Justifying Legal Sexual Identity Rights for LGBTTQ Students: A Critique of Liberal Neutrality

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ABSTRACT

Recent legal measures within Canada provide students the right to affirm the moral permissibility of lesbian, gay, bi, trans, two-spirited, and queer (hereafter LGBTTQ) identities within any state funded school. Such rights extend even to students in independent religious schools that parents may have chosen precisely because they teach that LGBTTQ desires and practices are immoral. Many, both within Canada and throughout the world, oppose such legal measures as wrongly promoting a controversial moral worldview at the expense of legitimate parental authority. In this study, I consider whether theories of political morality that endeavor to be neutral in justification can justify such measures against moral and religious dissent. I argue that, due to a lack of a genuinely neutral basis from which to build a morally binding theory of justice, the neutralist approach fails, given the resources on offer in the literature.

Can Neutralists Justify Rights For LGBTTQ Students?

Introduction

In this project I consider whether is it possible for the state to remain morally neutral when justifying the extension or denial of legal sexual identity rights for LGBTTQ students. For the purposes of this study, such rights include any and all legal rights that affirm students' expression of the moral permissibility or virtue of LGBTTQ sexual identities. I argue that the state cannot remain morally neutral in such cases, given the theoretical resources on offer within the current literature, due to the lack of a defensible source of genuinely neutral values. I defend this claim in relation to two categories of neutralist view, which I refer to as: (a) comprehensive-neutralist and (b) non-comprehensive neutralist, corresponding to whether or not the neutralist view draws on an account of our fundamental or essential interests as persons. If sound, the arguments in this study provide reasons to pursue a non-neutral account of political morality as a response to the challenge of assessing the legal rights demanded by LGBTTQ students and their allies against moral and religious dissent. I show that, given the resources available in the literature, there is no morally binding conception of state neutrality that remains distinct from perfectionism. Thus, neutralist approaches to justification are revealed as internally incoherent. Due to this negative result, I claim that we are unable, at present, to answer the practical question of whether or not the state has a moral obligation to provide legal sexual identity rights for LGBTTQ students. Nevertheless, we take one significant step toward answering this question by ruling out this influential neutralist approach to theorizing justice.

Project Overview: Against a Neutral Justification for LGBTTQ Student Rights

In Chapter 1, I define legal sexual identity rights for LGBTTQ students and consider recent Canadian laws that provide students the right to form gay-straight alliance student groups (hereafter GSAs), within any state funded school as examples of such rights. By examining the public debates regarding the extension of GSA laws, I highlight the contested moral status of students' right to affirm the moral permissibility of LGBTTQ identities in schools. Nevertheless, I claim that providing or denying such rights requires the state to promote one ideal of citizenship or another. I identify one influential type of approach to theorizing justice—those that aim at justificatory neutrality—as a possible means to assess the morality of these conflicting ideals. Such theories of political morality, I claim, presuppose the existence of some neutral basis of justification. Otherwise, the simplest explanation is that such approaches are categorically indistinct from the non-neutral theoretical type that such theorists explicitly reject.

I identify three candidate 'neutral-makers' or bases upon which to establish a normative commitment's genuine neutrality within the literature: (1) its being non-controversial; (2) its relative scope; and (3) its inhering in the public political culture of a liberal democracy, rather than a metaphysical account of the moral interests of persons. If sound, the property or properties comprising the neutral-maker in question establish the distinction between the values that a neutral conception of political morality promotes and a controversial conception of the good life. Alternatively, if each of the bases of neutrality available in the literature fails, then there is no reason to suppose that a genuine distinction exists between the wide plurality of possible forms of perfectionist politics and the ostensibly neutralist doctrines some claim are distinct. In this case, the simplest explanation—that these categories are indistinct—entails that justificatory neutrality fails on demands of internal coherence. Neutralist views of political morality claim they are neutral with respect to controversial conceptions of the good life. If all of the candidate neutral-makers available fail, however, then the simplest explanation is that officially neutralist theories of political morality

are not neutral with respect to such conceptions. Instead, such views of political morality appear indistinct from a form of the perfectionism neutralists reject.

In Chapter 2, I consider and reject the first two neutral-makers in relation to the comprehensive-neutralist views defended by Ronald Dworkin and Will Kymlicka. Autonomy prioritizing comprehensive neutralist approaches, such as Dworkin and Kymlicka's, might seem to afford a plausible justification for LGBTTQ rights. Despite this fact, I claim that counter examples show that the two bases of neutrality that such theorists rely upon fail to distinguish neutral from non-neutral justifications. I argue that, due to the lack of a sound basis upon which to draw a genuine distinction between the comprehensive neutralist approach and the perfectionism that such theorists reject, the simplest explanation is that there is no such category distinction between these types of view. As a result, this justificatory neutralist approach is revealed as incoherent. I claim that the third neutral-maker, a normative commitment's inhering in the public political culture of a liberal democracy rather than a metaphysical account of moral interests, is inconsistent with the motivation for taking a comprehensive approach to political morality. As a result, I suspend consideration of this candidate basis of neutrality until Chapter 3.

In Chapter 3, I consider and reject the third candidate neutral-maker in relation to the non-comprehensive neutralist view advanced by John Rawls in his *Political Liberalism*. By avoiding commitment to any single metaphysical account of generic human interests, some theorists think that Rawls' non-comprehensive approach to theorizing justice affords a neutral standpoint to appeal to between proponents of such comprehensive views, at least within liberal-democratic societies. If sound, Rawls' non-comprehensive approach may thus appear to offer an attractive basis of normative neutrality from which to justify the extension of legal sexual identity rights for LGBTTQ students. Despite this fact, I argue that Rawls' non-comprehensive approach to theorizing justice fails to establish the moral priority of the political values his account requires. To render the

normative force of his view plausible, Rawls relies upon an interpretation of liberal-democratic political institutions that I claim elides the philosophical character of social reality. As a result, Rawls' controversial normative conclusions regarding political morality remain unjustified.

By attempting to evade the normative philosophical features of social reality, I maintain that Rawls' methodological approach displays a problem shared by all non-comprehensive theories of justice. By abstaining from offering and defending a normative account of persons and their essential or fundamental interests, in cases of genuine conflict all such accounts fail to explain why we should adhere to their preferred normative ideals, which are intended to regulate all others. If such accounts explain why we should accept their preferred normative ideals as binding, I claim that they become comprehensive. In this case, they must face the difficulties regarding the neutral makers consistent with a comprehensive approach considered in Chapter 2. If the arguments in Chapter 2 are sound, this line of revision entails that such accounts become perfectionist. Alternatively, failing such an explanation, non-comprehensive accounts of justice remain indistinct from a mere *modus vivendi* between political rivals and lose the morally binding character that neutralists desire.

Due to the lack of an alternative basis upon which to build a neutralist normative framework I reject both comprehensive and non-comprehensive neutralist approaches as means to assess the moral justification of legal sexual identity rights for LGBTTQ students. Insofar as such approaches fail, I conclude that there are reasons to consider non-neutral perfectionist and pragmatic theories as a possible means to assess the justification of such rights claims. Due to existing critiques of perfectionist and pragmatic accounts of political morality, I resist the temptation to conclude in favour of such views. Questions surrounding potentially elitist implications of perfectionist views and regarding whether a pragmatic account of justice is ultimately viable require careful consideration that extends beyond the scope of this study.

Practical Implications and Scope

Given the two inconsistent possibilities that remain open, in addition to the third, of identifying some adequate basis of neutrality, it should be clear that, however regrettable, this project does not identify and defend a sound positive view of political morality. As such, the practical implications that we can draw from this critical work, taken on its own, are limited. For those of us, myself included, who desire a clear answer to the policy question of whether or not the state has a duty to extend legal sexual identity rights for LGBTTQ students and, if so, on what basis, this study is unsatisfyingly silent. Despite this fact, we can draw at least one important far reaching action guiding implication: When justifying the legal sexual identity rights of LGBTTQ students, or considering other questions of political morality, do not appeal to existing theories of political morality that claim to be neutral in justification.

We can draw this broad theoretical implication insofar as the criticisms levied in this study target features internal to the justificatory neutralist approaches examined. Thus, if successful, these criticisms undermine all applications of the neutralist approaches to theorizing justice under consideration. We therefore establish a necessary condition of a sound theory of justice: that given the resources on offer such a theory, if it exists, is non-neutral. Justificatory neutralist approaches to theorizing political morality are appealed to in a wide array of cases relevant to a wide array of topics, ranging from constitutional law to questions of distributive justice. So, if the conclusions of this study are correct, we can take at least some solace in our efforts. On the way to finding an answer to the educational policy question regarding the rights of LGBTTQ students and their allies that motivates us, we have provided some aid to researchers in a wide array of fields of inquiry relying on a theory of justice.

In addition, given the wide appeal of the notion of state neutrality within the public culture of liberal democracies—most notably the United States—the findings of this study challenge a central tenant of liberal society's popular self-image. We reproduce this image where we teach or habituate students to accept it within schools. So, this study's destabilizing work also carries deep significance within the context of educational practice, despite not offering an action guiding solution regarding the rights considered in the present case. If sound, the argument challenges us as teachers and policy makers to think twice before teaching children that the liberal state does not require any conception of good and evil to be treated as true, but instead affords individuals the choice of their own conception of the good life from a neutral standpoint. If this study is sound, the liberal state is caught in contradiction where it attempts this feat.

Methods

Finally, two methodological points are worth highlighting before moving into the substantive argument against neutralist attempts to justify legal sexual identity rights for LGBTTQ students. The first consideration is regarding the relation between the particular case regarding the rights claimed by LGBTTQ students and ideal theory, within the critical strategy I employ. One approach to criticizing a normative view of political morality begins with a strongly or commonly held moral intuition and then shows that the theory under consideration is inadequate insofar as it fails to capture that intuition. I will not rely upon this type of critical strategy within this study and the challenges that it inevitably encounters where moral intuitions differ. Instead, the criticisms of neutralist theories of justice I will advance rely only on the presupposition that a sound theory of political morality is internally consistent—that such a theory is not self-contradictory on critical examination. Provided this necessary condition for a sound theory can be granted for the sake of

this critical project, we can sidestep more complex questions of moral epistemology. I will not make the further assumption that a sound theory of justice exists.

A second point involves the application of a sound ideal theory, were we to find one, to the particular case of legal sexual identity rights for LGBTTQ students. As noted, our negative finding will not guide action regarding the legal rights of LGBTTQ students and their allies. We must also recognize the possibility than an ideal theory is unlikely to be uniquely action guiding in all practical cases. Even with a complete ideal theory of political morality based on sound arguments, on that theory, some cases may yield a plurality of options that are equally permissible from a moral point of view. In addition, even on a complete ideal theory of justice, it may *appear* that a plurality of options are equally permissible, from a moral point of view, as a result of our limited knowledge of relevant facts in a particular case. Without a carefully articulated ideal theory in hand it is impossible to discern whether the case of legal sexual identity rights for LGBTTQ students is a case where that sound ideal theory will necessitate a unique course of action or whether the state will be left in such cases to purely preferential social choice.

Conclusion

With these methodological considerations in mind we can begin our examination of claims for and against the view that the state has a duty to legally protect students wishing to affirm the moral permissibility of LGBTTQ identities in all state funded schools. I will argue that in assessing the morality of this question the state cannot remain neutral in justifying its action between controversial conceptions of the good life. In recognizing this fact, we will take a small step toward identifying the necessary conditions for a sound theory of justice by which to assess the conflicting demands of LGBTTQ students and their allies on the one hand and by dissenting moral and religious opponents of such rights on the other. This study, thus, forms a small piece of a broader

important project aiming to construct a sound positive theory of justice capable of assessing the moral rights of LGBTTQ students. While this broader project will remain one for future research, this more limited study offers a significant first step toward that end.

Chapter One

The Moral Status Of LGBTTQ Students and Justificatory Neutrality

Introduction

In this chapter, I define legal sexual identity rights for LGBTTQ students and highlight the contested nature of such rights within contemporary moral, legal, and educational practice. Proponents of these legal rights endeavor to recognize the civic equality of LGBTTQ students. Opponents, by contrast, appeal to considerations regarding the value of moral and religious pluralism and asymmetries between the moral status of adult citizens and minor children to ground their opposition. Despite the controversy regarding such legal provisions, the state must act to extend or deny these measures. In extending or denying such rights, I claim that the state commits to promoting one ideal of citizenship over another within schools. I identify one influential type of theory of political morality that aims to remain neutral in justification with respect to controversial conceptions of the good life as a means to assess the choice between these competing ideals. I claim that such neutralist approaches require a basis upon which to distinguish their normative claims from the non-neutral conceptions of political morality such theorists reject. In concluding this chapter, I identify three candidate bases of neutrality or 'neutral-makers' that such theorists appeal to within the literature to be critically appraised in subsequent chapters.

1.1 Contested Rights for LGBTTQ Students

As noted in the introduction, for the purposes of this study, call any and all legal rights that aim to affirm students' right to express the moral permissibility or virtue of LGBTTQ sexual identities 'legal sexual identity rights for LGBTTQ students.' Let us stipulate, furthermore, that an LGBTTQ sexual identity is one wherein the bearer of that identity sees LGBTTQ sexual desires or

practices as integral to that bearer's life, rather than peripheral or antithetical. In so doing, we leave open the possibility that a person with same sex desires may not have an LGBTTQ identity if that person sees those desires as peripheral or antithetical to her or his identity or plan of life. This is not to suppose that same sex desires are not materially determined by factors prior to an agent's choosing or control. Nor is this definition intended to suggest that one *ought* to repudiate same-sex desires. Rather it is to say that one's normative interpretation of the desires one has is a determinant of one's identity as a person. It makes a difference, that is, for who I am, whether or not I embrace or endorse the sometimes conflicting desires that I have. We leave open the question of whether such identification is sufficient on its own or whether one can err in such questions of normative self-interpretation for this study. We leave it as an open possibility, thus, that, in addition, one's identification with or repudiation of such desires must be true to some true or deep self to count as sufficient for bearing a particular sexual identity. Admittedly, this treatment of the complex issue of sexual identity is fast, but should nevertheless suffice for our purposes.

On these definitions, recent Canadian laws that provide students the right, *inter alia,* to form student groups known as 'Gay-Straight Alliances' (hereafter GSAs) within any state funded school, religious or otherwise, are prominent examples of such legal sexual identity rights.[1] GSA laws do not, however, exhaust the range of possible legal sexual identity rights that might be extended to LGBTTQ students.[2] We can imagine a wide array of more robust laws promoting a gay positive culture within schools, including but not limited to measures guaranteeing the use of classroom materials that positively represent LGBTTQ lifestyles, provisions mandating that schools hire representative percentages of LGBTTQ teachers as role models, and health curricula that affords equal (or at the very least representative) time to non-heterosexual forms of sexual practice. Such

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1 Hereafter, I will refer to this subset of laws as 'GSA laws'.

2 Donn Short, *Don't Be So Gay*! *Queers, Bullying, and Making Schools Safe* (Vancouver: UBC Press: 2013), 228. Hereafter, *'DBG'.*

measures, which move beyond mere grudging tolerance toward a more explicit affirmation of the moral permissibility or even virtue of non-heterosexual identities in the classroom may be required, as some maintain, to create truly safe and inclusive schools for LGBTTQ students.[3] Although I focus my attention primarily on issues of moral justification regarding GSA laws, the disputes I consider regarding religious pluralism and civic equality attend to all such broader efforts to advance legal sexual identity rights for LGBTTQ students. This is not to deny, however, that there may be significant differences between distinct legal measures, possible or actual, that require further elucidation.

Within Canada, two provinces have implemented GSA laws. Ontario's Bill-13 "The Accepting Schools Act" (2012) and Manitoba's Bill-18 "The Public School Amendment Act (Safe and Inclusive Schools)" (2013) each provide the right for students, *inter alia*, to form GSA student groups in any state funded school. As one researcher notes, GSAs provide a space within which sexual minority and straight-ally youth meet "to discuss how to end sexual prejudice and heterosexism in schools; and to create positive change by making schools welcoming, supportive, and safe places for all students, regardless of sexual orientation."[4] This vision is echoed in Ontario's Bill-13, which enshrines a legal obligation for all school boards to support students interested in establishing and leading "activities or organizations that promote the awareness and understanding of, and respect for, people of all sexual orientations and gender identities, including organizations with the name gay-straight alliance or another name."[5] Manitoba's Bill-18, likewise, explicitly provides students the right to form student groups promoting "the awareness and understanding of, and respect for, people of all sexual orientations and gender identities" and to refer to these groups

[3] Short, *DBG*, 228.
[4] Laura A. Szalacha, "Safer Sexual Diversity Climates: Lessons Learned from an Evaluation of Massachusetts Safe Schools Program for Gay and Lesbian Students," *American Journal of Education* 110:1 (2003): 61.
[5] Ontario, Accepting Schools Act, S.O. 2012, C.5

as "gay-straight alliances."[6] In the case of both Canadian laws, the right to form a GSA importantly extends to students in religious schools, which may have been chosen by parents, in part, precisely because such schools teach that homosexuality is morally proscribed. Canada's GSA laws, thus, empower students to form GSAs, which affirm the moral permissibility of LGBTTQ identities, even where their parents strongly oppose homosexuality on moral or religious grounds.

Unsurprisingly, the effort to extend GSA laws in Canada has been met with staunch opposition from religious communities. In large part, the conflicts about GSA laws recapitulate a classical liberal dilemma; namely, of how to interpret and prioritize the ideals of freedom and equality. For those demanding GSA laws, a call to recognize the moral and civic equality of homosexual students within state funded schools is at the forefront of concern. For those opposed to such laws, respect for a conception of moral and religious freedom takes priority, particularly as this freedom is expressed in a robust regard for parental authority within the private sphere of the family and a parent's right to choose a denominational school for her child.

Proponents of GSA laws claim that such measures provide important resources necessary to address two central concerns. First, GSAs are claimed to show moral respect for LGBTTQ students as civic equals. Second, GSAs are taken to mitigate harms disproportionately experienced by LGBTTQ students. With respect to the first goal, as Donn Short argues, Canada's GSA laws extend the moral and legal ideal articulated in Section 15 of the Canadian Charter of Rights and Freedoms to all students in state funded schools.[7] In Section 15, the Charter provides that the state must treat each individual as "equal before and under the law" and to ensure each individual's entitlement "to the equal protection and equal benefit of the law without discrimination."[8] Since the 1995 Supreme Court of Canada decision in Egan v. Canada (1995), as Short notes, "without discrimination" has

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[6] Manitoba, Bill-18, 2nd Session, 40th Legislature, Manitoba, 61 Elizabeth II, 2012, ss 41(1.8)
[7] Donn Short, "Queering Schools, GSAs and the Law" in Gerald Walton, ed., *The Gay Agenda: Claiming Space, Identity and Justice* (New York: Peter Lang, 2013), 8. Hereafter, *'QS'*.
[8] Canadian Charter of Rights and Freedoms , RSC 1982, Section 15 (1).

been read as including sexual orientation within the list of impermissible bases of differential treatment in the law.[9] Thus, the state's ensuring that students are not subject to disrespect or discrimination on the basis of their sexual orientation, in the view of Short and many others, simply affirms those students' civic equality. Whatever the differences between minor students and adults, these advocates take it to be a matter of basic justice that such students be entitled to at least the same forms of respect and non-discrimination autonomous homosexual adults enjoy within many liberal democracies under the auspices of equality.

Second, for proponents of GSA laws, the potential for such legal measures to increase the safety of LGBTTQ students is of paramount importance. Many believe, on the basis of empirical evidence, that GSA laws can be expected to reduce significant physical and psychological harms disproportionately experienced by LGBTTQ students. The Manitoba Teachers' Society and the Rainbow Resource Center, for example, cite recent research involving 3,600 students across Canada, which found that 21% of LGBTTQ students report being physically harassed or assaulted while 64% feel unsafe at schools, as strong evidence supporting the need for legal intervention.[10] Such proponents take GSA laws to be a plausible means to reduce harm by promoting an environment that is respectful of LGBTTQ identities. Thus, these advocates claim, GSA laws can be interpreted as simply affirming the spirit and intent of the Canadian constitutional rights "to life, liberty and security of the person" (Section 7) and "not to be subjected to any cruel and unusual treatment or punishment" (Section 12).[11]

In addition to concerns regarding physical safety, at least some Canadian LGBTTQ students, as Short's recent ethnographic research suggests, see the disrespect of being treated inequitably in

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[9] Short, *QS*, 8

[10] Taylor, C, and T Peter, *Every class in every school: The first national climate survey on homophobia, biphobia, and transphobia in Canadian schools.* Final report, Egale Canada Human Rights Trust, Toronto: Egale Canada Human Rights Trust, 2011 16-17; Kusch, Larry, and Nick Martin. "Opponents Bash Bullying Bylaw." *The Winnipeg Free Press.* February 26, 2013. http://www.winnipegfreepress.com/local/opponents-bash-bullying-law-193216981.html (accessed July 20, 2013)

[11] Dennis Hiebert, "Six Views on Manitoba's Anti-Bullying Bill", *Winnipeg Free Press,* March 23, 2013.

predominantly heterosexual schools as a threat to their safety in a broader moral sense. Although students acknowledge the priority of addressing physically violent heterosexist behaviour in a number of contexts, many believe that inequitable treatment and disrespect pose a greater threat to their safety than strictly physical forms of violence.[12] As Short observes in interpreting the results of his study, "Sexual-minority students defined safety for themselves much more broadly, in some cases, than did their own schools…Students and teachers offered a critique of current approaches to safety by pointing to the need to conceptualize safety in terms of doing equity."[13] Equity, Short suggests, is more robust "than 'inclusion' or recognition of diversity" and involves confronting and transforming the "heteronormativity of official and unofficial space in schools."[14] Confronting heteronormativity, in the view of these students, Short reports, entails addressing issues of not just physical, but also "verbal and relational or attitudinal violence,"[15] and institutionalizing more robust gay-positive curricula for all students. For these LGBTTQ students, provisions such as those written into the Charter ideal of civic equality are a mere first step toward promoting more fully equitable and gay-positive school spaces. GSA laws, it might be claimed, are just one helpful tool by which to leverage this broader shift toward a gay-positive school culture.

Opponents of GSA laws, for their part, concede their willingness to address physical and psychological harms disproportionately faced by LGBTTQ students, so long as addressing the harms in question does not entail asserting that homosexuality is morally permissible. The Ontario Catholic School Trustees Association, for example, asserts their willingness to address concerns regarding physical safety and psychological wellbeing for students experiencing "same-sex attraction" by providing psychological and spiritual supports within the parameters of a Catholic vision of

[12] Short, *DBG*, 228
[13] Short, *DBG,* 227
[14] Short, *DBG*, 228
[15] Short, DBG, 229

sexual morality.[16] To the extent that we take this commitment at face value, we recognize that a regard for the physical and psychological suffering of students, where other moral issues are not involved, is not what is primarily in question between the two sides of the debate. Both sides agree that the inequitable distribution of harms experienced by LGBTTQ students must be addressed. While opponents do not deny that GSA laws may be sufficient for reducing such harms, they maintain that other means exist to address the harms that *ought* to be addressed in schools and that such measures are therefore not necessary.

The religious opponents' claim, in this regard, is not entirely implausible. One might reasonably assert that much of the success of modern pluralistic societies results from the fact that individuals can morally disapprove of their fellow citizens' lives but, nevertheless, abstain from physically and psychologically harming those citizens in practice. If this is correct, it is not immediately unreasonable to claim, in addition, that religious students might do likewise within the spaces of schools. Although disapproving of other students' homosexual desires, religious students, it might be claimed, could abstain from negative utterances and physically harmful acts other than those purported harms identical with respectfully expressing their opinion of moral disapproval. Insofar as such physical and psychological harms are addressed, religious schools opposed to GSA laws may claim that they have provided a sufficiently safe context for LGBTTQ students. The specific alleged harm of being told, as a minor, that one's sexual desires or ethical beliefs are morally impermissible by one's parents, those parents' chosen educators, and others in the school context parents choose, it might be claimed, is no harm requiring remediation by the state at all within a pluralistic society.

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[16] Ontario Catholic School Trustees Association. *Respecting Difference: A Resource for Catholic Schools in the Province of Ontario Regarding the Establishment and Running of Activities or Organizations Promoting Equity and Respect for All Students.* Policy Position Paper, Toronto: Ontario Catholic School Trustees Association, 2012, p. 3, 10. Hereafter, 'Catholic School Trustees, *RD'.*

Proponents of GSA laws, here, might rightly interject that advocating mere grudging tolerance of non-heterosexual ways of living, alongside eliminating physical bullying or verbal acts of intimidation fails to address concerns advanced by the students in Short's study. According to those students, positively recognizing the moral permissibility of LGBTTQ identities within school spaces is essential to such students' sense of safety, even where bullying practices might otherwise cease. Even if students (and teachers) abstain from physically or verbally intimidating LGBTTQ students on the basis of sexual identity, experiencing the persistent moral claim that non-heterosexual practices are wrong and may carry damning religious consequences, may itself be claimed to be a breach of students' safety. Such a worry might be made further plausible by noting the powerful and authoritative role that adults and peers in a school play within a students' life and formation of self-esteem. Following this concern, one might claim that the social failure to admit and celebrate the moral permissibility or even virtue of a student's affirming same-sex desires is itself a harm against LGBTTQ students. Call this broader notion of safety grounded in moral recognition within social space 'cultural safety'.

A regard for cultural safety, it might be claimed, grounds the need for GSA laws and gay-positive schools which affirm the moral permissibility of LGBTTQ identities. To selectively deny the importance of this harm, it might be claimed, is moreover to fail to take safety seriously. As such the appeal to cultural safety, it might be claimed, undermines the need for the normative theoretical approach to assessing the moral rights of LGBTTQ students advanced within this study. Without departing from the independently intuitive claim that the state has a basic duty to provide safety for its citizens and their children, proponents might assert that it follows that the state has an obligation to provide GSA laws and other legal measures that promote a broader duty to recognize the moral permissibility of LGBTTQ identities in schools. No philosophical or moral-theoretical inquiry, as a result, is needed.

This preliminary objection to the claims of opponents of GSAs is important inasmuch as it calls us to consider and articulate the philosophical nature of the disputes regarding GSA laws. Although I share a concern for the cultural safety of LGBTTQ students, I do not believe that an argument rooted only in empirical reports of a lack of experienced cultural safety is sufficient to fully illuminate or justify GSA laws without additional theoretical argument. Despite employing the language of safety, the type of safety invoked by proponents of cultural safety for LGBTTQ students is one necessarily bound up with claims about a moral duty to express a particular kind of moral regard for such students, their identities and practices, in relation to the purportedly moral desires and convictions of opposed parents and community members. Inasmuch as this is true, the primary issue in the debate regarding GSA laws remains moral in nature. We might dispute which practices are morally permissible or obligatory. All parties should agree, however, that there is no reason to assert that a sensed lack of cultural safety that follows exclusively from having one's desired practices *rightly* deemed morally impermissible, from the perspective of justice, is a harm requiring remediation by the state. After all, we can imagine cases where a claimed lack of cultural safety, even if the claim was sincere, would not obviously necessitate remedial action by the state to promote social reform.

To illustrate this point, consider the possibility of a community wherein members of a religious cult, premised on highly implausible beliefs—some regarding the nature of members identities—comprise the vast majority of members. Suppose, furthermore, that due to a fear of God's wrath this cult experiences deep psychological suffering and engages in practices of self-harm in any case where anyone in the community fails to convert to and practice the cult's faith. The members of the cult claim that the state ought to enforce conversion to their faith, due to the lack of cultural safety others' non-conversion poses to them. Suppose, furthermore, that, due to the cult's rather hysterical worries regarding God's wrath and the moderate nature of the community's few

non-believers, the negative affects upon the reports of diminished cultural safety for the non-believers, if forced to convert, would be minimal by contrast to the gains in reported cultural safety for cult members. Despite the net gain in empirically experienced cultural safety for the community as a whole, we should see that it does not obviously follow that the state has a duty to promote the social reform the cult desires. Even if cult members sincerely believe and feel that they *are* the types of beings who will suffer God's wrath due to the non-believers' failure to convert, it does not follow, without further argument, that the state ought to ensure that everyone converts to accommodate the cult's beliefs. Alternatively, one might reasonably suggest that the sect ought to abandon its unjust demands or bear the consequences for holding such normative beliefs about themselves and others. If we recognize this possibility, we recognize that an empirical claim to a loss of cultural safety, even when sincere, is not on its own sufficient for justifying remedial social change or state action. In some cases, conceding social change in light of such a demand may be a moral mistake.

Thus, if claims regarding cultural safety are to ground the necessity of recognizing the moral permissibility of LGBTTQ identities within schools, it follows that we must articulate the relevant normative difference, if any, between the empirical claims of LGBTTQ students and their allies and other morally implausible demands that might be advanced under the auspices of cultural safety. Insofar as this is the case, we are forced into the terrain of a normative theory of political morality—of what the state *ought* to do in response to such claims and why. To the extent that this is true, we recognize that the dispute between the proponents and opponents of GSA laws turns not on a mere psychological willingness or unwillingness to have the state address harm and safety concerns but on a philosophical question regarding the content of political morality. Specifically, opponents and proponents of GSA laws disagree on the philosophical question of whether or not there is a moral obligation for the state to support minor students who wish to affirm homosexual identities within publically funded schools against their parents' wishes.

To ground their dissenting beliefs regarding the normative content of political morality, opponents of GSA laws appeal to considerations of religious freedom embedded within Canadian constitutional law. The specific considerations opponents appeal to differ across provinces due to differences embedded in Canadian constitutional legal history. Nevertheless, these appeals are underwritten by a common spirit and intent regarding the value of moral and religious pluralism and the importance of parental authority as a means to maintain such pluralism. In response to Ontario's Bill 13, for example, opponents appeal to Section 29 of the Charter to buttress their efforts to reject the extension of the ideal of civic equality, entrenched in Section 15, to minor students within denominational schools. As opponents of GSA laws rightly note, Section 29 of the Charter states that:

> Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.[17]

The rights of denominational, separate, and dissentient schools, in turn, are detailed in Section 93 of the Constitution Act of 1867, which in subsection one holds that:

> Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.[18]

Although exactly which legal rights a denominational school possessed at the time of the union is legally contested, courts in a majority of cases to date have maintained that denominational and dissentient schools in 1867 possessed broad powers to cultivate a religious ethos within their student body.[19] According to the Ontario Court of Appeal, for example, Section 93 is rightly interpreted as entailing that:

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[17] Canadian Charter of Rights and Freedoms, SC 1982, Section 29.
[18] Canadian Constitution Act, SC 1867, Section 93(1).
[19] Meehan, Eugene. "Lexview 77.0-Constitutional Implications of Bill 13 Amendments." *Cardus Centre for Cultural Renewal: Lexview.* September 27, 2012. http://www.cardus.ca/lexview/article/3566/ (accessed January 5, 2014), Italics added.

> …the aim of Catholic education is not merely the transmission of knowledge and development of skills, but rather the integral formation of the whole person according to a vision of life that is revealed in the Catholic tradition.[20]

Similarly, according to the Supreme Court of Canada, under Section 93:

> … the Catholic School differ(s) from the public school. This difference does not consist in the mere addition of religious training to the academic curriculum. The religious or doctrinal aspect of the school lies at its very heart and colours *all its activities and programs*.[21]

The legal powers afforded to religious school boards to cultivate a religious ethos in immunity from Charter challenges are significant. In the cases cited these powers have legally justified the firing of teachers who deviate from canonical Catholic teachings within their *private* lives and the denial of employment to non-Catholics on the *basis* of their non-Catholicism.[22] Both of these decisions explicitly reject the extension of Section 15 considerations of civic equality to the governance of religious and dissentient schools. Given the constitutional demand that the law respect the powers of religious school boards as they were in 1867, these findings might be unsurprising. Nevertheless, they suggest that parents and religious schools, at least as a matter of Canadian constitutional law, enjoy broad powers to inculcate a religious ethos, in some cases, even where that ethos stands in conflict with Charter provisions. In affording these broad powers to parents, the Canadian state expresses a deep normative regard for a strand of the liberal tradition that places great importance on tolerating robust moral and religious pluralism and that affords wide scope to parental authority within the private sphere of family life.

The Ontario Catholic School Trustees Association, in its "Respecting Difference" policy paper, appeals to this pluralist strand within the liberal tradition to oppose Ontario's Bill-13. According to the trustees:

> Beliefs across a whole number of areas, including religion and cultural practices and more personal matters such as acceptable sexual conduct, will differ and these different beliefs are an aspect of living in a multicultural and pluralistic society that honours human rights and

[20] Daly, et al v. Attorney General of Ontario [1999] 44 O.R. (3d) 349, O.J. No.1383
[21] Caldwell et al. v. Stuart et al. [1984] 2 S.C.R. 603. Italics added.
[22] Caldwell et al. v. Stuart et al. [1984] 2 S.C.R. 603

> diversity. While it is an all too human temptation to insist that others share our beliefs and to eradicate the frameworks that make a variety of choices possible, forced acceptance of beliefs about which we may differ is not the hallmark of a free and democratic society but rather its opposite.[23]

In Manitoba, the Section 29 provisions within the Charter do not apply to the governance of separate and dissentient schools due to reasons within the province's legal history. Nevertheless, the opponents of Manitoba's Bill 18 appeal to an analogous respect for moral and religious pluralism and parental authority that they see as equally implicit in the Section 2 provisions regarding religious freedom. The Evangelical Fellowship of Canada (EFC), for example, released a position paper in response to Bill 18 lamenting what it sees as restrictions on religious diversity at the expense of a particular conflicting set of moral commitments advanced by the state. According to the EFC:

> In the name of diversity and respect for others, Bill 18 proposes that the Government of Manitoba enforce select perspectives and belief systems, seeking to render the school system increasingly homogenous, rather than encouraging proper respect for each Manitoban child and the unique cultural and religiously informed perspective and up-bringing chosen for them by their parents.[24]

As part of the demand of maintaining genuine moral pluralism, both organizations opposing GSA laws rely on the claim that parents have a right to choose a conception of the good life for their children and to enroll their minor children within that conception. As one defender of the Catholic school's opposition to Ontario's Bill 13 writes:

> Catholic parents and schools — like other religious and cultural communities — wish to retain their constitutionally protected right to ensure that any school teaching or activity is consistent with their philosophical and religious values, including their understanding of sexual morality. They also want to defend their responsibilities and rights as the primary educators of their children — responsibilities and rights that pre-exist the state.[25]

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[23] Catholic School Trustees, *RD*, 5

[24] Evangelical Fellowship of Canada, "Falling Short: Manitoba's Bill 18, the Safe and Inclusive Schools Act", http://files.efc-canada.net/si/Education/Falling%20Short,%20Bill%2018.pdf, 3. Hereafter, "EFC, *FS*".

[25] Chabot, Cecil. "Ontario's anti-bullying bill resorts to bullying." *The Toronto Star*. 06 3, 2012. http://www.thestar.com/opinion/editorialopinion/2012/06/03/ontarios_antibullying_bill_resorts_to_bullying.html (accessed November 4, 2013).

Echoing this view of the normative relationship between the family and the state, the Ontario Catholic School Trustees Association cites a Supreme Court ruling that claims that the legal right to educate a child belongs primarily to the family and is "contracted" or "delegated" by parents to the state.[26] Within this normative vision of politics, the state is portrayed as an instrumental mechanism parents use to realize their conception of the good, including whatever responsibilities that conception entails with respect to the enrollment of their minor children. Minor children are subject to their parents' judgment within this moral view of society and, presumably, have no overriding right as such to choose their own conception of the good life, at least while they are minors.

This last set of claims regarding parental authority and the moral and political status of the family highlights the doubly controversial nature of sexual identity rights for LGBTTQ students. In addition to the general controversies surrounding the moral status of homosexuality around the globe, efforts to extend legal sexual identity rights to LGBTTQ students unavoidably involve deep philosophical controversies surrounding the moral status and interests of minor children. Rightly or wrongly, children are regularly subject to coercive, paternalistic interventions in both the public and the private sphere. Where many in liberal societies see such paternalistic infringements on the private lives of adults as impermissible, many also think that such interventions are morally justified, or even obligatory, in the case of children. Thus, where liberal restraint with respect to the private sphere tends to favor the extension of rights for LGBTTQ adults seeking to live private lives free of church and state interference, the case is far more ambivalent for children who are often left by the same spirit of restraint to live under the paternalistic judgment of their parents within the private sphere.

Despite these deep controversies, society cannot avoid taking a stand on the extension or denial of GSA laws aspiring to protect students' right to affirm the moral permissibility of LGBTTQ

[26] R. v. Audet [1996] 2 S.C.R. 171

sexual identities within schools. In either case, the state promotes a distinct ideal of citizenship—a conception of what it is good for a citizen to be. On the first possibility the state promotes an ideal wherein we, as adult or minor citizens, recognize that students ought to be guaranteed protections to express support for or identification with LGBTTQ sexual identities that others reject. On this first possibility this right obtains even where such affirmation conflicts with the moral demands of parents, other students, state actors, and community members. The demands of civic equality, on this ideal, thus extend to all students, even against their parents' wishes. On the other possibility, the state takes it to be permissible to deny such rights claims. In this case the state promotes an ideal of citizenship wherein we, as minor or adult citizens, are obligated to recognize that in at least some cases parents' moral or religious demands may be permitted to override students' claims to affirm the moral permissibility of LGBTTQ identities at school. On this second possibility we concede that it is permissible for parents, in at least some cases, to reject their children's desire to express approval of a homosexual identity as a case of sexual immorality that ought to be discouraged within the school context. Here, demands of religious diversity and parental authority within the family override the demand of moral and civic equality as it is interpreted in the Charter with respect to adults in at least some cases.

For the remainder of this study, I will bracket the interesting legal question of what courts or societies in fact do, in light of present legal practices or social norms where such political ideals conflict. Instead I examine the normative moral question of what the state *ought* to do with respect to such conflicting ideals and how it ought to justify its action in such cases from a moral point of view. Toward this end, I will consider one highly influential justificatory neutralist approach to theorizing political morality as a means of assessing the conflicting ideals of citizenship projected by the proponents and opponents of legal sexual identity rights for LGBTTQ students. I will argue that given the resources on offer a justificatory neutralist approach is ultimately inadequate to the task of

adjudicating conflicts between advocates of GSA laws and those claiming that such legal rights unjustifiably infringe on moral and religious pluralism. Problems of theoretical incoherence, I claim, ultimately undermine the justificatory neutralist approach.

Practically, our theoretical assessment of the debates regarding GSA laws has direct implications for at least two contexts relevant to educational institutions. First, whether we take one or the other of the two competing ideals to be morally justified will inform the conclusions that we as adult democratic citizens believe we ought to reach regarding educational policy in state funded schools. Our judgment regarding which ideal or ideals, if either, is morally justified, for example, will have an impact not only on whether or not we affirm GSA laws, but on a number of the more robust legal sexual identity rights that many desire to extend to LGBTTQ students against religious opposition. It remains possible, for example, that on a sound theory of political morality either ideal will be permissible and neither obligatory. Nevertheless, this too, is relevant information, from a moral point of view, in forming policy. It would entail, for example, that it is not morally obligatory for the state to provide students such rights in all contexts, though it may permissibly do so. Second, the civic ideal we advance will have a practical impact on what, if anything, we teach students about questions regarding the moral status of LGBTTQ sexual identity within schools and the relative priority of religious freedom and civic equality. This justification of school practice *to* students will have broader implications for the moral life of the classroom inasmuch as questions regarding social justice and the role of religion within civic life play a robust role within a number of issues considered in contemporary public and private school curricula. With these practical considerations in mind, we can turn to focus on whether a justificatory neutralist approach can be of aid in assessing these conflicting ideals.

1.2 Justificatory Neutrality

In contemporary political philosophy, perhaps the most influential approach to assessing the morality of state action is one that can be described as neutral with respect to justification. Following a tradition initiated by Immanuel Kant, and revitalized in the more recent work of John Rawls, this approach advances two central theses: first, that there are genuine normative principles of justice that the state has a duty to enforce and against which we can assess the justice of a society; second, that although the state ought to justify its action morally, it ought not to do so by appeal to a controversial conception of the highest human ideals. To ground justice, the state, on this view, must instead appeal to a set of normative values that are neutral between competing controversial conceptions of the good life that citizens might choose to pursue. In this regard, justificatory neutralists aim to defend individual rights and duties as the normative categories relevant to justice, as distinct from controversial conceptions of the good life or human flourishing. Conceptions of the good, on this view, are distinct from and restrained by the limitations imposed by the rights and duties political justice guarantees. Justificatory neutralists, in defending the normative categories of rights and duties as limits or restraints on the state's pursuit of the good, thus, assert what is often referred to, following Rawls, as "the priority of the right to the good."[27]

Due to the nuanced nature of justificatory neutralist views, it is important to distinguish the sense in which these theorists aspire to neutrality from those in which they do not. Here, Rawls is a useful guide. According to Rawls, justificatory neutralists aspire to be neutral only insofar as they hold that in matters of basic or constitutional justice "the state is not to do anything intended to promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it."[28] By 'comprehensive doctrine' Rawls, here, refers to conceptions of the human good—the ideals of character and personal virtue that justificatory neutralists rule out as a foundation for justice. Justificatory neutrality, Rawls claims, should be distinguished from two other

[27] John Rawls, *A Theory of Justice: Revised Edition*, (Cambridge, MA: Harvard University Press, 1999), 28. Hereafter, "*ATJ*".
[28] John Rawls, *Political Liberalism: Expanded Edition,* (New York: Columbia University Press, 2005), 193. Hereafter, '*PL*'.

senses of state neutrality. First, justificatory neutralist approaches are distinct from those that rely upon a neutral procedure that aspires to give "all citizens equal opportunity to advance any conception of the good they freely affirm."[29] Due to the normative nature of their position, justificatory neutralists reject some conceptions of the good life as unjust and therefore rightly discouraged by the state, regardless of citizens' wishes to the contrary. Second, Rawls distinguishes justificatory neutralist approaches from those that aspire to be "neutral in their effect."[30] Neutrality in effect, according to Rawls, is the view "that the state is not to do anything that makes it more likely that individuals accept any particular conception rather than another unless steps are taken to cancel, or to compensate for, the effects of policies that do this."[31] Neutrality in effect, in Rawls' view, ought to be rejected as "impracticable."[32] According to Rawls,

> …it is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time; and it is futile to try to counteract these effects and influences, or even to ascertain for political purposes how deep and pervasive they are.[33]

For our present purposes, I take Rawls' reasons to be sufficient to rule out both of these alternative neutralist approaches from consideration within the scope of this study. Hereafter, any view referred to as 'neutralist' unless otherwise designated is neutral only in justification.

Within the scope of this study, I will make reference to four types of theory of political morality only two of which aspire to neutrality:

1. Comprehensive neutralist
2. Non-comprehensive neutralist
3. Comprehensive non-neutralist (or perfectionist)
4. Non-comprehensive non-neutralist (politically pragmatic or morally skeptical)

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[29] Rawls, *PL*, 193.
[30] Rawls, *PL*, 193.
[31] Rawls, *PL*, 193.
[32] Rawls, *PL*, 194.
[33] Rawls, *PL*, 193.

(1) and (2) are sub-types of justificatory neutralist theories, which I will critically assess throughout sections two and three of this study. (3) and (4) are types of theories that neutralists reject and from which their views must therefore remain distinct. In this study, these latter categories will serve as important measures of the internal coherence of neutralist views. If the distinctions neutralists rely upon cannot be maintained, an axiom of this study is that such incoherence is a significant theoretical problem—that incoherent theories cannot be sound theories. Toward mapping the theoretical space within which neutralist views operate, some development and definition of these categories is in order.

First, within theories that aim to be neutral with respect to justification, there is a distinction between two logically possible types of view: those that rely upon an account of our fundamental or essential human interests in deriving our interest in a neutralist political morality and those that do not. Call the first type of theory 'comprehensive' and call the second type 'non-comprehensive'.[34] Comprehensive neutralist theorists explicitly defend a particular normative philosophical anthropology, a conception of persons and their fundamental interests, to ground their neutralist politics. Non-comprehensive neutralists, by contrast, reject the project of developing and defending a normative philosophical anthropology as a basis upon which to ground their neutralist politics. Instead, non-comprehensive neutralists appeal to alternative sources for their central normative concepts, for example, to certain fundamental ideas embedded within the public culture of a particular type of society.

Second, to critically assess justificatory neutralist views, we must also recognize the important contrast between such views and two non-neutral ways of theorizing justice in a pluralistic society that such theorists reject. The first non-neutral type of theory is comprehensive. This 'perfectionist' view like, comprehensive neutralist views draws on a normative philosophical

[34] I am indebted to Lauren Bialystok for this distinction, which roughly follows Rawls' in *Political Liberalism* at p.13.

anthropology, an account of our essential or fundamental interests as persons. Perfectionists, by contrast with neutralists, however, hold that the state has a duty to promote a sound conception of what it is truly good for a person to be and may rightly justify its action by appealing to this obligation.[35] The second type of non-neutralist theory is non-comprehensive inasmuch as it holds that there is no set of ideals essential to persons, at least that we can identify theoretically, that the state *ought* to realize—although some course of action might be more pragmatically useful than others in serving the contingent interests of state actors or particular political groups.[36] Nevertheless, the state need not be neutral between competing conceptions of the highest human ideals. Without appealing to a normative account of the interests of persons to justify its action, the state may simply promote some set of ethical practices or other. On this latter 'pragmatic' or 'morally skeptical' view, politics reduces at base to a matter of contingent compromises, a *modus vivendi*, between advocates of competing political or private interests. Our moral intuitions and language, where they depart, merely obscure this deeper moral-epistemic fact. Unlike advocates of the first type of theory of justice, justificatory neutralists reject the state's obligation to promote a controversial conception of the human good life. By contrast with advocates of the second type of view, justificatory neutralists reject that the principles of justice are merely the result of a practical compromise or *modus vivendi* between competing non-rationally adjudicable ethical worldviews.

At least at first blush, the demands of theorizing the moral and legal rights of LGBTTQ students might appear especially challenging for justificatory neutralist theorists. For advocates of morally pragmatic and perfectionist theories of justice there is no principled difficulty with the state paternalistically or coercively shaping parents' or children's conceptions of the good life. Provided, for the latter type of theorist, that the intervention is grounded in sound ideals or for the former

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[35] For example, see Thomas Hurka. *Perfectionism.* (New York: Oxford University Press, 1993).
[36] For example, see Richard Rorty. "Postmodernist Bourgeois Liberalism." *The Journal of Philosophy* 83, no. 10 (1983): 583-589.

type, that the intervention was successful, no other questions need to be answered. For neutralists who hold that the state ought to abstain from promoting a controversial conception of what it is good for a human being to be, the demand of coercively intervening in students' and family's lives to promote a particular ideal of citizenship is more complex. The neutralist cannot simply claim that might makes right and impose her view, if she wishes to maintain the required contrast with non-neutral morally skeptical views, which see politics as a mere *modus vivendi*. Nor can the neutralist appeal to a controversial or unreasonable conception of what it is good for a person to be to ground her moral demands, if she is to maintain the contrast she requires with non-neutral perfectionist doctrines of justice. Nevertheless, neutralists must promote some ideals if the normative goals of a neutralist form of normative political morality are to be realized within political practice.

Both comprehensive and non-comprehensive justificatory neutralists, thus, require a basis to ground their normative moral commitments that is both morally binding and distinct from the conceptions of the highest human ideals that such theorists reject in justifying state action. Failing such a basis, neutralist approaches, despite official denials, are revealed as indistinct from either the perfectionist or the morally skeptical pragmatic approaches that such theorists reject. There are three sources that theorists appeal to as bases of neutrality in justifying political action within the literature. These bases are a normative commitment's: (1) being non-controversial; (2) having wide-relative scope with respect to other conceptions of the good life; and (3) inhering within the public political culture of a liberal democracy, rather than being grounded in a metaphysical account of the moral interests of persons. Call these candidate sources or bases of justificatory neutrality 'neutral makers'.

In chapter two, I critically assess Will Kymlicka and Ronald Dworkin's comprehensive neutralist theories of liberal political morality as a possible theoretical response to the challenge of adjudicating the conflicting ideals of citizenship in the debate regarding LGBTTQ students. I consider and reject the first two neutral makers as bases that comprehensive neutralists such as

Kymlicka and Dworkin might employ to attempt to ground the normative commitments required by their theories of political morality. I argue that the third neutral-maker is inconsistent with the motivation for taking comprehensive approaches to theorizing political morality and suspend consideration of this basis until the third chapter of this study.

In Chapter Three I consider John Rawls' non-comprehensive neutralist framework as an alternative way to conceive of justificatory neutrality in response to the challenge of assessing the morality of legal sexual identity rights for LGBTTQ students. Using Rawls as an exemplar, I argue that problems inherent to a non-comprehensive approach to theorizing political morality undermine the third neutral-maker, a commitment's inhering the public culture of a liberal democracy, rather than being grounded in a metaphysical account of the moral interests of persons.[37] All three neutral makers, I claim, ultimately fail in relation to both comprehensive and non-comprehensive neutralist views. As a result, we have reasons to explore non-neutral forms of justifying state action with respect to the rights of LGBTTQ students.

[37] Although the move to a non-comprehensive approach is not always taken to be one in defense of neutrality amidst competing controversial moral and philosophical doctrines, there are at least some theorists who read this theoretical strategy as such. For example, Susan Mendus, appears to take this approach to defending the kind of neutrality required by Rawls' account. See her "Teaching Morality in a Plural Society" *Government and Opposition* 33, no. 3 (July 1998): 355-371. I take Mendus' reading of Rawls' "method of avoidance" to provide one way of responding to Michael Sandel's criticism that comprehensive neutralist views presuppose a conception of the human good and are therefore non-neutral. For Sandel's critique, see *Liberalism and the Limits of Justice.* 2nd Edition. (New York,: Cambridge University Press, 1998).

Chapter Two

Against Comprehensive Neutrality

Introduction

In this chapter, I consider an influential comprehensive neutralist approach to theorizing political morality as a means to assess the competing ideals of citizenship projected in the debates regarding GSA laws. As representatives of this approach, I examine Ronald Dworkin and Will Kymlicka's comprehensive neutralist theories. As noted in the previous section, comprehensive neutralists require a basis for their normative claims that is distinct from a pragmatic *modus vivendi* and an appeal to the highest human ideals. I consider and reject two 'neutral-makers' comprehensive neutralists appeal to in the literature to accomplish this task: a normative commitment's (1) being non-controversial and (2) having wide relative scope with respect to some subset of conceptions of the good life. I argue that a third neutral maker, a commitment's inhering in the public culture of a liberal democracy rather than a metaphysical account of the moral interests of persons, is inconsistent with the motivation for taking a comprehensive approach to theorizing political morality. I conclude that if we endeavor to morally justify the measures contained in GSA laws, given the resources on offer, a comprehensive neutralist approach is inadequate.

2.1 Comprehensive Neutrality

Building on the definitions introduced in Chapter 1, for the purposes of this study, let us stipulate that an approach to theorizing political morality is comprehensive neutralist if and only if it asserts three premises. First, comprehensive neutralist theories are *comprehensive* insofar as they advance a normative philosophical anthropology—an account of persons and their essential or fundamental interests. Second, comprehensive neutralist theories of political morality are *neutralist* insofar as they require the state to remain neutral in justifying its action with respect to competing

controversial accounts of the good life. Third, comprehensive neutralists derive our interest in a neutralist politics from the normative philosophical anthropology they advance. If successful, these three premises combine to ground justificatory-neutralist politics in our fundamental or essential interests as persons. The structure of this position can be expressed in the form of the following valid argument:

1. All persons share a set of discoverable fundamental or essential normative interests.
2. If (1), then all state action should be neutral in justification with respect to competing controversial conceptions of what it is good for a person to be.
3. So, all state action should be neutral in justification with respect to competing controversial conceptions of what it is good for a person to be.

2.1.1 Philosophical Anthropology

Within contemporary political philosophy, Ronald Dworkin and Will Kymlicka are the most prominent defenders of the comprehensive neutralist approach. Both Dworkin and Kymlicka advance a philosophical anthropology that asserts three central premises: (a) that all persons have an essential interest in using their autonomous powers to discover and live a truly, as opposed to merely apparently, good life;[38] (b) that our lives only go well when we endorse the life that we live "from the inside" without paternalistic interference;[39] and (c) that there is no transcendental standard or *telos* against which to assess individuals' conceptions of the good life.[40] Both Dworkin and Kymlicka derive an essential interest in neutralist politics, shared by all persons, from this philosophical anthropology. In sketching what I take to be their type-identical position, I will draw on the

[38] Will Kymlicka, *Liberalism, Community, and Culture,* (New York: Oxford-Clarendon Press, 1991), 10. Hereafter, '*LLC*'; Dworkin, Ronald. *Sovereign Virtue*, (Cambridge, Massachusetts: Harvard University Press, 2000), 244. Hereafter, '*SV*'.
[39] Dworkin, *SV*, 268; Kymlicka, *LLC*, 12.
[40] Dworkin, *SV*, 258; Kymlicka, *LLC*, 86.

resources afforded by each thinker's account toward providing the most robust defense possible of their shared comprehensive neutralist position.

The first premise in Dworkin and Kymlicka's philosophical anthropology can be broken into two conjuncts. First, that we have an essential or fundamental interest as individuals in living a life that includes objectively valuable goods or ends; Second, that the best theory of value presupposes that there are at least some objectively valuable goods or ends. With respect to the first conjunct, Kymlicka claims that, "Our essential interest is in leading a good life, in having those things that a good life contains," which, "[…] is different from leading the life we currently believe to be good."[41] Likewise, in Dworkin's view, where our objective and merely preferential interests conflict, our objective or "critical interests alone"[42] ought to guide our conduct. To maintain the distinction between a life that pursues objectively valuable projects and one that does not, Dworkin and Kymlicka require their second conjunct from value theory to obtain; namely, that there are at least some objectively valuable goods or ends.

With respect to this latter claim, Dworkin argues that there is an important distinction between two forms of wellbeing or interests that people have. Dworkin refers these two aspects as a person's "volitional" and "critical" wellbeing. A person's volitional wellbeing, in Dworkin's view, is "improved, and just for that reason, when he has or achieves what in fact he wants."[43] A person's critical wellbeing, by contrast, is assessed with respect to objectively valuable ends and is "improved by his having or achieving what it makes his life a better life to have or achieve."[44] Within our widely shared practices, Dworkin claims, not all ends are valuable simply because we want them. Some

[41] Kymlicka, *LLC,* 10.
[42] Dworkin, *SV*, 244.
[43] Dworkin, *SV*, 242.
[44] Dworkin, *SV*, 242.

ends, such as a "close relationship with [one's] children,"[45] according to Dworkin, are wanted because they are valuable for their own sake, even if they are not desired.

Similarly, Kymlicka claims that our practices of deliberation only make sense on the assumption that we can be wrong, not just about the means to ends that we treat as given, but also about the value of the ends we pursue.[46] According to Kymlicka, "We may come to see that we've been wasting our lives, pursuing trivial or shallow goals and projects that we had mistakenly considered of great importance."[47] For example, "I may succeed brilliantly at becoming the best pushpin player in the world," Kymlicka argues, "but then come to realize that pushpin isn't as valuable as poetry, and regret that I ever embarked on that project."[48] An adequate theory of practical reasoning, by Kymlicka's lights, as Dworkin suggests, thus, captures our fallibility with respect to our ends by holding that some of the ends we might pursue are objectively valuable, while others are not.

The second and third premises in Dworkin and Kymlicka's philosophical anthropologies combine to deny the justification for coercive paternalism through politics, despite the existence of a set of essential or fundamental interests that we share as persons. The second premise asserts that a person's genuinely or autonomously endorsing the life she lives is a necessary condition for that life being best for her. The third rejects the existence of any transcendental standard by which to assess structured conceptions of the good life. Dworkin refers to the second premise regarding endorsement as the "constitutive" approach to understanding the effect of endorsement on a person's wellbeing.[49] According to Dworkin, "my life cannot be better for me in virtue of some feature or component I think has no value."[50] For Dworkin, a person's genuine endorsement of the life she lives is, thus, a necessary condition for that life's being more valuable than any alternative

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[45] Dworkin, *SV*, 242.
[46] Kymlicka, LLC, 11.
[47] Kymlicka, *LLC*, 10.
[48] Kymlicka, *LLC*, 11.
[49] Dworkin, *SV*, 268.
[50] Dworkin, *SV*, 268.

that the person would have endorsed.[51] This condition obtains regardless of whether or not the paternalistically promoted life a person wouldn't have endorsed includes more objectively valuable goods than the alternative life the person endorses.[52]

The constitutive approach to endorsement, according to Dworkin, captures our intuition that a life that a person sees no point in living cannot be a better life for that person—though it might be better for others in that person's community (268). Combined with the objectivity of value, Dworkin's view allows us to criticize Hitler's life as being a wasted one, while denying that it could have been made better for *him*, on the basis of paternalistic intervention Hitler himself would not have endorsed.[53] Dworkin thus rejects paternalistic interventions that are grounded in the belief that "in a genuine political community each citizen has a responsibility for the wellbeing of other members and should therefore use his political power to reform those whose defective practices will ruin their lives."[54] Like Dworkin, against such efforts to improve the character of others through state action, Kymlicka claims that, "my life only goes better when it is led from the inside in accord with my beliefs about value."[55] "Praying to God may be a valuable activity," according to Kymlicka, "but you have to believe that it's a worthwhile thing to do—that it has some worthwhile point and purpose. You can coerce someone into going to church and making the right physical movements, but you won't make someone's life better that way."[56]

The endorsement condition, as Dworkin recognizes, is on its own insufficient to rule out paternalistic political interventions in cases where we have sufficient reason to believe that a person is likely to come to endorse the life that she is coerced into living in the future. Suppose we had strong reasons to believe in a transcendent standard of the human good life or *telos* by which to

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[51] Dworkin, *SV*, 268.
[52] Dworkin, *SV*, 271.
[53] Dworkin, *SV*, 268; 272.
[54] Dworkin, *SV*, 211
[55] Kymlicka, *LLC*, 12.
[56] Kymlicka, *LLC,* 12.

judge the conceptions of the good pursued by individuals. If this was so, then we might suspect that a person could be led to endorse a life of that form, inasmuch as the standard in question would be discoverable and sharable, at least in principle, between rational agents. The third premise within Dworkin and Kymlicka's philosophical anthropologies rejects this possibility by rejecting the existence of any transcendent form of the good life or telos against which particular lives might be evaluated. If sound, this third premise blocks perfectionist paternalism that is justified by an appeal to a human telos: critical reflection reveals that we have no reason to believe that such a *telos* exists.

In support of this anti-perfectionist premise, Kymlicka rejects Charles Taylor and Michael Sandel's arguments for a perfectionist form of communitarian politics by noting the conspicuous incompleteness of these thinkers' accounts of the human telos that they claim the state ought to promote.[57] According to Kymlicka, "Sandel and Taylor say there are shared ends that can serve as the basis for a politics of the common good which will be legitimate for all groups in society. But they give no examples of such ends or practices—and surely part of the reason is that there are no such ends."[58] Although there may be widely shared conventional ends within a particular community, Kymlicka notes that such ends often serve to politically marginalize and illegitimately privilege certain groups within society and as a result should be rejected.[59] So, without a clear and defensible positive account of the human telos, in Kymlicka's view, there are moral reasons to resist assuming any such transcendent standard of the good life exists by which to guide state action.

Dworkin similarly rejects the existence of transcendent standards by which to measure a person's ethical impact in favour of historically and culturally "indexed" ethical "parameters."[60] On transcendent views, Dworkin claims, "the metric of value, of how far someone's life has succeeded

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[57] Kymlicka, *LLC*, 86.
[58] Kymlicka, LLC, 86.
[59] Kymlicka, LLC, 86.
[60] Dworkin, *SV*, 258.

in being good, must remain everywhere the same."[61] On the indexed view that Dworkin advocates, the standards by which good lives are measured are historically contingent and susceptible to change. "There is no settled cannon of skill in living," according to Dworkin, "and some people's lives, at least, make claims about ethical skill that if widely accepted would change prevailing views on the subject, and might even launch what would seem a new mode of living well, making…ethical value from nothing."[62] Note that Dworkin does not claim that we might *discover* the correct transcendent standard of the good life that we were previously mistaken in rejecting by trying out new forms of living. The claim is that *value* itself is *constructed* or created through the change in our practices without any relation to a transcendent standard. As a result, the standards against which we assess a good life can change with the rise of a new cultural or historical consensus around new ethical practices. The lack of a transcendent standard to assess the conceptions of the good life that individuals pursue facilitates Dworkin and Kymlicka's rejection of state paternalism. Paternalism, in Dworkin's view, "assumes that we have some standard of what a good life is that transcends the question of what circumstances are appropriate for people deciding how to live, and so can be used in answering that latter question, by stipulating the best circumstances are those most likely to produce the really correct answer."[63] If Dworkin and Kymlicka are correct, there is no such transcendent standard of the good life. So, such paternalism is unjustified.

Dworkin denies that this rejection of paternalism, however, rules out "compulsory education and other forms of regulation which experience shows are likely to be endorsed in a genuine rather than manipulated way; when these are sufficiently short-term and noninvasive and not subject to other, independent objection."[64] In Dworkin's opinion, the state can permissibly promote a plurality of options that have been taken by a sufficiently large number of individuals to be valuable parts of a

[61] Dworkin, *SV*, 257.
[62] Dworkin, *SV*, 258.
[63] Dworkin, *SV*, 273.
[64] Dworkin, *SV*, 274.

good life throughout history. The state cannot, however, in Dworkin's view reasonably mandate that some structured set of such options be included in all citizens' different lives. No structured set of goods, on this view, after all, is good for everyone.

2.1.2 Neutralist politics

Dworkin and Kymlicka assert that a politics that is neutral with respect to competing conceptions of the good life follows from this account of our essential interests as persons. Due to the nature of our essential interests as persons, for Dworkin and Kymlicka, citizens' lives cannot be made better through the paternalistic use of state power that we cannot reasonably expect such citizens to endorse. Although each person has an essential normative interest in living a truly good life, in Dworkin's view, if the state is to properly respect citizens as equals, it cannot coherently aim to promote any single conception of the good life as perfectionists demand.[65] Instead, Dworkin claims that to properly respect the critical interests of citizens, the state ought to enforce principles of justice that allow citizens to identify and realize the conditions of a just distribution of resources that is neutral with respect to the ultimate ends chosen by citizens.[66] These conditions of political morality, for Dworkin, form the background against which citizens are to autonomously identify and pursue any among a diversity of conceptions of the good life.[67]

Similarly, Kymlicka claims that on the basis of his comprehensive philosophical anthropology, we require an egalitarian politics that facilitates our capacities for critical reflection upon and the pursuit of a wide array of conceptions of the good life.[68] Such a politics, in Kymlicka's view, is necessarily neutralist or anti-perfectionist. According to Kymlicka, a perfectionist theory includes "a particular view, or range of views, about what dispositions and attributes define human perfection

[65] Dworkin, *SV*, 268-269.
[66] Dworkin, *SV*, 281.
[67] Dworkin, *SV*, 281.
[68] Kymlicka, *LLC*, 13.

and it views the development of these as our essential interest."[69] Kymlicka's neutralist view, by contrast, rejects that we "are bound to any complex of interests"[70] echoing his denial of transcendent ethical standards. According to Kymlicka,

> our essential interest in living a life that is in fact good requires an ability to revise our ends and to pursue those revised ends. Perfectionism inhibits this process. If we only have access to resources that are useful for one plan of life, then we shall be unable to act on our beliefs about value should we come to believe that that one preferred conception of the good life is misguided. (Or at any rate, we shall be unable to do so without suffering some penalization or discrimination in social benefits).[71]

Kymlicka's anti-perfectionist or neutralist politics is grounded instead in a "thin theory of the good"[72] that protects individual liberties and affords an egalitarian distribution of resources. Such a politics, based on a 'thin' rather than 'thick' theory, in Kymlicka's opinion, "best enables people to act on and examine their beliefs about value, and that is the most appropriate way to promote people's essential interest in leading a life that is in fact good."[73]

2.2 A Comprehensive Neutralist Interpretation of Sexual Identity Rights for LGBTTQ Students

If Dworkin and Kymlicka's comprehensive neutralist approach to understanding political morality is sound, the justification of state action for or against GSA laws will not appeal to any controversial conception of the human good life. Dworkin and Kymlicka's neutralist approach, thus, may seem to parry the worry of religious groups who take the state to be unjustifiably imposing controversial moral values on their children. On the comprehensive neutralist view advanced by Dworkin and Kymlicka the state does not aim to unjustifiably enforce "select perspectives and belief systems," as religious opponents of Bill 18 claim but rather the background conditions for cultivating students' ability to choose any among a wide array of such perspectives or systems. The

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[69] Kymlicka, *LLC*, 33.
[70] Kymlicka, *LLC*, 34.
[71] Kymlicka, *LLC*, 34.
[72] Kymlicka, *LLC*, 34.
[73] Kymlicka, *LLC*, 34.

religious opponents of GSA laws, on this view, are simply mistaken. The state does not unjustifiably impose an "increasingly homogenous" moral vision, but rather the preconditions for a robust diversity of moral and religious choices. On this interpretation, religious opponents of legal sexual identity rights for LGBTTQ students are revealed as the real enemies of moral and religious diversity. Opponents seek the right to unjustifiably impose purportedly transcendent views of the good life on minor LGBTTQ students (and for that matter other students as well). Parents, it might be claimed, ought to instead prioritize students' capacities to autonomously choose between such conceptions, which form options that children may or may not later endorse in their lives as adults. If students, after appropriate consideration of alternatives, believe it best to live or endorse LGBTTQ identities, on the comprehensive neutralist view there is no principled reason to deny their choice in this regard, due to the rejection of transcendent ideals. By allowing students to consider alternative lifestyles and to make choices about the life they take to be best to promote as agents, a comprehensive neutralist might claim that we simply cultivate students' capacities to live autonomous lives as adults and to pursue any among a plurality of good lives they might lead.

Although prioritizing the autonomy of students by making alternative plans of life available for rational consideration and choice may seem paternalistic where families or minor students disagree with affording such options, following Dworkin, the comprehensive neutralist appears to have a reply. The neutralist might claim that we can justify educational paternalism on the basis that we can "confidently" look ahead to future "free and genuine endorsement" of such measures by students.[74] The capacity for autonomous or genuine endorsement, after all, is just what Dworkin's comprehensive neutralist view of political morality demands that we promote through educational practice. Genuinely endorsing the life that you live, it might be claimed, is simply to see that life as the best for you after sufficient rational consideration of alternatives. A comprehensive neutralist

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[74] Dworkin, *SV*, 283.

education, if successful, will afford the necessary alternatives and cultivate the necessary capacities for rational thought to produce just this form of endorsement. So, we can reasonably expect students, after completing such an education, to genuinely endorse the lives they choose. By contrast, due to the lack of a transcendent "standard of what a good life is,"[75] the comprehensive neutralist, following Dworkin, might claim that no similar confidence can be had with the comprehensive religious conceptions of the good life that parents aim to promote paternalistically. Such religious conceptions of the good life, where they are taken to afford a universally justified human telos are simply misunderstood, as no such justification obtains.

2.3 Is Comprehensive Neutrality Perfectionist?

The religious opponents of Bill-18 would likely want to resist this comprehensive neutralist interpretation of the critical interests of their children. Toward this end, such opponents might reassert their suspicion that a controversial moral ethos—a transcendental ideal—is unjustifiably being imposed upon their families. If this is correct, whatever appeal the autonomy promoting comprehensive neutralist approach to justifying the rights of LGBTTQ students and their allies might afford is ultimately unwarranted without further argument demonstrating the priority of this ideal. To develop this claim, parents might ask how Dworkin and Kymlicka's autonomy prioritizing views escape collapsing into a form of the paternalistic perfectionism these thinkers officially reject.

To distinguish their politics of neutral concern as a *normative* rather than descriptive theory, Dworkin and Kymlicka set their views in contrast with others that permit individuals to pursue conceptions of the good life that are at odds with our essential interest in the rational formation, revision, and endorsement of life plans.[76] Were there no possible or actual moral practices prohibited on Dworkin and Kymlicka's accounts, there would be no meaningful sense in which their views

[75] Dworkin, *SV*, 273.
[76] Kymlicka *LCC,* 56; Dworkin *SV*, 284.

would be normative accounts of political morality, as they intend. Given the necessity of such moral contrast cases, however, religious opponents might claim that it remains unclear how Dworkin and Kymlicka can escape conceding that their theory, to use Kymlicka's definition, "includes a particular view, or range of views, about what dispositions and attributes define human perfection,"[77] and that "it views the development of these as our essential interest."[78] If Dworkin and Kymlicka also demand that we impose a perfectionist view on children and families, while denying that just this is permissible, then their view is internally inconsistent and more work needs to be done to establish the priority of their preferred moral practices when they stand in conflict with other dissenting views of the good life.

Note that characteristically perfectionist views of politics such as those espoused by Aristotle or Hegel fail to specify, in full, what a perfect human being would look like or be. Instead, these views of politics are perfectionist in the sense that they aim to provide a formal account of ends that the state ought to promote as good for all persons to realize within their otherwise different lives. On Dworkin and Kymlicka's views, the demand that the state promote a conception of persons as autonomous liberal-egalitarian choosers rather than as heteronomous illiberal choosers seems to encompass just this kind of perfectionism. In this regard, Dworkin and Kymlicka's liberalism meets the "particular view, or range of views" criterion Kymlicka asserts is constitutive of perfectionist doctrines. Moreover, within Dworkin and Kymlicka's vision of liberal society resources and sanctions are distributed such that they accord with the ideal of being an egalitarian liberal chooser of the good life—just as is detailed on the second criterion of Kymlicka's definition of perfectionism. Those who interfere with the choosing of an autonomous agent, where the interference is clear—as in the most egregious cases of sexism, racism, religious hatred, and homophobia—in Dworkin and Kymlicka's opinion, justifiably face sanctions from the liberal state as a demand of political morality.

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[77] Kymlicka *LCC*, 33.
[78] Kymlicka *LCC,* 33.

Perpetrating individuals face such sanctions, moreover, regardless of the sincerity or resolve in the justice of their illiberal actions with respect to their conception of the good life—no matter how committed they are to endorsing their conception of the good life 'from the inside.' So, it seems that Dworkin and Kymlicka are committed to the view that some choices regarding the good life ought to be "penalized and discriminated against by society,"[79] Kymlicka's third criterion, of three, for a doctrine's being perfectionist. In light of these facts, it might seem clear that Dworkin and Kymlicka's comprehensive neutralist political morality is an incoherent form of the perfectionism these thinkers officially reject.

Dworkin and Kymlicka would likely concede that the state must enforce substantive moral judgments on their liberal theories of political morality, inasmuch as morality is judgmental by definition. They would nevertheless deny that such moral judgments are perfectionist. To maintain this line of defense, comprehensive neutralist theorists such as Dworkin and Kymlicka require a basis that distinguishes their preferred fundamental normative commitments from the perfectionism and morally skeptical pragmatic politics that they reject. Call such a basis, following the term of art introduced in Chapter 1, a 'neutral maker'. Without such a basis, the simplest explanation is that such comprehensive neutralist views are perfectionist. Dworkin and Kymlicka appeal to two different neutral makers in developing their theories: a normative view's (1) being non-controversial and (2) having wide relative scope. Both I will argue are inadequate.

2.3.1 Neutral Maker 1: Being Non-Controversial

Kymlicka invokes the first neutral maker in an argument he levies against Joseph Raz's liberal perfectionism, citing a passage from Dworkin in support of his view. As Kymlicka notes, according to Raz, state action is by its nature engaged in controversial judgments regarding the good

[79] Kymlicka *LCC*, 33.

life.[80] So, in Raz's view, any coherent liberalism's justification will "invoke perfectionist ideals."[81] Kymlicka, however, argues that Raz is mistaken about liberalism being implicitly perfectionist because the liberal norms the latter defends are "non-controversial."[82] According to Kymlicka, Raz's argument for liberalism's cultural norms is non-perfectionist inasmuch as it "relies on the non-controversial value of a secure cultural pluralism for people in developing their varying conceptions of the good."[83] Due to the non-controversial grounding of the need for "secure cultural pluralism" as a means to develop a conception of the good life, Kymlicka maintains that Raz's insight "does not undermine the possibility of a politics of liberal neutrality."[84] In Kymlicka's view, there is no reason why "governments couldn't develop a decision procedure for public support of the culture of freedom that respected the principle of neutral concern that was endorsable as fair by everyone in society."[85] The state, in Kymlicka's view, could, for example, "ensure an adequate range of options, not by contributing to the ways that it finds valuable, but by providing tax incentives for private citizens to contribute to the ways of life they find valuable."[86]

Kymlicka's appeal to a procedural solution, wherein everyone gets a say from their unique conceptions of the good life into the type of pluralism society will allow, it should be evident, is question begging in the debate about liberal neutrality with perfectionists such as Raz. What is in dispute between perfectionists, such as Raz, and neutralists, such as Kymlicka is, *inter alia*, precisely the moral neutrality of such procedural solutions—where all individuals are provided equal say in the social outcomes society pursues, restricted by the demands of justice. Perfectionists, like Raz, are willing to acknowledge that such procedural solutions entail rejecting views of the good life that are

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[80] Kymlicka *LCC*, 80.
[81] Kymlicka *LCC*, 80.
[82] Kymlicka *LCC*, 81.
[83] Kymlicka *LCC*, 81.
[84] Kymlicka *LCC*, 81.
[85] Kymlicka *LCC*, 81.
[86] Kymlicka *LCC*, 81.

morally opposed to exactly those solutions and, therefore to acknowledge that the solutions in question depend upon perfectionist ideals. Kymlicka wants to deny this fact. Whether or not the attempted denial is ultimately possible, what is clear is that, on pain of circularity, Kymlicka cannot appeal to the possibility of such procedural solutions to establish those solutions' neutrality.

The problem, then, for Kymlicka, is to explain how a view's being non-controversial establishes that the view in question is morally neutral, as this is what is left when the circular argument is subtracted from his account. Kymlicka does not provide a detailed examination of what it takes to be controversial within his argument. He does, however, cite Dworkin to indicate a distinction between an empirical and a normative sense of the term 'controversial' in a footnote while defending his view. Dworkin and Kymlicka appeal only to the latter of these two senses of 'controversial'. So, I will only briefly consider the first empirical sense for completeness. On the empirical usage of 'controversial' the degree to which a claim is controversial is defined by the degree of empirical consensus or dissensus regarding that claim. To see that a normative commitment's being empirically non-controversial is insufficient on its own for a view's being non-perfectionist, we need only imagine a world in which a radically perfectionist doctrine is and has always been agreed to by a perfect consensus. A radically theocratic state does not become morally neutral in aim simply by virtue of consensus that such a monist state is ethically and politically correct. Insofar as this is true, a view's being empirically non-controversial is not sufficient, on its own, for that view's being morally neutral in justification with respect to competing conceptions of the good life.

The textual evidence suggests that Kymlicka and Dworkin would concede this point. According to Kymlicka, remarking on the meaning of 'non-controversial' that he intends, "The point is not that diversity and complexity are valued equally in different conceptions of the good."[87]

[87] Kymlicka *LCC*, 97 note 4

To the contrary, Kymlicka, like Dworkin, acknowledges that liberal diversity is not valued equally across all such conceptions. Instead, Kymlicka claims that he employs the term 'controversial' in a different, less familiar, normative sense. On this normative usage of 'controversial' we might claim that one *ought* to realize or recognize that a particular claim is controversial or non-controversial upon *due reflection*. Think, here, of the rebel philosopher, calling her dogmatic community to recognize the *actually* controversial nature of their dogmatic moral consensus. We can perhaps equally imagine such a philosopher calling her community to recognize that some commitment, once we think about it correctly, is tacitly endorsed by all of us, and, thus, *ought* to be recognized as actually non-controversial despite our dogmatic claims of disagreement.

Kymlicka's remarks in a footnote to his argument against Raz's perfectionism indicate that it is in this normative sense that he takes liberalism's political morality to be non-controversial. Quoting Dworkin directly, Kymlicka claims that "Since our intellectual environment provides the spectacles through which we identify experiences as valuable, it cannot sensibly be put on the scales as one of the experiences it identifies to be weighed against others and found more or less valuable than they."[88] Kymlicka concludes that, "The importance of cultural pluralism for a theory of liberal equality lies below, or prior to, the value attached to it in any of the particular conceptions which are contained in the culture."[89] Recalcitrant others, on Kymlicka and Dworkin's view, are treated as though they *ought* to recognize that the moral-epistemic process of evaluating ends that they propose is of incommensurably higher importance than any conception of the good that might conflict with it. This fundamental interest in the process of rational normative evaluation, for Dworkin and Kymlicka, is to be taken as non-controversial only in the non-empirical sense that it is *implicitly* essential to our valuing projects and goals at all. So, undermining this process in the name of a

[88] Kymlicka *LCC*, 97 note 4.
[89] Kymlicka *LCC*, 97 note 4.

valued project would be, in some sense, self-defeating; it would devalue precisely what we are doing in valuing some end or other.

Counter-examples, however, show that a view's being normatively non-controversial fails to establish that the view in question is morally neutral rather than perfectionist. Consider the possibility of a perfectionist theocrat who rejects rationality as the means of forming and assessing moral views. Instead, assume that this theocrat favors a non-rational faith-based moral epistemology—say of personal revelation through divine intervention. This theocrat, by hypothesis, believes that God reveals moral truth to individuals in accord with his providential vision by intervening in history. Our rational, critical powers, on the theocrat's view, do not reveal the truth about goodness, but, where this is claimed, express an imperfect form of human confusion. God's intervening agency and not our own, according to the theocratic, reveals the truth about what is best in life where God sees fit.

Like Dworkin and Kymlicka, the theocrat can claim that her faith-based moral epistemology and providential metaphysics *ought* to be recognized as non-controversial methods and preconditions of ascertaining moral truth. Obedient faith in the one true religion, revealed by providential intervention, rather than the rational judgment of goodness, in her view, make up "the spectacles" through which we discover what is truly good for us as moral beings. Perhaps she is wrong. Nevertheless, what is at issue in discerning who has the correct *normative* use of 'non-controversial' in such cases is simply which moral epistemology and metaphysics are true—hers or the comprehensive neutralists'. But if 'non-controversial' in this normative sense is equivalent to what one ought to recognize as morally, epistemically, and metaphysically true, this hardly distinguishes Dworkin and Kymlicka's anti-perfectionism from the perfectionism it endeavors to reject. Both sides can, and do, claim to advance true moral views. It remains for Dworkin and Kymlicka's defender to show why their views of moral truth are neutral, given their apparent congruence with

the latter's own definition of perfectionism, and their susceptibility to empirical controversy and dispute.

2.3.2 Neutral Maker 2: Wide Relative Scope

Given the challenges with this first neutral maker, Dworkin and Kymlicka might appeal to the second neutral maker, a view's relative scope, to establish their views' neutrality. Dworkin and Kymlicka might claim that their theories' thinness—such views' wide relative scope with respect to competing conceptions of the good life—establishes those views' *relative* neutrality with respect to such doctrines. Cast in this light, Dworkin and Kymlicka might claim that their views are *relatively* neutral with respect to the thicker, narrower, views they encompass. Thick views, like those of the religious opponents of Bill 18, Dworkin and Kymlicka might claim, are *relatively* perfectionist insofar as they are consistent with only a narrower array of conceptions of the good. Notice that on this interpretation 'neutral' becomes synonymous with "permissive with respect to some set of practices or ends". The state's promoting a relatively permissive moral life, however, is consistent with perfectionism, provided the more permissive moral life is best. The permissive perfectionist will claim that the ends permitted or proscribed by her doctrine are selected to promote what is best for humanity, on her best theoretical account of that end. Dworkin and Kymlicka as neutralists, by contrast, must now face a dilemma.

Some views, such as utilitarianism or pragmatism, permit a wider array of moral practices than Dworkin or Kymlicka's comparatively thick views of the good, which rule some such conceptions out as unjust. If Dworkin or Kymlicka's moral frameworks are to be preferred over those that are more permissive than their own, it is either because doing so promotes a better life for humanity or it is not. If a comprehensive neutralist moral framework is preferred because it promotes better forms of human life, then it is indistinguishable from a permissive form of

perfectionist doctrine. If Dworkin and Kymlicka's moral framework does not promote a better life for humanity, then its priority over more permissive views remains unclear. Claiming that the comprehensive neutralist's preferred moral practices are not better, but 'right' or 'moral' simply begs the question against competing views of moral obligation and permissibility grounded in opposing principles or intuitions. In this latter case, we may promote Dworkin and Kymlicka's preferred moral commitments as a matter of practice, or parochial predilection, but there is no rational normative justification for doing so. Nothing on either lemma, however, establishes Dworkin or Kymlicka's view as neutral.

In Chapter 1, I note that some neutralists appeal to a third possible neutral maker—a particular normative commitment's inhering within the public culture of a liberal democracy, rather than a metaphysical account of the moral interests of persons—to ground the neutrality of state action within their accounts. This option, however, is unavailable to comprehensive neutralists, who want to provide an account of our essential or fundamental interests as persons in a politics of neutral concern. By starting with a normative philosophical anthropology, rather than an appeal to prevailing norms of justice within the institutions of a particular society, comprehensive neutralists aim to provide a basis by which to evaluate and understand why one *ought* to endorse such institutional norms. For the comprehensive neutralist, appeal to this third neutral-maker, thus undermines the motivation for developing a comprehensive approach to theorizing political morality in the first place.

Conclusion

Neither Dworkin nor Kymlicka appeals to any other sources of neutrality within their account and I cannot see any consistent with their views. Failing a property or range of properties that distinguish such comprehensive neutralist views from perfectionist political moralities, the most

theoretically simple explanation, by appeal to Leibniz' Law, is that such views are perfectionist. Like the religious opponents of GSA laws, Dworkin and Kymlicka implicitly provide a substantive account of what it is good for a person to be, which sets the limits of obligatory and permissible behavior, and grounds state sanctions and paternalistic guidance. Bracketing cultural and religious traditions that reject liberalism on the grounds that the former are 'controversial' or 'thick' views incoherently elides the need to justify comprehensive liberalism's own perfecting vision of humanity with respect to such conceptions. Due to this internal incoherence, the moral priority of Dworkin and Kymlicka's comprehensive neutralist view remains unjustified as a basis for assessing the morality of state action with respect to students and families where such action runs in conflict with other sincerely held views and convictions.

Problematically, where we appeal to Dworkin or Kymlicka's comprehensive political morality to justify legal sexual identity rights such as GSA laws, the worry of faith-based groups is vindicated. On Dworkin or Kymlicka's political morality, the EFC's claim that, unjustifiably, "In the name of diversity and respect for others, Bill-18 proposes that the Government of Manitoba enforce select perspectives and belief systems, seeking to render the school system increasingly homogenous,"[90] appears sound. Whatever we might think of the EFC's or any other religious group's positive doctrine, if we accept Dworkin or Kymlicka's neutralist view, Bill-18 *does* incoherently and therefore unjustifiably enforce select perspectives and belief systems, rendering our school system increasingly homogenous. While the particular kind of moral homogeneity the state promotes in such cases may be correct, if we wish to establish this fact and justify the practices enshrined in Bill-18 and other GSA laws, as I believe we ought to, some alternative account of the relevant justification is required.

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[90] EFC, "FS", 3.

To be clear, I believe that it is morally right to protect students' ability to form gay-straight alliances within their schools. I have nevertheless argued that Dworkin and Kymlicka's approaches fail to justify this practice on neutralist grounds. Importantly, nothing in this chapter entails that the moral opponents of GSA laws are morally justified in holding their competing positive comprehensive views. Many such views are likely similarly incoherent. More work remains to be done before we can establish the most coherent theory of the moral landscape—whether it is some form of perfectionism, a moral-epistemically skeptical pragmatic view, or some better account of neutrality. On the basis of such work we might acquire a coherent view from which to morally justify GSA laws and other legal sexual identity rights for LGBTTQ students. For now, I have argued that a helpful first step in this regard is to notice that Dworkin and Kymlicka's comprehensive neutralist account is inadequate to the task.

In the next chapter I consider whether a non-comprehensive neutralist approach advanced by John Rawls provides a defensible framework by which to assess the competing claims in the debate regarding GSA laws from a neutralist perspective. In assessing Rawls' approach, I consider whether the third neutral-maker, a normative commitment's inhering in the public political institutions of a liberal democracy, rather than in a metaphysical account of the moral interests of persons, establishes a defensible basis by which ground justificatory neutrality. I argue that, ultimately, this neutral maker likewise fails due to an inability to individuate neutralist approaches from either the perfectionism or political pragmatism that such theorists reject.

CHAPTER 3: AGAINST NON-COMPREHESNIVE NEUTRALITY

Introduction

Given the difficulties with the first two candidate neutral-makers, the defender of justificatory neutrality might appeal to the third neutral maker, a commitment's inhering in the public political culture of a liberal democracy, to distinguish her view from the perfectionism and political pragmatism that neutralists reject. In Chapter 2, I argue that grounding normative commitments within the public political culture of a liberal democracy, rather than a metaphysical account of the moral interests of persons, is inconsistent with the motivation for taking a comprehensive approach to theorizing political morality. Such an appeal remains consistent, however, with a non-comprehensive neutralist approach to theorizing political morality.

In this chapter, I critically assess this third neutral-maker as it is employed in John Rawls' influential non-comprehensive neutralist theory of political morality, articulated in his *Political Liberalism*. Rawls suggests that we can separate questions of comprehensive morality from questions of non-comprehensive *political* morality, allowing the state to be neutral in its aim with respect to a wide range of reasonable tokens of the former type of moral view.[91] Some critics, including Susan Mendus, believe this strategy affords Rawls a framework by which to justify normative educational policy decisions that is neutral in aim.[92] Others have challenged the non-comprehensive aspects of Rawls' account. In this chapter, I build on these criticisms to claim that unargued interpretive decisions required by Rawls' non-comprehensive neutralist approach render his conclusions regarding justice unsound. Rawls' neutralist theory of justice, I conclude, is pushed back either toward a comprehensive account and the difficulties with the two neutral makers considered in the

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[91] Rawls, *PL*, 13.
[92] Susan Mendus, "Teaching Morality in a Plural Society," *Government and Opposition* 33, no. 3 (July 1998): 358. Hereafter, '*TM*'.

previous chapter or collapses into a mere *modus vivendi,* both views Rawls rejects. In either case a Rawlsian approach fails to establish the possibility of a neutralist framework of justification for state action.

3.1 Rawls' Non-Comprehensive Neutralist Theory of Justice

Like the comprehensive neutralist theories considered in Chapter 2, Rawls' non-comprehensive neutralist account of justice attempts to occupy a principled moral middle ground between two canonical types of view. First, Rawls' conception of political justice is intended to remain distinct from perfectionist forms of political idealism that hold that the state ought to promote a single highest goal or *telos* in all human lives. Second, Rawls' theory of justice is intended to avoid reducing politics to a pragmatic *modus vivendi* between conflicting and incommensurable views.[93] Rawls rejects the first view, due to what he describes as the fact of "reasonable pluralism."[94] Pluralism and dissensus regarding the good life, in Rawls' opinion, is the natural state of affairs where human rationality is not oppressed.[95] Presumably, conditions of non-oppression ought to obtain in a liberal democracy. So, Rawls maintains, it is "unrealistic" to appeal to such sources as the basis of a theory of justice for such a society.[96]

To explain the permanence of reasonable pluralism under conditions of non-oppression, Rawls outlines a set of epistemic challenges involved in deliberating about the good life, which he refers to as "the burdens of judgment."[97] Despite the weight of the burdens of judgment and the fact of pluralism, which undermine accounts of justice grounded in the highest human ideals, Rawls, as noted above, intends for his theory of justice to remain distinct from a mere practical

[93] Rawls, *PL*, xxxix.
[94] Rawls, *PL*, 54.
[95] Rawls, *PL*, 55.
[96] Rawls, *PL*, 58.
[97] Rawls, *PL*, 54.

compromise or *modus vivendi* between moral and political rivals. As a result, like the comprehensive neutralists considered in Chapter 2, Rawls requires a means to distinguish his theory's basic normative commitments from controversial accounts of the human good life, while remaining morally binding on all citizens within a democratic society. To accomplish this task, Rawls' draws a distinction between his "political" theory of justice and what he refers to as "comprehensive" moral conceptions that govern other spheres of a citizen's life. The difference between the two forms of morality, in Rawls' view, is "a matter of scope: that is, the range of subjects to which a conception applies and the content a wider range requires."[98] According to Rawls,

> A moral conception is […] comprehensive when it includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole. A conception is fully comprehensive if it covers all recognized values and virtues within one rather precisely articulated system; whereas a conception is only partially comprehensive when it comprises a number of, but no means all, nonpolitical values and virtues and is rather loosely articulated.[99]

To develop his non-comprehensive political theory of morality, which stands in contrast with such fully and partially comprehensive views, Rawls appeals to normative features of the liberal-democratic political tradition.

According to Rawls "justice as fairness starts from within a certain political tradition,"[100] that is, from the "public political culture of democratic society."[101] "In a democratic society," Rawls maintains, "there is a tradition of democratic thought, the content of which is at least familiar and intelligible to the educated common sense of citizens generally."[102] This tradition of democratic thought, in Rawls' view, is implicit in "Society's main institutions, and their accepted forms of

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98 Rawls, *PL,* 13.
99 Rawls, *PL,* 13.
100 Rawls, *PL,* 14.
101 Rawls, *PL,* 13.
102 Rawls, *PL,* 14.

interpretation are seen as a fund of implicitly shared ideas and principles."[103] Within the "accepted forms of interpretation" of liberal democratic institutions, Rawls asserts that there is a distinction between the public political culture and the background culture of civil society.[104] The comprehensive justifications for democratic institutions, in Rawls' view, exist only in the latter and not the former.[105] Rawls develops his "freestanding" or autonomous theory of political justice by appealing only to the non-comprehensive political ideals in the public culture. So, provided that those norms are morally binding, Rawls appears to acquire the foundations necessary to develop a theory of justice that is neither merely pragmatic nor grounded in a theory of the highest human ideals.

Rawls identifies two concepts immanent to the public political culture of democratic society and derives a third from these first two that are of particular relevance to assessing the neutrality of his approach to theorizing justice in the context of rights for LGBTTQ students. The first is a conception of citizens as free and equal engaged in a fair system of cooperation over time; the second is the ideal of a well-ordered society, regulated by two principles of justice.[106] The third is the ideal of public reason, a norm of political discourse that Rawls derives based on his normative conception of citizens and society to govern debates regarding the selection of the basic principles of justice and their application to particular cases.

First, according to Rawls, citizens within a liberal democracy are free if they possess "two moral powers": a "capacity for a sense of justice and for a conception of the good" and "the powers of reason (of judgment, thought, and inference connected with these powers)."[107] Citizens are equal, in Rawls' view, if they have "these powers to the requisite minimum degree to be fully cooperating

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[103] Rawls, *PL,* 14.
[104] Rawls, *PL,* 14.
[105] Rawls, *PL,* 14.
[106] Rawls, *PL,* 14.
[107] Rawls, *PL,* 19.

members of society."[108] Free and equal citizens within liberal societies, in Rawls' view, participate in relationships governed by "fair terms of cooperation… terms that each participant may reasonably accept provided that everyone else likewise accepts them."[109] The ideal of a well-ordered society "effectively regulated by a public political conception of justice,"[110] in Rawls' view, follows from this conception of democratic society and the normative political conception of persons as free and equal. In such an ideal society, for Rawls, "the publicly recognized conception of justice establishes a shared point of view from which citizens' claims on society can be adjudicated."[111] This shared point of view does not, in Rawls opinion, rely upon any "comprehensive religious, philosophical, or moral doctrine."[112] Thus, the ideal of a well-ordered society is one that aims to be neutral in justifying state action between competing reasonable conceptions of the good life, despite being a genuine ideal of political *morality* or justice.[113]

From this view of citizens and society, Rawls derives the ideal of "public reason" an ideal of political discourse for debating questions of constitutional justice and their application to particular cases. For Rawls, so long as an individual recognizes herself and others as free and equal in the public sphere, she can live a just life under any other reasonable comprehensive doctrine she chooses within the other non-political spheres of life. When we debate matters of fundamental justice and their application to particular cases within the public sphere, however, on Rawls' theory, our respect for the political conception of persons and justice demands that we appeal only to those reasons that we can reasonably expect other citizens, as free and equal, to reasonably accept.[114]

Due to the burdens of judgment and the fact of reasonable pluralism within liberal democracies, Rawls maintains that the reasons we can expect others to reasonably accept cannot be

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[108] Rawls, *PL,* 17.
[109] Rawls, *PL,* 16.
[110] Rawls, *PL,* 35.
[111] Rawls, *PL,* 35.
[112] Rawls, *PL,* 42.
[113] Rawls, *PL,* 194.
[114] Rawls, *PL,* 214.

based only in a comprehensive conception of the good life, that is, in any individual's view of "the whole truth" regarding morality.[115] If state actors and citizens are to affirm one another's status as reasonable citizens when debating such issues of fundamental political importance, they must, in Rawls' view, instead bracket any reasons they hold based on philosophical, religious, or political conceptions of the good life.[116] According to Rawls, we must "apply the principle of toleration to philosophy itself"[117] and avoid such questions so far as is possible in such cases. Only those remaining reasons that we can reasonably expect citizens who are free and equal to reasonably accept alongside the burdens of judgment are admissible.[118]

Where the comprehensive neutralists discussed in Chapter 2 seek to promote a politics grounded in a theory of persons and their essential interests, Rawls' non-comprehensive theory of justice relies on a political theory of persons intended to avoid such controversial philosophical questions. In appealing only to a non-comprehensive conception of persons embedded within liberal democratic social institutions, Rawls' political rather than metaphysical approach strikes some theorists as affording the resources necessary to separate questions of comprehensive morality from questions of justice in the context of educational practice. According to Susan Mendus, for example, in her article "Teaching Morality in a Plural Society," Rawlsian education successfully drives a sharp wedge between the political skills required for citizenship and justice, on the one hand, and morality, which she takes to be limited to comprehensive accounts of the good life, on the other. On Mendus' vision of Rawlsian education,

> that part of children's education which is the responsibility of the state should, so far as possible, be kept separate from questions of morality and the development of specific moral virtues, and should concentrate simply on enabling children to develop the skills necessary for effective participation in the public culture of a democratic society.[119]

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[115] Rawls, *PL,* 216
[116] Rawls, *PL,* 220
[117] Rawls, JF 224
[118] Rawls, *PL,* 225
[119]Mendus, *TM*, 238.

Due to the separation between the political and the moral, Mendus claims that "Political liberalism will be resolutely agnostic on questions of morality, even to the extent of saying nothing about the status of moral judgments themselves."[120] The motivation for this commitment to neutrality, which, in Mendus' view, is distinct from moral skepticism, is to "concentrate rather on providing the conditions under which those with different and conflicting moralities may live together in political stability and justice."[121]

By relying merely on the normative commitments implicit within liberal democratic societies, the state, in Mendus' view is able to take a deeply agnostic stance in its educational policy with respect to moral questions. Rawls' conception of justice, following Mendus' reading, may thus appear to afford a basis for claiming neutrality between conflicting comprehensive moral ideals while assessing the two ideals of citizenship implicit in the effort to extend or deny legal sexual identity rights for LGBTTQ students. The ideal conception of persons advanced by Rawls does not exemplify the best way of being human; rather it is the requisite notion for a just democratic society that makes no claims about individual moral conceptions beyond their justice in a pluralistic context. In light of this fact, although the normative conclusions we derive from Rawls' ideal of citizenship will have implications for the survival and flourishing of various doctrines, the state need not, as a matter of aim, promote any particular comprehensive conception of the good life through schools. Following Mendus' reading, it may, thus, appear that political liberalism is able to remain neutral in its justification with respect to reasonable competing conceptions of the good life, as Rawls claims, even when promoting its particular ideal of citizenship and society through state mandated education.[122]

By appealing to the political conception of persons and society embedded within the public

[120] Mendus, *TM,* 360.
[121] Mendus, *TM,* 360.
[122] Rawls, *PL,* 195.

culture of liberal democracies affirmed by an "overlapping consensus" of a plurality of different but reasonable comprehensive views, Rawls seemingly achieves a normative foundation from which to ground a neutralist conception of justice. Using this conception, grounded in the third candidate neutral-maker identified in the introduction of this study, Rawls may appear to acquire a foundation from which to adjudicate the moral status of conflicting rights claims in the public debates regarding legal sexual identity rights for LGBTTQ students. Rawls may appear to do so, moreover, without demanding any *particular* comprehensive ideal of character obtain within society.[123] A wide range of reasonable but mutually exclusive comprehensive ideals of character instead afford stability to the political conception of persons, society, and justice.

3.2 A Non-Comprehensive Neutralist Assessment of Rights for LGBTTQ Students

In Chapter 1, I argue that the decision on whether or not to extend GSA laws and other legal sexual identity rights for LGBTTQ students forces the state to choose between promoting one of two possible ideals of citizenship. On the first ideal, citizens have an obligation to support students wishing to affirm the moral permissibility of LGBTTQ identities in any state funded school. On the second ideal, the state, rightly conceived, ought to reject this obligation to hold that in some cases it is morally permissible to deny students this right. Rawls does not consider the rights of children in detail in *Political Liberalism*. A Rawlsian approach might appear attractive, however, to the neutralist defender of legal sexual identity rights for LGBTTQ students. On at least on one plausible, though not incontestable, interpretation, the Rawlsian view seems to provide a means by which to justify GSA laws and other legal sexual identity rights for LGBTTQ students against religious dissent.

[123] Rawls, *PL,* 195.

On the interpretation I will advance, a Rawlsian approach, first, negatively, shields students from efforts to use the state to impose a comprehensive morality that is opposed to LGBTTQ sexual identities or practices as an aim without additional justification in the language of public reason. Second, positively, this Rawlsian interpretation affords a presumption in favour of cultivating students' political autonomy when conflicts with parents' comprehensive doctrines arise. Combined, these features of a Rawlsian approach to theorizing political morality may appear to provide plausible reasons by which to justify GSA laws and other gay-positive school practices against religious dissent.

First, negatively, a Rawlsian approach affords resources to block efforts to use state resources to coercively promote controversial comprehensive views of the good life. Some controversial comprehensive moral and religious views rule out the moral permissibility of homosexual identities. If such views are permitted on their own to justify the coercive use of state resources in schools, then it follows that denying students the right to affirm the moral status of LGBTTQ identities is a permissible aim of state action in at least some possible cases. The Rawlsian the ideal of public reason, however, rules out a majority's pursing such sectarian aims as the sole justification for state policy. On the Rawlsian framework, parents may be able to oppose homosexuality within privately funded churches or home schools that do not rely on the coercive power of the state. Parents cannot object, however, that their religion's prohibition on homosexuality is a reason, on its own, that there should not be practices supporting homosexual students in state funded and regulated schools. Such a demand, on the Rawlsian view, is a canonical violation of the duty to address one another as free and equal in the public sphere through the language of public reason. The religious demand, in this case, is one that other citizens could reasonably reject, given the burdens of judgment, and the fact of reasonable pluralism. Whatever the consequences in effect for such religious views, in developing his conception of civic education,

Rawls is clear: If a religious community withers away under the "reasonable requirements for children's education", it might be a matter of "regret."[124] For Rawls, it is not, however, unjust. To the contrary, it would be unjust to fail to provide an adequate civic education cultivating the political virtues requisite for a just society.[125]

Second, positively, a Rawlsian interpretation of justice suggests that the state has a duty to recognize, at minimum, a presumption in favour of promoting the political autonomy of students as citizens. On any Rawlsian interpretation, the cultivation of students' capacities as future politically autonomous citizens is a duty of the state. This duty, as noted above, takes priority over comprehensive conceptions of the good life that reject the state's right to cultivate the virtues of citizenship. Recall: if the "reasonable requirements for children's education," undermine the persistence of a religious or cultural view, it might be a matter of "regret", in Rawls' view, but it is not unjust. In light of this fact, we can reasonably infer that where there is no public reason by which to justify overriding students' exercise of political autonomy, using state resources to stifle that autonomy's development reads as a failure of civic duty on the part of the state.

In the case of GSA laws and many other legal sexual identity rights, students are afforded a right, where they desire to exercise it, to engage in the practice of making informed judgments about which types of lives may be worth living. Adults have the right to make such choices within liberal democracies as politically autonomous citizens. Given this fact, allowing students to begin engaging in such deliberations and judgments is a plausible way to prepare them to exercise their rights as citizens. So long as no student is forced to adopt an LGBTTQ identity, rather than one that merely respects the autonomy of those who choose to affirm such identities as free and equal citizens, the state does not wrongly promote any conception of the good life. Instead the state only promotes the knowledge and skills necessary to exercise one's civic rights when one becomes an adult citizen. In

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[124] Rawls, *PL,* 200.
[125] Rawls, *PL,* 200.

light of this fact, worries from religious groups that claim the state enforces "select perspectives and belief systems"[126] appear misguided. To the contrary, the Rawlsian can claim, the state promotes only those norms that are required for allowing an adult citizen to choose one's own reasonable conception of the good life amidst a plurality of options.

As noted, this interpretation can be disputed by Rawlsians. Although some Rawlsians demand that children only be enrolled in those conceptions of the good that can be justified in the language of public reason, thus foregrounding the presumption in favour of promoting those children's political autonomy, others reject this view. Steven Lecce, a critic sympathetic to Rawls' project, for example, argues that unlike most adults, children do not have the capacities that ground the state's respect for adult citizens in sufficient degree to undermine parents' right to enroll minor children in fundamentalist conceptions of the good life.[127] According to Lecce, "children, who have neither comprehensive ethical beliefs in the relevant sense nor, at least initially, the cognitive, emotional or moral capacities to autonomously develop them."[128] Due to this asymmetry in autonomous capacity, Lecce claims that minor students do not warrant the same forms of protection from ethical paternalism that adult citizens enjoy. Provided that children's "developmental needs" are met and future autonomy not actively impaired or destroyed, Lecce argues, minor children may rightly be enrolled in their parents' comprehensive conception of the good life, fundamentalist or otherwise.[129] In Lecce's view, "parents show their children no disrespect simply by influencing the gradual emergence and content of the ethical beliefs they will come to have as adults."[130]

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[126] EFC "FS," 3.
[127] Lecce, Steven. "How Political is the Personal?" *Theory and Research in Education*. 6, no. 1 (March 2008): 35. Hereafter, "HPP"
[128] Lecce, "HPP," 35.
[129] Lecce, "HPP," 40.
[130] Lecce, "HPP," 35.

If Lecce is correct, Rawlsian proponents of comprehensive enrollment might claim that due to students' lack of autonomous capacity, parents ought to be able, likewise, to determine the moral content of school curricula to which their children are exposed in all matters beyond a bare minimum set of political skills necessary for democratic citizenship. Thus, where parents choose to send their child to a religious school, it might be argued that the state has no obligation to enforce a right for that student to organize groups that express dissent from that child's parents' religious view, provided students' "developmental needs" are otherwise met alongside the pre-requisites for developing political autonomy as adult citizens.

The religious opponents of GSA laws above acknowledge that they are willing to address all harms and safety issues experienced by LGBTTQ students other than those cultural safety issues which specifically entail acknowledging the moral permissibility of such sexual identities. Many LGBTTQ adult citizens are politically autonomous, free and equal citizens, despite anti-gay religious upbringings. So, the pro-enrollment Rawlsian might claim, employing Lecce's framework, that political autonomy is not *destroyed* by a homosexuality proscribing but, otherwise, loving and caring religious family life and schooling. In addition, as a part of what William Galston calls parents' "expressive right" to enroll their children within a conception of the good life, it might be claimed that parents have at least some authority to punish what they take to be inappropriate sexual conduct or moral beliefs on the part of their children, whether or not that conduct is heterosexual.[131] So, the pro-enrollment Rawlsian might also claim that allowing parents to deny their children the right to affirm the moral permissibility of particular sexual practices as minors at school may not be immediately out of point. Finally, although adult citizens may be permitted to exercise moral dissent from others' comprehensive views, the pro-enrollment Rawlsian might retort that actually *exercising* such dissent as a *minor* is not requisite for knowing *how* to do so or *that* one will be permitted to do

[131] William Galston, "Church, State, and Education" in *A Companion to the Philosophy of Education*, Ed. Randall Curren, (Malden, MA: Blackwell, 2003) 412-429.

so once one is an adult citizen. As in the case of many rights, the mere knowledge that minor students will be allowed a right to such dissent in the future may be claimed to be enough for the purposes of securing the state's interest in having functioning adult citizens. Full political autonomy is not, it might be claimed, a right of minor student-citizens, given their parents' conflicting legitimate interests.

Although I believe the first interpretation of the Rawlsian view is the most coherent, provided that the normative priority of political autonomy to conflicting comprehensive views can be established, I will not defend that interpretive claim here. Deeper problems attend to the non-comprehensive neutralist project that make the question of which version of this project is most applicable in the present case moot.

3.3 Against Non-Comprehensive Neutrality

The Rawlsian justification for LGBTTQ student rights is attractive, in part, I believe, because it draws on many of the right sources, for example, a strong regard for our autonomy as citizens and a notion of social reciprocity. Moreover, if it were possible to retreat from challenging and controversial philosophical questions to take a standpoint that does not aim to promote any conception of the good life over any other when forming state policy, one can understand why this might be desirable. Despite such appealing features, Rawls' attempt to derive his theory of justice from a strictly political and not metaphysical normative conception of persons and society ultimately undermines his view. The problem with Rawls' account is foundational. Rawls wants to begin with an interpretation of the basic normative principles implicit in democratic institutions. On critical examination, however, it becomes evident that Rawls' non-comprehensive methodological approach serves to evade not just critically important features of philosophical discourse, but of social reality

proper. By evading the philosophical features of social reality, Rawls' conclusions regarding justice are ultimately left unjustified.

Recall that Rawls starts with what he calls certain "accepted forms of interpretation"[132] of our public culture as the fund of his basic normative concepts and distinctions. Some theorists, such as Mendus, take the appeal to such "accepted" interpretations of institutionalized political values to afford a source of politically binding, morally neutral values. Within our culture, however, the fact that an interpretation is widely accepted says nothing on its own for the justice or epistemic legitimacy of that interpretation. Rawls' aligning with certain "accepted" interpretations within actual liberal democratic societies is, thus, more aptly described as taking a controversial philosophical stand in line with what he believes to be a conventional orthodoxy. Pace Rawls rather unified view of cultural norms, as William Galston argues, "cultural interpretation is far more likely to recapitulate than (as Rawls supposes) to resolve the deep disputes that now divide our political order."[133] To establish this insight from Galston, it is instructive to consider the contested nature of three central normative commitments Rawls' account requires us to accept:: (1) that due to the burdens of judgment the actual pluralism in liberal democratic societies is a permanent and natural feature of those societies; (2) that the concept of freedom with respect to citizens is best interpreted in terms of the "two moral powers"; and (3) that the concept of equality is best understood as an equality between free citizens as per (2).

First, as Eamonn Callan and Meira Levinson note, Rawls requires that free and equal citizens accept the burdens of judgment as a necessary condition of being reasonable in the public sphere. The demand that different religious groups accept the provisional nature of their view, as Callan

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[132] Rawls, *PL,* 14.

[133] William Galston, *Pluralism and Social Unity.* in *John Rawls: Critical Assessments of Leading Political Philosophers*, edited by Chandran Kukathas, (New York: Routledge, 2003), 125. Hereafter, '*PSU*'.

argues, however, is at odds with the nature of much "garden variety" fundamentalism found within liberal democracies today.[134] Similarly, Levinson argues that:

> For many individuals, especially, although not only for many religious fundamentalists, accepting this would require that they fundamentally reconceive their relationship to their communities and churches, the character of their beliefs, the content of their values and even their conception of their own identities. In this respect, to accept the burdens of judgment is to diminish the pluralism that the burdens of judgment claim to respect and explain.[135]

Indeed, as Callan notes, accepting the burdens of judgment and their implications for moral pluralism is inconsistent even with some forms of Millian perfectionism that hold that the state ought to promote individuality.[136] The demand that within the sphere of politics citizens see their comprehensive moral views as one mere view amidst a permanent plurality, Callan claims, is to require an exacting form of "sophisticated belief" alien to many citizens.[137] Not all faiths and moral conceptions, as a matter of fact, see their view as one among many equally legitimate others, even in the sphere of institutional politics. If the burdens of judgment are controversial philosophical commitments as Callan and Levinson suggest, then it should be no surprise that the derived permanence of the "fact of reasonable pluralism" regarding the good life that Rawls asserts and its implications for justice are also normatively controversial and contested.

Rawls' interpretation of the neutrality of the burdens of judgment and their implications for the fact of pluralism, as Galston notes, seems at odds here, not just with some political philosophers, but also with a United States Constitution that in its second sentence declares "We hold these truths to be self-evident."[138] If Galston is correct, the liberal tradition's public culture, despite Rawls' denial of the comprehensive nature of that tradition's commitments regarding justice, appears to *include*

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134 Eamonn Callan, *Creating Citizens*: *Political Education and Liberal Democracy.* (New York: Clarendon Press, 1997), 38. Hereafter, '*CC*'.
135 Levinson, Meira, *The Demands of Liberal Education*, (New York: Oxford University Press, 1999), 17. Hereafter, '*DLE*'.
136 Callan, *CC*, 30.
137 Callan, *CC*, 37.
138 Galston, *PSU,* 126.

comprehensive claims as the basis of its inalienable rights. A number of critics, including comprehensive liberals such as Ronald Dworkin and Will Kymlicka, as well as perfectionist communitarians, such as Michael Sandel, Thomas Hurka, and Charles Taylor, likewise deny that the actual pluralism within liberal democracies entails Rawls' conclusions. All of these thinkers reject that liberal pluralism entails a non-comprehensive approach to theorizing justice. The latter three deny, in addition, that such pluralism prohibits theories of justice grounded in an account of the human good.[139] In light of these facts, Rawls' interpretation of the pluralism within social reality appears undeniably as one that is philosophically controversial and but nevertheless unargued against alternatives.

Analogous difficulties attend to Rawls' conception of citizens as "free and equal." Rawls claims that a person is free if that person has two moral powers: a "capacity for a sense of justice and for a conception of the good" and "the powers of reason (of judgment, thought, and inference connected with these powers)."[140] Rawls' interpretation of political freedom as a kind of minimalist rational autonomy combined with a sense of deontological justice is, however, once again, one controversial view amidst many *within* the liberal-democratic tradition. As, no doubt, Rawls is aware, there is a wide gulf between interpretations of the concept of freedom as it is invoked by a diversity of thinkers *within* the liberal-democratic tradition. There are, for example, significant practical and theoretical differences between those tending toward a "negative" picture of freedom as physical non-interference, by Kantians, who understand this concept in the egalitarian language of formal autonomy, and by Millians who believe the state ought to promote autonomous individuality. Aristotelians and Hegelians such as Amartya Sen and Taylor, who claim that the qualitative worth of the choices a person has available to pursue is a determinant of the extent to which that person is

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[139] Michael Sandel, *Liberalism and The Limits of Justice* (NY: Cambridge University Press, 1982)*;* Thomas Hurka, *Perfectionism*; Taylor *Sources of the Self: The Making of Modern Identity*,

[140] Rawls, *PL,* 19.

free, further complicate the contested picture of the central political ideal.[141] Each of these perspectives of the political concept of freedom might be read as a normative interpretation of the liberal democratic political culture, despite inconsistency with Rawls' own preferred interpretation. Due to this fact, Rawls' unargued interpretation is once again revealed as deeply philosophically and normatively controversial *within* that tradition.

Finally, in Rawls' view, citizens ought to be treated as equals if they have the two moral powers "to the requisite minimum degree to be fully cooperating members of society."[142] There is, however, a wide-ranging debate throughout the history of liberal-democratic thought about both the correct normative meaning of equality both with respect to *who* it includes and what *metric* satisfies that ideal's demands. As civil rights movements throughout liberal democratic history reveal, whether or not someone *counts* as a person within a political tradition—the "Equality between *who*?" question—is open to controversy and debate. Indigenous people, women, and African Americans, among others, including LGBTTQ persons, have had to engage in prominent struggles to overturn prevailing definitions of personhood to win the right to be recognized as members of the community of moral equals.

Similarly, the "equality of what?" question regarding the metric of equal treatment between persons included in the moral community sharply divides citizens in their interpretation of liberal-democratic ideals. Some liberal-democrats, for example, believe in equality of welfare and argue for a more robust state aiming to improve the equal distribution of wellbeing amongst citizens through public policy. Some, like Rawls, see resources as the metric of whether or not citizens are being properly respected as equals. Other liberal-democratic citizens prefer a more libertarian concept of mere formal equality before the law as truest to the best aspects of the tradition. Others still see

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[141] Amartya Sen "Capability and Wellbeing," in *The Quality of Life* Martha Nussbaum Ed. (Oxford: Clarendon Press, 1993), 34; Charles Taylor "What's Wrong with Negative Liberty" in *Philosophical Papers 2: Philosophy and the Human Sciences*, (New York: Cambridge University Press, 1985), 219.
[142] Rawls, *PL,* 17.

equality as involving a moral commitment to non-oppression. Yet again, the liberal democratic tradition is far from univocal. Furthermore, this interpretative plurality within the normative traditions that make up liberal democratic culture obtains without delving into the deeper question of whether the tradition itself, whatever its bounds, *ought* to be reproduced intergenerationally or abandoned in favour of a *better* more ethically progressive alternative.

Given the controversial meanings and contested normative status of central ideals within the liberal-democratic tradition and of the tradition itself, Rawls' defender is forced into a dilemma. Either Rawls' argues for the moral or epistemic priority of his interpretation of liberal democratic ideals which are intended to regulate all other ideals, or he does not. If Rawls' defender argues for the moral or epistemic priority of his interpretation of the tradition, then his account, if it is rationally grounded through such arguments, becomes comprehensive. Unless some conception among the plurality of possible normative interpretations can be rationally identified as better reflecting our fundamental normative interests as persons, there is no significant sense in which any of these ideals *ought* to be seen as normatively binding where strong countervailing commitments conflict. As Levinson argues, "The only reason for the state to acknowledge one capacity over another is if the former is more worth realizing than the latter. But this is tantamount to asserting that the particular capacity has *worth* for all human beings (within the society in which the liberal debate is taking place)—i.e. that the capacity represents a substantive *good*." [143] Failing a comprehensive interest in the interpretation of political ideals Rawls wants the state to promote to regulate all others, for any interpretation of those ideals, some opposed ideal or interpretation, so far as we can discern, is equally binding on us as individuals.

Alternatively, if there is no sense in which Rawls' interpretation can be demonstrated as better reflecting our fundamental normative interests as persons, his account of our political ideals

[143] Levinson, *DLE,* 20.

collapses into a mere *modus vivendi* where might makes right. If nothing rationally distinguishes the ideals or capacities the state promotes under the auspices of justice from those citizens appeal to when rejecting those demands, then there is no sense in which the demands of justice are anything more than an expression of a non-rational power play. What is called 'political morality' in this case becomes identical with a form of sectarian special pleading between proponents of clashing social practices. It should be noted that for defenders of LGBTTQ rights at odds with many non-rationally grounded faith-based perspectives, collapsing justice into a *modus vivendi* is a significant concession. If there is no rational priority grounding the calls for justice on behalf of sexual-minority students, then religious opponents' non-rational claims against these demands are no worse, in principle, than those in favour. This downward leveling of moral principles to effective force is particularly disadvantageous for proponents of such rights where LGBTTQ students and their allies are a minority living amidst an opposed religious or moral majority. In this case, there is nothing, in principle, that can be said to demonstrate the moral error of opposing rights for LGBTTQ students, and indeed, there is no principled reason for the opposed majority to listen where they do not feel inclined.

That Rawls' methodology elides this dilemma by presenting his controversial interpretation of our tradition as a brute social fact masks an important challenge to the normative force of his view. Pace Rawls, part of what it means to be a citizen within the public culture of a liberal democracy is to see oneself within the contested and conflicting normative conceptions of that tradition. Once we recognize that as citizens it is possible to answer *all* of the central normative questions of political philosophy attending to our tradition divergently, we can see that Rawls owes us a deeper account of why we should grant his controversial normative conceptions of citizens and society a privileged place in our lives, if we are to regard it as morally binding. Otherwise, Rawls' demands under the auspices of justice are indistinct from a mere *modus vivendi*—a practical political

assertion of one rationally unjustified view amidst many different but equally unjustified possible ethical traditions. Rawls, however, rejects both of these possibilities. Due to this fact, the Rawlsian approach, despite its attractive features, fails to afford a basis sufficient to articulate the moral distinction necessary to justify state action with respect to the rights of LGBTTQ students.

Importantly, any theory of justice that elides an appeal to an account of our basic or fundamental interests as persons faces the same dilemma as Rawls'. So, our critique of Rawls' case carries fatal implications for all non-comprehensive approaches to theorizing justice, which also aspire to be genuinely morally binding in cases where others may reject such normative demands. In light of this fact, if we seek to retain a genuinely morally binding theory of justice, we are pushed back toward a comprehensive approach. If the critique of the two neutral makers employed by comprehensive neutralists offered in Chapter 2 is sound, then such an approach must also be non-neutral or perfectionist, given the lack of a genuine alternative. This, of course, is not to suppose that a viable perfectionist theory exists.

Conclusion

Although a Rawlsian approach to theorizing the legal sexual identity rights of LGBTTQ students might appear appealing to defenders of such rights, I have argued that this confidence is unfounded. Rawls relies upon a particular normative interpretation of the liberal democratic tradition as his normative starting point. Nevertheless, Rawls' non-comprehensive neutralist approach leaves us without a clear explanation of why we should accept either the particular interpretation of the public culture of liberal democracy he relies upon or the principles he derives from that interpretation where they conflict with other strongly held commitments. If Rawls explains why we have a rationally identifiable interest in the normative priority of the principles of justice he advances, I have claimed that his account grows into a comprehensive political morality.

In this case, Rawls explains why such values should trump all others in cases of conflict across the many spheres of a human life. On this line of revision Rawls promotes a comprehensive ethical ideal and is forced into facing the problems with the first two candidate neutral-makers considered in the second section of this study.

Alternatively, if Rawls does not explain why we have a rationally identifiable ethical interest in the principles of justice sufficient to explain their priority over competing conceptions, his view collapses into a pragmatic view of politics as a mere *modus vivendi*. Problematically, Rawls rejects this view of justice as 'less hopeful' than his own. In either case, Rawls' view, as stated, fails as an account of political justice, which seeks to be non-comprehensive, morally binding, and neutral in justification. The problems implicit in Rawls' methodological approach to normative political philosophy, as noted, are endemic to any non-comprehensive approach to developing such a theory. So, while Rawls remains the most influential proponent of this methodological approach, the difficulties he faces are shared by all who follow this method of theorizing justice. Given this dilemma and the resources on offer in the literature, if we are to seek a genuinely morally binding theory of justice to assess the rights of LGBTTQ students, then we are forced to consider a perfectionist approach to justifying such ideals. If no perfectionist theory is viable, we are forced to accept a form of political pragmatism.

Conclusion

Toward a Non-Neutral Account of Political Morality

Perfectionism or Pragmatism?

In this study, I have argued that given the resources on offer, a justificatory neutralist approach to theorizing the moral rights of LGBTTQ students is inadequate. Comprehensive neutralists, such as Will Kymlicka and Ronald Dworkin fail to individuate their views from forms of the perfectionism that they reject. Non-comprehensive neutralists, such as John Rawls, by contrast, fail to establish the normative priority of the principles of justice that they advance. As a result, non-comprehensive neutralist views are forced to grow either into a comprehensive theory of political morality or collapse into a pragmatic *modus vivendi* wherein might makes right. In the first case, non-comprehensive neutralists must confront the difficulties that are fatal to comprehensive neutralist views of justice. As a result, this line of revision ultimately abandons justificatory neutrality, in favour of a form of perfectionism—a comprehensive non-neutral theory of justice. In the second case, non-comprehensive neutralists abandon the distinction between their view and morally skeptical pragmatic theories of justice—non-comprehensive, non-neutral theories—that see the terms of political morality as the product of a mere *modus vivendi* between competing worldviews. On this latter view, no moral view of the good life enjoys greater comprehensive justification than any other, though any among a wide array of possible views, might gain popularity and survive within political practice.

If the arguments presented within this study are sound, given the resources on offer, these two non-neutralist approaches remain the viable options by which to theorize the legal sexual identity rights of LGBTTQ students. Both types of view, however, face well-established criticisms within the literature. Perfectionist views, for example, are notoriously forced to grapple with the

problem of anti-egalitarian elitism that many take to be inherent within the approach. As Rawls and others argue, for any end that the state chooses to promote, some people will be better positioned to realize that end within their lives than others.[144] On a perfectionist theory of justice, then, some think that it follows that those who are poorly positioned to realize excellence might be used as mere means to realize the excellence of those better positioned.[145] In this case, we seem to commit, at the very least, to potentially offensive anti-egalitarian practices and, at worst, to the beginning of a justification for natural slavery. Although perfectionists historically have appealed to a diversity of sources to parry this worry, not all are convinced that these solutions are successful.[146] A more detailed examination and defense of this position, therefore, is required before we conclude in favour of such an approach. Pragmatic theories of justice, like Richard Rorty's, by contrast, appear to give up the genuinely moral dimension of justice altogether.[147] On this latter view, nothing distinguishes a demand of political morality from non-rational special pleading on behalf of any actual or hypothetical political community of individuals. Where there are no rational means available to discern between the plurality of possible moral views, morality reduces to a matter of individual preference. To the extent that we have any sense of binding moral obligation, we may resist this line of revision.

Given the criticisms within the literature of both perfectionist and pragmatic theories of political justice, it would be too fast to conclude that either of these approaches succeeds where justificatory neutrality fails. If, however, a perfectionist view with satisfactory solutions to the documented problems attending to that approach were identified, the foregoing would appear to provide reasons in favour of such a view over justificatory neutralist alternatives. A perhaps

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144 Rawls, *ATJ*, 290.
145 Rawls, *ATJ*, 290.
146 Steven Wall, "Perfectionism in Moral and Political Philosophy." *Stanford Encyclopedia of Philosophy*. Winter 2012. http://plato.stanford.edu/archives/win2012/entries/perfectionism-moral/ (accessed October 12, 2013); Lecce, Steven. "Should Egalitarians Be Perfectionists?" *Politics* 25, no. 3 (2005): 127-134.
147 Richard Rorty, "Postmodernist Bourgeois Liberalism," *The Journal of Philosophy* 83, no. 10 (1983): 583-589.

welcome implication of the possibility of a viable perfectionist view of political morality may be the potential to justify robust gay-positive schools that reach beyond the conditions of mere grudging tolerance for LGBTTQ students and their allies. Given the sense expressed by LGBTTQ students in Short's study that a lack of cultural safety is among the most important challenges that they face, a sound perfectionist account of political morality may thus afford a significant practical advantage. By affording the resources to discriminate between morally repugnant and morally appropriate demands of cultural safety, securing the latter over the former in cases of conflict, a sound perfectionist account of political morality may justify the kind of culturally safe spaces LGBTTQ students deserve.

Of course allowing the state to appeal to theories of human flourishing in justifying its action also opens the unwelcome possibility that LGBTTQ practices might be revealed as immoral on the best theory of the human good life, as, for example, John Finnis claims.[148] Despite the possibility of objections such as Finnis' it remains unclear whether the opponents of legal sexual identity rights for LGBTTQ students are in fact capable of defending the ideals that they take to justify a truly moral life. Finnis' view, at the very least, has been strongly contested. By contrast, at least some of the most plausible perfectionist theories of political morality, particularly those grounded in the value of autonomy, affirm the moral permissibility of homosexuality.[149] Although much rides on these arguments, we should not be immediately deterred by this fact. Much also rides on the arguments for deontological theories of political rights and duties that attempt to remain silent regarding the good life, but nevertheless establish the priority of justice. A critical assessment of competing perfectionist views, however, extends beyond the scope of this study.

For now, I have argued that a hopeful first step toward morally assessing the rights of LGBTTQ students and their allies is to abandon the justificatory neutralist approaches on offer. If this conclusion is sound, we have identified one necessary condition of a sound theory of political

[148] Finnis, "LMS," 31-43.
[149] Ball, "MFD," 1871-1943.

morality: that such a theory does not assert justificatory neutrality, at least founded on the basis of the resources we have considered. This condition, however, is far from sufficient for a sound theory of political morality. In the absence of a sound theory, for better or for worse, we are unable to decide, at present, whether or not the state has a moral duty to extend the legal sexual identity rights proposed by many LGBTTQ students and their allies. Whatever dismay this lack of clarity might cause, it is compounded by the possibility, noted in the introduction, that even a sound ideal theory may not be action guiding on the specific choice posed in the case of LGBTTQ student rights. While I suspect an action guiding theory relevant to the case of such student rights can be constructed, proof of this suspicion must wait until the development of a positive ideal theory.

Despite these practical limitations, the arguments contained in this study, if sound, entail a significant rethinking of a central tenet of liberal society's self image as it is often reproduced intergenerationally through schools. Although it is common place to suppose that liberal conceptions of justice are both morally binding and neutral regarding competing controversial conceptions of the good life, if sound, the arguments in this study deny that this belief is warranted. This study, thus delivers a significant blow to our confidence in the non-judgmental nature of our political institutions regarding questions of good and evil, a confidence often expressed by teachers in the classroom. Insofar as we take our political institutions, schools included, to aim to realize ends of justice rather than comprehensive morality, we are revealed to be mistaken. In light of this challenge to one dominant narrative of our social life, a careful sorting between the remaining perfectionist and pragmatic options for grounding political practice therefore remains critically important. If we think, as we should, that teaching false beliefs as true is a vice within the project of education, giving careful attention to remaining paths of revision is absolutely central to forming sound curricula and teaching practices in light of this breach within one powerful stand of our social and political story.

The types of practices we permit or deny are permissible within school life, both at the level of policy and practice, are closely related to the metric upon which we discern the permissibility or impermissibility of such practices. If the norms of justice are governed only by what might survive in society pragmatically, the range of morally permissible educational practices, at least in principle, will be far wider than what we would rule out if we take some particular moral or ethical ideal to be the goal toward which education *ought* to strive in forming the character of citizens. In addition to these effects on schools and school life, how we sort between the remaining options within the dialectic will have a great deal to say about the *pedagogical* character of the state—as itself a kind of instrument of normative education and guidance—with respect to the lives and character of its citizens. As critical theorists are often keen to note, the dominant institutions of society, which include the state, the prevailing positive law, education systems, media, and economic bodies, play a formative role in reproducing or revising a given form of life and the civic character that form requires. If neither the state nor any other among these other institutions can be neutral regarding the formation of citizens' moral character when promoting justice, then moral education and character formation is also a function of these other normative institutions.

In recognizing the pedagogical role of the state and civil society play in forming the moral character of citizens, future research might fruitfully explore whether it is possible to invert the structure of normative priority largely supposed by this study. In this project we asked whether guiding educational practice by the ideals of a particular political doctrine—justificatory neutrality—was well founded. I argued that it was not, due to the incoherence of the political doctrine in question. Alternatively, we might consider whether ethical ideals intrinsic to the practice of education—of the lifelong search for the truth in community with others—might afford an ethos capable of guiding our politics. Given the ubiquity of educational practices across human civilizations, it is not absurd to hope than a common ethos appropriate to guiding a progressive

politics might be found in this domain. In the future search for a plausible positive account of political morality, this possibility, in my view, warrants careful exploration.

As we move toward the fulfillment of this broader project of developing a sound positive account of political morality, many interesting questions remain. For now, I have argued that the state cannot be neutral when justifying whether or not it has a moral duty provide the legal rights claimed by LGBTTQ students and their allies. If the state is to morally justify its action, given the resources on offer, I have claimed that it will do so by promoting some ideal of the good life or other over others. The next step in this project is to discern whether such a justification is possible and if so, on the basis of which ideals. This next step must wait for now. The urgency posed by the practical plight of students in schools hostile to their very existence, however, calls us to engage rigorously with these theoretical questions and to work toward a careful answer sooner rather than later. I suspect that the political life of schools can be better. With careful thought, hope remains that it will be.

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