liberals engaged in this struggle has been to seek to preempt substantive discussion by establishing that no perfectionist political theories are justified. This attempt has produced two distinct arguments for the consequent neutrality of the state toward all perfectionist principles: the truth of pluralism (incommensurability) argument and the fact of pluralism argument.

I have argued that the validity of both parts of the truth of pluralism argument — that incommensurability itself is a moral fact and that neutrality follows from this fact — is extremely doubtful. There is no good reason to think that all comprehensive moralities are incommensurable. Even if there were, the very concept of incommensurability would, in losing its essential link to rationality, also lose its coherence.

68 After all, Rawls has argued for a welfare state. See J. Rawls, A THEORY OF JUSTICE 75–83 (1971).
70 E.P. Thompson, Whigs and Hunters 258 (1975).
The fact of pluralism argument is unrefuted, but incomplete; it asserts that as between neutrality and coercion as responses to moral dissensus, the state must opt for neutrality. The proponents of this argument, however, have not met their burden of proof to show that neutrality is the required option. Thus, neither argument for neutrality has succeeded in proving perfectionism to be a false or inappropriate political principle. The prima facie case for perfectionism remains unrebutted.

Therefore, at least for the foreseeable future, liberals who wish to see liberal values promoted through politics need not fear either that the ground has been taken from under their feet or that they are wheeling a Trojan horse into the citadel. Liberal perfectionists are liberals too. Neutrality is only one possible liberal story, one that probably makes more sense as a way of pursuing certain moral values than as a way of avoiding their pursuit. Of course, this also means that the substantive debates cannot be preempted after all. The phony war is over; let the clash of the gods commence.