

On the Justification of Basic Rights^{*}

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1 Introduction

In recent years, there has been much debate about the justification of basic moral rights. These rights set standards that any socio-legal system must honour in order to count as morally acceptable. The challenge, for those who find the idea of basic rights compelling, is to offer an account of where these rights come from. More precisely stated, the challenge is to explain *by virtue of what* members of a socio-legal system possess these rights.

Answers abound in the literature. Some authors point to human beings' inherent dignity, others to their capacity for normative agency, others still to fundamental human interests.¹ Rainer Forst's discourse-theoretical approach to basic rights offers a welcome alternative to these familiar justifications. In Forst's view, basic rights are grounded in a prior, and more abstract, right to justification that all human beings hold vis-à-vis one another.

In Forst's words:

[Basic rights], even though they aim at a legal, political and social status and can only be justifiably fully determined and realized in a democratic regime, have a "ground" that is both moral and, if you will, transcendental: the autonomy of persons with a right to justification as a normative authority equal to all others. Basic rights are *constructed* on that basis, where the agents of construction are autonomous persons, and the principles of construction are principles of justification among equals.²

Forst contends that this approach to the justification of basic rights is superior to those already available in the literature, including justifications associated with the interest and will theories of rights.³ Forst's discussion is very rich and complex, and his proposed discourse-theoretical approach is certainly appealing. In

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1 E.g., John Tasioulas, 'Human Dignity and the Foundations of Human Rights,' in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press/British Academy, 2013), 291-312; James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008); Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), ch. 7.

2 Rainer Forst, 'The Justification of Basic Rights. A discourse-theoretical approach', *Netherlands Journal of Legal Philosophy* 45(3), 10.

3 Forst also discusses Habermas's own version of a discourse-theoretical justification of basic rights. Here, I only focus on interest and will theories.

what follows, however, I raise some doubts about its alleged superiority to rival views. In particular, I argue that, once we clarify the success criteria for a justification of basic rights, the advantages of Forst's discourse-theoretical approach are put into question. Perhaps surprisingly, this approach is vulnerable to some of the criticisms that Forst believes undermine interest- and autonomy-based views – or so it seems to me.

I proceed as follows. In Section 2, I define terminology and set out two desiderata for a plausible justification of basic rights. In Section 3, I explain why, in Forst's view, attempts to ground basic rights in *non-procedural considerations*, such as (a) fundamental human interests and (b) humans' capacity for autonomy, fail. I then consider why Forst's *procedural*, discourse-theoretical approach may be thought to overcome the difficulties affecting rival views. In Section 4, I suggest that, instead of overcoming those difficulties, Forst's approach appears to replicate them. I then conclude.

2 What makes for a good justification of basic rights?

Our discussion focuses on the justification of basic rights. In order to be able to evaluate whether any such justification is successful we need: (1) a clear definition of our 'justificandum' – i.e., basic rights – and, (2) a clear account of the success conditions for a justification of those rights.

Regarding (1), let us first focus on the notion of 'a right.' I take a right to be a Hohfeldian claim right: a duty that is *owed* to another individual.⁴ For an agent A to have a right to X against another agent B is for A to have the standing, or authority, to demand X from B.⁵ The notion of a right, so understood, combines a duty (a moral 'ought') with a structure of interpersonal accountability for the duty's performance.⁶

Which rights are *basic*? Basic rights are those that any social system – e.g., any state – must honour to be minimally morally acceptable. They include rights to bodily integrity, freedom from torture, of religion, movement, association, rights to property and political participation as well as, though more controversially, rights to basic goods and services. As Forst makes clear in the final part of his discussion, these are rights he himself regards as 'basic.'

Let me now turn to (2). What makes for a successful justification of basic rights? At a minimum, such a justification would have to satisfy two desiderata: (a) fit

4 Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning,' *The Yale Law Journal* 26, no. 8 (1917): 710-70.

5 See also Joel Feinberg, 'The Nature and Value of Rights,' *The Journal of Value Inquiry* 4, no. 4 (1970): 243-60.

6 In the article I am discussing, Forst does not provide a technical definition of what a right is. Though his repeated references to individuals' 'authority' to demand justifications from each other suggest that the Hohfeldian idea of a claim right is in fact what he has in mind.

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with evidence and (b) explanatory power.⁷ To be sure, several more desiderata could be added, but this pair strikes me as particularly significant to any justificatory endeavour, and will suffice for the purposes of my argument.

Fit with evidence: A successful justification of basic rights must *fit* our most strongly held convictions about basic rights.

A justification for basic rights may fail to meet this desideratum in a number of ways. First, failures of fit might be due to a given justification being *inconsistent* with the evidence. A justification of basic rights that denied the existence of basic rights against torture would exemplify this type of failure. Second, failures of fit may manifest themselves in the form of *under-generation* of moral phenomena compared to the evidence. A justification of basic rights that did not vindicate – i.e., that remained silent on – rights to free movement and political participation would exemplify a failure of this kind. Third, and finally, failures of fit may take the form of *over-generation* of moral phenomena, as against the evidence. In the case of basic rights, this would occur, for instance, if our justification delivered the conclusion that the right to be ‘greeted politely’ is in fact a basic one.

To give a further example of how the criterion of fit functions, consider the strong moral conviction that ‘it is wrong to mistreat non-human animals.’ This is the piece of evidence we wish to explain/account for. Now let us assume that the following principle (P) is proposed to explain the relevant evidence: ‘It is wrong to damage others’ property.’ There are, of course, many problems with this principle as an explanation of the wrongness of mistreating non-human animals. One such problem is precisely a matter of fit. Our judgement tells us that it is wrong to mistreat *all* non-human animals. Yet the principle proposed only fits part of the evidence: it allows us to vindicate the judgement that it is wrong to mistreat non-human animals *that belong* to other human beings. The principle thus under-generates judgements of wrongdoing compared to our (intuitive) evidence.

Explanatory power: A successful justification of basic rights must *account for and illuminate* our most strongly held convictions about basic rights.

Not all principles or explanations that fit the evidence are equal. Some are clearly more powerful and illuminating than others. To see this, let me offer an example in the positive, empirical domain. Let us assume that I return home after a day’s work and find the door leading to the kitchen terrace shut but unlocked. Everything else is in its place. Here are two possible explanations for the door being unlocked. The first is that I had forgotten to lock it before leaving my flat. The second is that the British Secret Services sneaked into my apartment and distributed small microphones all over it (microphones which only an expert could detect) to spy on me. Note that both explanations fit the evidence available to

7 The desiderata discussed here are methodologically in line with the views expressed in Christian List and Laura Valentini, ‘The Methodology of Political Theory,’ in *Oxford Handbook of Philosophical Methodology*, ed. Herman Cappelen, Tamar Gendler, and John Hawthorne (Oxford: Oxford University Press, 2016), 525–53.

me. Yet the former appears more plausible, and a lot more powerful, than the latter. The latter is far-fetched and roundabout: akin to a ‘conspiracy theory.’ Conspiracy theories may do well at the level of fit. Where they fail is in terms of explanatory power.

Similar considerations apply, *mutatis mutandis*, to explanations in the normative realm: what we normally call ‘justifications.’ Take again the earlier example involving the wrong of mistreating non-human animals. This time, *assume* that in fact the proposed principle P, namely that one ought not to damage others’ property, fits the evidence: as it happens, all non-human animals have owners. Even then, P would seem unsatisfactory from an explanatory point of view. Why? Because it is a roundabout and unilluminating way of explaining why it is wrong to mistreat non-human animals. Surely, this has to do with those animals’ interests or inherent status, not with the rights of those who own them. The ‘property’ explanation is far-fetched.

An explanation might fail – i.e., be unilluminating – not only due to its *roundabout* and far-fetched nature, but also due to its *stipulative* character. In that case, the purported explanation is little more than a restatement of the explanandum. An example of this failure would be trying to explain the claim that ‘it is wrong to mistreat non-human animals’ by appeal to principle P ‘one ought not to mistreat nonhuman animals.’ P is simply a restatement of the explanandum. It stipulates that the explanandum is the case, without telling us why. Going back to our main topic, any justification of basic rights exhibiting the features of being ‘roundabout’ or ‘stipulative’ would be unsatisfactory.

Before proceeding further, let me respond to a possible worry. Faced with these desiderata, one might be concerned that my discussion in what follows begs the question against Forst, by assuming an account of what makes for a good justification of basic rights that differs from what Forst’s discourse-theoretical approach recommends. This is a reasonable worry, but its applicability to my discussion is, I think, limited. First, as will become apparent shortly, Forst’s critiques of non-procedural approaches to basic rights often *presuppose* the desiderata I have set out in this section. To that extent, Forst appears implicitly to accept them. Second, even if we assume that *Forst himself* rejects those desiderata, this would not invalidate my argument. It would only make it an external, as opposed to an internal, critique of Forst’s view; a critique that would at least be of interest to those who accept the desiderata I set out.

3 The vices of non-procedural approaches to the justification of basic rights, the virtues of procedural ones

Forst expresses dissatisfaction with dominant approaches to the justification of basic rights, which ground such rights in particular features of human beings, rather than in dialogic procedures. The features Forst focuses on are (a) weighty human interests and (b) humans’ capacity for autonomy or normative agency.

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Neither of them, he claims, offers a plausible starting-point for justifying basic rights. In this section, I recast Forst's reasons for coming to this conclusion by reference to the desiderata that I have sketched in the previous one.⁸ Doing so will give a clear organizing principle to my discussion, without, I believe, altering the substance of Forst's critiques. I will then briefly explain how Forst's own preferred *procedural* approach to the justification of basic rights overcomes the difficulties with rival views.

3.1 *The vices of an interest-based approach*

On an interest-based view, as Joseph Raz famously articulates it, X has a right against Y 'if and only if (...) an aspect of X's wellbeing (his interest) is a sufficient reason' to place Y under a duty.⁹ But, as Forst notes, '[t]his leaves open the criterion for which aspects of well-being, or which interests, are sufficient to ground a right (...).'¹⁰ Interest theorists typically answer by reference to interests being 'weighty enough' to place duties on others. There are two problems with this response. First, as Forst points out, one needs to explain by virtue of what a certain interest counts as 'sufficiently weighty.' Second (and here I am going somewhat beyond Forst's own critique), even if an answer to the former question were available, it is not clear that considerations of weight can satisfactorily explain the phenomenon of *rights possession*.¹¹ Recall that, key to the notion of a right is the standing to make claims on others. But why should we think that a duty grounded in someone's interest – no matter how weighty – automatically gives him or her the standing to *demand* the duty's performance as a matter of right? There may be circumstances in which I ought to help a stranger, and my duty to help him or her is 'activated' by the urgency of his or her interests. Yet this, by itself, seems insufficient to vindicate the conclusion that the stranger in question has a right against me – i.e., the standing to claim the performance of my duty.¹²

8 In his discussion, Forst refers to the 'interest theory' and the 'will theory' of rights, respectively. Strictly speaking, though, interest and will theories of rights are not primarily devoted to justifying (basic) rights. Instead, they are concerned with *defining* what a right is. For the former (at least in Raz's version), a right is a duty grounded in another's interests. For the latter, a right is a moral power to control the duty of another. To that extent, assessing will and interest theories of rights by the standards applying to a successful justification of basic rights might not seem quite correct. This is why, in my reconstruction of Forst's discussion, I refer to justifications of rights grounded in interests and autonomy, respectively. This accurately captures the nature of the views about the justification of rights that Forst targets, without triggering concerns about confusion on the nature of the will and interest theories. Cf. the helpful discussion in Adina Preda, 'Rights: Concept and Justification,' *Ratio Juris* 28, no. 3 (2015): 408-15.

9 Raz, *The Morality of Freedom*, 166.

10 Forst, 'The Justification of Basic Rights', 15.

11 This is an objection I have independently raised against the interest theory elsewhere. Laura Valentini, 'There Are No Natural Rights,' *unpublished manuscript*, 2016. It also appears to be 'in the ballpark' of what is ultimately driving Forst's dissatisfaction with it, since he generally places emphasis on the relational structure of rights; but I am not entirely sure.

12 For this type of objection to the interest theory, see Frances M. Kamm, 'Rights,' in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman, Kenneth E. Himma, and Scott J. Shapiro (Oxford: Oxford University Press, 2002), 476-513.

Recast in the language of my desiderata, interest-based approaches appear to be deficient at the level of *explanatory power*. By justifying basic rights by appeal to ‘sufficiently weighty interests’ they fail to explain the accountability-structure of the rights phenomenon. Perhaps, interest theories can get us to basic duties. But it remains unclear how they can get us to basic *rights*. They *stipulate* that interests generate duties the interest-bearer has the standing to demand, but they do not actually tell us where this ‘standing to demand’ comes from.

3.2 *The vices of an autonomy-based approach*

For theorists who ground rights in individuals’ capacity for autonomy or normative agency, as Hillel Steiner puts it,

‘[t]he job of rights (...) is to demarcate *domains* – spheres of practical choice within which the choices made by designated individuals (...) must not be subjected to interference – and to specify those demarcations without reference to the content of the choices to be made within those spheres.’¹³

On this view, qua autonomous choosers and end-setters, we are endowed with the moral power to demand certain actions and omissions from one another. But it is ultimately up to us to decide whether to make these demands, or to release others from the duties they have to respect our spheres of agency.¹⁴

Forst argues that this autonomy-based justification of basic rights proves problematic. First, as several others have remarked, if rights-possession is grounded in individuals’ capacity for autonomy, then it looks like small children and people with severe mental disabilities may not, in principle, have rights. This renders an autonomy-based approach defective in terms of *fit*, to the extent that our considered judgements tell us that children and people with severe mental impairments do in fact have rights.¹⁵

Second, and again in line with much existing literature, Forst complains that autonomy-based theories are inconsistent with yet another piece of evidence: i.e., the inalienability of some rights.¹⁶ If rights are meant to express and further individuals’ autonomy, then it is always ‘up to the right holder’ to decide whether to claim or waive them. Yet many would balk at the idea that one may waive a right as vital as, say, the right not to be tortured.¹⁷

13 Hillel Steiner, ‘Working Rights’, in Matthew H. Kramer, N. E. Simmonds and Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998), 238, quoted in Forst, ‘The Justification of Basic Rights’, 16.

14 Echoes of this autonomy-based justification of rights may be found in H.L.A. Hart, ‘Are There Any Natural Rights?’, *The Philosophical Review* 64, no. 2 (1955): 175-91; Griffin, *On Human Rights*.

15 Forst, ‘The Justification of Basic Rights’, 16-17.

16 Forst, ‘The Justification of Basic Rights’, 16.

17 Note that these are not exhaustive criticisms of the autonomy-based perspective. I am just mentioning those that seem central to Forst’s arguments.

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3.3 *The virtues of a procedural, discourse-theoretical approach*

Forst believes that his discourse-theoretical view, based on the right to justification, overcomes the *explanatory* and *fit* difficulties plaguing interest- and autonomy-based approaches. Crucially, this approach is *structurally different* from the previous two, in that it offers a *procedural* ground for basic rights. Justified basic rights are those that result from successful processes of mutual justification, processes that articulate individuals' fundamental *right* to justification.

Appeal to the right to justification may close the explanatory gap identified in the case of the interest theory. This is because the right to justification already 'contains' the structure of mutual-accountability that interest-grounding duties do not appear to be able to generate. Human beings, as free and equal authorities, have the standing to *demand* justifications from each other. Justified basic rights, in turn, result from the iterated fulfilment of this reciprocal demand. They afford fundamental protections for human interests that are 'non-rejectable between such persons who seek to establish their status as legally, politically and socially non-dominated subjects.'¹⁸

Note that, on this account, the right to justification is prior to anyone's interests. This right, not any given interest, is what grounds the normativity of basic rights. Certain interests *emerge* as the relevant objects of rights through an iterated process of justification, which includes the fundamental equal authority of individuals as one of its premises. And as we have seen, unless basic rights are justified by appeal to individuals' fundamental authority to make demands on one another, it is unclear how the mutual-accountability structures typical of rights can get off the ground.

Forst also insists that his right-to-justification-based approach is superior to autonomy-based approaches at the level of fit. First, Forst's approach does allow for the existence of inalienable rights. Specifically, the one right that is inalienable is the right to justification, which humans possess quite independently of their wishes, interests or deeds.¹⁹ Second, Forst claims that, despite giving prominence to the status of individuals as autonomous agents with the standing to make demands on each other, his approach to basic rights does not imply that children or individuals with serious mental disabilities may not hold rights. In his words:

"The right to justification, as any truly Kantian account free from empiricist reductionist acknowledges, is not grounded on the *actual capacity* to produce and use justifications but on a moral (or, in Kantian language, noumenal) characteristic of human beings (or what Kant calls "human nature") as justificatory beings who are owed the duty of justification even though they may not be able to exercise their corresponding right."²⁰

18 Forst, 'The Justification of Basic Rights', 15.

19 Forst, 'The Justification of Basic Rights', 16.

20 Forst, 'The Justification of Basic Rights', 17. Italics added by author.

In sum, if Forst is right, his right-to-justification view is at an advantage compared to interest-based and autonomy-based justifications of rights, both at the level of fit and at the level of explanatory power.

4 The vices of the right-to-justification approach

There is much that I find congenial in Forst's discourse-theoretical approach. Yet, on reflection, I doubt that it can deliver all that it promises. In particular, I suggest that, like many other Kant-inspired, procedural approaches to the justification of rights, it is *too thin* to provide satisfactory justifications from the perspective of *fit*. And when the approach is amended to try to remedy these fit deficits, *explanatory inadequacies* emerge.

4.1 *The right to justification and fit*

We know that basic rights are those that result from the justificatory procedures mandated by the right to justification. But what, exactly, do these procedures amount to? Only by answering this question can we determine whether Forst's justificatory criterion leads to conclusions that fit our considered judgements. There are two simple interpretations of how the right to justification grounds basic rights. I call the first *actualist* and the second *hypothetical*. In what follows, I consider each one in turn. I conclude by discussing a third possibility – in fact, the one Forst endorses – which treats the justification of basic rights as a two-step process: first hypothetical, then actualist.²¹ Considering each step individually, however, is instructive, and gives us a sense of the different shapes a discourse-theoretical approach to basic rights might take.

On the crudest version of the actualist interpretation, whatever rights are broadly accepted within any real-world political community qualify as justified basic rights, since they are the output of real-world processes of justification: no matter how imperfect. The trouble with this interpretation – which I am certain Forst does *not* endorse – is that it ends up legitimizing the status quo, even if this cannot plausibly be said to reflect a commitment to the equal standing of individuals as autonomous agents.

A different, and more plausible version of the actualist interpretation, would hold that basic rights can only exist, and be justified, if they are the output of an *appropriately constituted* real-world process of justification, whereby this process is itself suitably democratic and egalitarian. This alternative rules out worries about status-quo-bias, but it might also lead to the counter-intuitive conclusion that, in societies where 'appropriate procedures of justification' are missing, nobody has basic rights/nobody's basic rights can be violated. This conclusion is not only counter-intuitive – indeed, I doubt Forst would endorse it – but alerts us to the well-known 'chicken-and-egg' problem affecting discourse-theoretical approaches. For if we make the pre-conditions for what counts as a 'validating' procedure of

21 Forst also referred to the two-step process in verbal communication to me.

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justification thick enough, then it looks like we have ended up presupposing the very rights the procedure of justification was supposed to establish. If, say, only the pronouncements of the collective will of societies that look much like liberal democracies meet the standards of the right to justification, then the right to justification seems to *presuppose* what it aims to establish. To solve the problem of fit, we get into explanatory trouble.

What about the *hypothetical interpretation*? On this interpretation, the justification of basic rights does not require a ‘real-world’ process of construction, but a hypothetical one, such as the process outlined by constructivists like Rawls or, for a more orthodoxly Kantian version, Onora O’Neill.²² But as Rawls’s example clearly shows, there is very little that hypothetical agents of construction can construct unless we characterize them and their choice situation in a sufficiently rich manner. If we want to know what is, or is not, rejectable by certain agents, we presumably need to know what these agents’ most important interests are. A principle that mandates equal rights to freedom of movement is, presumably, non-rejectable by equal, autonomous agents who *have an interest in free movement*. But if, in order to deliver plausible substantive results – those that ‘fit’ the evidence – the hypothetical version of the discourse-theoretical approach must appeal to interests, then the gulf between this approach and the interest-based approach seems to shrink. In fact, one wonders whether the two may be sensibly said to differ in the first place. Perhaps, they are different notational variants of the same view.

To illustrate, on an interest-based view, rights are said to be duties grounded in interests that are weighty enough. What interests are ‘weighty enough’? Those the protection of which is non-rejectable among justificatory equals. On a right-to-justification view, basic rights are the output of a process of construction between equal and autonomous agents of justification. What are the relevant ‘outputs’? They are those that mandate the protection of these agents’ most important interests.

A discourse theorist could respond that his approach still is superior to the interest-based one because, while the interest-based view (as I have suggested) cannot genuinely explain the authority structures behind rights, by being based on a *right* to justification, the discourse-theoretical approach can. But if my analysis above is correct, then it is not clear that Forst can avail himself of this response. And this is because, just like in the case of Scanlon’s ‘reasonable rejectability test,’ it is far from clear that the output of a relevant justificatory procedure has to take the form of ‘reciprocal rights’ – understood as duties all members of a social system have the standing to claim.²³ The output *might* involve rights, but need not. For

22 See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999), and Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996).

23 T.M. Scanlon, ‘Reply to Leif Wenar,’ *Journal of Moral Philosophy* 10, no. 4 (January 1, 2013): 400-405.

instance, it could also include non-rights norms: duties not correlative to rights. Unless we stipulate that the output of the constructive procedure will take the form of reciprocal rights – e.g., by way of an appropriate ‘engineering’ of the motives and interests of the agents of construction – there appears to be no necessary reason why hypothetical justification should deliver a set of *rights*, and *rights only*.²⁴

If my discussion so far is correct, attempts to remedy problems of fit with the discourse-theoretical approach lead to the creation of problems of explanatory power. And in fact, when it comes to explanatory power, discourse theory appears to be affected by two independent difficulties – difficulties that arise even before we try to amend the theory to address issues of fit.

4.2 *The right to justification and explanatory power*

First, the complex theoretical apparatus Forst proposes to justify basic rights lacks intuitive immediacy. Imagine someone asks: By virtue of what do human beings have a right not to be tortured? Forst’s answer, if I understand his theory correctly, would be something along the following lines: ‘Because you, like all your fellow members of society, have a transcendental right to justification as autonomous and equal agents. The principle that one ought not to be tortured as a matter of right is non-rejectable among autonomous and equal agents. This is why you have such a right.’ (There could be a similar version of the answer, referring to an actual process of justification, or to a combination of hypothetical and actual justification.)

This is a sophisticated response, but I worry that most would react to it by saying: ‘What about my interest in not being tortured? What about the cruelty of torture?’ And in fact, a particularly sophisticated interlocutor might even go on to ask: ‘Isn’t it *because* the interest in not being tortured is so important that we have now come to acknowledge its status as a matter of right (or that we *ought* to acknowledge its status as a matter of right)?’ In other words, there is a suspicion that the discourse-theoretical approach might offer a somewhat roundabout way of justifying basic rights. To be sure, this is not enough to invalidate the theory. As we have seen, an interest-based approach may be more direct, but problematic on other grounds. Still, the somewhat roundabout nature of the discourse-theoretical view should at least give us some pause.

Second, Forst’s method for avoiding the conclusion that children and individuals with serious mental disabilities lack rights-holding status comes at high explanatory cost. If I read his argument correctly, he avoids this conclusion by stipulating that there is something ‘non-empirically’ special in *human nature* that justifies the ascription of rights to all human beings, independently of their capacities.²⁵ The difficulty with this explanation is that, if human nature is not meant to be a label

24 Cf. Leif Wenar, ‘Rights and What We Owe to Each Other,’ *Journal of Moral Philosophy* 10, no. 4 (January 1, 2013): 375–99.

25 Forst, ‘The Justification of Basic Rights,’ 17.

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attached to some biological feature of entities, then it refers to something mysterious and metaphysically dubious; no less dubious than appeals to God or Platonic ideals. And those kinds of explanations, precisely because of their arbitrariness and mysteriousness, are hardly satisfactory: in fact, reasonably rejectable.

So far, then, it looks like Forst's discourse-theoretical approach has its own difficulties in meeting our two core desiderata for a satisfactory justification of basic rights. But could a more complex and nuanced version of that approach – the one that Forst himself seems to prefer – respond to my concerns?

4.3 *A two-level justificatory schema?*

Towards the end of his article, Forst distinguishes between 'two levels of justification and specificity' with respect to basic rights.²⁶ More precisely, he says:

'On a first, moral-political level, a conception of generally defined basic rights needs to be defined such as we find in human rights declarations or (somewhat more concretely) in constitutions, leaving the concrete determination to be specified by law (...). On a second level, which is a combination of moral, political and legal construction, the particular content of basic rights must be specified discursively. For example, whereas on the first level the reasons for a right to democratic political participation are regarded as non-rejectable, the task at the second level is to determine how this can be realized in such a way that the moral status of being a justificatory equal acquires the best possible legal and political expression (...).'²⁷

This description of the relevant justificatory process seems to combine what I called 'hypothetical' and 'actualist' versions of the discourse-theoretical approach, whereby the former is prior to, and places constraints on, the latter. Does the two-level view avoid the difficulties that undermine its single-level alternatives? I am not sure it does. The two-level view certainly allows Forst to eschew the difficulties affecting the actualist version of the discourse-theoretical approach, but not those affecting the hypothetical one. In particular, those difficulties would carry over to the first stage of the two-level view, and so would the explanatory deficiencies outlined in the previous subsection, to do with the 'roundabout' and 'mysterious' nature of the discourse-theoretical justification. Overall, then, combining the hypothetical and actualist approaches does not allow Forst's view to sidestep the most significant difficulties with other versions of discourse theory.

5 Conclusion

In this short paper, I have tried to show that Rainer Forst's discourse-theoretical approach to the justification of basic rights may not be as free from explanatory and fit deficits as his presentation of the view might lead us to believe. My aim in

²⁶ Forst, 'The Justification of Basic Rights', 23.

²⁷ Forst, 'The Justification of Basic Rights', 23.

doing so is *not* to discredit the discourse-theoretical approach, aspects of which I find very appealing. Instead, my discussion is meant to invite Forst to address those difficulties directly, and thereby make good on the claim that his approach improves upon interest-based and autonomy-based views.

Furthermore, in organizing my argument around two key desiderata, I hope *either* to have provided a useful framing tool for further discussion about the justification of basic rights *or*, at least, to have made the second-order question of *what counts* as a good justification of basic rights more salient. While I felt it was appropriate to rely on 'fit' and 'explanatory power' in my own discussion (because Forst's critiques of rival views also point to fit and explanatory deficiencies), I wonder whether a discourse-theoretical approach, by its very nature, should be assessed by reference to different theoretical standards. Once again, I hope my discussion will serve as an invitation for discourse theorists to engage with this question.