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# Sovereignty across generations: The problem of divisive pluralism dismissed

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**Johan van der Walt**
University of Luxembourg, Luxembourg
University of Stellenbosch, South Africa

## Abstract

The Rawlsian conception of constituent power in Alessandro Ferrara's Sovereignty Across Generations is burdened by a deep contradiction that renders the central argument in the book highly questionable. On the one hand, Rawls is (correctly in my view) presented as the thinker that confronted contemporary political theory with the problem of divisive pluralism. On the other hand, Rawls is also presented (incorrectly in my view) as the thinker who then suddenly found a solution for this divisive pluralism in the 'common values' that all the members of these divisively pluralist societies share 'unproblematically'. The combination of these two moves leaves one with the sense that Rawls rather frivolously put up the problem of divisive pluralism like a strawman that he could shoot down again without much ado. This article proposes a different reading of Rawls that considers him a serious thinker who did not amuse himself and his readers with strawman-problems. For this reading of Rawls, guidance is drawn from Hans Kelsen, the very thinker whom Sovereignty Across Generations casually dismisses for failing to grasp or appreciate the 'common values' that pluralist societies share so 'unproblematically'.

## Keywords

Ferrara, Rawls, Kelsen, divisive pluralism, political liberalism

**Corresponding author:**
Johan van der Walt, Department of Law, University of Luxembourg, 4, rue Alphonse Weicker, 2721, Luxembourg.
Email: johan.vanderwalt@uni.lu

## I Introduction

I wish to begin this introduction by stressing that the points that I will be raising in this response to Ferrara will surely not be new to him. The points that I will be raising have already been raised in many friendly and collegial discussions between us in recent years. In the course of these discussions, I have come to know Ferrara as one of the finest scholars and colleagues that I have had the fortune to meet in the course of my career. I also trust our mutual admiration for Rawls' thought will sustain the collegial and friendly spirit of our scholarly exchanges for as long as we both walk the face of our ailing planet, notwithstanding the very different reasons that inform this mutual admiration. And I therefore also wish to stress that it is in the spirit of this collegiality and friendship – for which I also thank him dearly – that I offer the undoubtedly robust critique of his work that follows. I consider *Sovereignty across Generations* (*SAG*) a fine, informative, important and impressive book. I unfortunately also considered it deeply flawed in essential respects, as will become clear in what follows.

The central aim of *SAG* is to develop a political liberal or Rawlsian understanding of constituent power. The aim is not just to turn Rawls' sparse observations about constituent power in *Political Liberalism* into a fully-fledged Rawlsian conception of constituent power, but also to show that this conception of constituent power resolves all the paradoxes and predicaments from which theories of constituent power have thus far not been able to extract themselves.

Ferrara's is clearly a stunningly ambitious claim. It purports to finally resolve a puzzle that have been burdening the reflections of major political philosophers for centuries, starting with Rousseau and continuing with the other most notables – Sieyèz, Schmitt and Kelsen together with their more recent readers and interpreters – by showing how the one philosopher who actually paid scant attention to the puzzle, Rawls, actually solved it. This mission, if considered accomplished, would do Rawlsian political theory the service of extending it quite triumphantly to a field of inquiry where it is has largely been absent. This service, however, would come at a huge cost. It would come at the cost of reducing Rawls' theory of political liberalism to a rather frivolous posing and resolving of pseudo problems. More precisely: It comes at the cost of dismissing Rawls' key concern with the problem of irresolvably-divisive pluralism – the very concern that one may have wanted to consider his crucial and groundbreaking contribution to the political thought of our time – as a non-problem after all.

It is exactly with regard to this point that Ferrara's and my reading of Rawls take leave of one another. I refuse to consider Rawls a frivolous philosopher who concocted pseudo problems easily resolvable with readily available solutions. I insist to indeed count him as one of the truly pertinent political philosophers of our time, and I do so precisely because he pointed our attention to a problem that *cannot be resolved*, a problem, in other words, with which we simply have to deal because it will not go away. I further insist to count Rawls as one of the truly pertinent political philosophers of our time because of his profound search for ways in which we may deal or hope to deal with problems that we cannot wish away.

The problem that I have to face in this response to Ferrara's reading of Rawls is of course that he is a much more seasoned reader of Rawls than I am. It may well be that Ferrara's reading of Rawls is correct and that mine is wrong. If it would eventually become manifest that this is indeed the case, indeed the case that Ferrara's reading of Rawls is correct and mine wrong, it will be a disastrous turn for Rawlsian political and legal theory, for that will sound the death knell of Rawls' pertinence for the political theory of our time. Rawlsian thinkers – those who like me count him among the truly pertinent political philosophers of our time – may well hope that the weaker contender might win the day here, against the odds. I will do my best, and I will do so in three steps. I will first show how Ferrara dismisses the problem of divisive pluralism by setting it up as a straw man and forthwith shooting it down again (part II). I will then develop a reading of Rawls that will hopefully show convincingly that Rawls did not consider divisive pluralism a pseudo problem or a straw man that can be put up and shot down with little ado (part III). And I will end by showing how this different reading of Rawls may be developed into a truly pluralist concept of constituent power that is fundamentally different from the one Ferrara offers us in *Sovereignty across Generations* (Part IV).

## II Divisive pluralism dismissed

The text of *Political Liberalism* would appear to sustain two very different assessments of the status of divisive pluralism in Rawls' thinking. The one assessment could plausibly conclude that Rawls himself only raises the problem of divisive pluralism for purposes of showing rather quickly that it is not much of a problem after all. Of concern in this reading would be the way in which he appears to invoke the idea of an *overlapping consensus* regarding principles of *public reason* as a secure exit out of the divisive disagreements into which comprehensive theories of justice regularly descend in pluralist societies. This reading of Rawls can be fleshed out into a constitutional theory that duly shows how intractable disagreements regarding the moral acceptability of ordinary law can be resolved legitimately with recourse to constitutional law that every reasonable person concerned can and must endorse, provided this law and the judicial interpretations that apply it can be recognised as adequate embodiments of the principles of public reason and the overlapping consensus that sustains them.

The strawman problem raises its head as follows: What remains of the social fact of divisive pluralism and the intractable disagreements regarding the moral acceptability of coercive law that Rawls takes as his point of departure, if closer inspection speedily enough reveals readily available principles of public reason and constitutional law that all reasonable persons can endorse and must endorse if they are to be recognised as reasonable? In this reading of Rawls, the structural constellation of Rawls' argument appears to reduce his initial observation regarding deeply divisive pluralism and intractable moral disagreement in contemporary societies to the marginal problem of unreasonable disagreement, unreasonable disagreement that raises no legitimacy concerns and simply warrants being contained like a disease, as Rawls soberly put it.[1] In the final analysis, divisive pluralism does not strike one as the major problem that he announced it to be at the outset. It turns out to have been a strawman.

I wish to stress from the outset that this is only one of at least two plausible readings of Rawls' text. I will turn to the second reading in the second part of my argument (part III). In the rest of this first part, I would like to explain why I am worried that Ferrara's arguments in *SAG* appear to endorse this first reading without reserve. One of the telltale signs of this endorsement comes to the fore in his blithe dismissal of Hans Kelsen's contribution to the problem of constitutional legitimacy, of which a key passage warrants full quotation:

> From a Rawlsian perspective, the problem with Kelsen's paradigm of 'pure law' is the assumption that *all* law-making, including constitutional law- making, 'ultimately turns on compromise and not on truth', as though reference to truth as such, and not just to *controversial* or *contested* truths, were the problem. For Rawls, on the contrary, *shared* truth claims and *shared* normative claims are not only unproblematic, but they constitute the building blocks of public reason, the reason of democratic citizens. Truth-related deliberation poses no threat to democratic civility if and only if no party oversteps the boundaries of public reason, invoking or actually wielding legal coercion in order to back up and enforce *contested* truth claims.[2]

Omitted form this quote is a footnote referring the reader to my 2014 portrayal of Kelsen's position, a portrayal by which I am still happy to stand as duly accurate. The portrayal draws directly from Kelsen's express statements in *Vom Wesen und Wert der Demokratie* (first published 1929) regarding the irrelevance of moral truth claims in the political disputes of pluralist societies. It is important to mention this text here and to highlight its essential gesture. It is exactly because Kelsen accepts the fact of pluralism in modern societies as a pervasive phenomenon that cannot be wished away that he dismisses the relevance of truth claims in politics. If we cannot convince one another of our truth claims, thereby effectively terminating the problem of divisive pluralism, insists Kelsen, there is simply no point in insisting on them in the course of political disputation. It is important to be precise on this point. Kelsen does not object to the raising of truth claims for purposes of starting a serious conversation. He just insists that one should let go of them when it turns out they are not going to get one anywhere.

It is with regard to exactly this point that one can imagine that Kelsen would have responded with much puzzlement at Ferrara's adamant insistence on Rawls' endorsement of 'shared truth claims' and 'shared normative claims' that constitute the 'unproblematic … building blocks of public reason'. 'But Professor Ferrara', one can imagine him saying, 'was Rawls not the philosopher who made the divisive pluralism of modern societies the key point of departure of his theory of political pluralism?' 'Why would he have invoked this notion of divisive pluralism with regard to societies that can rely *unproblematically on shared truth and normative claims*?' 'Such societies surely do not at all strike me as divisively pluralist'. 'And surely', Kelsen – now also having caught a glimpse of another passage from SAG, fifteen pages further on – may well have continued, 'such a society cannot be "traversed by a deep rift."'

How would Ferrara respond? Considered strictly on the terms of the later passage mentioned, he could and should answer: 'Indeed not, Professor Kelsen, the "deep rift" that

I invoke there is discerned by some readers of Rawls that impute to him a Schmittian exclusion of some members of the community for reasons of "being unreasonable" or only "partly reasonable." It is not me who is imputing that "deep rift" to Rawls'. Should Ferrara indeed respond in this way, he would be confirming Kelsen's impression, as imagined here, that some readers of Rawls, Ferrara himself a telling case in point, simply cancel the divisive pluralism that prompted Rawls' theory of political liberalism in the first place. In other words, they continue to hold on to a theory and quite remarkably continue to consider its coherence intact, notwithstanding the fact that its initial contemplation was, according to them, inspired by something like an optical illusion.

The (first) passage quoted above is not a one-off deviation from the general idea on which the arguments in *SAG* are based. It is a due confirmation of the general argument that Ferrara meticulously builds on his 'pluralist' adaption of Plato's cave allegory early in the book, and which continues to be the guiding image until the end. Here is the first key statement of the idea:

> Imagine that the group of philosophers— destined to rule the cave— are heading back from the outside world for motivations not different from the ones found in the canonical version. They want to report what they have seen and reform life in the cave. Wouldn't they also perhaps want to stop for a while, on their way back, at the entrance of the cave to exchange impressions and check if they can agree on a common story that one of them, as their spokesperson, would relate? And if upon conversing at the entrance of the cave, standing sideways, the conversation dragged on without coming to a close, and they came to the realization that their dialogue would not be likely to result in a common report: wouldn't they agree to keep their report to the observations and conclusions blessed by full overlap and to make them the only basis for exercising legitimate authority in the cave?[3]

Ferrara's 'pluralist' adaptation of the cave allegory continues for many more lines, but the essence can already be found in the part quoted here. And the key phrase and assumption on which it all hangs is surely that 'wouldn't they agree' towards the end. And it is precisely with regard to this 'wouldn't they agree' that a cautious reader may well want to ask: Why would they agree? And if one would look for plausible reasons why they might agree, it surely can only be because they indeed have a 'full overlap' regarding all of their essential or important observations. It is this 'full overlap' regarding essential observations that render restant disagreements about what they have seen unimportant enough to discard. In other words, the vision of the group of philosophers remains essentially unitary and essentially singular, notwithstanding the plurality and severalty of the members of the group. One simply does not understand how Ferrara can consider their report, and the decisions (again made in full agreement!) based on it, 'pluralist affirming'.[4] There is no divisive pluralism anywhere in sight here. If this allegory offers an accurate portrayal of Rawls' concept of public reason, we will have to accept that pluralism was, for Rawls, nothing but a bad dream from which he woke up quite quickly. Or a strawman that he set up to shoot down without much ado.

There is another element of the allegory that our imagined Kelsen will not have failed to find highly questionable. Along with its fragrantly spurious claim to be

'plurality-confirming', it also puts forward the idea that the philosophers' deliberation and problem-free agreement about how to present their report to the cave dwellers transforms that report into a product of deliberative or public reason that has nothing to do with what they saw outside the cave. Here are the key lines now of concern:

> Could then the fugitive-philosophers describe that pluralism-affirming argument as something that they *found* in the outside world, as objectively as they found the light of the sun? 'Hardly so', a contemporary Glaucon again would have again to admit. Evidently the philosophers, during their conversation, *standing sideways at the entrance of the cave*, ground their pro-pluralism stance neither on *doxa* nor on *episteme*. That stance simply is *the most reasonable thing for them* to do. At that moment, they have given rise to *deliberative* or *public reason* and to its standard of reasonability.[5]

Ferrara's 'contemporary Glaucon' and the 'contemporary Socrates' that prods him on in this passage both seem to have a rather peculiar understanding of deliberation or deliberative reason. How can any deliberation about the *presentation* of what one has observed be considered the definitive element of that presentation that renders the actual observation itself irrelevant? If this were an apt understanding of deliberation, deliberative reason may as well forego the trouble of careful observation. It could just make things up as it goes, provided the *presentation* of these made-up things is the outcome of some or other deliberative process that leads to agreement. Quite a bit of this would indeed seem to go around in contemporary politics, but why would Ferrara entertain such a questionable conception of deliberative reason? The answer must lie in his endeavour to present public reason as 'political and not metaphysical', as Rawls put the matter in a seminal essay.[6] The key endeavour in *SAG* is indeed to present constituent power as a vehicle of Rawlsian public reason that no longer draws its norms from celestial observation, but does so, instead, on the basis of a careful assessment of its own history, so as to determine a course of action that is 'most reasonable for us'.[7]

It should be noted at the outset that Rawls' initial assumption that a conception of justice rooted in a historical tradition (as opposed to eternal principles of reason or natural law) would render it 'political' and 'not metaphysical' was already completely unwarranted. To the extent that *SAG* follows him on this point, it simply repeats that mistaken assumption instead of questioning it. It is important to grasp the spuriousness of Rawls' initial assumption well because it casts considerable light on why it might tempt one to put forward an observation-free and episteme-free conception of public reason. The point, already duly and lucidly made by Kelsen,[8] is this: It makes no difference whether one considers the foundation of law written in the stars or written in one's own history. The latter is bound to be as metaphysical as the former. Why? Well, because both foundations would require a cognitive appraisal of an existing state of affairs; they would both turn on an *episteme*. The temporal character of the two foundations may well differ. The former may be more enduring, the latter more fleeting. And it may well be the greater fleetingness of the latter that might tempt one to suggest there is no cognitive appraisal and no episteme at work in it, as if cognitive appraisals are only applicable to longstanding states of affairs or enduring states of being, the kind of things that ancient philosophers considered written

in the stars. One should not succumb to this (already in itself a very telling metaphysical) temptation. In the case of both foundations, the celestial and the more or less fleetingly historical and terrestrial, will the assessment of the foundational source turn on an answer to the question 'what is the case?'; 'what is the case as it stands *now*?'

Recast in terms of Rawls' and Ferrara's 'non-metaphysical' proposals, the question will look like this: '*What is* the historical tradition that founds our concept of justice and public reason?'; '*What is* the underlying and prevailing constituent power that ultimately allows us to make coherent sense of our constitution and its core values *across generations*, notwithstanding the evidently varying (often perturbingly so) interpretations of those values by different teams of judges and different legislators in the course of time?" Rawls' and Ferrara's 'non-metaphysical' foundations must in the final analysis lead to the questions 'who are we, after all?', 'what is the script that informs our irrecusable "here we stand?"', as Ferrara puts it.[9] And it is exactly here that the problem arises to which Kelsen already alerted us long ago: These questions can simply not be answered positively under pluralists conditions. Under conditions of the truly divisive pluralism that not only Kelsen but also Rawls and Ferrara affirm (at least initially, in the case of the latter two) as the very point of departure of their theoretical endeavours, any positive answer to them is bound to be perceived as a deeply *contentious proposal* regarding a state of affairs, and not by any standard a *cognitive appraisal* of the 'what is?' question at stake. Any attempt to assert cognitive appraisal under these circumstances would need to claim metaphysical access to hidden truths – be it about the stars, be it about our history, be it written in our hearts – that some see, and others don't.

Nothing short of a veritable return to religiously and culturally united communities is going to restore the cognitive appraisals and the epistemes of which the rise of pluralist societies deprived us. Does this mean that Ferrara's contemporary Socrates and Glaucon win the day after all? Are we simply doomed to embark on the peculiar practice of episteme-free and observation-free public reason that they have in mind? Were one to accept this to be the case, one would do so with a real risk of abandoning the very idea and concept of a normatively bound practice of public reason. One had much better look for effective substitutes that can be employed as effective placeholders for the cognitive appraisals and epistemes that got lost in the process of divisive pluralisation that we usually call 'modernity'. One had better look for founding concepts and norms that can *effectively* be employed *as if* they were accurate appraisals of one's historical tradition, *as if* they stem from epistemically sound observations regarding a constituent power that authors one's constitutional law coherently across generations, notwithstanding the frequently bothering signs that it actually doesn't. No doubt, when the bothering signs that it actually doesn't would become too frequent and too pervasive, the *as if* that conditions this constituent power will soon enough lose its *effectiveness*. What ensues then will be referred to as a revolutionary termination of constitutional order. In the interim chaos, destruction, bloodshed and horror that all too often characterise such terminations, the expression '*as if*' will, remarkably, no longer be in need of employment. One would finally know what reality looks like when the *as ifs* – the fictional norms – that kept it at bay, collapse.[10] And one would once again learn the bitter lesson of how important it is to sustain and cultivate the *effectiveness* of the *as ifs* that allow one to live a relatively civilised life.

These two terms, *as if* (*als ob*) and effectiveness (*Wirksamkeit*), are of course the key operative terms in the neo-Kantian conception of law that Kelsen bequeathed to the world. Had these two terms not fallen so disastrously into disuse during the *absolute realities* that dawned in Europe in the beginning of the twentieth century, his own biography would surely have ended very differently from the way it did. He would not have been cremated in a small town outside Berkeley, California. His ashes would not have been dispersed nearby in the Pacific Ocean. One *must* imagine that he would have come to rest much closer to the Vienna where he once was a drafter of pluralism-appropriate proportional electoral laws, co-drafter of the Austrian Constitution, member of its first Constitutional Court, and on his way to becoming one of the most profound legal theorists ever to have walked the face of this planet. *SAG* dismisses and discards the contribution that this man made to the very questions that it poses much too easily and much too flippantly.

It is, however, not only Kelsen's credentials that are at stake here. The reputation of Rawls, whom I will likewise count among the most profound political philosophers to have walked the face of this planet, is also deeply in question here. If one does not want to reduce his legacy to the frivolous raising of a pseudo problem, one had better embark on a different reading of his work than the one expounded in *SAG*. This is what I will endeavour to do now. In doing so, I will also endeavour to show the profound insight that Rawls contributes to the problem of sustaining the *effectiveness* of the *as ifs* that allow us to live relatively civilised lives for as long as they do. It will turn out that the distance between Rawls and Kelsen is not at all as vast as *SAG* suggests.

## III A different reading of Rawls

The key move in the different reading of Rawls that I wish to offer here concerns the status of the seminal notion of 'overlapping consensus' in his work. If one's business is to make sure that Rawls does not go down in history as the raiser of a pseudo problem, one would have to insist that he never considered 'overlapping consensus' an answer to the problem of divisive pluralism, an answer that 'unproblematically' resolves and terminates the real and persisting problem of pluralism. One would have to show that he considered it a critically necessary *assumption* that *might* allow one to deal with a problem that one cannot resolve. For the purpose of showing this, one would have to insist that Rawls never considered 'overlapping consensus' an observable fact amenable to cognitive appraisal. As a critically necessary assumption, but an assumption nevertheless (a 'presupposition', Kelsen would have called it), one would have to argue that Rawls never doubted the sheer fictionality of this key notion in his work. And once one has shown that Rawls never doubted the fictional *as if* status of the overlapping consensus that he invoked, one could and would have to show that his whole endeavour in *Political Liberalism* and later texts was to explore and articulate the conditions under which the *effectiveness* of this *as if* can be sustained.

Is this Kelsenian reading of Rawls possible and plausible? I am not even remotely in a position to confirm that it is. Confirmation would have to come from the side of readers who know his work much better than I do.[11] The best that I can do in this regard is to point out three elements of the argument in *Political Liberalism* that suggest this reading may

not be too far-fetched. The first concerns the very lucid regard for the potential shortfalls of public reason articulated in a key passage in *Political Liberalism*. The second and third concern the emphasis throughout the work on two other key concepts, the duty of civility and the appreciation of burdens of judgement. I will begin with the key passage on the frequent failure of public reason and then move on to show that it is exactly because of this regard for the imperfection of public reason that the call for civility and an appreciation for burdens of judgement become critically necessary – as opposed to totally superfluous – elements of his argument.

Here is the key passage:

> One difficulty is that public reason often allows more than one reasonable answer to any particular question. This is because there are many political values and many ways they can be characterized. Suppose, then, the different combinations of values, or the same values weighted differently, tend to predominate in a particular fundamental case. Everyone appeals to political values but agreement is lacking and more than marginal differences persist. Should this happen, as it often does, some may say that public reason fails to resolve the questions, in which case citizens may legitimately invoke principles appealing to nonpolitical values to resolve it in a way they find satisfactory. Not everyone would introduce the same nonpolitical values but at least all would have an answer suitable to them. The ideal of public reason urges us not to do this in cases of constitutional essentials and matters of basic justice. Close agreement is rarely achieved and abandoning public reason whenever disagreement occurs in balancing values is in effect to abandon it all together.[12]

Rawls cannot be clearer on the point. Public reason often cannot resolve the differences of those who appeal to public reason. These differences, he adds, are not marginal ones. They are 'more than marginal ones'. They are substantial enough for some to invoke the failure of public reason. One must note well that Rawls is not telling those who would invoke its failure that they are wrong to do so. He does something else. He 'urges' them not to abandon public reason because of its failure to resolve disagreement. More precisely: The ideal of public reason itself, he says, 'urges us' not to give up on it. In other words, Rawls 'urges us' to stick to it, *as if* it has not failed, *as if* it is still intact. Under circumstances of intractable disagreement, intractable disagreement *in the very name of public reason*, some will say public reason has failed. For them, the 'public reason' that prevails no longer qualifies as public reason. Rawls nevertheless urges them to continue to consider it public reason. He asks them to enter an 'as if' mode of thinking that can hardly be distinguished from the 'as if' mode that holds Kelsen's *Grundnorm* in place. In one of the last statements about the epistemological status of the pure theory of law, Kelsen observed that it is not the only way that one can look at the law. One can also look at the law in terms of brutal power relations, he said.[13] But by doing so, he clearly suggested, one gives up on or abandons the idea of law. It is not far-fetched to suggest that his pure theory of law urges us not to give up on the idea of law, just because it can easily and plausibly come to be perceived as an outcome of power relations, as it frequently does for those whose legal arguments do not get heard.

It is quite a different portrait of public reason that emerges here when one compares it with the public reason that Ferrara describes in his response to Kelsen (in the very first quote above). Public reason built with the 'unproblematic building blocks' of '*shared* truth claims and *shared* normative claims' cannot be further removed from the public reason Rawls has in mind when he calls on us not to abandon public reason when it fails to resolve our disagreements. Ferrara's description of public reason culminates in a denial of the divisive pluralism that essentially motivated Rawls' concept of public reason. Rawls' portrayal, at least in this passage, confirms his incisive regard for the irreducible divisiveness of social and political pluralism. It also confirms his regard for the interminably problematic status of public reason under conditions of divisive pluralism. He understands well that public reason is not a reality, but an easily abandonable, precarious ideal.

That is why he *urges* us not to abandon it. It is important to pause and reflect on the performative status of this verb *urge.* Of concern is not a reasoned argument. Rawls can no longer offer us reasoned grounds for holding on to public reason under circumstances where public reason has just proved unable to provide such grounds. To the contrary, under the circumstances portrayed, *reasoned grounds* may very well sound a call for abandoning public reason, given the real perception that it has just betrayed reasonable expectations. That is why Rawls must take recourse to a different mode of performativity here. Hence, his recourse to the verb *urge*. It would be silly to look up the word 'urge' in the Index of *Political Liberalism.* One would of course not find it there (I did check, just in case). One can nevertheless argue that it plays a crucial role in the book, because it goes to the heart of two key thoughts that Rawls puts forward in it, both of which are central to his endeavour to come to terms with the divisiveness of pluralism that the reasoning mode of public reason cannot solve or resolve. The key thoughts of concern are 'the duty of civility' and 'an appreciation of burdens of judgement'." The book *Political Liberalism*, might one conclude then, *urges* its readers to grasp and embrace the crucial role that an elementary civility plays in the sustenance of civilised coexistence under circumstances of divisive pluralism. The heart of this elementary civility, its author also urges one to grasp and embrace, consists in a forgiving regard for burdens of judgement, a forgiving regard for the differences that precipitate intractable disagreements between members of pluralist societies.

If the ideas of overlapping consensus and unproblematically shared values and truth claims were the principal thoughts and key operative concepts to be extracted from the book *Political Liberalism*, the book would sadly be accusable of setting up and shooting down the strawman of divisive pluralism. Were it so, were overlapping consensus and shared values and truth claims indeed the key operative concepts in the book, its extensive invocations of the call to civility and appreciation of burdens of judgement would also make no sense. The idea of prevailing consensus and 'unproblematically' shared truth claims would render them completely superfluous. The fact that the book takes such conspicuous recourse to these two ideas would suggest that the boot is on the other foot. The call to civility and appreciation of burdens of judgement would seem to be the key operative terms in the book, with the opposite effect. They do not render the ideas of overlapping consensus and shared truths and values superfluous or meaningless. To the contrary, they sustain them. They have to do so because unlike Ferrara's contemporary

Socrates and Glaucon appear to believe, no society can begin a civilised discussion without serious appeals to cognitive appraisals of things we understand and values we hold in the same way.

To be sure, the duty of civility and appreciation for burdens of judgement no longer allow one to consider overlapping consensus and shared truths and values 'unproblematic'. The very need for the duty of civility and appreciation of burdens of judgement testifies to the deeply problematic and utterly precarious nature of all appeals to consensus and shared values and truths in pluralist societies. And it is this testimony that ultimately demands that the cognitive status of appeals to consensus and shared values and truths be lowered to nothing more than working assumptions without which public reason cannot get started.

## IV Political liberal constituent power and sovereignty

On the reading of Rawls offered above, he no longer stands accusable of having frivolously set up and shot down the strawman of divisive pluralism. He comes across as a profound and serious thinker who considered it an irresolvable problem, one who seriously and profoundly searched for ways in which we *might* deal with it in a civilised way. And this brings me to the importance of this reading of Rawls for the Rawlsian understanding of constituent power and sovereignty that Ferrara develops in *SAG*. *Dealing with divisive pluralism in a civilised way* may well be the heart of the political liberal concepts of constituent power and political liberal sovereignty that Rawls may have contemplated. Had he worked them out, these concepts may well have turned out quite differently from the conception of political liberal constituent power and sovereignty that Ferrara puts forward in SAG. Constituent power of which the essential constituent force pivots on an active appreciation of burdens of judgement and a committed compliance with the duty of civility – the essential modes of *dealing* with deep division, in other words – would most likely not have been construed by Rawls as a unitary power or force of a singular people or nation as it is portrayed in *SAG* in a quite Schmittian and Weimarian fashion (Schmitt being invoked here solely for his emphasis on the unity – *Einheit* – of constituent power and sovereignty). Rawls may well have considered portraying it in Viennese fashion[14] as nothing but the culminating effect of an unfathomable panoply of constituent forces that *somehow* contribute to the sustenance of a functional system of government and statehood in an *enduringly contingent* and always quite surprising way.[15] The fact that unitary systems of functional government manage to prevail under conditions of deeply divisive pluralism should always strike one as quite a surprise.

I have described this truly pluralist conception of constituent power in terms of an unfathomable panoply of constituent forces more extensively elsewhere and cannot do so here.[16] Suffice it to briefly describe the disconcerting absurdity that results from the insistence to stick to a conception of unitary and singular trans-generational constituent power under conditions of deeply divisive political and social pluralism with reference to one of the key arguments in *SAG*. Ferrara seeks to persuade his readers to understand the history of constitutional case law that straddles completely irreconcilable judicial decisions such as the ones in *Plessy v Ferguson* and *Brown v Board of Education* (to which we can now of course also add *Roe v Wade* and *Dobbs v Jackson Women's Health*

*Organisation*) as a manifestation *across generations* of one and the same constituent power.[17]

Of concern here, for Ferrara, is the same constituent power exercised by the same judicial actor interpreting the same constitutional essentials quite correctly for each of the two generations of Americans involved in the cases of *Plessy* and *Brown*, bearing in mind the very different 'cognitive assumptions' that informed the mindsets of each of them, living as they did in very different historical times. To consider these decisions as deeply and fragrantly irreconcilable, argues Ferrara in response to a very due query from the side of Steve Winter,[18] is to ignore the very different cognitive appraisals that informed the thinking of these two generations. Historically different cognitive appraisals thus become the joker card that allows one to switch play from the suit of spades to the suit of hearts without raising a question. The remarkable thing about this joker card is not the card itself, but is its underlying assumption that the *Plessy* generation exclusively played spades and the *Brown* generation exclusively played hearts. There was no deep political and social division at the time of *Plessy*, nor was there at the time of *Brown*, suggests Ferrara's argument. Just imagine Homer Plessy and all the black people of his generation being told by the court, 'we are very sorry if you thought differently, but your cognitive appraisal of the situation need not inform our interpretation of the constitution'. 'There is only one valid set of cognitive appraisals in any society at a time and it this case yours simply are not part of it'.

The same of course applies to all progressive liberals irrespective of race who happened to believe, *already at the time*, that *Plessy* was an abominable and deeply insulting decision. Progressive liberals would indeed remain irked by the fact that the court in *Brown*, because of constraining courtroom politics, could not just go ahead and say *Plessy* was wrongly decided, full stop. For these liberals, *Plessy* was not a matter of having been right at the time but outdated now.[19] Ferrara's conception of a unitary constituent power informed by the developing and changing but always essentially singular and homogenous set of cognitive appraisals lured him into a rather dismaying appraisal of the decision in *Plessy*. Would Rawls, perhaps convinced by the idea of an evolving overlapping consensus that essentially remain intact across generations, the generation of *Plessy* included, have assessed *Plessy* similarly? It would be hard to believe that.

Perhaps we really need to learn to read Rawls differently. And we really need to begin to think of constituent power differently. One possible starting point for this different reading of Rawls and different conception of constituent power would be to locate a decisive chunk of the unfathomable multi-nodal constituent power or powers that sustained the American legal system in the wake of *Plessy* in the incredibly and perhaps nothing less than incomprehensibly forgiving compliance with the duty of civility that constrained enough Americans of *Plessy's* 'generation' from returning, quite understandably and justifiably, to the civil war from which they had just emerged.

## ORCID iD

Johan van der Walt https://orcid.org/0000-0001-6747-8752

## Notes

1. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 64, n. 19.
2. Alessandro Ferrara, *Sovereignty across Generations* (Oxford: Oxford University Press, 2023), 101.
3. Ferrara, *Sovereignty across Generations*, 30.
4. Ibid, 31.
5. Ibid, 31.
6. John Rawls, 'Justice as Fairness: Political not Metaphysical', *Philosophy & Public Affairs*, 14, no 3, (1985): 223–251.
7. It is a recurrent theme in the book, but see especially Ferrara, *Sovereignty across Generations*, 241.
8. See Kelsen, *Reine Rechtslehre* (Tübingen: Mohr Siebeck/Vienna: Österreich Verlag, 2017), 408.
9. Ferrara, *Sovereignty across Generations*, 241.
10. This thought is informed and guided by Hans Lindahl's most profound reading (with reference to Blumenberg and Lefort) of modern democracy as an endeavour to retreat from the absolutism of reality. See Hans Lindahl, 'Democracy and the Symbolic Constitution of Society' in *Ratio Uris* 11, no. 1, (1998): 12–27.
11. One leading Rawls scholar has nevertheless given considerable encouragement to this reading of Rawls. See Frank Michelman, 'Civility to Graciousness: Van der Walt and Rawls,' *Ethics & Politics*, 23, no. 2, (2021): 495–508 and Michelman, *Constitutional Essentials*, (New York: Oxford University Press, 2022), 89–101.
12. Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 240–241.
13. See Thomas Olechowski, Hans Kelsen. *Biographie eines Rechtswissenschaftlers* (Tübingen: Mohr Siebeck, 2021), 913. The statement was made in a recorded conversation with Heinz Keinert in 1968. The idea was nevertheless already articulated in a 1927 observation about the 'Gorgon head of power that becomes visible when the law's veneer of normativity gets scratched'. See Hans Kelsen 'Ausspruch über Erich Kaufmann, "Die Gleicheit vor diem Gesetz im Sinne des Art. 109 der Reichsverfassung"', *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer III*, 1927, 53–55.
14. For the role that this 'Viennese' background played in Kelsen's conception of the pure theory of law, see his autobiographical note regarding the religious and cultural pluralism of the Austrian state (before and up to 1920, of course) that convinced him to regard the state as a purely legal order that is not rooted in the social-psychological or socio-biological reality of any people, in Kelsen, *Autobiographie (1947)* in Kelsen, *Werke I* (Tübingen: Mohr Siebeck, 2007), 59–60.
15. I borrow this term from Hans Lindahl who employs it to stress the *double enduring* in what is crucially at stake here, namely, the exigency of having to endure a contingency that endures. See Lindahl 'Enduring Contingency: Remarks on the Precariousness of Liberal Democratic Law' *Netherlands Journal of Legal Philosophy*, 52, no. 1, (2023): 46–55. One can also refer in this regard to a 'bearing' with contingency, to bring into play the apt expression that Frank Michelman employs to describe a Stoic civility that copes with legal arrangements that for the moment – and one never knows for how long – do not accord with one's sense of proper or good law. See Michelman *Constitutional Essentials*, 100.

16. Van der Walt, 'Reply to my Critics', *Netherlands Journal of Legal Philosophy*, 52, no. 1, (2023):150–153.
17. Ferrara, *Sovereignty across Generations*, 225–229.
18. Ferrara, *Sovereignty across Generations*, 227, fn. 227.
19. For an incisive discussion of the reticent way in which the Warren Court articulated its decision in *Brown*, see Morton Horwitz, 'The Supreme Court 1992 Term – Foreword: The constitution of Change. Legal Fundamentality without Legal Fundamentalism', *Harvard Law Review*, 107, no. 1, (1993): 30–117.

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