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Public Reason and Political Justifications

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THE IDEA OF PUBLIC REASON REVISITED

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INTRODUCTION

In a constitutional democracy citizens normally have a sense of the kinds of reasons that are fittingly appealed to, as well as those that are not, in legislative and judicial forums and when arguing about laws and the constitution with people who hold different religious or philosophical views. We see this all the time in arguments in news editorials, for example. But it is very hard to characterize these reasons in any straightforward way. It is not enough to say that, because people have different faiths and their differences are irresolvable, religious considerations ought to be kept out of politics. For people have irresolvably conflicting philosophical and ethical beliefs too. Moreover, sometimes it may be wholly fitting within public political life for members of a faith to declare the religious beliefs that lead them to support or oppose measures involving fundamental questions of justice (Martin Luther King's religious declarations in support of civil rights is one example). How then are we to make sense of this idea of “public reasons”?

John Rawls takes the rather inchoate idea of public reason and explicates it, characteristically, in a complicated way. For example:

– Public reason is characteristic of a democratic people; it is the reason of equal citizens.
– Public reason’s subject is the good of the public; its content is a political conception of justice.
– Public reason’s constraints apply in the “public political forum,” not in the “background culture.”
– Public reason is “complete”: It is capable of providing reasonable answers to questions involving constitutional essentials and matters of basic justice.
– Public reason aims for public justification and is reasoning

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addressed to others in their capacity as reasonable democratic citizens.

- Public reason and public justification meet the "criterion of reciprocity"; they proceed from reasons or premises we reasonably think others could reasonably accept to conclusions they also could reasonably accept.

- When government officials act from public reason, legal enactments by a majority are politically legitimate, even when they are not fully just.

Given the complexity of Rawls's account, the idea of public reason and the related ideas of political legitimacy and public and political justification are easily, and often, misunderstood. I hope to shed some light on what Rawls means by these key ideas in political liberalism. In the first three Parts (I-III) of the paper, I discuss the background to Rawls's idea of public reason and how public reason is closely bound up with conceptions of democratic citizens and democratic institutions. Then in Parts IV-V, I discuss how public reason is integrally related to other central ideas, including political reasonableness and political legitimacy, and public and political justifications. Here, to help clarify these ideas, I address some powerful criticisms of them by Joseph Raz. In Part VI, I discuss the completeness of public reason and address the frequent argument to the contrary, that appeals to comprehensive reasons are unavoidable to resolve many constitutional disputes. I discuss two versions of this objection, by Dennis Thompson and Amy Gutmann on the one hand, and Ronald Dworkin on the other. In Part VII, I discuss Rawls's claim that the supreme court is the exemplar of public reason, and compare public reason with Cass Sunstein's account of "Incompletely Theorized Agreements." The paper concludes with some reflections on the evolution of Rawls's idea of a well-ordered society.

I. BACKGROUND AND NEED FOR THE IDEA OF PUBLIC REASON

Few moral philosophers have devoted as much effort and painstaking detail as Rawls to working out the nature of moral justification. Rawls began his career writing, not on justice, but on justification in moral philosophy. His first article, Outline of a Decision Procedure for Ethics, deriving from his doctoral dissertation, provided the basis for his later account of reflective equilibrium. In that work Rawls sets forth a four-part test for "the reasonableness of moral principles." The first part says that moral principles are to be a

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1. John Rawls, Outline of a Decision Procedure for Ethics (1951), reprinted in John Rawls: Collected Papers 1 (Samuel Freeman ed., 1999). "[T]he aim of the present inquiry, [is] namely, to describe a decision procedure whereby principles, by means of which we may justify specific moral decisions, may themselves be shown to be justifiable. Now part of this procedure will consist in showing that these principles are implicit in the considered judgments of competent judges." Id. at 6.
"comprehensive explication of the considered judgments of competent judges."2 In the second and third parts of Rawls's test, his contractarianism becomes evident, though not yet explicitly referred to in those terms. The second test says reasonable principles are those that "show[] a capacity to become accepted by competent moral judges" after criticism and open discussion, and which "exhibit a capacity to win free and willing allegiance and be able to implement a gradual convergence of uncoerced opinion."3 "Thirdly," Rawls says, the reasonableness of a principle is tested by seeing whether it can function in existing instances of conflicting opinion, and in new cases causing difficulty, to yield a result which, after criticism and discussion, seems to be acceptable to all, or nearly all, competent judges, and to conform to their intuitive notion of a reasonable decision.4

Here it is evident that Rawls from the beginning conceived of justification in moral philosophy as establishing the reasonableness of moral principles. For Rawls, reasonableness stands in for the notion of truth in moral philosophy. Now the idea that reasonable moral principles are those that are generally acceptable to conscientious, informed, and morally motivated moral agents resurfaces in *A Theory of Justice.* It is found, not directly in the agreement in the original position, but in Rawls's account of moral persons and a well-ordered society. A condition upon rational parties' agreement in the original position is that the principles of justice be publicly knowable and generally acceptable among free and equal moral persons with a sense of justice in a well-ordered society regulated by those principles.5

The publicity condition implicit in Rawls's account of a well-ordered society suggests that he was concerned with an idea of public justification prior to explicitly appealing to that idea.6 The publicity condition in *A Theory of Justice* implies that principles of justice are reasonable only if they are generally acceptable to the members of a well-ordered society and could serve as a basis for public justification for them in resolving issues and disputes about justice. One of Rawls's primary arguments against utilitarianism is that the principle of utility could not serve as a basis for public justification in a well-ordered society that remains stable, whereas the principles of justice

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2. *Id.* at 10.
3. *Id.* at 10-11.
4. *Id.* at 11.
5. The parties in the original position choose principles for a "well-ordered society," which Rawls defines as an ideal society where everyone accepts the same principles of justice and basic social institutions are publicly known to satisfy these principles. John Rawls, *A Theory of Justice* § 1, at 4-5, § 78, at 453-54 (rev. ed. 1999); see *id.* § 23, at 113 n.5 (on the publicity condition).
are ideally suited to play this role because of their emphasis on reciprocity. Still, however much the idea of publicity and even public justification might have guided Rawls's arguments for the principles of justice up to and including *A Theory of Justice*, and afterwards in the 1980 Dewey Lectures, it is not until *Political Liberalism* that we find a need for the distinct idea of public reason.

The idea of public reason initially was designed to deal with a gap in Rawls's theory of justice, which arose after he discerned problems with the account of the stability of a well-ordered society, as depicted in *A Theory of Justice*. That account relied on the assumption that everyone in a well-ordered society of justice as fairness would find it rational to develop and exercise their capacities for justice in order to achieve the good of social union and realize their nature as free and equal autonomous moral beings. What made this argument for the "congruence of the right and the good" work (in so far as it did) was an assumption that the great majority of people in a well-ordered society would find it rational to affirm their (purported) nature as free rational beings by endorsing the Kantian ideal of moral autonomy as an intrinsic good. In order to achieve the good of autonomy, agents must incorporate into their life-plans a highest-order virtue to act for the sake of justice, which enables them to realize their moral capacities for justice and thereby achieve moral autonomy. For our purposes the important point in Rawls's complicated argument for the congruence of the right and the good is that, if it were true that the stability of a well-ordered society depended on such a congruence, then reasons of moral autonomy, self-realization of moral and rational capacities, and related Kantian ideas would serve as fundamental justifying reasons in making and interpreting laws, and more generally in public justification in a well-ordered society.

To see why, consider what is needed to apply abstract principles of justice to decide on laws and to interpret and enforce their implications in particular cases. For example, what kinds of considerations are relevant to deciding the scope and limits of the basic liberties in Rawls's first principle, such as freedom of the person and freedom of association? What kinds of constitutional rights do these abstract liberties require? Do they imply a general right of privacy that protects a right of abortion and a right to same-sex relations? People with different religious and philosophical views disagree about this. But in *A Theory of Justice* Rawls envisioned political recourse to the values of moral and rational autonomy to decide such questions. In Rawls's first principle of justice, as stated in *A Theory of Justice*, basic liberties can only be limited for the sake of a
more extensive system of basic liberties. One reason for the priority given to maximal basic liberty is that the most extensive scheme of basic liberties is needed to realize the moral and rational autonomy of free and equal moral persons. Following A Theory of Justice, public recourse to these kinds of reasons is perfectly appropriate, if not necessary, to interpret the constitution in a society governed by Rawls's principles of justice.

The problem Rawls subsequently discovered with official political appeals to autonomy are familiar. The value of autonomy is part of one or more “comprehensive doctrines” which (because of certain “burdens of judgment”) could not be generally endorsed by conscientious moral agents, even in a well-ordered society where Rawls's own principles of justice are generally accepted. To justify application of the principles of justice by appealing to this and other Kantian or Millian values is to appeal to moral values which some conscientious citizens (liberal Catholics for example) explicitly reject. Now for many political and legal theorists, there is no genuine problem here. They will say that liberalism, if it did not originate with the idea of autonomy, receives its most robust and securest defense when grounded in the value of moral and rational autonomy (as in Kant, Mill, or Rawls himself). If so, then these values should be made part of public political culture and education if liberalism is to be best secured against its potential adversaries.

Rawls gradually came to think that this position—namely, enforcing a generally accepted public conception of justice under the auspices of a philosophical doctrine that many reasonable citizens reject—borders on a violation of liberty of conscience. For even if that philosophical doctrine were true, still to enforce it politically differs little from the political enforcement of a religious faith from the point of view of

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11. In A Theory of Justice the first principle says: “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.” The first principle’s priority rule says a basic liberty can be restricted only for the sake of protecting others’ basic liberty. Rawls, A Theory of Justice, supra note 5, § 39, at 220. In The Basic Liberties and Their Priority, (lecture VIII of Political Liberalism) Rawls restates the first principle in response to H.L.A. Hart’s objection that the idea of maximal liberty is problematic. In response, Rawls substituted “fully adequate scheme of equal basic liberties” for “most extensive total system” of equal basic liberties, and tied the interpretation of the “fully adequate scheme” to a conception of free and equal moral persons with two moral powers. See Rawls, Political Liberalism, supra note 8, at 291.

12. See Rawls, A Theory of Justice, supra note 5, § 82. Notice that in both Planned Parenthood v. Casey, 505 U.S. 833 (1992), and Lawrence v. Texas, 123 S. Ct. 2472 (2003), the Supreme Court relied on the values of “personal dignity and autonomy” to reaffirm a woman’s right to abortion (in Casey) and the protection of same-sex relations (in Lawrence). The personal autonomy referred to in these cases seems to be simply individual liberty. See Casey, 505 U.S. at 851. As such, it should not be understood as the kind of positive freedom that Kant, J.S. Mill, Rawls, and others intend under the name of “autonomy” (or alternatively, “individuality”) and which serves for them as a comprehensive conception of the human good.
reasonable and rational citizens rejecting that doctrine. A well-ordered society’s generally accepted conception of justice relies on comprehensive reasons and values which many reasonable and rational citizens still reject. These comprehensive reasons are politically endorsed since they are officially consulted by legislatures and the courts to determine the application of principles of justice to the constitution. For Rawls, any conception of justice (including justice as fairness) endorsed under these conditions no longer provides a public basis for justification, even though all reasonable people accept the principles embodied in that very conception and it is politically embodied in laws.

Rawls developed political liberalism to alleviate these problems. Its main ideas include (1) the ideas of the domain of the political and a political conception of justice, (2) the idea of an overlapping consensus, and (3) the idea of public reason. As Rawls describes it, a political conception of justice differs from a moral conception of justice (such as that offered in A Theory of Justice) in that it is “freestanding” from comprehensive views and is worked up from fundamental ideas implicit in democratic culture and shared by reasonable citizens.13 Because it is freestanding and its fundamental ideas are widely shared, Rawls conjectures that a political conception should be able to generate (in a well-ordered society) an overlapping consensus on its principles and basic ideas among different reasonable comprehensive doctrines, each of which then endorse it for their own particular reasons. Finally a political conception that is widely affirmed in an overlapping consensus of reasonable views provides needed content to public reason; it thereby legitimates the laws and serves as a basis for public justification among people with differing moral and religious views. This litany roughly describes the relationships among Rawls’s key ideas in political liberalism. Now I’ll say something more to clarify the idea of public reason.

Rawls contrasts public reasons with both non-public and comprehensive reasons. Public reason (as Rawls understands the idea) involves a set of shared considerations which count as good reasons in public deliberation and argument about laws and their interpretation, among reasonable and rational democratic citizens who endorse different fundamental values. Because of liberty of conscience and other basic liberties, citizens in a democratic society are inevitably going to have, not just different values or conceptions of their good, but also different religious, philosophical and ethical views. (This is the fact of reasonable pluralism.) It is because reasonable doctrines disagree about basic values and reasons that there is (for Rawls) a need for the idea of public reason—public

13. See Rawls, Political Liberalism, supra note 8, at 11-15, on the features of political conceptions.
reason presupposes reasonable pluralism. In *A Theory of Justice* there was no need for an account of (public) reasons that was any different from the reasons that accompanied the Kantian interpretation of justice as fairness. For everybody in a well-ordered society already accepted the comprehensive reasons provided by a Kantian view. But given reasonable pluralism, there is no longer a shared set of comprehensive reasons and guidelines for reasoning that all can appeal to in applying principles of justice. Public reason aims to delineate such a shared set of considerations that are not peculiar to any comprehensive view, but which can be accepted by all reasonable views in so far as they accommodate democratic ideals. For Rawls public reasons are part of the "domain of the political." The moral ideal of free and equal autonomous moral persons cannot provide a basis for public justification in a well-ordered democracy (as Rawls had hoped in *A Theory of Justice*); however, the political ideal of free and equal democratic citizens can serve this public role because this political ideal can be endorsed by different reasonable comprehensive views (so Rawls contends).

Rawls says "[p]ublic reason is characteristic of a democratic people: it is the reason of its citizens [as such], of those sharing the status of equal citizenship." This suggests that the mere fact that people in a society commonly accept and reason in terms of some common religion or other comprehensive doctrine does not make that doctrine part of public reason. Even assuming that all the members of an Islamic state, such as Saudi Arabia, accept the Muslim religion and appeal to religious reasons in deliberating and discussing laws, this does not make Islam part of public reason. Saudi Arabia has no public reason in Rawls's sense, only shared comprehensive reasons the nature of which rule out the possibility of a public reason.

In his earlier presentation of the idea of public reason Rawls introduces public reason as part of justice as fairness. He distinguishes two kinds of liberal political values: first, "the values of political justice—fall under the principles of justice for the basic structure"; and second, "the values of public reason—fall under the guidelines for public inquiry, which make that inquiry free and public." The values of public reason are among the guidelines for applying the principles of justice that presumably all reasonable persons accept in a well-ordered society. If we assume different comprehensive conceptions in a well-ordered society, then even

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15. *Id.* at 586.
though everyone accepts the same principles of justice, they will apply
the principles of justice differently because they have different
comprehensive views. For standards of evidence, inference, good
reasons, and judgment differ among comprehensive views. As a result
there is a need in a well-ordered society for standards of inquiry and
reasoning that will allow people holding different comprehensive
views to come to the same conclusions in applying the public
conception of justice. So Rawls depicts the parties in the original
position as agreeing, in addition to principles of justice, to “guidelines
of public reason” for applying these principles.18

But Rawls also has another route to the idea of public reason, one
that is not tied specifically to justice as fairness. Here Rawls
introduces the idea of public reason by way of a requirement of liberal
legitimacy.19 Liberal legitimacy imposes a moral duty of civility on
citizens: a duty “to be able to explain to one another on those
fundamental questions [regarding constitutional essentials and
matters of basic justice] how the principles and policies they advocate
and vote for can be supported by the political values of public
reason.”20 Legitimacy is not an idea that plays any explicit role in A
Theory of Justice. Again, like public reason, the need for it arose
largely as a result of the same problems implicit in A Theory of
Justice’s argument for stability. Even if everyone endorses the same
conception of justice, and this conception (justice as fairness, let us
assume) were the most reasonable, still it would not be legitimate to
make and enforce laws under it for reasons (such as autonomy) that
cannot be reasonably endorsed by other reasonable comprehensive
views. Rawls indicates that this conception of legitimacy, like public
reason, is necessary “if each citizen [is to have] an equal share in

18. “In justice as fairness, then, the guidelines of public reason and the principles
of justice have essentially the same grounds. They are companion parts of one
agreement.” Id. at 225-26.
19. Id. at 217. The liberal principle of legitimacy says:
[O]ur exercise of political power is proper and hence justifiable only when it
is exercised in accordance with a constitution the essentials of which all
citizens may reasonably be expected to endorse in the light of principles and
ideals acceptable to them as reasonable and rational.
Id. For Rawls’s initial statement of the principle, see id. at 137; a later statement is in
Reply to Habermas, id. at 393; and Rawls’s final statement of the principle in his 1997
(Samuel Freeman ed., 1999). See also the earlier statement of the principle in Rawls’s
Harvard lecture notes, John Rawls, Justice as Fairness: A Restatement 41, 84, 90-91,
(Erin Kelly ed., 2001). For a discussion of how political legitimacy is related to but
differs from justice, see Rawls, Political Liberalism, supra note 8, at 427-29.
20. Rawls, Political Liberalism, supra note 8, at 217. A duty of civility is in A
Theory of Justice, but is stated differently: it “imposes a due acceptance of the defects
of [just] institutions and a certain restraint in taking advantage of them.” Rawls, A
Theory of Justice, supra note 5, § 53, at 312. Rawls appealed to this duty to argue for
a duty to normally comply with unjust laws provided that they do not exceed certain
bounds of injustice.
Moreover, as suggested, liberty of conscience is at issue, since for Rawls there is no genuine difference between government officials deciding on and enforcing a law or decree that is purely for reasons of autonomy and their deciding on and enforcing the same law or decree purely for religious reasons (because it is compatible with God's commands as expressed in natural law). Both cases are not legitimate exercises of political authority, even though the laws concerned may be substantively just.

Another use Rawls makes of the idea of legitimacy is to deal with the problem of the status of duly enacted laws that are not wholly just or reasonable. Even the most conscientious legislators who apply a just constitution and follow just democratic procedures can make laws with unjust results. Rawls contends that these laws are still legitimate, even if not wholly just or reasonable, in so far as they meet the liberal principle of legitimacy. Provided duly enacted laws do not exceed certain limits of injustice and meet the legitimacy principle, democratic citizens normally have a duty to obey them. 22

II. THE CONTENT OF PUBLIC REASON

The idea of public reason presupposes a diversity of conflicting reasonable comprehensive views, and it excludes reasons that are peculiar to one or another view (autonomy, aggregate utility, the will of God and natural law, etc.). But public reason is something more than simply the reasons and standards of judgment that reasonable comprehensive views all hold in common (an important point returned to later). What then is the nature and content of public reason? For Rawls public reason is the "reason of [democratic] citizens as such." 23 By "as such" he means that it is the reason of democratic citizens in their capacity as citizens, and not in any other status or position they occupy (as parent, or a member of a particular profession or religion, for example). Public reasoning implies the adoption of a general standpoint, one where people abstract from their ordinary perspectives guided by their particular interests and comprehensive views and take up the point of view of a democratic citizen. From this point of view one is to focus on the reasons and

22. See Rawls, Political Liberalism, supra note 8, at 393, 427-29. "It is unreasonable to expect in general that human statutes and laws should be strictly just by our lights." Id. at 393 n.30; see also Rawls, A Theory of Justice, supra note 5, § 53, at 312; Rawls, The Idea of Public Reason Revisited, supra note 14, at 578. Another clear need for an idea of legitimacy is in the case of just laws that are not duly enacted, but which are enforced by fiat. Universal health care is for Rawls a requirement of justice, but it would not be legitimate for an executive body to put such a system into effect by decree if it had been democratically rejected. As Rawls says, "being legitimate says something about [laws' or governments'] pedigree." Rawls, Political Liberalism, supra note 8, at 427.
23. Rawls, Political Liberalism, supra note 8, at 213.
interests of free and equal democratic citizens and what they require in order to function in their role as citizens and to freely pursue a conception of their good.

This leads us to the second aspect of public reason, namely its proper subject. The subject of public reason is the good of the public and matters of fundamental justice. The good of the public and matters of fundamental justice are what democratic citizens are to reason about when engaged in public reasoning—not their own particular good, or that of some group they identify with, or even justice or the good as determined by a comprehensive doctrine. How do we know the good of the public? For Rawls it appears to be defined in terms of the political values needed to realize the common interests that democratic citizens share—again, in their capacity as citizens. Democratic citizens have certain fundamental interests, which provide them with reasons as citizens and in turn supply a basis for public reason. On Rawls's political conception of free and equal moral persons, democratic citizens have "higher-order interests" in the exercise and development of the "moral powers" that enable them to cooperate and take part in social life and rationally pursue a conception of their good, as well as interests in establishing conditions needed to secure and maintain their freedom and equality. They also have a higher-order interest in social and political conditions that enable them to freely pursue reasonable conceptions of the good. These fundamental interests of democratic citizens provide the ultimate basis for public reasoning about fundamental justice and the common good. What are the political values and the measures needed to enable democratic citizens to realize their capacities for justice and rationality? What measures enable citizens to freely and fairly pursue their conceptions of the good? What duties and obligations to one another and to the public should citizens have if they are to achieve the common good? These are the kinds of questions that ultimately regulate public reason.

24. The two moral powers are (1) the capacity for a sense of justice, to understand, apply, and act from the public conception of justice; and (2) the capacity for a conception of the good, to form, revise, and rationally to pursue a conception of one's rational advantage or good. Id. at 19, 81, 103-04. Rawls refers to these respectively as the powers to be reasonable and rational.

25. Regarding the political values, Rawls says, "These values provide public reasons for all citizens." Rawls, The Idea of Public Reason Revisited, supra note 14, at 601. Among the liberal political values Rawls mentions are such values of justice as equal political and civil liberty, equality of opportunity, social equality and economic reciprocity, the common good, the social bases of self-respect, and the necessary conditions for these values. There are also the political values of public reason, including guidelines for free and public inquiry, the appropriate use of concepts of judgment, inference and evidence, and such political virtues as reasonableness, fairness-mindedness, and a readiness to honor the duty of civility, all of which make reasoned public discussion possible. See Rawls, Political Liberalism, supra note 8, at 139, 224. Later Rawls says that the values mentioned in the Preamble to the U.S. Constitution are examples of political values: a more perfect union, justice, domestic tranquility,
Third, public reason is guided by a criterion of reciprocity. "[T]he criterion of reciprocity is an essential ingredient specifying public reason and its content . . . ."26 To give public reasons is to give reasons that we can reasonably expect that others can reasonably accept as democratic citizens, in view of their fundamental interests in maintaining the conditions of their freedom and equality.27 I discuss the idea of reasonableness further infra, in Part IV. Here the main point is that this idea is to be interpreted in this context in terms of an ideal of free and equal citizens. For this reason Rawls frequently refers to the "politically reasonable."

Fourth, the content of public reason, Rawls says, is "given by the ideals and principles expressed by society's conception of political justice."28 Or, as Rawls says in later discussions, "the content of public reason is given by a family of political conceptions of justice, and not by a single one."29 To engage fully in public reason is to deliberate within the framework of a political conception when debating fundamental political questions, each of which satisfies the criterion of reciprocity.30 Here Rawls clearly indicates that public reasoning involves more than simply appealing to political values that democratic citizens hold in common. It also requires interpreting democratic political values according to the principles and ideas of a

the common defense, the general welfare, and the blessings of liberty for ourselves and our posterity, all of which include more specific values under them, such as the fair distribution of income and wealth. Rawls, The Idea of Public Reason Revisited, supra note 14, at 584. Efficiency and effectiveness are political values, which would include controlling economic, environmental and other kinds of social loss or waste. Id. Political values that relate to human health, the environment, and so on that Rawls mentions are: preserving the natural order to further the good of ourselves and future generations; promoting biological and medical knowledge by fostering species of animals and plants; and protecting the beauties of nature for purposes of public recreation and "the pleasures of a deeper understanding of the world." Rawls, Political Liberalism, supra note 8, at 245. From his brief discussions of abortion we learn that among the political values are: appropriate respect for human life, the reproduction of liberal society over time, full equality of women, and respecting the requirements of public reason itself in political discussion of controversial issues (such as abortion). See Rawls, Justice as Fairness, supra note 19, at 117. Political values that relate to the family are: the freedom and equality of women, the equality of children as future citizens, the freedom of religion, and the value of the family in securing the orderly production and reproduction of society and its culture from one generation to the next. Rawls, The Idea of Public Reason Revisited, supra note 14, at 601.

27. Cf. id. at 578.
28. Rawls, Political Liberalism, supra note 8, at 213.
30. See id.

A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse.

Id.
political conception of justice, and not according to anyone’s comprehensive view. The need for political conceptions to give content to public reason arises because, in the absence of a political conception of justice, public reason is incomplete—it is without sufficient content to resolve many of the political questions of justice encountered in democratic political life. The incompleteness of public reason means citizens and officials have to rely upon some comprehensive doctrine to make or interpret laws. For Rawls, this deprives laws of their legitimacy, since they no longer have a political justification. Why a lack of public justification should matter will be discussed further, in Part VI.31

Fifth, because public reason limits itself to considerations that reasonable citizens can reasonably accept in their capacity as democratic citizens, public reason does not aim to state the “whole truth” about metaphysics, morality, or ultimate values. There are many good and true reasons that are not a part of public reason, but which belong to comprehensive views. Rawls first used the term “public reason” just to make the point that the aim of public justification as reasonable agreement on a political conception cannot be achieved in a democracy if a conception is based in the whole “truth about an independent metaphysical and moral order.” For most, if not all, reasonable comprehensive doctrines endorsed by reasonable citizens contain at least some false judgments about metaphysical and moral issues. As a result, reasonable agreement among persons endorsing different doctrines can never be achieved on the basis of the whole truth. Rather than the whole truth, public justification is “founded on public agreement in judgment on due reflection. The aim is free agreement, reconciliation through public reason.”32 Rawls’s position gives rise to the objection (by Joseph Raz) that, in eschewing the whole truth, a public justification of a political conception might end up “publicly justifying” false principles on the basis of false beliefs. This objection is to be considered in Part V infra. As we will see, in response Rawls argues that, in eschewing the whole truth, public reason does not eschew objectivity of judgment, and indeed that reasonable judgments in political conceptions do not conflict with true judgments in reasonable comprehensive doctrines that endorse these political conceptions.33

Like many of his key ideas, the idea of public reason takes on increasing complexity each time Rawls discusses it. In his later works Rawls comes to envision a background of institutions required by public reason if its ideal is to be realized. In the 1996 Introduction to the paperback edition of Political Liberalism, then again in the Law of Peoples, Rawls discusses what is held in common by the political conceptions that provide content to public reason. They are all liberal conceptions in so far as they, first, guarantee certain familiar basic rights, liberties and opportunities; second, they assign priority to these basic rights, liberties and opportunities over other social and political values; and third, they insure measures providing all citizens, whatever their social position, adequate all-purpose means to make effective use of their basic liberties and opportunities. From prior discussions one might infer that by this third condition, what Rawls intended was simply a social minimum, i.e., income supports for the less advantaged, which might be decided in a number of ways in addition to Rawls’s difference principle. But Rawls here goes on to say that, in order for a liberal political conception to satisfy the third condition it must (as a matter of “common sense political sociology”) allow for five kinds of institutions: (1) public financing of political campaigns and ways of assuring the availability of information on matters of public policy, to prevent the distortion or manipulation of public reasoning; (2) “[a] certain fair equality of opportunity” especially in education and training; (3) a decent distribution of income and wealth; (4) society as an employer of last resort, needed in order to provide security and meaningful work, so citizens can maintain their self-respect; and (5) “[b]asic health care assured all citizens.”

Any political conception is unreasonable for Rawls unless it meets these conditions. It is unreasonable since, in the absence of these conditions, a political conception cannot meet the criterion of reciprocity. It cannot reasonably or sincerely be thought that other democratic citizens could reasonably accept the absence of effective

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34. Rawls, Political Liberalism, supra note 8, at xxxvii-lxii.
36. Cf. id. at 49; Rawls, Political Liberalism, supra note 8, at lxviii. From The Idea of an Overlapping Consensus and Political Liberalism, I think it is apparent that Rawls saw all liberal political conceptions as protecting basically the same set of abstract basic liberties that he says are protected by his first principle of justice: namely, liberty of conscience and freedom of thought, freedom of association and equal political liberties, the freedom specified by the liberty and integrity of the person, and the rights and liberties covered by the ideal of the rule of law. See John Rawls, The Idea of an Overlapping Consensus (1987), reprinted in John Rawls: Collected Papers 421, 440 n.27 (Samuel Freeman ed., 1999); Rawls, Political Liberalism, supra note 8, at 6, 291-94. Since these liberties, along with equal opportunities and adequate all-purpose means, can be understood in different ways, Rawls says there are many liberalisms. Id. at 6.
37. Rawls, Political Liberalism, supra note 8, at lviii-lix.
means to exercise the basic liberties as a basis for cooperation. Thus Rawls says, libertarianism is unreasonable since it does not try to meet these conditions, but indeed explicitly rejects them.\(^{38}\)

Now, it comes as some surprise when Rawls goes on to suggest that these same institutions are required by, or are a precondition for, public reason. These institutions are, he says, essential prerequisites for a basic structure within which the ideal of public reason, when conscientiously followed by citizens, may protect the basic liberties and prevent social and economic inequalities from being excessive. *Since the ideal of public reason contains a form of public political deliberation, these institutions, most clearly the first three, are necessary for this deliberation to be possible and fruitful.* A belief in the importance of public deliberation is essential for a reasonable constitutional regime, and specific institutions and arrangements need to be laid down to support and encourage it. The idea of public reason proposes how to characterize the structure and content of society’s fundamental bases for political deliberations.\(^{39}\)

Here Rawls suggests that the ideal, if not the idea, of public reason requires as background conditions not only a decent social minimum, but also the institutions of a deliberative democracy if that ideal is to be realized in political life. The distinction between the idea and the ideal of public reason may be important here. Rawls is not saying that a democracy cannot be governed by public reasons to any degree unless it guarantees all these background institutions. But it is clear that he thinks something essential to public reasoning is missing in the absence of a deliberative democracy and its background conditions. Public reason is the mode of discourse in a deliberative democracy and one of its most essential features.\(^{40}\) Moreover, deliberative democracy is the primary forum within which public reasoning takes place. Citizens in a democracy cannot effectively engage in public reasoning (1) if they or some of their members’ basic needs are not adequately provided for, to the degree that they cannot take effective and intelligent advantage of their basic freedoms; (2) if the political forum and the free flow of public information is corrupted by monied interests or by other concentrations of power; and (3) if there are not widespread fair opportunities for education, job training, and participation in public life. “Otherwise all parts of society cannot take part in the debates of public reason or contribute to social and economic policies.”\(^{41}\)


\(^{39}\) Id. at lix-lix (emphasis added); see also id. at 50-51.


\(^{41}\) Rawls, The Law of Peoples, *supra* note 35, at 50. For the relationship between public reason and deliberative democracy, see Joshua Cohen, Deliberation and Democratic Legitimacy, in The Good Polity: Normative Analysis of the State 17, 21, 24 (Alan Hamlin & Philip Petit eds., 1989); Joshua Cohen, Democracy and Liberty, in
IV. PUBLIC REASON AND POLITICAL REASONABLENESS

What kinds of considerations are to be expressed in public reason and count as public reasons? The public reasons that are to be expressed in public reason are considerations regarding political values that satisfy the criterion of reciprocity. In public reasoning, we are to present, as justifications for laws and policies, "reasons we might reasonably expect that [citizens] as free and equal might reasonably also accept."

The idea of reasonableness plays a major role in this criterion, and thus in understanding the idea of public reason. What does it mean? Throughout his career Rawls used the idea of reasonable—or "the Reasonable"—in a number of ways. At some point or another he refers to "reasonable acceptance," "reasonable political conceptions," "reasonable principles," "reasonable claims," "reasonable persons," "reasonable comprehensive doctrines," "reasonable conditions on agreement," and "politically reasonable." In all instances he refuses to offer a definition of "reasonable" in terms of necessary and sufficient conditions. Many express frustration at this, and say the idea of reasonableness only masks appeals to inchoate intuition. But any attempt to provide a definition of 'reasonable' would be incapable of capturing all that is involved in the many uses of this rich concept. Moreover, like most definitions of important concepts, the terms used in the definiens normally are in need of definition as much or more than the terms defined, initiating a process with no end in sight. In this regard, attempts to provide fixed and unreviseable definitions of "reasonableness" prove fruitless. What can be provided are clarifications, by focusing on important features of the idea of reasonableness as it is used in different contexts, in hopes that this will help explicate the concept. In many regards, Rawls’s moral and political philosophy is such an attempt to explicate the meaning and import of moral reasonableness—what reasonable principles of justice are, what it is to be a reasonable person, and so on. Rawls


42. While Rawls normally discusses "public reason" he occasionally refers to the plural, "public reasons." On at least two occasions he uses the singular and the plural in the same sentence: (1) "[R]easonable [comprehensive] doctrines may be introduced in public reason at any time, given that in due course public reasons, provided by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support." Rawls, Political Liberalism, supra note 8, at li-lii; (2) "However, it [public reason] does not, as such, determine or settle particular questions of law or policy. Rather, it specifies the public reasons in terms of which such questions are to be politically decided." Id. at lii.

43. Id. at li; cf. Rawls, The Idea of Public Reason Revisited, supra note 14, at 578.

provisionally characterizes a reasonable person as one who has a willingness to cooperate on fair terms, recognizes and appreciates the consequences of the "burdens of judgment," and has a sense of justice. He aims to show that a reasonable person in the end is one who affirms his principles of justice. Principles of justice that are (most) reasonable for free and equal citizens are those that would be agreed to by representatives of reasonable persons in the original position and which fit with our fixed and considered moral convictions in reflective equilibrium. Of course these are not definitions (which for Rawls are always provisional) but substantive claims about reasonable principles and persons.

Rawls then explicates the idea of reasonable principles by way of the related idea of reasonable persons: Reasonable principles of justice are those that reasonable persons or their representatives would endorse from a perspective that is fair between them (the original position on Rawls's account). What especially warrants mentioning here is that the idea of reasonableness and reasonable persons implies being responsive not just to the reasons others have but also to the reasons they think they have. The idea of reasonableness assumes that people often will act for reasons that are not valid or true (as determined by science or by the true comprehensive doctrine, if there is one). Many reasonable people have religious convictions that they believe provide them with reasons for acting and ordering their lives. Since conflicting religions (and

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45. "The overall criterion of the reasonable is general and wide reflective equilibrium," which "is a point at infinity we can never reach, though we may get closer to it." Rawls, Political Liberalism, supra note 8, at 384-85. What makes reflective equilibrium on principles of justice "general" is that principles are in "full" reflective equilibrium for each reasonable and rational citizen—"full" in so far as these principles are endorsed by and incorporated into their respective reasonable comprehensive doctrines. Id. See infra Part V.D. for a discussion of "full justification," and Rawls, Political Liberalism, supra note 8, at 386-87.

46. Rawls, A Theory of Justice, supra note 5, § 10, at 44.

47. Cf. Rawls, Political Liberalism, supra note 8, at 94. Reasonable persons have the following four features: They want to cooperate with others on terms that are fair and are willing to propose and honor such terms; they recognize and accept the consequences of the burdens of judgment; they both want to be, and to be recognized as, fully cooperative and fairminded; they have a "reasonable moral psychology," including a sense of justice, and thus want to do what is right and just for its own sake. Id. at 81-82. Each of these features of reasonable persons can be further clarified: for example we can assume that reasonable persons respect others and are sensitive to the reasons they have. They "take into account the consequences of their actions on others' well-being." Id. at 49 n.1. They don't exploit others or take advantage of them whenever the opportunity arises, and so on.

48. Steven Pinker says:

The Judeo-Christian conception is still the most popular theory of human nature in the United States. According to recent polls, 76 percent of Americans believe in the biblical account of creation, 79 percent believe that the miracles in the Bible actually took place, 76 percent believe in angels, the devil, and other immaterial souls, 67 percent believe they will exist in some
more generally, conflicting reasonable comprehensive doctrines) cannot all be true, most, if not all contain reasons that are false or which are based on false beliefs about the world. Still, Rawls claims it would be unreasonable to ignore or not be sensitive to these reasons, or not normally accept or tolerate people's affirming and acting on the particular beliefs that provide them with reasons. Persons and principles of justice are unreasonable in so far as they do not tolerate or accept that false beliefs can provide others with good reasons for acting—good reasons in so far as these reasons fit with their rational plan of life and reasonable comprehensive views. It would be unreasonable for a professor to give an exam on Yom Kippur or Good Friday and refuse to allow practicing Jewish or Christian students a makeup date because their beliefs (assumedly) are false. Their religious holy days provide practicing Jews and Christians with good reasons for not attending an examination on those days, and for me to be insensitive and unresponsive to these particular reasons ("personal reasons" as Scanlon would call them49) is to be unreasonable. To insist that others cooperate with you only on grounds and for reasons which you believe are true is the paradigm case of an unreasonable person. All the religious, moral, and ethnic fanatics in history meet this description. Even if creationism were true, it would be unreasonable to expect everyone else to endorse it; it could not serve as a source of public reasons, for there is no empirical evidence for it. It does not fit with the ways of reasoning and kinds of evidence that are part of public reason.

"Fair enough," one might say; "of course we should tolerate false comprehensive views so long as their practice does not undermine the requirements of justice and legitimacy. But what is objectionable is that (A) Rawls sees people with such false beliefs, and even their false beliefs too, as nonetheless reasonable (in a moral, even if not necessarily epistemic, sense of 'reasonable'); moreover (B) a reasonable political conception providing content to public reason cannot even question the alleged truth of these false comprehensive beliefs, but must accommodate or work around them; as a result (C) these false beliefs influence the range of considerations and of political conceptions which are themselves reasonable and which provide content to public reason. But this means (D) public reason ultimately deflects public acknowledgment of the truth about justice and the legitimate use of political power and can inculcate or propagate public affirmation of false principles. How can false principles and beliefs provide a basis for legitimacy? Moreover, how

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49. See T.M. Scanlon, What We Owe to Each Other 219 (1998).
do governments show respect for persons as rational self-directing agents by inculcating in them false beliefs regarding justice and legitimate political power?"

It is true that for Rawls reasonableness is largely a moral, not an epistemic category. One can be fully reasonable, politically speaking, and have reasonable views, and yet still have false metaphysical, ethical, or religious beliefs. Here it is important to recognize that, even if Rawls were to allow people with false beliefs to influence the range of political conceptions that are seen as reasonable and politically effective (not that I believe he does—see below), still he is not advocating that justice and the conception of justice that is most reasonable in any way assumes or is substantively influenced by these or other false beliefs. For Rawls, the most reasonable conception of justice is justice as fairness, and it (presumably) assumes no false beliefs. (For example, the parties in the original position have only true beliefs regarding the general information relevant to their decision on principles of justice.) The problem that Rawls confronts in Political Liberalism is not the same problem as in A Theory of Justice. In setting forth the conditions for reasonable conceptions of justice that may provide content to public reason he is not directly addressing the question of the true or (as he says) most reasonable conception of justice that he addressed in A Theory of Justice. Instead he speaks to the questions of the conditions of the stability of a liberal constitution and its political legitimacy—its authority to make and enforce coercive laws and legitimately use political power among citizens who conceive of themselves as free and equal.

Given that these are the issues at stake in political liberalism, surely a condition upon the legitimate use of political power among equals is not that the following two conditions be met: (1) to be legitimate, laws made pursuant to that power must accord wholly with requirements of the true conception of justice, and (2) those who exercise that power know this and are in a position to justify their exercise of power according to the true comprehensive doctrine; moreover, those subject to political power must be informed of the true doctrine (not

50. This objection is based on Joseph Raz's remarks in his paper, Disagreement in Politics, 43 Am. J. Juris. 25, 42 (1998). With regard to the final question above, it would be ironic if Rawls's account were subject to the criticism that it allows for government's knowing incultation of false beliefs among citizens. (Below I contend it is not). For one of Rawls's primary arguments against utilitarianism and other teleological conceptions is that they do allow for, if not require, the incultation of false beliefs regarding the bases of social cooperation when needed to achieve stability. Justice as fairness rules out this potentiality by way of its publicity condition on principles of justice. See Rawls, A Theory of Justice, supra note 5, § 29, at 154-58.

51. For Rawls's definition of "reasonable persons" and "reasonable comprehensive doctrine" see Rawls, Political Liberalism, supra note 8, at 49-50 and 59 respectively.

52. See Rawls, A Theory of Justice, supra note 5, § 78, at 454.

53. Rawls, Political Liberalism, supra note 8, at xxxix.
just what authorities believe is the true view). If these were the conditions for the legitimate exercise of political power, then political power has never been legitimately exercised and perhaps never will be. For Rawls, it is enough for the legitimate exercise of political power that those who exercise it be able to justify their actions by a reasonable political conception that meets the reciprocity criterion. It is not necessary for political legitimacy that all political power be exercised only on terms allowed by the true comprehensive doctrine and its account of justice. To hold that is to collapse the idea of legitimacy into the idea of justice. Rawls always believed that justice as fairness is the most reasonable (or true, if you will) political conception and that it is in the best position to meet the criterion of reciprocity and provide a basis for public justification required by the liberal principle of legitimacy. But the superiority of justice as fairness cannot be definitively established on the basis of public reason alone. As a result, Rawls did not want to claim, understandably, that only laws conforming exactly to justice as fairness are legitimate, and he certainly did not want to claim that laws were not legitimate unless those legislating and enforcing them applied justice as fairness and could justify them by its terms. For Rawls, the legitimate exercise of political power must meet certain conditions of justice, namely respect the broad outlines of a liberal constitution and requirements of "basic justice," but within these parameters political power can be legitimately exercised without being wholly just.

If these are the sorts of issues Rawls is addressing in formulating the idea of public reason, then perhaps the objections mentioned above are not as serious as they might seem. To begin with (and answering the objections above in the order presented):

(A) If being reasonable means having no false fundamental or significant beliefs, then there are few if any reasonable people. Also, if beliefs cannot be reasonable without being true, then no one has fully reasonable beliefs. This is not what Rawls means by reasonableness.

Moreover, (B) What difference does it make that a political conception of justice does not draw into question the false comprehensive convictions of those to whom it is addressed, when it is required that any reasonable political conception be freestanding of the false (as well as true) values and metaphysical ideas that are peculiar to peoples' comprehensive views? Is it really a liberal constitution's role to insist of reasonable people who already accept and observe liberal principles of justice that they must accept them for the right comprehensive reasons, thereby imposing on reasonable people against their conscientious convictions the true comprehensive moral view?

More importantly, (C) since a reasonable political conception and
public reason itself are freestanding of false comprehensive views and are based on ideas implicit in democratic culture, the content of public reason and the legitimacy of political power is not jeopardized by the false comprehensive values or beliefs that reasonable citizens hold. If then a reasonable political conception does contain false principles, it is not due to inference from false judgments in comprehensive views but to misinterpretation within public reason itself of the implications of democratic ideas. Here it is relevant that Rawls does not see public reason as consisting of false judgments or under the influence of false comprehensive views. He says it involves "knowledge and ways of reasoning—the plain truths now common and available to citizens generally." Public reason is "part of the truth" and not the "whole truth." In bracketing true (and false) comprehensive reasons, public reason clearly limits the range of judgments that may be appealed to and justified; but there is no reason to think that this renders "part of the truth" partly false.

Finally, (D) regarding the potential falsity of the political conceptions of justice that inform public reason and their role as a basis for legitimacy: It is true that if all liberal conceptions of justice (as defined by Rawls) are false, and instead some other non-liberal conception is true (libertarianism, for example, or Straussian perfectionism), then public reason involves inculcating false beliefs. Then it may be that the entire project underlying political liberalism is misguided, not just its account of public reason. But it is misguided because liberalism itself is false, not simply because of some defect in Rawls's account of public reason and public justification. For public reason can accommodate the principles of justice of most any comprehensive liberal doctrine (including Raz's, Rawls believed), so long as it does not insist on what must be a perfectionist requirement, namely that liberal justice requires of its citizens not just that they accept and conform to liberal principles out of their sense of justice but also that citizens accept liberal principles for the right reasons according to the true comprehensive doctrine (and thus according to Kantian autonomy, or utilitarianism, or liberal perfectionism, or ideal discours theory, or natural law doctrine, or whatever comprehensive doctrine that is true). Short of this, for this to be a real objection, it first has to be shown that liberalism is a false view (which is not argued by those raising the objections above).

To sum up, three aspects of public reason can be distinguished: (1) standards of judgment, evidence, inference, and reasoning; (2) empirical judgments, that is the facts, reliable statistical regularities, and uncontested scientific laws or generalizations; and (3) the political values of democratic justice and the public conception of justice that give content to public reason. Clearly Rawls did not see the standards

54. Rawls, Justice as Fairness, supra note 19, at 90.
of inference, evidence, and justification that are to govern public reasoning to be false or jeopardized by the falsity of reasonable comprehensive doctrines. Nor did he intend to allow false empirical judgments into public reasoning. So if public reason leads to false judgments that are not the result of misapplying (1) or (2), then it must be because of the falsity of (3), the values and principles of liberal and democratic justice relied upon. But what reason do we have to believe that these values and principles are false? This question cannot be settled within public reason, for it takes these values as given. The question would have to be settled on the basis of argument among comprehensive views—those endorsing liberal and democratic values versus those advocating non-liberal and non-democratic values. Rawls believed justice as fairness, presented as a comprehensive Kantian doctrine as in *A Theory of Justice*, is closer to moral truth, or what is most reasonable, than any other comprehensive doctrine of justice. Raz, Dworkin, and other liberals endorsing different comprehensive liberal views think otherwise. But according to Rawls, there is nothing about liberal comprehensive views that would prevent their agreeing upon a liberal political conception that provides content to public reason, and this political conception will be true, assuming that any true comprehensive doctrine (whether Rawls's, Raz's, Dworkin's, or anyone else's) endorses the same principles.

These remarks go some way towards responding to certain criticisms of Rawls and others who rely upon a moral idea of reasonableness and reciprocity in justification. Joseph Raz particularly objects to (1) the idea of justification to a person (which I address in the next part), and (2) the claim that we can have any basic obligation to justify the exercise of political power to people with false beliefs about values and the origins of justice and political authority (which would include many if not all people with religious beliefs, for example). Raz contends that the mere fact that people conscientiously believe something does not provide them with reasons for anything. “Our reason is that, as we see it, things are so and so. Naturally, we may be wrong.” But if our beliefs are false, then we cannot have reason to act upon them, even though we believe we do. But if this is so, then the fact that others conscientiously believe something does not provide them with reasons, nor should they expect it to provide us with reasons either. If so, Raz contends, it is far from

55. Compare Rawls's claim regarding the original position: “[S]ince principles are consented to in the light of true general beliefs about men and their place in society, the conception of justice adopted is acceptable on the basis of these facts.” Rawls, *A Theory of Justice*, supra note 5, § 69, at 398.


57. Raz says, “If I do not think that the fact that I hold a view is a reason for me to follow it, why should I think that it is a reason for others?” *Id.*
obvious to what degree we should defer to others' judgments and aim for consensus. It may be important to justify political authority to people with false moral and metaphysical convictions, to bring them to understand its bases and get them to agree, but deferring to consensus should not be allowed to structure the idea of political justification or provide a basis for political legitimacy. For Raz (and many others) political justification is like justification of any other kind in that it involves, not reasonable agreement, but showing propositions and principles to be true. To justify moral principles to people with false values is to show them the truth of those principles and the falsity of their values. Moreover, public reason consists only of true reasons. No principle or value that is false can provide anyone with a reason for doing anything.

It is arguable whether or not false beliefs can provide reasons for people with those beliefs. There is something to the suggestion by J.S. Mill, that if our values and beliefs are the product of a freely chosen plan of life that fits our "character" and is arrived at after critical reflection, then we may have more reason to act on them than we do the true values imposed on us by the dead hand of custom. Knowing and acting on true judgments is not an absolute value or reason that trumps all others. Second, while the false beliefs of others clearly do not provide us with reasons to follow them in doing what those false beliefs dictate, still we can be under a stringent duty and have sufficient reasons to respect others following the dictates of their false convictions, particularly if they involve freely chosen values of great importance to a person. Respecting others as persons and as citizens involves allowing them to non-coercively decide their values and (within limits of justice) act on their chosen ways of life. This moral requirement implies a duty to allow others to make their own mistakes of judgment and action, and, within limits of justice, act on their false beliefs as well. We do not respect others as persons by insisting that they only act according to the true view about the comprehensive good, and we surely do not respect them if they are coercively required to observe only what we or the government believes are true comprehensive values. But from the perspective of citizens with different comprehensive views, this is how the public political enforcement of any comprehensive doctrines appears, whether it be the purported truths of religion, or the purported truths of autonomy and individuality. It may be true that respect for persons does not require respect for their false views. Still, respect for persons as citizens does require allowing them to form and act on their false views so long as they are within limits of justice. Otherwise, where someone is coercively forced to act according to the requirements of a comprehensive conception of values that person

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58. Id. at 43.
rejects, the perception will be that freedom of conscience and equal political liberty has been violated. It is unreasonable force, Rawls says, to insist that one's comprehensive view prevail when constitutional essentials and basic justice is at stake.\(^{59}\)

Raz and others who endorse liberal comprehensive doctrines would surely reply that their doctrine does allow people to act upon their false beliefs. What is rejected is the political liberal idea that controversies over values, and therewith false comprehensive doctrines, should in any way be allowed to affect the standards for the legitimacy of constitutions. The correct standard for legitimacy is not whether purportedly reasonable people with conflicting reasonable comprehensive views endorse or reasonably can endorse the constitution, but whether the constitution itself meets independent standards that are true. Disagreement in politics is of no substantive importance in determining standards of justification and legitimacy. Only truth can justify and only truth can bestow legitimacy.\(^{60}\)

I have already discussed above why it is mistaken to understand Rawls's account of public reason as if it allowed false comprehensive doctrines and values to determine or even influence standards of public reason, political justification, and political legitimacy: Public reason derives its content from a liberal political conception that is freestanding of all comprehensive doctrines. Moreover, this is not the place to discuss and compare Raz's own complicated account of reasons and justification in ethics.\(^{61}\) Still it should be noted that Raz's disputes with Rawls evidence deep differences regarding the nature of reasons and of justification, and their relationship to the requirements of liberalism. For Rawls, political justifications in terms of public reasons (as opposed to justifications in terms of comprehensive liberal doctrines) are required to respect liberty of conscience and the political autonomy and independence of democratic citizens. In the context of political liberalism, to knowingly act on the truth (even if we could know the whole truth) of the correct comprehensive (liberal) doctrine (as opposed to what one believes the true doctrine) is still not such a fundamental value that it trumps all others, particularly the values of political reasonableness and the freedom and equality of citizens. What is distinctive about Rawls's political liberalism is that certain moral values are conceived as determining not just the kinds of reasons political officials can appeal to in political justification but also independent standards of moral objectivity, justification, and validity that apply within the domain of the political. Political liberalism is an extension of Rawls's earlier idea of the independence of moral theory from metaphysics (which includes for Rawls any

\(^{59}\) See Rawls, Political Liberalism, supra note 8, at 247.

\(^{60}\) See Raz, Disagreement in Politics, supra note 50, at 40-43.

For Rawls, standards of moral justification, moral objectivity, and correctness of moral judgments differ from standards appropriate for the sciences and other theoretical disciplines. The idea originates with Kant that the preeminent value of moral autonomy requires that standards for justification originate in practical reason itself (reason "legislating" principles for itself), and not be imposed from outside by an independent metaphysical, moral or religious realm. For Kant, the values of moral and individual autonomy require that reason be the source of its own principles of action. In order to realize this moral value, standards for moral justification, objectivity, and correctness ("validity") of moral judgments must conform to certain moral (not just theoretical) requirements of practical reason.

Rawls "demythologizes" Kant's conception of pure reason and the a priori and then extends Kant's basic idea. As Kant sees morality as independent of "metaphysics," Rawls seeks to make a significant part of morality—"the domain of the political"—independent of a comprehensive morality as well, including Kantian morality and the value of moral autonomy. For Rawls, political autonomy requires that democratic citizens "legislate" principles for themselves, meaning that they should be able, as reasonable citizens, to fully understand and endorse constitutional principles and subordinate laws in their capacity as free and equal citizens, as moved by their sense of justice. This is a moral ideal of citizens in a democratic society. But for this moral ideal to be possible the standards for political justification and legitimacy must differ from those required by other domains of inquiry. For Kant, and for Rawls prior to political liberalism, a conception of moral objectivity and valid moral judgment—judgment from an impartial perspective that embodies all the requirements of practical reason—provides the standard for valid and correct moral judgments (or, if you will, moral truth). Moral constructivism is an attempt to incorporate an ideal of the autonomy of reasonable and rational moral agents into the procedures for moral justification that issue in standards of moral truth (namely, moral principles). Similarly for Rawls's political liberalism, an account of political objectivity and reasonable political judgment—cast in terms of agreement in judgment from an impartial perspective that embodies the basic ideals


63. See Rawls, Political Liberalism, supra note 8, at 402. [C]itizens gain full political autonomy when they live under a reasonably just constitution securing their liberty and equality, with all of the appropriate subordinate laws... and when they also fully comprehend and endorse this constitution and its laws, as well as adjust and revise them as changing social circumstances require, always suitably moved by their sense of justice and the other political virtues.

Id.
and requirements of democratic reason—provides the standard for correct—that is, most reasonable—judgments of democratic justice. Political constructivism seeks to represent an ideal of the political autonomy of free and equal citizens who are reasonable and rational in the objective procedures for political justification that issue in the standards for "political truth," or what is most (politically) reasonable. It is in order to fully realize the ideal of the political autonomy of free and equal democratic citizens that Rawls sees it as necessary to establish an account of political justification and public reasons, as well as the political legitimacy of democratic constitutions and laws, independent of conceptions of the truth of comprehensive (liberal) doctrines.64

V. REASONABLE PERSONS, LIBERAL LEGITIMACY, AND POLITICAL JUSTIFICATION

From the previous discussion of Raz's objections we have seen that public reason and the liberal political conceptions that provide it with content are not influenced by false comprehensive doctrines (even when political conceptions are endorsed by doctrines with false views). Rather, public reason and its political conceptions gain their content from ideas and values implicit in democratic culture. In this part and the next I emphasize how reasonableness for Rawls is primarily a moral-political category, and that what is politically reasonable is to be determined from the "public point of view" of reasonable and rational free and equal citizens, and not from the point of view of any (nonpublic) reasonable comprehensive doctrine. This means one has to be very careful not to import a particular philosophical account of 'reasonable' into political liberalism that is at odds with public reason itself. To illuminate this aspect of Rawls's view, I address here some further arguments Joseph Raz makes against Rawls.

A. The Liberal Principle of Legitimacy

Raz criticizes the following principle: "a political authority is legitimate only if its authority is established by a principle which all

64. The original position for Rawls is the objective "procedure of construction" that specifies moral and political principles of justice. Rawls contends that the objects of moral judgments (including moral principles of justice and moral facts) and true judgments regarding them, are not prior to and independent of a procedure of construction that results in moral principles; these principles in turn are needed to specify the moral facts about which moral judgments are true. To then say that a moral judgment is true is to say that the judgment accords with principles that are the product of the objective procedure of judgment which incorporates all the requirements of practical reason. See John Rawls, Kantian Constructivism in Moral Theory (1980), reprinted in John Rawls: Collected Papers 303, 354 (Samuel Freeman ed., 1999); see also Rawls, Political Liberalism, supra note 8, at 119-25.

65. Rawls, Political Liberalism, supra note 8, at 384 n.16.
people are committed to accepting by their current views, whatever they are, provided only that they are reasonable. Legitimate political authority is then to be based on the agreement of reasonable comprehensive views of people, or at least agreement among people holding reasonable views.

Here Raz objects that the agreement of those who hold unreasonable views should count too in determining the legitimacy of authority, since “their life and well-being are of moral consequence.” Contractualists will reply (he continues) that the liberal criterion of legitimacy is based in respect for rational self-directing agents as such. Agents who hold unreasonable beliefs are unreasonable, and thus do not respond to reason as they should. Hence (the contractualist concludes), “the reason for treating people as rational self-directing agents does not apply to them.” But this reply, Raz says, does not respond to his objection, for it refers to the reasonableness/unreasonableness of people, whereas the contractualist criterion for legitimacy refers to the reasonableness of belief. It is not true that people with unreasonable beliefs are all unreasonable people. Unreasonable people are “unyielding,” or unresponsive to reason and evidence. Beliefs however are unreasonable “if they are, in relation to all the evidence available to the experts, patently false.” Reasonable people can have unreasonable beliefs if that is all they have been exposed to (e.g. those creationists who have only been exposed to creationism might be reasonable people). Likewise unreasonable people can have reasonable beliefs for the same reason. This shows that “one cannot take the rejection of any proposition as in itself strong evidence that the agent is unreasonable (in the sense in which this is a cognitive vice).” Raz concludes that the contractualist criterion for political legitimacy “has no political teeth.” For “[t]here is no proposition which has currency in Western societies and which some people in them could not reasonably accept.” As Raz suggests later, “any

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66. Raz, Disagreement in Politics, supra note 50, at 33.
67. This implies, Raz says that “[t]he legitimacy of a political authority comes to an end when the principles on which it is based no longer enjoy the agreement of all the reasonable. This makes the principle very demanding.” Id. at 33 n.9. Here it is clear from the context that Raz means “reasonable views” rather than “reasonable person.”
68. Id. at 33.
69. Id. at 34.
70. Id.
71. Raz says that Rawls’s moral definition of reasonable person—as one who has the belief and disposition of valuing willing cooperation above all other virtues or values—does not help here either; for as a belief or character trait it “is not one which has any bearing on the intellectual virtues.” It may turn out that a person who is reasonable in Rawls’s sense is unreasonable, cognitively speaking, and vice versa. Id. at 36. This shows, Raz says, that Rawls misapplies his own test of legitimacy.
72. Id.
73. Id. at 37.
convinced anarchist, or indeed anyone else who has a principled objection to the current government, [has] a veto on its legitimacy.\textsuperscript{74}

This argument has two major shortcomings: it misreads Rawls's principle of legitimacy, and it relies on Raz's (not Rawls's) definition of "reasonable." First, (the question of how to understand "reasonable" aside) Rawls's principle does not say that political legitimacy is based on the agreement on principles by all reasonable views or doctrines, or agreement by all reasonable persons, or even agreement by all persons (even reasonable persons) holding reasonable views or doctrines. It says: "the exercise of political power is legitimate only when it is exercised in fundamental cases in accordance with a constitution, the essentials of which all reasonable citizens as free and equal might reasonably be expected to endorse."\textsuperscript{75}

This indicates that political legitimacy depends upon acceptance \textit{from a particular standpoint}, that of reasonable and rational free and equal citizens (guided by certain fundamental interests). The principle's focus then is on (politically) reasonable persons who are defined in a certain way—not (as Raz says) on any person who holds reasonable views. Which principles are acceptable to people who have reasonable views or subscribe to reasonable doctrines is simply not Rawls's criterion of legitimacy. Nor is political legitimacy determined by the consensus of reasonable views or doctrines themselves, or even of reasonable persons judging from the standpoint of their reasonable views. (Politically) reasonable persons holding reasonable views may in fact reject laws that are politically reasonable and legitimate. Conscientious liberal Quakers for example may reject all war, even if in self-defense or to protect human rights. But this does not deprive a just war of its legitimacy for Rawls.\textsuperscript{76} The important point is that political legitimacy, like political reasonableness, both are to be decided from the public point of view of reasonable democratic citizens.\textsuperscript{77}

In regarding political legitimacy as agreement on principles by all reasonable views or persons holding reasonable views, Raz appears to confuse political legitimacy with the idea of an overlapping consensus. But overlapping consensus is a standard for stability, which is different from political legitimacy. The political legitimacy of a constitution is a precondition of its stability "for the right reasons." In effect Rawls's

\textsuperscript{74} Id. at 40.
\textsuperscript{75} Rawls, Political Liberalism, \textit{supra} note 8, at 393 (emphasis added).
\textsuperscript{76} Id. at 393-94.
\textsuperscript{77} This is also evident from Rawls's first two statements of the principle in \textit{Political Liberalism}. See id. at 137, 217; see also \textit{supra} note 19. Rawls's final statement of the principle of legitimacy makes clear its basis in the criterion of reciprocity: "The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens." Rawls, \textit{The Idea of Public Reason Revisited}, \textit{supra} note 14, at 578.
idea of an overlapping consensus is a conjecture that all reasonable doctrines in a well-ordered constitutional democracy can endorse, each for their own particular reasons, only those constitutions based on political conceptions that meet the liberal principle of legitimacy. If they can, then a legitimate constitution is stable, not as a compromise or *modus vivendi*, but “for the right reasons,” namely for the moral reasons endorsed by each reasonable view. On the other hand, if too many reasonable views cannot endorse a legitimate constitution, then legitimate liberal authority may be unstable. Then the question becomes whether it is possible for a just constitution to endure. But whether or not a reasonable doctrine departs, in whole or part, from acceptance of the liberal political conception and is no longer in an overlapping consensus, this does not deprive the constitution or laws of their legitimacy. It is simply not true that Raz’s argument has shown that “any of the views, ideologies, philosophies, religions, or what not which have currency in that society should vindicate the principles of the constitution, or else they lack legitimacy.”

**B. The Idea of a Reasonable Person**

To make the argument that Rawls’s principle of legitimacy allows most any ideology or misfit in society to defeat government’s legitimacy, Raz imports his own definition of “reasonable person” and “reasonable belief” into his argument; these underlie his contention that reasonable people (those responsive to reason and evidence) can have most any unreasonable (“patently false”) belief, and unreasonable people can have any reasonable belief. Perhaps they can on Raz’s purely cognitive account of “reasonable,” but this is not Rawls’s specification of the concept of a reasonable person. While cognitive reasonableness to some degree (responding to evidence, making logical inferences, etc.) must be presupposed in Rawls’s account (otherwise people could not think clearly), the characteristics of *politically* reasonable persons Rawls designates are mainly moral characteristics: a willingness to cooperate on fair terms;

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78. Raz, *Disagreement in Politics*, supra note 50, at 37. This misreading of Rawls’s principle of legitimacy underlies Raz’s extraordinary claim that under this principle, the anarchist can deprive any government of legitimacy, and even “the state has no authority over the fanatical murderer. It does not even have authority to defend people against him.” *Id.* at 40. Clearly, anarchists and fanatical murderers are unreasonable people with unreasonable views in Rawls’s sense. Their actual or hypothetical consent is not required or relevant for any of Rawls’s purposes.

79. Here it is relevant that Rawls says that standards for what are to count as politically reasonable judgments within public reason are informed by the guidelines for inference, evidence and judgment that are part of public reason, as well as “criteria and procedures of commonsense knowledge and ... the methods and conclusions of science when not controversial.” Rawls, *Justice as Fairness*, *supra* note 19, at 91-92.
having a reasonable moral psychology, including a sense of justice; appreciating and accepting the implications of the burdens of judgment for social life, and so on. Given these characteristics, it is simply not true that a reasonable person can accept most any proposition, or that the rejection of any proposition is not evidence that a person is unreasonable.\(^80\) Because of their moral-political convictions and dispositions, reasonable persons in Rawls's sense are responsive to public reason, and not just to reason in a cognitive sense. There are all kinds of unreasonable propositions (in Raz's sense, and in Rawls's) which conflict with public reason and which for this reason are not acceptable to politically reasonable persons.\(^81\) Raz's claim that the principle of legitimacy "has no teeth" does not apply to Rawls.

The same problem besets Raz's argument that being unreasonable and having unreasonable beliefs is not a moral defect that should exclude a person from influencing what principles are legitimate. An absence of the characteristics and beliefs of politically reasonable persons is decidedly a moral defect. Politically unreasonable people are not willing to cooperate with others on fair terms; they insist on politically enforcing what they believe to be "whole truth" even though they know that others reasonably disagree; they do not have a sense of justice or other moral dispositions. Anyone who has all these characteristics and all they entail is deeply flawed morally: For he or she has no respect for others with different values or for their rights, and thus is hardly fit for social life, at least not among people who do not think as he or she does. Of course the lives of politically unreasonable people, so described, should count as much as anyone else's in so far as they have the same rights and liberties (so long as they do not violate others' basic rights.) But this does not imply that their unreasonable views should be taken into account and accommodated within public reason.

C. The Bases of Legitimacy

Is Rawls's principle of legitimacy designed so as to achieve respect for rational self-directed agents as such (as Raz suggests)? Here it is more accurate to say that it is (in part) directed to achieving the political autonomy of free and equal democratic citizens, when seen as politically reasonable and rational. Political liberalism aspires to discover a basis for social cooperation and the exercise of political authority that is freely acceptable to reasonable democratic citizens. If we see the principle of legitimacy in this way, then Rawls's principle—unlike the principle Raz attributes to him—quite readily

\(^80\) Raz, Disagreement in Politics, supra note 50, at 36.

\(^81\) Indeed there are many reasonable propositions in Raz's sense, and reasonable doctrines in Rawls's sense, which are not acceptable to public reason, and which (Rawls's) reasonable citizens will not insist on as a basis for their political relations, even though they may believe them true.
converges with the argument (summarized above) Raz attributes to contractualists for excluding unreasonable persons from the test for political legitimacy. The reason the agreement of politically unreasonable persons is not necessary, or even desirable, for political legitimacy of principles is that, as unreasonable, they are not simply unyielding in their judgments, but are also intolerant of other reasonable comprehensive views and the reasonable persons who endorse them. So most anything politically unreasonable people might agree to regarding constitutional essentials and basic justice could not be justified to reasonable and rational citizens endorsing reasonable views or comprehensive doctrines.

D. Political and Public Justification

Rawls says, "Public justification is not simply valid reasoning, but argument addressed to others." Raz questions the idea of justification to a person. "The claim is that a condition of legitimacy is that the principles on which the constitution is founded can be justified to the people who are supposed to be subject to them. Does that mean more than that the principles of the constitution are justified?" He argues that it cannot, citing a number of reasons: (1) justifications are not "inherently private" or addressed to specific people, as the contractarian position implies, but "are in principle publicly available"; (2) some people are not capable of understanding justifications of authority, due to limited mental capacities, or mistaken ideologies, or misguided religious beliefs; and (3) justifications do not have to be articulated to be known and understood, and in any case, "full articulation of the justification of authority is impossible in practice."

This is not the place to fully respond to Raz’s criticisms of Rawls’s idea of justification to a person, for to do so adequately would require a discussion of Raz’s more general argument against contractarianism, put forth elsewhere, as well as his alternative conception of reasons and justification, which are themselves quite complicated. But it can at least be emphasized that Rawls’s idea of justification does not imply addressing arguments designed to convince people whatever their circumstances, capacities, beliefs, and desires. What Rawls calls “political justification” (which is part of “public justification”) does not even require justification to reasonable people in the terms of standards set by their reasonable comprehensive views. Rather, political justification is addressed to persons seen as reasonable and rational and in their capacity as free and equal citizens. Moreover it is

83. Raz, Disagreement in Politics, supra note 50, at 37.
84. Id.
85. Id. at 38.
86. Id. at 39.
framed in terms of the political values of justice and of public reason. On this understanding of political justification, some (if not all) of the criticisms Raz directs at Rawls are wide of their mark. For example (in response to (1) above), on Rawls’s account political justifications are inherently public, for they are addressed to persons who occupy the “public point of view” of reasonable democratic citizens. Moreover, (2) they are not tailored to meet the limited capacities, mistaken ideologies, or particular interests people have, but address them as reasonable and rational democratic citizens with an interest in developing and exercising the moral powers needed to engage in social cooperation.

To appreciate better what Rawls means by “justification to persons” it may help here to look to his late article, Reply to Habermas.\(^{87}\) Here Rawls distinguishes three kinds of justification at work in political liberalism. (1) Political justification is justification to persons in their capacity as reasonable democratic citizens; it is justification in terms of public reasons and hence relies on political values and their ordering in terms specified by a freestanding political conception of justice. Political justification is in this manner pro tanto Rawls says; it does not take into account all moral and other values, as they might be ordered by a reasonable comprehensive doctrine. (2) Full justification, Rawls says, “is carried out by an individual citizen as a member of civil society.”\(^{88}\) Full justification is justification to a person in terms of his or her reasonable comprehensive doctrine. In full justification a reasonable person incorporates the political conception of justice that is politically justified into, and justifies it according to the terms of, his or her own reasonable comprehensive doctrine by bringing his or her judgments into reflective equilibrium. This is a task left to citizens themselves, together with others who affirm the same reasonable comprehensive doctrine. “The political conception gives no guidance in such questions, since it does not say how non-political values are to be counted. This guidance belongs to citizens’ comprehensive doctrines.”\(^{89}\) Notice that while there are as many full justifications as there are reasonable comprehensive doctrines, full justification is not justification to persons whatever their subjective dispositions and whatever values they may affirm. Rawls’s philosophy does not encompass justification to a person regardless of his or her aims or intelligence or subjective point of view. Instead, a full justification addresses reasonable and rational persons who occupy the standpoint and affirm the values and ideals of one or another reasonable comprehensive view. Moreover, while full justification involves justification of the political conception according to the terms of reasonable comprehensive doctrines that are not

\(^{87}\) Rawls, Political Liberalism, supra note 8, at 393.

\(^{88}\) Id. at 386.

\(^{89}\) Id. at 386-87.
wholly true—"mistaken ideologies" in Raz's terms—the falsities affirmed by a doctrine do not influence or affect the truth or reasonableness of the freestanding political conception itself (as discussed in the previous section).

Finally there is (3) Public justification: A condition of public justification of the political conception of justice is that it stands in full justification (or reflective equilibrium) within the terms of all reasonable comprehensive doctrines endorsed in society. There is then a reasonable overlapping consensus among reasonable comprehensive doctrines.\(^9\) Given an overlapping consensus, each reasonable member of society can aver to others that the reasonable comprehensive doctrine he or she endorses both incorporates and justifies (in terms peculiar to each reasonable doctrine) the liberal political conception that is recognized to be politically justified. "[T]his mutual accounting shapes the moral quality of the public culture of political society."\(^9\) It is this public knowledge of a reasonable overlapping consensus—citizens' awareness of the fact that each reasonable citizen has fully justified and embedded the political conception into his or her reasonable comprehensive view—that constitutes (for the most part) the public justification of the political conception.\(^9\)

E. Legitimacy and False Beliefs Revisited

Finally, Rawls is clearer in his late works that there is a "family of reasonable political conceptions of justice" that provides content to public reason, and which therefore plays a role in political and public justification. These political conceptions are reasonable in that they all affirm the essential features of liberalism (viz., the basic liberties and their priority, and a social minimum). But liberal political conceptions differ in a number of ways: how they specify the social minimum and equality of opportunity, determine the fair value of the political liberties, and assign significance to other political values of

\(^9\) Id. at 388.

\(^9\) Id. at 387.

\(^9\) Id. at 392. Two other aspects of public justification are stability for the right reasons and political legitimacy. Political legitimacy has been discussed. As for stability, when there is an overlapping consensus on the most reasonable political conception, society is effectively regulated by this conception, and public political discussions on constitutional essentials are reasonably decidable in terms of public reason as informed by the family of political conceptions, society is then "[stable] for the right reasons." Id. at 391. For each citizen now endorses the governing political conception, not as a compromise, but because it expresses the conception of justice that is best justified according to his or her own reasonable comprehensive doctrine. See id. In the terms used in A Theory of Justice, the right is then congruent with each citizen's good, as determined by her rational plan of life and the reasonable comprehensive doctrine she endorses. See generally Rawls, A Theory of Justice, supra note 5.
Reasonable political conceptions do not always lead to the same conclusion; nor do citizens holding the same conception always agree on particular issues. If so, then at most only one of these political conceptions can be completely true. But the fact that the others contain false beliefs to some degree (regarding how to set the social minimum, for example) does not imply that government officials, when they rely on them, are, as Raz contends, "inculcating" or "propagating" false beliefs among its citizens, certainly not knowingly; and even if unknowingly, then not any more so than any government or society inculcates false beliefs in its members when it allows for freedom of speech and discussion. Democratic citizens and government officials (legislators and often judges too) can always argue about and contest the laws and the correct understanding of constitutional provisions, and even the alternative liberal conceptions of justice that are appealed to in public reason to justify laws. What they cannot do, if they are to satisfy the moral (not legal) duty of civility, is contest liberalism itself, or provide reasons incompatible with a liberal constitution. It is true that public reason inculcates the values of a liberal and democratic constitution. But this is a problem only if liberal and democratic constitutions all embody false conceptions of justice. Only then would government officials in a constitutional democracy propagate and inculcate false beliefs in a way that should cause serious concern from the perspective of the true comprehensive view. But since Raz endorses liberalism and democracy, this is not a problem that he is concerned about.

VI. THE COMPLETENESS OF PUBLIC REASON

Is the idea of public reason feasible? That is, is public reason up to the task of providing a basis for public justification in all, or nearly all, issues regarding constitutional essentials and basic justice? One common objection to the idea of public reason is that it is not very deep, or at least not sufficiently deep to deal with all the political issues it needs to if it is to serve as a basis for constitutional argument. It is said that, because people have such different

93. Rawls seems to hold that liberal political conceptions endorse roughly the same basic liberties, those, "familiar from constitutional democratic regimes." Rawls, The Idea of an Overlapping Consensus, supra note 36, at 440; see also Rawls, Political Liberalism, supra note 8, at xlviii-xl ix, 6; Rawls, The Idea of Public Reason Revisited, supra note 14, at 581. He also says that liberal political conceptions all endorse ideas of citizens as free and equal persons, and of society as a fair system of social cooperation over time, yet interpret these ideas in different ways. Id. at 582.


comprehensive views in a liberal democracy, there is little hope of
their agreeing on values and principles to the degree needed to
resolve many highly disputed constitutional issues. The problem of
abortion is often brought up in this connection. To resolve this
problem politically, inevitably officials and citizens will have to appeal
to comprehensive views to interpret the scope of basic constitutional
liberties and other abstract liberal principles they all agree on.

Here it is worth re-emphasizing that Rawls sees public reason as
gaining its content from a political conception of justice. One of the
main roles of political conceptions of justice in Rawls's account of
public reason is that they should enable public reason to be complete.
In the absence of a political conception, public justification cannot be
carried through and the duty of civility remains unfulfilled—we could
not then provide justifications that others could reasonably accept in
their capacity as free and equal citizens.

But the fact that political conceptions of justice provide content to
public reason does not adequately respond to the objection since it
only states, but does not show, that public reason actually is capable of
providing satisfactory arguments for all constitutional essentials and
questions of basic justice. But for that matter, it is hard to see how
one could satisfactorily answer this broadside objection without first
trying to work out in some detail resolutions to most constitutional
disputes by relying solely on public reason.96 One issue the objection
forces however is, what is a complete resolution of a dispute (for
example, regarding the right of abortion) which can be addressed
solely in terms of public reason? Clearly, a complete resolution
cannot be a general consensus, for that is hardly if ever to be had for
any significant constitutional dispute. For Rawls, a complete
resolution is not even one that every reasonable person accepts on the
basis of his or her reasonable comprehensive doctrine. Again, such a
resolution may not be possible for many issues under any
circumstances. Instead, for Rawls, a resolution regarding a
constitutional essential is always a political resolution: It is one that is
framed in terms of political values of public reason and is an argument
to a conclusion which reasonable persons in their capacity as
democratic citizens can reasonably expect other citizens in the same
capacity reasonably to accept.

Two questions need be kept separate here. First there is the
question of whether public reason is capable of politically resolving a
constitutional essential such as the abortion issue, in terms of the
political values of public reason and without appealing to
comprehensive reasons and doctrines. Second, there is the question
of whether all reasonable citizens affirming reasonable comprehensive
doctrines can accept the political resolution provided by public reason

on the basis of their comprehensive doctrines. We have seen that the first question is to be addressed in terms of public reasons and political values that address the circumstances and interests of free and equal citizens. In response to the first question, Rawls gives an example of the kinds of public reasons that need to be taken into account in politically resolving the abortion dispute, (suggesting that other political values may also be relevant). Among the political values relevant to abortion he suggests are due respect for human life, freedom and equality of women, and society’s interests in the family and the ordered reproduction of liberal society over time. He says (without arguing the point) that a reasonable balance of these and other relevant political values does provide a politically reasonable answer—one satisfactory to reasonable persons in their capacity as free and equal citizens—to the question of whether women should have a right to abortion at some stage of pregnancy. The answer he believes justified on the basis of these political values is that women should have such a right during the first trimester. It may be that he would be open to the suggestion that a longer term, perhaps even a somewhat shorter term, is also politically reasonable. But Rawls says that to afford women no right to abortion is unreasonable. Presumably he says this because to refuse to recognize a right to abort under any circumstance is to give absolute weight to one political value (respect for human life) at the expense of all others—and this is politically unreasonable. It is unreasonable since the reasonable balance of public reasons is to be determined by taking into account such considerations as the interests of citizens in maintaining the conditions of their freedom and equality, their higher-order interests in the moral powers, and other political values regarding the good of citizens. A reasonable balance of public reasons is not to be determined by taking into account the religious, philosophical, or moral values of people occupying one or another comprehensive view.

The important point here is that the question of the completeness of public reason regarding abortion depends upon whether there is a balance of political values that is satisfactory to reasonable persons in their capacity as free and equal citizens, in light of the political conception of justice they affirm. My own view is that, because Rawls recognizes a family of political conceptions providing content to public reason, there has to be more than one politically reasonable answer to this issue. That is, far from being incomplete, public

97. Id. at 243 n.32.
98. See Rawls, The Idea of Public Reason Revisited, supra note 14, at 606 ("Reasonable political conceptions of justice do not always lead to the same conclusion; nor do citizens holding the same conception always agree on particular issues." (citation omitted)); see also Rawls, Political Liberalism, supra note 8, at lvi.
reason is overdetermined in so far as it provides more than one politically reasonable answer to many constitutional issues.\textsuperscript{99}

Now the second question mentioned above—which, recall, needs to be kept separate from the first question of the alleged completeness of public reason—is whether reasonable people, given the reasonable comprehensive doctrines they affirm, will in fact accept the political resolution of the abortion problem as determined by a proper balance of public reasons. Perhaps some won’t even in a well-ordered society. So it may be that there are some reasonable people who cannot accept the political resolution of the abortion issue in terms of public reason. They sincerely believe that the fetus is a (metaphysical and moral) person, at all or most stages of development; that to abort it is or is like murder; that since protecting the lives of innocent persons is the most important human value, it is morally and politically unjust for any government to permit abortions at any stage for any reason; and that they as individuals ought to politically reject (and perhaps even resist) abortion whatever the cost to themselves. In that case, a citizen is no longer able to fully affirm the politically reasonable resolution—one based in the political values of public reason—as a sufficient basis for resolving all constitutional essentials. He or she will not then be in a position to fulfill the duty of civility (which makes perfectly good sense from their point of view, given that protecting the innocent against murder is the more important issue).

This may indeed happen, even in a well-ordered constitutional democracy governed by a liberal political conception that is endorsed by all reasonable doctrines. Rawls does not rule it out. The main point however is that the fact that some reasonable people or reasonable doctrines may not be able to accept the resolution of the abortion issue as determined in terms of political values of public reason does not imply that public reason is incomplete or that it is incapable of resolving a constitutional essential or matter of basic justice. What it implies is that not all reasonable people or reasonable comprehensive doctrines are always capable of accepting the politically reasonable resolution to constitutional disputes provided by public reason as informed by a political conception of justice.\textsuperscript{100} Is this a problem for Rawls? It will be a problem only if, as a result of their inability to accept the political resolution by public reason for one or more constitutional issues (e.g. regarding abortion), they are led to reject public reason itself in all other cases. Then those citizens and

\textsuperscript{99} Jon Mandle clarified this point for me with regard to abortion.

\textsuperscript{100} In his initial treatment of public reason, in \textit{Political Liberalism}, Rawls seems to say that for a citizen to reject the conclusions of public reason is to be politically unreasonable, but that “a comprehensive doctrine is not as such unreasonable because it leads to an unreasonable conclusion in one or even in several cases. It may still be reasonable most of the time.” Rawls, Political Liberalism, \textit{supra} note 8, at 244 n.32.
their comprehensive doctrine can no longer endorse a political conception of justice in an overlapping consensus with other reasonable comprehensive doctrines. Depending on how many citizens and how many reasonable comprehensive doctrines are in this position, it raises questions regarding the stability of the family of liberal political conceptions. But Rawls conjectures that, even though some reasonable comprehensive doctrines may not be able to accept the resolution to a disputed constitutional issue on the basis of public reason, still in a just and well-ordered constitutional democracy, they will be able to endorse in the main the requirements of a liberal political conception and the deliberations of public reason. This mainly is all that is required for "stability for the right reasons."

Rawls discusses just this kind of case in his last work on public reason. His main example is Quakers, who are pacifists, and who for religious reasons reject all war, even when it is politically justified in a just society on the basis of public reason.101 On all other political issues but war, Quakers can endorse constitutional democracy and can abide by its legitimate laws decided on the basis of the political values of public reason. Rawls seems to say that, so long as they recognize it as legitimate law and accept the obligation not to violate the law, Quakers act properly when, through "witnessing," they express their dissent from public reason and laws allowing for just war, thereby letting other citizens "know the deep basis of their strong opposition" and "bear[ing] witness to their faith by doing so."102 In this connection, Rawls alludes to "the parallel case of Catholic opposition to abortion,"103 and apparently sees religious witnessing against all abortions as appropriately expressed in the same way, even though it is not an expression of public reason, but indeed opposes the conclusions of public reason. Both examples are appropriate exercises of freedom of speech, certainly in the "background culture," if not in the public political forum or by government officials executing their duties.

As I understand Amy Gutmann and Dennis Thompson's position, which in many respects resembles Rawls's, this is one area in which they nonetheless disagree with him.104 "[P]olitics cannot be purged of moral conflict" in their view.105 The "value of public reason"106 is mainly expressed via a requirement of deliberative reciprocity, that "reasons must be mutually acceptable"107 to equal citizens. But even

102. Id.
103. Id.
104. See Amy Gutmann & Dennis Thompson, Democracy and Disagreement (1996).
105. Id. at 93.
106. Id. at 67.
107. Id. at 54. "When citizens make moral claims in a deliberative democracy, they [should] appeal to reasons or principles that can be shared by fellow citizens who are
given this principle of reciprocity, Thompson and Gutmann say that there are certain fundamental "deliberative disagreement[s]"—"conflicts in which moral reasons so deeply divide citizens that no resolution seems possible on any fair terms of cooperation." Deliberative disagreements are "fundamental because citizens differ not only about the right resolution but also about the reasons on which the conflict should be resolved." The controversy over the legalizing of abortion is the paradigm case of a deliberative disagreement. In the case of deliberative disagreements like abortion "government must take a stand on questions involving such disagreement, even if reciprocity... do[es] not determine the answer." To resolve such disagreements government officials and citizens must appeal to moral considerations that are not acceptable to one another. Here I assume they mean that officials as well as citizens are to decide in terms of their conscientious moral convictions, after considering all relevant reasons. But in so doing they should practice an "economy of moral disagreement," namely, "seek the rationale that minimizes rejection of the position they oppose."

Gutmann and Thompson's position differs from Rawls's in allowing appeals within the public political forum to moral values that Rawls would see as belonging to comprehensive doctrines rather than the political values of public reason. In this regard, Gutmann and Thompson do not see public reason (in their sense of mutually acceptable reasons) as complete. I do not think that they would see public reason in Rawls's sense as complete or adequate to its task either. Why this is so, I am not sure. It may be that Gutmann and Thompson see the political values of public reason Rawls appeals to (respect for human life, equality of women, etc.) as insufficient to provide either or both (a) a constitutional solution to the abortion problem or (b) a satisfactory solution acceptable to all the parties in the abortion dispute. Some have argued that to provide either a constitutional solution or a mutually acceptable solution to the abortion dispute, the question of the metaphysical personhood of the fetus must be decided, or at least the fetus's moral status must be addressed and decided one way or the other.

similarly motivated" to find fair terms of social cooperation. Id. at 55.
108. Id. at 73.
109. Id.
110. Id. at 74.
111. Id. at 77.
112. This is implied by certain "principles of accommodation" the authors discuss. See id. at 79-91. Gutmann and Thompson discuss a principle of civic integrity, requiring consistency and integrity of principle, and a principle of civic magnanimity, requiring, among other things, taking opposing arguments seriously and being open to changing one's convictions. Id.
113. Id. at 84 (emphasis omitted).
114. Id. at 84-85 (citation omitted).
115. In Life's Dominion, Ronald Dworkin contends that the question of the
This is just the sort of claim that Rawls hopes to avoid with the idea of public reason. While Rawls does not explicitly say so, I believe the best way to understand his position is as follows. Questions regarding the metaphysical personhood of the fetus, or its moral status as a being with interests are not questions resolvable by public reason and about which free and equal citizens can reasonably agree. But it is not necessary to resolve them to address the political issue of abortion and whether women have constitutional rights of choice at some stage of pregnancy. On political grounds of public reason reasonable citizens can agree that no abortion rights at all are a severe restriction on women's freedom and their ability to function as equals in social and civic life. Moreover, there is no compelling case that the fetus is a person, constitutionally speaking. It does not have the capacities of political personhood (the moral powers) even in an undeveloped state. This does not necessarily imply that constitutionally speaking the fetus is not a person; for while having these capacities are clearly sufficient for constitutional personhood, they may not be necessary. Still there has to be some compelling case for the constitutional personality of the fetus if we are to limit altogether women's freedom to choose, and it has not been (and it is not clear how it could be) established in terms satisfactory to public reason. Hence the reason that women should have rights of choice is that there are substantial political values and interests—regarding women's privacy, their social and civic equality, and their freedom—that would be greatly burdened by an absence of rights of choice. Moreover there is no indication or agreement that any person, constitutionally speaking, would be burdened by women exercising rights of choice. Given these substantial political values, the burden of proof should reside on the side of opponents to choice, to make the case that there are sufficiently compelling public political reasons that justify burdening those political values and interests. That there are such burdens on women's interests should not be a point of dispute between pro-choice

personhood of the fetus should be avoided politically since it is so ambiguous. See Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 22-23 (1993). He states that in fact very few opponents of abortion actually believe the fetus is a person, see id. at 13, and he is clearly skeptical about the claim that it is, see id. at 112. Still, he claims, the fetus prior to six months is incapable of having rights, since it is incapable of experiences, and therefore incapable of having interests. See id. at 14-21. Moreover, he implies, the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), implicitly made such a decision in finding in favor of a right of abortion. See Dworkin, supra, at ch. 4.

116. That possession of (a capacity for) the moral powers is sufficient for constitutional personhood takes care of the ridiculous argument which says that, "For pro-choice advocates to question the personhood of the fetus is just like supporters of slavery questioning the personhood of slaves." The correct reply is that clearly slaves do possess the moral powers and deserve to be treated as persons under the Constitution, and it is not at all clear—indeed all the empirical evidence is to the contrary—whether fetuses do.
and anti-choice views, for these are political values of public reason acceptable to reasonable citizens. The disagreement rather is (or should be) over whether there are sufficient public reasons for overriding those political values. The pro-choice argument is that there is no acceptable case within public reason for the constitutional personhood of the fetus, and that the political value of due respect for a form of human life is not sufficiently compelling, for public political reasons, during its gestation to completely outweigh the political values regarding women's political interests; therefore there is no acceptable case for burdening women's privacy, equality, and liberty so completely as to deny any right of choice.\footnote{117}

This is, I believe, a better way to understand the position the Supreme Court adopted in \textit{Roe v. Wade}\footnote{118} than the position which contends that the Court could not avoid the (metaphysical) question of the personhood of the fetus and indeed must have found that it was not a person. Of course, as Dworkin points out,\footnote{119} Justice Blackmun's argument from precedent—that the fetus is not a person within the terms of the Constitution because it has never has been treated as such in law or under the Constitution—is not a satisfactory argument. The Court might have said the same thing (and probably did) about slaves before the Civil War Amendments, but clearly this would not be a justification for perpetuating the injustice of slavery. But Blackmun might have gone on to say that, whatever its metaphysical or moral status according to the most reasonable comprehensive doctrine, the fetus is not protected by equal protection or the Due Process Clause protecting life, liberty and property, since no acceptable justification has been provided within public reason for treating the fetus as a constitutional person.\footnote{120}

\footnote{117} The point then is that the pro-choice and the anti-choice positions are not symmetrical. The uncontroversial burdens placed upon women by a ban on abortion, and the lack of any obvious constitutional person who is burdened by abortion, establish an asymmetry that imposes a special argumentative burden on the anti-choice position, which it cannot meet in terms of public reason. I am grateful to Joshua Cohen for suggesting this argument, especially for the idea that Rawls does not have to deny the constitutional personhood of the fetus to argue in favor of a constitutional right to choose.

\footnote{118} 410 U.S. 113 (1973).

\footnote{119} Dworkin made this point in discussion at the Fordham conference on Rawls. In \textit{Life's Dominion} Dworkin seems to assign greater weight to precedent in establishing the claim that the fetus is not a constitutional person. See Dworkin, \textit{supra} note 115, at 109-12.

\footnote{120} I do not mean to claim here that my interpretation of \textit{Roe v. Wade} provides a better "fit" along the lines of Professor Dworkin's account of Law as Integrity than does his own reading, which sees the Court as appealing to comprehensive reasons. Law as Integrity would require that \textit{Roe} be read in light of later abortion decisions, including \textit{Planned Parenthood v. Casey}, 505 U.S. 833 (1992), and other constitutional privacy cases. In \textit{Casey}, Justices O'Connor, Kennedy, and Souter appealed to the value of personal autonomy as a reason for upholding women's right to abortion. \textit{Id.} at 851. This appeal to autonomy seems to be nothing more than an appeal to the liberty and equality of women to control their own lives unimpeded by legal
Now for the second question I distinguished above—whether political values of public reason can provide a satisfactory solution, moral or political, to all reasonable persons. That of course will depend on the content of their reasonable comprehensive views and the priority they give to political values of justice. It may well be that many reasonable orthodox Catholics and Jews and theologically conservative Protestants in a well-ordered constitutional democracy will never be able to morally accept the political right to abortion that Rawls sees as justified on the basis of public reason (assuming that he is right that a constitutional right is so justified on that basis). But this does not mean that they must reject public reason or even the political legitimacy of abortion rights (here Rawls cites Governor Cuomo's lecture on abortion). Moreover, even if they do reject the moral and political legitimacy of abortion rights, it still does not mean they must reject the requirements of public reason in all other constitutional essentials and matters of basic justice. They are in the same position as Quakers who reject the politically liberal account of just war: Even though they dissent from the conclusions of public reason on that issue, and see the law as itself unjust and not morally legitimate, this does not mean that they must reject the political legitimacy of the law or of the constitution. This of course will be decided by their reasonable comprehensive doctrine. But I conjecture that there are few reasonable opponents of abortion who are prepared to abandon democracy, or who, aware of the burdens of judgment, are prepared to abandon public reason and use whatever political means are available to legally enforce the demands of their comprehensive views.

It is important to emphasize once again that Rawls's main concern in political liberalism is to show how a well-ordered constitutional democracy governed by a liberal political conception is practicably possible, that is, "stable for the right reasons," and politically legitimate. He is not trying to argue, nor does he need to argue for his restrictions on their reproductive decisions. As such, it is a legitimate public reason. But suppose O'Connor, Kennedy and Souter meant autonomy in the full sense, as a kind of positive freedom that partially defines the human good, and that underlies the comprehensive liberalism of Kant, Mill, early Rawls, and perhaps Dworkin too. On that reading of Casey, it may well be that the best way to understand the abortion decisions is that they do appeal to comprehensive values and perhaps even a metaphysical conception of personhood. But this would not undermine Rawls's view of a supreme court as an "exemplar of public reason." Rawls, Political Liberalism, supra note 8, at 231. Rather it would mean that the U.S. Supreme Court, as it sometimes does, improperly (and perhaps unnecessarily) has gone beyond the strictures of public reason and appealed to comprehensive reasons, to justify a decision that is justifiable (or perhaps is not) purely on the basis of public reasons. Sometimes the best interpretation of constitutional law according to Law as Integrity may not accord with the political values of public reason. But I do not see how by itself this can be an objection to Rawls's account of public reason.

purposes, that all reasonable persons morally will agree on all the politically reasonable decisions reached by deliberations based on public reason. As we have seen, clearly some will not (Quakers and liberal orthodox Catholics). So the fact that public reason does not take into account all reasons that are relevant to deciding “the whole truth” regarding the moral permissibility of abortion should not raise serious problems for his account. Serious problems arise only if many reasonable comprehensive doctrines in a well-ordered constitutional democracy cannot endorse a liberal political conception in an overlapping consensus and accept as politically legitimate most (not necessarily all) of the deliberations and conclusions of public reason based on the family of liberal political conceptions.

Finally, at this conference Ronald Dworkin raised an important question that I cannot fully address but which demands at least mention and a brief reply. Dworkin says that the idea of public reason is not well-formed. His objection, as I understand it, is as follows:

Rawls says political officials and democratic citizens are under a duty of civility, to satisfy the criterion of reciprocity and give reasons for policies they support to others that they could reasonably accept. Suppose someone finds a comprehensive doctrine, such as Kant’s or Mill’s defense of liberty in terms of autonomy, not only reasonable but also persuasive. Or suppose, like Professor Dworkin, one finds reasonable an argument for equality that begins with a view about the objective and equal importance of every human life going well—which is part of a comprehensive ethical position. What is there to prevent him from thinking that other reasonable people could reasonably accept the comprehensive position that he finds not only reasonable but persuasive? What prevents him from saying of such people, “Yes, if they are reasonable, they can accept this; maybe they won’t, but they can.” Now Rawls may reply that Dworkin is asking the wrong question: The question is not “Can they reasonably accept this as people, or from the point of view of their comprehensive view?” but “Can they reasonably accept it in their capacity as free and equal citizens?” But it is not clear if this limitation means anything. It may be that in his account of public reason Rawls builds into the definition of free and equal persons that they are persons who demand and will offer only arguments of a certain kind. But that is not helpful. What is needed is an account of why the notion of justification to others as reasonable and rational and free and equal citizens prevents one from saying that citizens, if they are reasonable, could or should reasonably endorse this comprehensive position.122

Here it is important to recognize that the notion of reasonableness,

122. I rely on a transcription of Professor Dworkin’s remarks at the conference (transcript on file with the Fordham Law Review).
like the notion of "reason," is itself constrained by political liberalism and the requirements of public political argument. The sense in which Dworkin (and others) contend that it is reasonable for other reasonable citizens to accept their comprehensive doctrines is not the sense of reasonableness used in political liberalism. To take a parallel case (suggested to me by Joshua Cohen): Pope John Paul II says in *Evangelium Vitae*\(^\text{123}\) that we can know by reason that the fetus has the rights of a human person from conception and that abortion is a crime. The empiricist and the Kantian deny this and also deny that we can know God's existence by reason. The empiricist, Kantian, and Catholic natural law theorist clearly have different views of reason, its operation, and its competence. But surely when the Pope says that the pro-choice position is unreasonable—because reason tells us that life begins with conception—and that we can reasonably expect everyone, insofar as they are reasonable, to accept the anti-choice view, he is relying on a view about reason that cannot be part of a liberal *political* conception. The same is true of the empiricist's notion of reason, and the Kantian idea of (pure) reason. Opponents of natural law (or of Hume's or Kant's views of reason and reasonableness) may be, in some comprehensive sense, "unreasonable," but they are not *politically* unreasonable.

The more general point here (and again I am indebted to Joshua Cohen) is that Rawls's idea of the domain of the political implies that we cannot generate the need for and requirements of a liberal political conception by starting "outside" political argument with a philosophical conception of reason and reasonableness. Reason and reasonableness themselves need to be given a moral-political interpretation in terms of what is appropriate to demand/expect of others in their capacity as democratic citizens. So Rawls specifies the ideas of *public* reason, and *political* reasonableness. When is someone being unreasonable, politically speaking? That is in part a matter of working out whether someone is offering and insisting on using considerations in political justification that are unsuited to the setting of justification addressed to free and equal persons with different reasonable comprehensive views. It is politically unreasonable for legislators, judges, and lawyers engaged in constitutional argument to rely on Catholic natural law doctrine in deciding whether women have a right to abortion. But the same is true of other comprehensive metaphysical and moral doctrines.

With this as background, let us consider now whether it is reasonable (as Dworkin contends) for those who accept one or another liberal comprehensive doctrine to expect that others endorse—not just the same liberal political conception these doctrines support and their public political justification—but also the

comprehensive reasons (moral and rational autonomy, individuality, and so on) that Kant’s, Mill’s, Raz’s, or Dworkin’s liberal doctrines use to justify these liberal conceptions. It is perhaps not unreasonable to expect that they will. But this does not imply, and indeed it is wrong to say, that it is reasonable, politically speaking, to expect them to. For, to begin with, there are many other reasonable comprehensive doctrines justifying the same or similar liberal political conceptions that also would not be unreasonable for reasonable persons to accept. But more to the point: To see why a reasonable democratic citizen could not reasonably expect other citizens to reasonably accept a doctrine of moral autonomy or Equality of Resources when framed as a comprehensive doctrine, we should look again to Rawls’s definition of reasonable person, and the aims and interests that guide reasonable persons’ judgments from the public standpoint of free and equal citizens. First, reasonable persons want to cooperate with others on fair terms that other reasonable persons can willingly accept and abide by. (Among other things, reasonable persons do not want other reasonable people to feel unduly coerced in complying with the basic terms of their political system.) This implies living with others on terms that are justifiable to them. Moreover, reasonable persons appreciate and accept the consequences of the burdens of judgment—reasonable persons inevitably will differ in their reasonable comprehensive views. These features of reasonable persons suggest that reasonable persons will look for terms of cooperation that, so far as possible, do not rely on a particular comprehensive doctrine. For if the terms of cooperation depend exclusively on comprehensive doctrines, then people with conflicting reasonable doctrines cannot willingly accept them (thereby contravening the first aspect of reasonable persons). Avoiding comprehensive doctrines is especially important given the further purpose for which liberal political conceptions are to be used. In addition to their role as terms of willing cooperation, a liberal conception also is to serve as a basis of public and political justification among reasonable citizens who endorse different and conflicting reasonable comprehensive views. Terms of cooperation that depend on a particular doctrine in order for their terms to be understood simply cannot serve this role.

This is where the idea of a political justification, as justification to persons in their capacity as free and equal citizens, becomes important. Reasonable citizens in a democratic society normally

124. Rawls uses the concept of “not unreasonable” to denote a space between being reasonable and unreasonable. See, e.g., Rawls, Justice as Fairness, supra note 19, at 184, 190; cf. Rawls, Political Liberalism, supra note 8, at 74. Because of the burdens of judgments, it is not unreasonable for reasonable persons to endorse one or another reasonable comprehensive doctrines within a wide range.

125. Rawls, Political Liberalism, supra note 8, at 49.
regard themselves and each other in this way in their political relations. They cannot agree on the “whole truth” or on the nature of truth, or of reason. But the aim of a political justification is not showing-the-truth, as it is conceived by one or another comprehensive view. Rather, political justification addresses others in terms of their shared political self-conception, namely, in their capacity as reasonable and rational democratic citizens. Democratic citizens have a rational interest in maintaining their status as free and as equals, and in developing and exercising the reasoning and other capacities (including the moral powers) which enable them to be cooperating members of a democratic society. They also have a fundamental interest in the social conditions within which they pursue their conception of the good. To justify terms of cooperation and provide reasons to people that they can reasonably accept in their capacity as reasonable and rational and free and equal citizens, is to provide them with reasons that are responsive to these fundamental interests they share. These public reasons express political values—the measures society and its citizens need to support, and social conditions that need obtain, if citizens are to realize these capacities and freely pursue their determinate conceptions of their good.  

This is how the idea of political justification, and reasonable acceptability to people in their capacity as reasonable and rational and free and equal citizens, differs from the idea of reasonable acceptability that Dworkin invokes in his criticism of Rawls above. Of course, it is still open to Dworkin to object that the constraints of public reason prevent him from making the best arguments for his position within the political forum (in democratic legislatures and the courts). The best arguments for a liberal political conception are provided, he will say, by his own liberal comprehensive doctrine and cannot be made solely in terms of public reason. But even if the comprehensive reasons Dworkin’s account provides supply the best argument for liberal principles from the point of view of the “whole truth,” still from the perspective of other reasonable citizens who endorse different comprehensive doctrines (liberal Catholics, Kantians, utilitarians, and so on) these arguments do not appear to be the best, or even persuasive, arguments. They do not provide a justification to them, one that they can reasonably be expected to reasonably accept, either in their capacity as reasonable democratic citizens, or in terms of their reasonable comprehensive doctrines.

VII. PUBLIC REASON AND THE COURTS

I conclude with some remarks on the relevance of Rawls’s idea of public reason to the courts and legal reasoning. Rawls says that public

126. For a list of some of the liberal political values that serve as the basis for public reason, see supra note 25.
reason is the reason of a supreme court and that a supreme court is the "exemplar of public reason."\textsuperscript{127} What does he mean? He is not saying that the Supreme Court of the United States is an exemplar of public reason, but rather that it belongs to the office of a supreme court, as such, to be the exemplar of public reason. Some understandably might interpret this claim as undemocratic, in so far as it may seem to favor courts over democratically elected legislative bodies in interpreting the constitution. It is true that Rawls does believe that a supreme court is "one of the institutional devices to protect the higher law."\textsuperscript{128} But he does not say that a supreme court is needed for these purposes in all constitutional democracies. It is a contextual question to be decided on an individual basis whether a supreme court is needed to protect constitutional essentials in a particular democratic society.\textsuperscript{129} But where a supreme court is needed, it is to have final institutional authority to interpret the constitution. Then "the political values of public reason provide the Court's basis for interpretation."\textsuperscript{130} "By applying public reason the court is to prevent that [higher] law from being eroded by the legislation of transient majorities...."\textsuperscript{131}

Does this protective role of a supreme court make the court antidemocratic? It makes it antimajoritarian with respect to ordinary law, but on a correct understanding democracy is not majoritarianism. It is government by a constitution that is the product of the constituent power of a democratic people consisting of the body of free and equal citizens. This is, of course, an idealization of democracy, one involving not simply majoritarian legislative procedures, but a substantive ideal of a political constitution as the product of the will of free and equal citizens. A supreme court, when it acts to uphold a democratic constitution, is not being antidemocratic. Though it may frustrate majority legislative will, "[t]he court is not antimajoritarian with respect to higher law when its decisions reasonably accord with the constitution itself," as the expression of the constitutive power of a democratic people.\textsuperscript{132}

Rawls's account of a constitutional democracy of course will not satisfy proponents of majoritarianism and parliamentary democracy for whom judicial review is, by (their) definition, antidemocratic. But what about advocates of deliberative democracy, who also assign, if not an exclusive role, then the leading role for elected legislative representatives in interpreting the constitution? In saying a supreme court is the exemplar of public reason, Rawls is not saying that a

\textsuperscript{127} Rawls, Political Liberalism, supra note 8, at 231.
\textsuperscript{128} Id. at 233.
\textsuperscript{129} Id. at 235.
\textsuperscript{130} Id. at 234.
\textsuperscript{131} Id. at 233.
\textsuperscript{132} Id. at 234.
democratic legislature cannot be relied upon to interpret the constitution and express public reason too. "A supreme court is not the only institution," he says, to give "due and continuing effect to public reason."

For public reason is to govern just as much the deliberations of legislative representatives, as well as the reason of citizens when they vote on constitutional essentials and matters of basic justice. For Rawls there is no inconsistency between deliberative democracy and a constitutional democracy with judicial review even though a deliberative democracy may be required by, or a condition of, public reason if it is to find appropriate expression, whereas a supreme court is not always required by public reason. Still, what makes the supreme court the exemplar of public reason where it exists is that, while legislative representatives and citizens may vote their comprehensive views on non-essential questions, "public reason is the sole reason the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone." As such the supreme court has a special educative role in a democracy. Judges, as judges, should have and express no other values than the political values of public reason as they are understood by a political conception of justice. For Rawls, it is the role of a constitutional court to interpret the constitution in light of the political conception judges see as most reasonable, consistent with precedent and a written constitution.

Now, contrast Rawls's account with Cass Sunstein's account of the role of the courts in judicial review. Sunstein's idea of Incompletely Theorized Agreements on principles is sometimes compared with Rawls's idea of overlapping consensus and public reason. For Sunstein, what makes constitutions possible in a democratic society is that people with different philosophical and religious views, who cannot agree on abstract matters of religion and basic moral principle, nonetheless can reach agreement on "mid-level" constitutional principles, and even more, agreement on the outcomes of particular cases and the "low-level" legal rules and principles that account for them. The justifications for these agreements are, and moreover must remain, "incompletely theorized" since no appeal is made by constitution makers, or by courts that interpret them, to an abstract Herculean theory to justify these agreements. There is no such theory, Sunstein contends, that all reasonable members of a democratic society could agree to. Instead, appeal is made by courts to such legal means of interpretation as stare decisis in order to explain and justify agreements on outcomes and lesser legal principles, and

133. Id. at 235 & n.22.
135. Rawls, Political Liberalism, supra note 8, at 235.
136. Cf. id. at 236-37.
these modest methods of interpretation are normally sufficient for these purposes. It is not the role of the courts, particularly in a democracy, to appeal to abstract legal and political theories to justify their decisions. Not only are judges generally not competent when it comes to the abstract philosophical and moral reasoning such theories require, but more importantly, Sunstein says, political theories do not have democratic approval by the people. People accept lower and mid-level legal and constitutional principles for all sorts of different reasons that issue from their religious and moral views.

There are certain similarities between Sunstein’s and Rawls’s accounts: Both accept the impossibility of agreement on comprehensive doctrines and emphasize the possibility of agreement on “mid-level constitutional principles” among people with different values and comprehensive views. But as Sunstein himself notes, what he is doing is quite different from Rawls. Sunstein is trying to find a way to forge and justify agreements on legal outcomes and on lower and middle-level legal principles without appealing to more general political and moral principles of theories. Rawls, by contrast, aims to provide just the abstract principles and theory—the political conception of justice—that Sunstein rejects. Rawls claims that a political conception is required as an integral part of public reason, for without political conceptions of justice, public justifications cannot be complete, or even provided at all in some cases.

One problem with Sunstein’s view is that it offers what may well be an illusory solution, for what informs reasoning by analogy that constitutes stare decisis is a commitment to moral and political principles. The reason that people can agree on an outcome that is reached by relying on precedent is that they implicitly endorse political principles that allow them to judge that one line of cases rather than another functions as an appropriate precedent for the current case. Without agreement on principles there is no agreement on the judgment that some alleged precedent is similar enough to serve as a basis of decision for the present case. This does not mean, of course, that we know or even need to know what this principle is. Nor does it even mean that people implicitly rely on the same principles. Often, because of our implicit reliance on similar principles and other factors, judges’ judgments about the adequacy of precedent to decide a case suffices for a legal justification. Where the problem arises is when there is disagreement about the relevance or sufficient similarity of alleged precedents. That is one of several points when there is a need to appeal to more abstract principles. Another would be when relying on clear precedent works an injustice to someone. And Sunstein does not seem to deny this. He says, “[s]ome cases cannot be decided at all without introducing a fair

138. Id. at 46-47.
amount in the way of theory. Moreover, some cases cannot be decided well without introducing theory.”

So seemingly it is not that Sunstein rejects reliance on political conceptions of justice in public political argument by political officials. In the end, Sunstein’s argument really is only against judicial appeal to abstract principle (unless, it seems, it is absolutely necessary). His argument for judicial restraint in interpretation is mainly based in his affirmation of deliberative democracy, and ultimately of a view about justice. Judges lack “democratic pedigree,” he says.

The American system is a deliberative democracy in which the system of electoral politics is combined with an aspiration to political reason-giving. The real forum of principle in American government has been democratic rather than adjudicative; consider the founding, the Civil War, the New Deal, and others—progressivism, the civil rights movement, the women’s movement . . . . [F]undamental principles are best developed politically rather than judicially.

Set aside the question of whether this is an overly idealized understanding of American democracy and its legislatures and the alternative view that they resemble interest-based majoritarianism more than deliberative democracy, or the question of whether the American political system (given the “curse of money” and corporate influence in our politics) is rightly called “democratic” at all. We can agree with Sunstein’s aspirations, and still assign to the courts a significant role in expressing the democratic principles that the People have developed, legislatively and constitutionally. There is more to deliberative democracy on anyone’s account than simply legislative rule by officials elected subject to equal political rights and majority rule. As many advocates, including Rawls, have argued, a deliberative democracy has its preconditions, including an understanding of equal basic liberties and their priority, and a provision of a social minimum of the kind that Rawls sees as a precondition for public reasoning. What makes a democracy deliberative for Rawls is that it is governed by public reason. This is the “ideal of public reason.” But ideals are often not followed. Who is to attend to the preconditions of deliberative democracy and the public reason that informs it when elected representatives themselves undermine them? Who is to be the voice of public reason when the legislative branch refuses, perhaps because it is guided by the influences of wealth and other particular interests? The courts can be an essential ingredient of a deliberative democracy in a nation such as ours, with a federal system and widely diverse population that constantly generates democratic conflicts in

139. Id. at 54. Therefore, “[j]udges should adopt a presumption rather than a taboo against high-level theorization.” Id. at 57.
140. Id. at 60.
understandings of the Constitution and the laws. Moreover, to say a supreme court is the exemplar of public reason is not to deny that elected representatives are not also to be governed by public reasons in their deliberations and have a duty to justify laws in terms of them. But legislators are not always prepared to give voice to public reason.

Of course, as Jeremy Waldron rightly argues, courts are not disinterested purveyors of public reason either. They can be just as partisan as legislatures, with far more damaging consequences, since their decisions can be democratically overturned only by constitutional amendment. The history of the Supreme Court of the United States sometimes confirms Waldron’s point, but the Court has not always acted in such a partisan manner, and for much of the past seventy years it has acted compatibly with democratic justice and according to public reason. Whether this is sufficient to justify the institution in our history is a question better addressed by constitutional theorists and legal historians. But that there is a legitimate question at all belies Waldron’s position, which is that judicial review is never justified in a democracy. If we see democratic lawmaking as justified when it serves democratic justice and do not identify the two as being one and the same, then I do not see how the argument can be sustained that judicial review is never justified in a democracy.

VIII. CONCLUSION: THE FEASIBILITY OF A WELL-ORDERED SOCIETY OF JUSTICE AS FAIRNESS

It is often said that with political liberalism Rawls increasingly departed from the two principles of justice and the more egalitarian features of his view, that he came to doubt the difference principle, that he became more conservative. I do not believe any of these claims are true. I want to suggest a different understanding of what is going on in political liberalism: Rather than being a rejection of justice as fairness and its egalitarian aspects, political liberalism, and particularly The Idea of Public Reason Revisited, is Rawls’s final affirmation of justice as fairness. As Rawls states, political liberalism grew out of his concerns with the arguments for stability in A Theory of Justice. Because the congruence argument depended on everyone’s adopting the same comprehensive doctrine in a well-ordered society of justice as fairness, the argument for stability of that conception relied upon an unrealistic assumption about people’s philosophical, religious and ethical views. Justice as fairness allows for the very conditions that encourage reasonable people to have different and

conflicting comprehensive views, all of which are reasonable. The question then becomes: How can it realistically be assumed that justice as fairness might be generally accepted and endorsed and remain stable in a well-ordered society, where that conception of justice specifies the terms of social cooperation? Rawls's reply in political liberalism is: The conditions under which justice as fairness might specify a realistic conception of social cooperation that is generally endorsed by all reasonable people, who now have not only different and conflicting conceptions of their good but who also endorse different comprehensive doctrines, is a society in which justice as fairness (1) is conceived by citizens as a freestanding political conception of justice implicit in democratic values and culture, (2) which is affirmed by all reasonable comprehensive doctrines in an overlapping consensus, and (3) where the exercise of political power is recognized by all as legitimate since this freestanding political conception is regularly appealed to in order to specify political values and provide the content of public reason.

Conceived in this way—as a realistic account of the conditions under which justice as fairness might provide a stable basis for a well-ordered society—there is no dilution of the egalitarian elements of justice as fairness by political liberalism. Moreover, according to *A Theory of Justice*, justice as fairness is not only the most just liberal conception but, according to *Political Liberalism*, it is also the most legitimate political conception, or rather, it is the political conception that is most capable of providing legitimacy to the exercise of political power. What happens, however, once Rawls accepts (as he did in his last works on the subject) not only the fact of reasonable pluralism and reasonable disagreement in comprehensive doctrines, but inevitable disagreements among reasonable democratic citizens about justice itself, even among the members of a well-ordered liberal society? This is implicit in his claim that the forms of public reason are several and that a family of liberal political conceptions provides the content of public reason. The implications of this conclusion may be more far-reaching for assessing Rawls's work than is his adoption of political liberalism. For what it may mean is that Rawls gave up on an idea which moved him from early on and which underlay his contractarianism. This is the idea of a well-ordered society, defined as a society in which everyone publicly accepts the same conception of justice, and where this conception provides the basis for laws and political policies as well as public justification and agreement. The idea of a well-ordered society is significant for Rawls for several reasons. It is a society in which everyone can be seen as genuinely free and as legislators of the laws, since everyone freely accepts the basic justification for laws and the procedures which lead to them, compatibly with the conception of citizens as free and equal, reasonable and rational. Because the constitution and the laws issue
from a conception of justice that is constructed on the basis of citizens' conception of themselves as free and equal moral persons, a well-ordered society is to this degree a society in which all citizens can be said to be politically autonomous, and (if they endorse a liberal comprehensive doctrine) morally and rationally autonomous as well.

In conceding that even under the best of conditions, where justice as fairness itself is in effect, there will be a pluralism, not just of reasonable comprehensive doctrines, but of liberal political conceptions of justice, Rawls appears to concede that a well-ordered society of justice as fairness is not feasible, at least not as originally conceived. For a well-ordered society is defined as one where everyone publicly acknowledges and is motivated by the same conception of justice. But because of the burdens of judgment, this ideal is not practicable and is, by Rawls's own lights, unrealistic. The most that we can expect is a society where there is general acceptance by all reasonable people of one or another liberal and democratic political view (justice as fairness being among them). For Rawls, this must have been a difficult concession to have had to make. It means that the contractarian ideal of a society in which all reasonable and rational persons agree on the most reasonable principles of justice is beyond human capabilities. A just society in the fullest sense for Rawls—a well-ordered society conforming to justice as fairness that is stable for the right reasons—is not after all entirely possible. We can take consolation in the fact that something near-justice—a liberal society that satisfies the requirements of public reason—still is.
