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Lawrence B. Solum

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SITUATING POLITICAL LIBERALISM*

LAWRENCE B. SOLUM**

No book of political philosophy since I read the great classics of the subject has stirred my thoughts as deeply as John Rawls' A Theory of Justice.

H.L.A. HART1

I. POLITICAL LIBERALISM IN CONTEXT

We have another book by John Rawls, Political Liberalism,2 published in 1993 and the subject of this symposium. Already, Political Liberalism has been widely cited in law journals3 and reviewed in a variety of publications.4 This Foreword situates Political Liberalism in

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** Associate Dean for Academic Affairs, Professor of Law, and William M. Rains Fellow, Loyola Law School, Loyola Marymount University. I owe thanks to Sharon Lloyd for her comments on portions of this foreword in draft.


contemporary legal and political discourse. Part I places Rawls's new book in context, briefly recalling the argument of *A Theory of Justice*, and then exploring the influence of Rawls's work on contemporary legal thought. Part II provides a brief outline of *Political Liberalism*, relating its themes to the issues raised by Rawls's prior work. Part III introduces the contributions to the symposium. Finally, Part IV undertakes a summary accounting of the strengths and weaknesses of *Political Liberalism*.

A. *A Theory of Justice and the Problem of Stability*

John Rawls's *A Theory of Justice* is a modern classic, and its impact on contemporary legal thinking has been profound. One indicator of the work's influence is the staggering number of law review articles citing *A Theory of Justice*. Another measure is its frequent citation in the opinions of American courts—a phenomenon that is


6. For example, one writer observes that *A Theory of Justice* "has sparked off more argument among philosophers, and has been more widely cited by sociologists, economists, judges, and politicians than any work of philosophy in the past hundred years." Alan Ryan, *John Rawls, in The Return of Grand Theory in the Human Sciences* 101 (Quentin Skinner ed., 1985).


unduplicated by any other twentieth-century work of political philosophy.\(^9\) This section provides a brief sketch of the argument of *A Theory of Justice* and then introduces the problem of stability that is taken up in *Political Liberalism*.

The basic argument of *A Theory of Justice* is familiar. Rawls advances a theory of justice which he calls "justice as fairness."\(^10\) As Rawls explains, "[t]he aim of justice as fairness . . . is practical: it presents itself as a conception of justice that may be shared by citizens as a basis of a reasoned, informed, and willing political agreement."\(^11\) The elaboration of justice as fairness in *A Theory of Justice* proceeds in three parts. Part I, entitled "Theory,"\(^2\) presents the argument for two principles of justice. The full statement of the principles and the accompanying priority rules and general conception is as follows, with changes made in *Political Liberalism* noted in appropriate footnotes:

**First Principle**\(^13\)

Each person is to have an equal right to the most extensive

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10. RAWLS, supra note 5, at 3.

11. RAWLS, supra note 2, at 9.

12. RAWLS, supra note 5, at 3-192.

13. It is no longer clear that the first principle is indeed first. After stating the two principles in *Political Liberalism*, Rawls adds:

   Finally, as one might expect, important aspects of the principles are left out in the brief statement as given. In particular, the first principle covering the basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties. Certainly any such principle must be assumed in applying the first principle.

   RAWLS, supra note 2, at 7. At this point Rawls cites to *Rodney G. Peffer, Marxism, Morality, and Social Justice* (1989) as representative of his view with some modification. See RAWLS, supra note 2, at 7 & n.7. Later in *Political Liberalism*, Rawls states that this new principle, which we might call the **basic needs principle**, is one of the constitutional essentials. See id. at 166, 228. Peffer's modified version of Rawls's principles includes the following principle, ranked first in lexical priority:

   Everyone's basic security and subsistence rights are to be met: that is, everyone's physical integrity is to be respected and everyone is to be guaranteed a minimum level of material well-being including basic needs, i.e., those needs that must be met in order to remain a normally functioning human being.

   PEFFER, supra, at 14. The remainder of Peffer's principles are substantially equivalent to Rawls's version with one exception. Part (b) of Peffer's third principle requires "an equal right to participate in all social decision-making processes within institutions of which one is a part." *Id.* Rawls rejects this principle on the ground that it can only be satisfied by socialism and that the institutional question whether socialism is the preferred form of government should not be settled by the principles of justice, but should instead be reserved for the constitutional or legislative stage. See RAWLS, supra note 2, at 7 & n.7. The issue is too complex to take up here, but I am far from certain that socialism is the only form of social organization that could satisfy Peffer's principle 3(b).
total system\textsuperscript{14} of basic liberties compatible with a similar system of liberty for all.\textsuperscript{15}

**Second Principle**

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.

**First\textsuperscript{16} Priority Rule (The Priority of Liberty)**

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases:

(a) a less extensive liberty must strengthen the total system of liberties shared by all;

(b) a less than equal liberty must be acceptable to those with the lesser liberty.

**Second Priority Rule (The Priority of Justice over Efficiency and Welfare)**

The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle. There are two cases:

(a) an inequality of opportunity must enhance the opportunities of those with the lesser opportunity.

(b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship.

**General Conception**

All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed

\textsuperscript{14} *Political Liberalism* amends the first principle, substituting “fully adequate scheme” for “the most extensive total system.” See *Rawls*, supra note 2, at 291.

\textsuperscript{15} *Political Liberalism* adds “and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.” *Id.* at 5. The guarantee of the fair value of the political liberties “means that the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions.” *Id.* at 327. Although Rawls offers arguments against guaranteeing a wider guarantee of fair value in general, and a guarantee of the fair value of the religious liberties in particular, he does not offer such an argument against guaranteeing the fair value of the liberties expressed by the idea of the rule of law, that is, those associated with procedural due process. There are good reasons, however, to believe that the fair value of the rights of due process should be guaranteed. First, the guarantee provided by the second principle of justice frequently not suffice to secure their fair values. (Litigating one’s civil rights or defending a criminal case can be quite expensive.) Second, unlike the religious liberties, guaranteeing the equal worth of the liberties covered by the rule of law would not be socially divisive. Third, because at least some forms of litigation can shape the constitutional structure, the reasons for underwriting the political liberties may apply to the liberties covered by the rule of law as well. On these matters, see Alan Wertheimer, *The Equalization of Legal Resources*, 17 Phil. & Pub. Aff. 303 (1988).

\textsuperscript{16} As noted above, *supra* note 13, there may be an additional priority rule, since the basic needs principle may be lexically prior to the equal liberty principle.
equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.\textsuperscript{17}

The argument for the two principles is rich and complex and cannot be summarized here. Two important ideas deployed in that argument, \textit{the original position} and \textit{reflective equilibrium}, are discussed in the sections that follow. Very broadly, we might say that Rawls argues that the two principles are those "that free and rational persons would accept in an initial position of equality as defining the fundamental terms of their association."\textsuperscript{18} The "initial position of equality" is specified by laying out a hypothetical choice situation, "the original position," where representative parties select from a list of alternative principles of justice from behind a "veil of ignorance" which excludes from the parties knowledge of "how the various alternatives will affect their own particular cases."\textsuperscript{19}

Of course, the laying out of the original position, that is the specification of the conditions that characterize the position, will determine which principles of justice are chosen. This laying out is not done arbitrarily; rather, the selection of the conditions constituting the original position is constrained and justified in two ways. First, the conditions of the original position must be specified in a way that reflects widely shared beliefs about the freedom and equality of citizens. Second, a particular specification of the original position can be tested by assessing the principles of justice that would be chosen in that situation against our considered judgments about justice, both as applied to particular cases and at a relatively general or abstract level. As Rawls puts it:

\begin{quote}
In searching for the most favored description of this situation we work from both ends. We begin by describing it so that it represents generally shared and preferably weak conditions. We then see if these conditions are strong enough to yield a significant set of principles. If not, we look for further premises equally reasonable. But if so, and these principles match our considered convictions of justice, then so far well and good. But presumably there will be discrepancies. In this case we have a choice. We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principal, I assume that eventually we shall find a description of the initial situation that
\end{quote}

\textsuperscript{17} RAWLS, \textit{supra} note 5, at 302.
\textsuperscript{18} \textit{Id.} at 11.
\textsuperscript{19} \textit{Id.} at 136.
both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium.\(^{20}\) Thus, the first part of *A Theory of Justice* consists of an argument for the two principles, using the method of reflective equilibrium and the philosophical device of the original position.

Part II of *A Theory of Justice*, titled "Institutions,"\(^{21}\) gives content to the two principles by describing a basic structure that satisfies them. Rawls uses a four stage sequence to organize his discussion of such a structure. Stage one is the original position itself, in which the two principles are chosen.\(^{22}\) Stage two is a constitutional convention, in which the parties in the original position define governmental powers and citizens rights.\(^{23}\) Stage three is legislation, in which the justice of particular statutes and ordinances is assessed.\(^{24}\) Stage four is application, in which the laws are applied to particular circumstances.\(^{25}\) The second part of *A Theory of Justice* discusses particular rights, such as the liberty of conscience, political rights, and the rights to due process.\(^{26}\) This part of the book also includes a discussion of economic institutions, including the provision of public goods and taxation.\(^{27}\) Finally, Part II includes an important discussion of legal obligation and civil disobedience.\(^{28}\)

Part III of *A Theory of Justice*, titled "Ends,"\(^{29}\) discusses several topics. Perhaps the most important of these, so far as setting the stage for *Political Liberalism* is concerned, is stability. A conception of justice is unrealistic unless it can meet the criterion of stability. To meet this criterion, a well-ordered society—one whose citizens affirm and attempt to act on the conception of justice—must be able to sustain itself over time. As Rawls explains in the introduction to his second book, many of the differences between the two books arise from his efforts "to resolve a serious problem internal to justice as fairness, namely that the account of stability in Part III of *Theory* is not consis-

\(^{20}\) *Id.* at 20; see also RAWLS, *supra* note 2, at 8.
\(^{21}\) RAWLS, *supra* note 5, at 191-291.
\(^{22}\) See *id.* at 196.
\(^{23}\) See *id.*
\(^{24}\) See *id.* at 198.
\(^{25}\) See *id.* at 199.
\(^{26}\) See *id.* at 205-11.
\(^{27}\) See *id.* at 221-34.
\(^{28}\) Under the heading, "The Rule of Law." See *id.* at 235-43.
\(^{29}\) See *id.* at 266-70.
\(^{30}\) See *id.* at 277-80.
\(^{31}\) See *id.* at 350-91.
\(^{32}\) *Id.* at 393-587.
tent with the view as a whole.”33 In particular, A Theory of Justice relies on the idea of a well-ordered society in which citizens endorse justice as fairness on the basis34 of a comprehensive (or partially comprehensive) philosophical doctrine.35 But modern democratic societies are characterized by what Rawls calls “the fact of pluralism”—the fact that there is a “plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life.”36 Thus, one might say that the purpose of Political Liberalism is to restate the idea of justice as fairness without reliance on a comprehensive moral doctrine as the basis of stability. Without such reliance, justice as fairness becomes what Rawls calls a “political conception,” hence the title Political Liberalism.

At this point, I will postpone discussion of the problem of stability and its resolution in Political Liberalism and complete my discussion of its context by discussing three features of Rawls’s work that have played an important role in contemporary legal theory, the original position, reflective equilibrium, and the idea of public reason.

B. The Original Position and Legal Argument

Rawls’s argument for the two principles of justice uses the philosophical idea of the original position. Although the original position is a complex philosophical idea, the use of constructivist argument is familiar from ordinary moral discourse. When a parent asks a child who has hit her younger sibling to imagine how she would feel if her brother hit her, the parent is using a constructivist argument—asking the child to construct her moral evaluation of her own action by laying out a hypothetical situation and asking the child to generalize from her own reactions to the thought experiment.

In the original position, the parties are behind a veil of ignorance; they choose principles of justice without knowledge of their intellec-

33. Rawls, supra note 2, at xv-xvi.
34. A Theory of Justice does not use this terminology, but in the course of arguing that it is rational for citizens to be reasonable, that is, to act on principles of justice, Rawls argued that justice is an intrinsic good and the supreme good. See Rawls, supra note 5, at 570-75. These claims concern the role and position of justice within conceptions of the good, and thus Rawls’s admission that A Theory of Justice relied on a partially comprehensive conception of the good.
35. Examples of comprehensive religious or philosophical doctrines would include particular religious views, such as Roman Catholicism or Orthodox Judaism, and philosophical moral theories, such as hedonistic utilitarianism or Kant’s theory. A moral conception is comprehensive when it “includes conceptions of what is of value in human life, as well as ideals of personal virtue and character,” Rawls, supra note 2, at 175, that will guide and limit conduct in all spheres of life, not just the political sphere.
tual and physical endowments, their economic and social circumstances, or their plans of life. The original position has influenced the course of contemporary legal argument in two ways. The first influence is quite direct. Legal scholars have used the original position in a wide variety of contexts in order to make arguments about what is the fair or just legal rule. Of course, this use of the original position is quite different from that envisioned by Rawls. Rawls uses the original position to justify principles of justice and not particular legal rules.

The appropriateness of employing the veil of ignorance in actual adjudication raises interesting questions, but the influence of Rawls's thought on legal reasoning is unmistakable.

A second influence of the original position on legal thought is less direct. The communitarian critique of the liberal conception of the


38. See RAWLS, supra note 5, at 198-99.

39. Common law adjudication involves law making as well as law application. At the third stage, the stage of legislation, the veil of ignorance is not wholly lifted and individual legislators do not know their own circumstances. See id. at 198. Thus, one might argue that use of a veil of ignorance is appropriate in arguing about the fairness of common law rules.
self by Michael Sandel and others such as Bernard Williams has had a substantial influence on legal thinkers. The gist of the argument is that Rawls’s description of the condition of the representative parties behind the veil of ignorance in the original position implies that he is committed to a theory of the self. On this theory, the self is independent of its projects, commitments, and associations—hence, the so-called unencumbered self. If Rawls were committed to such a position, then his view would be inconsistent with the fact of pluralism. Such a theory of the self could not be incorporated into what Rawls calls a freestanding view; a metaphysical view of the self could not be accepted by citizens with the many conceptions of the good that coexist in a modern democratic society and would exist in a well-ordered society that adhered to justice as fairness.

It is now widely recognized that Sandel was mistaken in his characterization of Rawls’s position, as critical legal scholars have acknowledged. The veil of ignorance is not intended to reflect a


Some defenders of Rawls have argued that this critique does not hit home because Rawls is only creating a theory of justice, not a theory of human nature. Indeed, this objection... has been made in print by Ed Baker. ... Baker, Sandel on Rawls, 133 U. Pa. L. Rev. 895, 896 (1985). I remain completely unconvicted. Needing "only" to be able to postulate universal qualities that we should attribute to personhood within a theory of justice, seems to me just as demanding as the task of postulating a universal subject, tout seul. The same epistemological and political difficulties are involved whether one is divining the essential features of the subject in a moral theory or the
theory of the self; instead the veil provides a representation of a political idea about the freedom and equality of citizens. Nothing in justice as fairness rules out the idea that citizens may pursue conceptions of the good that specify a form of life for a community of voluntary association. Such a conception of the good could include an ideal of strong community, such as belief in the goodness of a form of association that is constitutive of the identities and ends of its members. Justice as fairness does, however, rule out, at least as forms of life, those conceptions of the good that require the state to coerce belief in a comprehensive moral or religious doctrine.\(^4\)

It may be ironic that the veil of ignorance is the feature of justice as fairness that insures that parties in the original position will not disregard the interests of citizens with communitarian conceptions of the good. When we go behind the veil of ignorance and use the original position to reason about justice, we are forced to evaluate principles of justice with the possibility that we will be encumbered with the general kinds of commitments and associations that Sandel identifies. The original position is designed to insure that the parties will fairly represent the interests of encumbered selves in their constitutive communities and projects.

Sandel’s criticisms have focused attentions on Rawls’s recent work. Although Political Liberalism addresses a different problem than the one mistakenly attributed to A Theory of Justice,\(^6\) Sandel’s work has played an important role in focusing the attention of legal scholars on recent developments in Rawls’s thinking.

C. Reflective Equilibrium and Legal Theory

As briefly mentioned above, the role of the original position in A Theory of Justice can only be understood in connection with the method of reflective equilibrium that is used to lay out the features of

essential features of human nature. It is no easier to build a small perpetual motion machine than a large one.

The nature of Boyle’s argument is not entirely clear. Consider the use of familiar constructivist forms of reasoning in ordinary moral discourse: do we need to build a theory of the essential features of human nature in order to ask someone, “How would you feel if you were treated like that?” Such moral thought experiments do not commit us to belief in a disembodied self that migrates to a transcendental realm in which it actually is “treated like that.”

45. See Lawrence B. Solum, Pluralism and Modernity, 66 Chi.-Kent L. Rev. 93, 100 n.40 (1990).

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the original position. As H.L.A. Hart describes the role of reflective equilibrium in Rawls's theory,

Rawls regards his two principles as established or justified not simply by the fact that they would be chosen, as he claims they would, by the parties in the original position, but also by the general harmony of these principles with ordinary "considered judgments duly pruned and adjusted." The test of his theory, therefore, is in part whether the principles he identifies illuminate our ordinary judgments and help to reveal a basic structure and coherence underlying them.

Although Rawls's description of the method is striking and original, it is related to much older ideas in moral and political philosophy, and in particular to the method described by Aristotle in his Nicomachean Ethics. A substantial body of philosophical literature has developed around Rawls's idea.

From the point of view of legal theory, the most profound influence of Rawls's notion of reflective equilibrium has been on legal scholarship about judging and judicial method. Indeed, judges themselves have used the method and noted a relationship between reflective equilibrium and common law adjudication. Perhaps one of the most important (but difficult to pin down) routes of influence of
Rawls's idea of reflective equilibrium is via Ronald Dworkin's theory of law as integrity.\textsuperscript{53}

An exploration of the influence of Rawls's idea of reflective equilibrium on Dworkin in particular and legal theory in general is outside the scope of this introduction, but the idea that common law adjudication uses a method like reflective equilibrium is a familiar one. Already decided cases, statutes, and constitutional provisions are like our considered judgments about particular cases. We construct legal theories that fit and justify the existing law. As in the case of reasoning about justice, it is likely that our tentative theory will not fit all the cases, statutes, and constitutional provisions. We then have two options. Take a prior case that is inconsistent with our tentative theory. It is possible that a prior case is mistakenly decided and that it will be confined to its facts or even overruled. It is possible that our tentative theory is mistaken and will need to be revised. In the law, of course, it is uncontroversial that "[t]he struggle for reflective equilibrium goes on indefinitely,"\textsuperscript{54} but it is also uncontroversial that the case before a judge must be decided, so a temporary equilibrium must be reached.

\textbf{D. Public Reason, the Law, and Religion}

A more recent Rawlsian notion that has begun to influence legal discourse is his idea of public reason. The idea of public reason was introduced in several of Rawls's essays in the 1980s,\textsuperscript{55} was extensively developed in his Melden Lectures entitled "The Idea of Free Public Reason" delivered in 1990,\textsuperscript{56} and published in revised form in \textit{Political Liberalism}.\textsuperscript{57} Consider three features of Rawls's idea of public reason. First, Rawls understands public reason as the common reason of a political society. A society's reason is its "way of formulating its


\textsuperscript{54} \textit{RAWLS, supra} note 2, at 97.

\textsuperscript{55} I have been unable to locate the phrase "public reason" in \textit{A Theory of Justice}; it does not appear in the index. \textit{See RAWLS, supra} note 5. A very similar idea does appear, however, in his discussions of "publicity." \textit{See John Rawls, Kantian Constructivism in Moral Theory: The Dewey Lectures, 77 J. PHIL. 515, 537 (1980) (hereinafter Dewey Lectures) ("Citizens in a well-ordered society agree on these beliefs because they can be supported . . . by publicly shared methods of inquiry . . . familiar from common sense and [including] . . . the procedures and conclusions of science, when these are well established and not controversial."); see also RAWLS, supra note 5, at 454. The idea does appear in John Rawls, \textit{Justice as Fairness: Political not Metaphysical}, 14 PHIL. & PUB. AFF. 223 (1985), and in the essays cited below.}

\textsuperscript{56} John Rawls, The Idea of Free Public Reason, Inaugural Abraham Melden Lectures, Department of Philosophy, University of California at Irvine (February 27 and March 1, 1990).

plans, of putting its ends in an order of priority and of making its decisions accordingly."\textsuperscript{58} Public reason contrasts with the "nonpublic reasons of churches and universities and of many other associations in civil society."\textsuperscript{59} Both public and nonpublic reason share features that are essential to reason itself, such as simple rules of inference and evidence.\textsuperscript{60} Public reasons, however, are limited to premises and modes of reasoning that can appeal to the public at large. Rawls argues that these include "presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."\textsuperscript{61} By contrast, the nonpublic reason of a church might include premises about the authority of sacred texts and modes of reasoning that appeal to the interpretive authority of particular persons.

Second, Rawls formulates a particular ideal of public reason—a standard for judging the appropriateness of the reasoning of citizens and officials. He does not apply his ideal to all actions by the state or even to all coercive uses of state power. Rather, his version of the ideal is limited (at least tentatively) to what he calls "the constitutional essentials"\textsuperscript{62} and "questions of basic justice."\textsuperscript{63} Thus, the scope of the freedom of speech and qualifications for the franchise would be subject to the Rawlsian ideal, but he does not resolve the question whether it would also apply to the details of tax legislation and the regulation of pollution control.\textsuperscript{64}

Third, Rawls's ideal of public reason applies to citizens and public officials when they engage in political advocacy in a public forum; it also governs the decisions that officials make and the votes that citizens cast in elections. The ideal does not apply to personal reflection and deliberation about political questions; by implication it could not apply to such reflection or deliberation about questions that are not political in nature.\textsuperscript{65}

\textsuperscript{58} Id. at 212.
\textsuperscript{59} Id. at 213.
\textsuperscript{60} Id. at 220.
\textsuperscript{61} Id. at 224.
\textsuperscript{62} The constitutional essentials are simply the basic provisions of the constitution, the structural provisions that determine legislative, executive, and judicial power and the provisions that ensure basic constitutional rights such as the right to vote, liberty of conscience, freedom of speech and religion, and the right to due process. See id. at 227.
\textsuperscript{63} Id. at 214; see also id. § 5, at 227-30.
\textsuperscript{64} Rawls notes that a full account of public reason would need to offer an account of these subjects and how they differ from the constitutional essentials and questions of basic justice. Id. at 214-15.
\textsuperscript{65} Id.


68. I first set forth this distinction in correspondence with Rawls. See RAWLS, supra note 2, at 247 n.36; Solum, Constructing Public Reason, supra note 60, at 741-51; Letter from Lawrence Solum to John Rawls, December 4, 1990.

69. RAWLS, supra note 2, at 247.

70. Id.

71. See id. at 247-54.
II. An Outline Of Political Liberalism

Political Liberalism consists of an introduction and eight lectures which range over a wide variety of topics and explore many ideas in great depth. Some of the lectures are reworkings of the various articles that Rawls has published since A Theory of Justice, but each of the lectures contains important new material, some involve quite substantial revisions, and one of them, the sixth lecture entitled “The Idea of Public Reason,” is published for the first time in any form. This survey of the book will preview some of the main ideas, with a particular emphasis on introducing key concepts and avoiding some possible misunderstandings of Rawls’s views. An attempt to summarize the book in a few paragraphs would be futile, but a very general mapping of the territory covered in Political Liberalism is possible.

The first lecture, titled “Fundamental Ideas,” introduces the basic ideas used in justice as fairness. In addition to the original position, four ideas are explored. The first is the idea of a political conception of justice. A political conception of justice is a moral conception that deals with the basic structure of society, that is the core political, social, and economic institutions. Although a political conception of justice is a moral conception, it should be what Rawls calls “a freestanding view.” That is, a political conception of justice should be presented so that it does not depend on any comprehensive moral or religious doctrine. For this reason, utilitarianism would not be a political conception of justice because utilitarianism is a comprehensive moral doctrine; utilitarianism takes a stand on the question of what constitutes the ultimate good.

The second idea is that of society as a fair system of cooperation. “Cooperation,” says Rawls, “involves the idea of fair terms of cooperation: these are terms that each participant may reasonably accept, provided that everyone else likewise accepts them.” In order for persons to be full participants in a fair system of cooperation, they must possess what Rawls calls “the two moral powers, . . . a capacity for a sense of justice and a capacity for a conception of the good.”

72. See id. at 213-54.
73. Id. at 3-46.
74. See id. at 22-28.
75. See id. at 11-15.
76. See id. at 11.
77. See id. at 12.
78. See id. at 15-22.
79. Id. at 16.
80. Id. at 19.
capacity for a sense of justice is the ability to comprehend, act on, and apply a political conception of justice. A capacity for a conception of the good is the ability to form, revise, and pursue one's self-understanding of the good. In sum, a political conception of justice establishes fair terms of cooperation applying to the basic structure of society among citizens with the two moral powers.

The third idea is that of a political conception of the person. Rawls is concerned here with the charge that the original position involves commitment to a metaphysical doctrine of the person; a charge that he believes is mistaken. The original position is intended to represent the political idea that citizens are free and equal. In particular, citizens in a democratic society conceive of themselves as: (1) having the moral power to form and act on a conception of the good, (2) being the source of self-authenticating claims, and (3) having the capacity for taking responsibility for their ends. The original position is intended to represent this political self-understanding.

The fourth and final idea is that of a well-ordered society. Such a society is one in which citizens accept the same principles of justice, in which the basic structure of the society satisfies and is known to satisfy these principles, and in which citizens have an effective sense of justice so that they generally comply with the requirements of the institutions that constitute the basic structure. In addition, the first lecture makes an important modification to the two principles of justice, suggesting that a basic needs principle that is lexically prior to the equal liberty principle should be added.

The second lecture, titled "Powers of Citizens and Their Representation," introduces several additional ideas. The first of these is the distinction between the reasonable and the rational. The intuitive notion is that one can be rational, meaning that one's actions make sense in light of one's beliefs and desires, but unreasonable, meaning that one is unwilling to acknowledge the legitimate claims of others. Rawls puts it this way, "[w]hat rational [but unreasonable] agents lack is the particular form of moral sensibility that underlies the desire to

81. See id.
82. See id. at 29-35.
83. See id. at 29 & n.31.
84. See id. at 30-34.
85. See id. at 35-46.
86. See id. at 35.
87. See supra note 13 (quoting the relevant passage from Political Liberalism).
88. See Rawls, supra note 2, at 47-88.
engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse."\textsuperscript{89}

Specifying the notion of the reasonable leads Rawls to introduce a subsidiary idea, the burdens of judgment. These burdens account for the fact that free institutions lead to pluralism, to a variety of comprehensive philosophical and religious doctrines about the nature of the good or ultimate value. Rawls argues that disagreement about such matters is reasonable given the difficulties of coming to consensus about them. These difficulties include: complex and conflicting evidence, disagreement about what is relevant and how to weigh the considerations that are relevant, the underdeterminacy introduced by hard cases, and the fact that there may be different kinds of normative arguments on both sides of a moral question.\textsuperscript{90} Particularly important is the following factor:

To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.\textsuperscript{91} Given the burdens of reason, we should expect that citizens will disagree about many moral and political questions. Thus, the pluralism that characterizes modern democratic societies is a reasonable pluralism.\textsuperscript{92} In addition to these topics, the second lecture discusses the publicity condition (the requirement that the conception of justice in a well ordered society be publicly known and accepted),\textsuperscript{93} rational and full autonomy,\textsuperscript{94} and moral psychology.\textsuperscript{95}

The third lecture, titled "Political Constructivism,"\textsuperscript{96} contrasts Rawls's approach to two other views, Kant's moral constructivism and rational intuitionism. Political constructivism involves the construction of the content of a political conception of justice; in justice as fairness, it is the difference principle and the equal liberty principle

\textsuperscript{89} Id. at 51.
\textsuperscript{90} See id. at 56-57.
\textsuperscript{91} Id.
\textsuperscript{92} But that does not mean that all disagreement is reasonable.
\textsuperscript{93} See RAWLS, supra note 2, at 66-71.
\textsuperscript{94} See id. at 72-81.
\textsuperscript{95} See id. at 81-88.
\textsuperscript{96} See id. at 89-129.
that are constructed. The original position is laid out in order to construct these principles.97

Rational intuitionism, a view that Rawls associates with Sedgwick and others, differs from political constructivism in four ways. First, rational intuitionism holds that moral principles and judgments, if correct, are true statements about an independent order of moral values, but political constructivism holds that principles of justice can be represented as the outcome of a procedure of construction, for example, as the outcome of deliberation in the original position. Second, rational intuitionism holds that moral first principles are known by theoretical reason; by way of contrast, the procedure of construction adopted by political constructivism is based on practical reason. Third, rational intuitionism employs a sparse conception of the person, holding that intuitive knowledge of moral first principles is sufficient to give rise to a desire to act from them; political constructivism instead uses a complex conception of the person, including the two moral powers, and of society. Fourth, rational intuitionism maintains that the truth of moral propositions consists in their correspondence to the independent order of moral values, but political constructivism uses the idea of the reasonable and does not take a stand on the question whether the principles of justice that are reasonable are also true.98 More programmatically, rational intuitionism is a form of moral realism; political constructivism neither affirms nor denies moral realism. But a moral realist might affirm the principles of justice which emerge from political constructivism and add that these political values are ultimately supported by an independent order of moral values.99

Political constructivism also differs from Kantian constructivism in several ways. One of these differences is that Kant’s theory is a comprehensive moral doctrine, in which the ideal of autonomy regulates all of life; political constructivism is a political doctrine that does not address questions about ultimate purposes and sources of value. The remaining differences discussed by Rawls require an exposition of Kant’s transcendental idealism and his view of philosophy as defense of reasonable faith, topics which are outside the scope of this brief outline.100

97. See id. at 103.
98. See id. at 91-94.
99. See id. at 95.
100. See id. at 99-101.
Another topic taken up in the third lecture is objectivity, and the sense in which objective reasons exist from the political point of view. Rawls offers the following formulation:

Political convictions (which are also, of course, moral convictions) are objective—actually founded on an order of reasons—if reasonable and rational persons, who are sufficiently intelligent and conscientious in exercising their powers of practical reason, and whose reasoning exhibits none of the familiar defects of reasoning, would eventually endorse those convictions, or significantly narrow their differences about them, provided that these persons know the relevant facts and have sufficiently surveyed the grounds that bear on the matter under conditions favorable to due reflection.101

With Warren Quinn,102 Rawls sees this idea of objectivity as essentially a Kantian one.103 This formulation of political objectivity is an important addition to Rawls's theory, but its adequacy is barely explored in *Political Liberalism*.

Rawls does qualify his claim in the following way:

I do not say that there being an objective order of political reasons consists in various activities of sound reasoning, or in the shared practice thereof, or in its success. Rather, the success of the shared practice among those reasonable and rational is what warrants our saying there is an order of reasons. The idea is that if we can learn to use and apply the concepts of judgment and inference, and ground and evidence, as well as the principles and standards that single out the kind of facts to count as reasons of political justice; and if we find that by reasoning in light of these mutually recognized criteria we can reach agreement in judgment; or if not agreement, that we can in any case narrow our differences sufficiently to secure what strikes us as just or fair, honorable or decent, relations between us; then all this supports the conviction that there are objective reasons.104

Perhaps not yet fully appreciated is the Wittgensteinian character of the stance that Rawls takes at this point. Being able to state sufficient reasons for judgment "is already the best possible explanation of the beliefs of those who are reasonable and rational. At least for political purposes, there is no need to go beyond it to a better one, or behind it to a deeper one."105 The insistence that there is no need for deep explanations is characteristically Wittgensteinian, and this is confirmed in the footnote to the previous quotation, in which Rawls says,

101. Id. at 119.
103. RAWLS, supra note 2, at 119 n.24.
104. Id. at 119-20.
105. Id. at 120.
“[w]e cannot ground these principals and canons [of the validity of practical reason] on something outside reason. Its concepts of judgment and inference, and the rest, are irreducible. With these concepts explanations come to and end; one of philosophy’s tasks is to quiet our distress at this thought.”106 The parallel to Wittgenstein’s *Philosophical Investigations* is unmistakable: as Wittgenstein says, “Explanations come to an end somewhere.”107

The fourth lecture, titled “The Idea of an Overlapping Consensus,”108 addresses the question of stability—a question that is central to the changes in *Political Liberalism* from Rawls’s positions in *A Theory of Justice*. How can a well-ordered society which adheres to justice as fairness maintain its stability given the reasonable pluralism of comprehensive moral and religious doctrines that will exist? One part109 of the answer to this question involves the idea of an overlapping consensus among reasonable comprehensive doctrines on a political conception of justice—where a political conception is a freestanding view that does not derive from any particular comprehensive doctrine.

In this brief preview, two possible misunderstandings of the idea of overlapping consensus will be explored. First, the idea of an overlapping consensus is not the method for construction of principles of justice. One does not begin by asking what political principles are already the subject of agreement between the various religious and philosophical views that prevail in our society. This is because justice as fairness starts with political notions about citizens and society and uses those ideas to lay out the original position; the principles of justice are constructed without reference to the particular comprehensive doctrines that currently prevail. Those doctrines, recall, are excluded in the first stage of the original position.110 Second, an overlapping consensus is not a mere modus vivendi, a peace treaty between warring conceptions of the good. Rather, the consensus is on moral principles (principles of political morality) that can be affirmed from

106. *Id.* at 120 & n.26.


108. *See RAWLS, supra* note 2, at 133-72.

109. There are two questions concerning stability. The first, not discussed in the text, is whether persons who are raised under just institutions will acquire a sufficient sense of justice. *Id.* at 141.

110. *See id.*
within the various reasonable comprehensive doctrines for good and sufficient reasons.\textsuperscript{111}

Consider one final point that is addressed in the fourth lecture: what must the content of the overlapping consensus be? Must there be an overlapping consensus on the whole content of justice as fairness, or would it be sufficient to have an overlapping consensus on the constitutional essentials?\textsuperscript{112} If the former, then there may be substantial practical difficulties given the complexity and subtlety of justice as fairness. If the latter, then several different political conceptions, including justice as fairness as one among many, could coexist. This possibility might enable a wider range of comprehensive conceptions to participate in an overlapping consensus. A comprehensive conception could participate if it included a conception of justice that included the same constitutional essentials as does justice as fairness, even though the various conceptions of justice might differ in some ways from justice as fairness. Thus, the overlapping consensus can be on a "class of liberal conceptions that vary within a more or less narrow range."\textsuperscript{113}

The fifth lecture, titled "The Priority of Right and Ideas of the Good,"\textsuperscript{114} deals with the claim, made by political liberalism, that the right is prior to the good. In order to clarify this claim, Rawls explores several different ideas of the good that play a role in his theory. One of these is the primary goods, the list of goods that are considered by the parties to the original position in their deliberations. These goods include basic rights and liberties, freedom of movement and free choice of occupation, the powers and prerogatives of the positions available in economic and political institutions, income and wealth, and the social bases of self respect.\textsuperscript{115}

Also in the fifth lecture, Rawls considers a number of objections, including those raised by Sen and Arrow, which focus on the differences in human capacities. These objections, which have been part of the important "equality of what?" debate, begin with the observation that different humans have different mental and physical abilities, different needs for medical care, and different needs for resources to realize their plans of life.\textsuperscript{116} Take the example of differences in physical

\textsuperscript{111} See \textit{id.} at 147.
\textsuperscript{112} See \textit{id.} at 149; see also Kurt Baier, \textit{Justice and the Aims of Political Philosophy}, 99 \textit{Ethics} 771 (1989).
\textsuperscript{113} See \textit{Rawls}, \textit{supra} note 2, at 164.
\textsuperscript{114} See \textit{id.} at 173-211.
\textsuperscript{115} See \textit{id.} at 181.
\textsuperscript{116} See \textit{id.} at 182-83.
abilities. Rawls notes that his theory assumes that all citizens have the capacity to be cooperating members of society; the theory does not address the question of justice toward persons who lack this capacity. Among those who do have this capacity, Rawls argues that satisfaction of the two principles of justice would entail that no injustice would be done to citizens with different physical or mental abilities.117

Another topic explored in the fifth lecture is the question whether, and in what sense, justice as fairness could be said to be "neutral" (a term that Rawls believes can be misleading) with respect to various conceptions of the good.118 Rawls makes it clear that justice as fairness is not neutral in the sense that it treats all conceptions equally.119 Unreasonable conceptions, including those that require injustice for their realization, will not be allowed as ways of life, although citizens may be free to advocate and believe in them.120 Even among reasonable conceptions of the good, justice as fairness may discourage some conceptions and result in the eventual demise of others. For example, justice as fairness may require the education of children to a degree that will permit them to engage in social cooperation and participate in political institutions. But even this much education may be inconsistent with the flourishing of some conceptions of the good; these conceptions, while not unjust, nonetheless may not retain adherents who are exposed as children or young adults to forms of life other than that which is required by those conceptions. Justice as fairness is not neutral in the sense that it would give these conceptions an equal chance of surviving over the long run.

The sixth lecture, titled "The Idea of Public Reason,"121 has already been discussed. In addition to the points already made, it is important to remember that Rawls does not envision that the limits of public reason would be enforced by the state. Rather, he says,

[Public reason] is not, of course, a matter of law. As an ideal conception of citizenship for a constitutional democratic regime, it present how things might be, taking people as a just and well-ordered society would encourage them to be. It describes what is possible and can be, yet may never be, though no less fundamental for that.122

117. See id. at 184.
118. Id. at 3-46.
119. Id. at 191-92.
120. See id. at 192-93.
121. See id. at 212-54.
122. Id. at 213.
Why should citizens adhere to an ideal of public reason that requires them to offer public reasons and sometimes even to refrain from appealing to their own deeply held religious or moral beliefs? The gist of Rawls's answer lies in the liberal principle of legitimacy: "our 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 light of principles and ideals acceptable to them as reasonable and rational."\textsuperscript{123} It is because of this principle that "the ideal of citizenship imposes . . . the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason."\textsuperscript{124}

The sixth lecture also contains discussion of the Supreme Court as an exemplar of public reason.\textsuperscript{125} This discussion briefly touches on a number of issues in constitutional theory, drawing on classical Lockean ideas and the recent work of Bruce Ackerman.\textsuperscript{126} "[C]onstitutional democracy is dualist," writes Rawls, "it distinguishes constituent power from ordinary power as well as the higher law of the people from the ordinary law of legislative bodies."\textsuperscript{127} The Supreme Court is one of the institutions that protects the higher law from legislative infringement. It exemplifies public reason when it engages in constitutional interpretation, and the best interpretation of the constitution is the one that best fits and justifies the constitutional text, history, and cases. Here Rawls is drawing on Ronald Dworkin's view.\textsuperscript{128}

The seventh lecture, titled "The Basic Structure as Subject,"\textsuperscript{129} explores the way in which justice as fairness takes the basic economic, social, and political institutions of society as that which is regulated by the principles of justice constructed in the original position. To begin, the two principles, the difference principle and the equal liberty principle, are clearly not suited to the role of regulating questions of justice for all social institutions. Although the utility principle might play that role even with respect to such social institutions as universities and churches, the two principles simply do not seem to apply to many

\textsuperscript{123} Id. at 217.
\textsuperscript{124} Id.
\textsuperscript{125} See id. at 231-40.
\textsuperscript{126} See id. at 231 n. 12; see also Bruce Ackerman, We the People: Foundations (1991); Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L.J. 453 (1989).
\textsuperscript{127} Rawls, supra note 2, at 233.
\textsuperscript{128} See id. at 236 & n.23.
\textsuperscript{129} See id. at 257-88.
issues of local justice.\textsuperscript{130} A second point concerns the way in which regulation of the basic structure creates a moral space within which individuals and groups can pursue their own conception of the good. Taking the basic structure as subject allows justice as fairness to aim at securing what Rawls calls "background justice."\textsuperscript{131} If the constitution secures basic liberties, the system of income and inheritance taxation secures reasonably just distribution of wealth, and so forth, then individuals may freely pursue their own ends with the knowledge that they act in a system which secures background justice.\textsuperscript{132} Finally, the seventh lecture concludes with a reply to Hegel’s criticisms of social contract theory, and a comparison of justice as fairness with the social contract theories of Locke and Hobbes with respect to those criticisms.\textsuperscript{133}

The eighth and final lecture, titled "The Basic Liberties and Their Priority,"\textsuperscript{134} develops Rawls’s response to important criticisms of A Theory of Justice made by H.L.A. Hart.\textsuperscript{135} These criticisms focus on the basic liberties and their priority; the statement of the two principles and the accompanying priority rules is quoted above.\textsuperscript{136} Hart exposed two gaps in the argument for justice as fairness. The first gap is that Rawls failed to provide an adequate justification for agreement on the basic liberties and their priority in the original position. The second gap is that Rawls failed to give an adequate account of how the basic liberties will be specified, and how conflicts among them will be adjusted as social circumstances become known in the four stage sequence, from original position to constitutional convention to legislation to adjudication. After outlining his response to the first gap, Rawls turns to the second. In A Theory of Justice, the equal liberty principle called for "the most extensive total system of basic liberties."\textsuperscript{137} Hart noted that "extensiveness" does not provide a satisfactory criterion for specifying the basic liberties. Political Liberalism amends the first principle, substituting "fully adequate scheme" for "the most extensive system."\textsuperscript{138} In a discussion that will be of particular interest to legal scholars, Rawls discusses how the basic liberties

\begin{itemize}
\item \textsuperscript{130} See id. at 260-61.
\item \textsuperscript{131} See id. at 268.
\item \textsuperscript{132} See id. at 269.
\item \textsuperscript{133} See id. at 285-88.
\item \textsuperscript{134} Id. at 289-371.
\item \textsuperscript{135} See Hart, supra note 1.
\item \textsuperscript{136} See supra text accompanying notes 13-24.
\item \textsuperscript{137} Rawls, supra note 5, at 302.
\item \textsuperscript{138} Rawls, supra note 2, at 291, 331-34.
\end{itemize}
are specified at the constitutional stage and uses the freedom of speech to illustrate the process.\textsuperscript{139}

My very brief summary of \textit{Political Liberalism} is now complete. Of course, I have only touched the surface of the book, and many of the ideas I have presented need to be read in the context of the whole book and Rawls's other writings in order for their true import to be appreciated. But, with that caveat in place, I turn to the contributions to the symposium.

\section{III. Views Of Political Liberalism}

This symposium on \textit{Political Liberalism} includes seven essays exploring several different aspects of Rawls's new book. The contributors are Joshua Cohen, Samuel Freeman, Stephen Griffin, Sharon Lloyd, Rex Martin, James Nickel, and David Richards. What follows is a brief introduction to some of the central themes of the essays, with more extensive discussion of some of the points that are raised. All of the essays raise important questions, but only a few of those can be addressed in this introduction.

The first essay, by Joshua Cohen, is titled \textit{Pluralism and Proceduralism}.\textsuperscript{140} Cohen addresses a rival of justice as fairness, "democratic pluralism," a theory that is associated in contemporary constitutional theory with the work of John Hart Ely.\textsuperscript{141} The occasion for this enterprise is Stuart Hampshire's review of \textit{Political Liberalism}; Hampshire finds alarming Rawls's contention that political values normally trump nonpolitical values, and hence the nonpolitical values associated with the comprehensive moral and religious doctrines that make up an overlapping consensus.\textsuperscript{142} In particular, Hampshire is concerned with the idea that a substantive notion of justice would override the values associated with majoritarian democracy.

Cohen sees Hampshire's view as a form of what Cohen calls democratic pluralism. Stated in different language than used by Cohen, democratic pluralism is the conjunction of three ideas: (1) \textit{The Fact of Pluralism}: modern societies will include a plurality of conceptions of the good; (2) \textit{The Possibility of Agreement on Procedural Justice}: despite this pluralism, a consensus can be reached on fair procedures such as democratic legislation; and (3) \textit{The Impossibility of Agreement}

\textsuperscript{139} See id. at 340-63.


\textsuperscript{141} \textit{JOHN HART ELY}, DEMOCRACY AND DISTRUST (1980).

\textsuperscript{142} See Hampshire, \textit{supra} note 4.
on Substantive Justice: consensus cannot realistically be expected to extend to agreement on a substantive conception of justice.

Against democratic pluralism, Cohen argues that democracy is intrinsically a substantive and not merely a procedural ideal. He offers a number of arguments for this conclusion. One of these begins with argumentative resources that democratic pluralism must concede, a conception of a fair procedure and a consensus on that procedure. Cohen shows that some practices will be seen as unjust if they could not be the outcome of a fair procedure; slavery is an example. The injustice of these practices is then no more controversial than the justice of the fair procedure itself. Thus, a premise of democratic pluralism leads to the conclusion that consensus can be reached on at least some matters of substantive justice. Further limits can be generated from the norms of reasonable argument that naturally flow from a consensus on democratic process. One such norm must be some sort of equality among citizens, following from their entrenched right to an equal vote. Cohen demonstrates that this equality norm can serve as the basis for generating a thicker consensus on matters of substantive justice than would follow from the notion of fair procedure alone. Cohen's argument, proceeding through a series of similar moves, is a tour de force, effectively demolishing the divide between consensus on substance and consensus on procedure upon which democratic pluralism is grounded.

Even more interesting, but perhaps more controversial, is Cohen's argument, using an analogy to the philosophy of mathematics, that the distinction between substance and procedure cannot be a deep or fundamental one. Although an increase in moral pluralism may decrease the sphere of overlapping consensus, it will not do so in a way that tracks the distinction between substance and procedure. If Cohen is right about this (I think he is), then it should be possible to show that increasing moral pluralism will produce shrinking procedural consensus. Cohen does not make such a showing, but once the issue is raised, examples leap to mind. For example, if the range of moral disagreement extends to include strong aristocratic conceptions, consensus on many ideas about substantive justice (ideas about wrongful killing, to take an easy case) will persist long after consensus on democracy itself has completely vanished.

143. See Cohen, supra note 139, at 600-16.
144. See id. at 608-09.
145. See id. at 610-12.
146. See id. at 616-17.
The second essay, by Samuel Freeman, is titled *Political Liberalism and the Possibility of a Just Democratic Constitution*. Freeman investigates the relationship between *Political Liberalism* and *A Theory of Justice*. Freeman provides a detailed, rigorous, and penetrating discussion of the difficulties that Rawls came to see in *A Theory of Justice* and the ways in which *Political Liberalism* addresses those problems. One issue taken up by Freeman is the relationship between Rawls's disclaimer of the account of stability in Part III of *A Theory of Justice* and his argument in the fifth lecture that "political society itself can be an intrinsic good" within a political conception of justice. The two moves could be seen as inconsistent, with the intrinsic goodness claim in *Political Liberalism* undermining the claim that justice as fairness is a truly freestanding view. Freeman's resolution of the tension includes the suggestion that the political intrinsic goodness of political society to citizens may be "defeasible" in the sense that some comprehensive views will not accept that the good is truly intrinsic. The possibility that some aspects of the political conception are defeasible would seem to raise some interesting questions about the nature of an overlapping consensus, but Freeman leaves such issues for another day.

Freeman also provides an important discussion of Rawls's idea of public reason and its relationship to the views of Kent Greenawalt. Freeman proceeds with a discussion of the public reason and judicial review that will be of particular interest to constitutional theorists. He begins by noting that Rawls does not conceive of democracy as essentially a voting procedure; rather, Rawls sees democracy as institutionalizing the basic equality of citizens through equal basic liberties, including but not limited to equal political rights. Judicial review may be antimajoritarian but is not antidemocratic (in Rawls's sense) when done to protect the equal basic liberties.

Freeman then discusses one of the most controversial and interesting ideas in *Political Liberalism*: not every purported amendment to the constitution that complies with the procedure set forth in Article V is necessarily valid. For example, the nullification of the freedoms of speech and religion in the first amendment would be

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147. Freeman, supra note 46.
148. See Rawls, supra note 2, at 207.
149. See Freeman, supra note 46, at 646.
150. See infra text accompanying notes 155-72.
151. See Freeman, supra note 40, at 659.
152. See Rawls, supra note 2, at 238.
abandonment and not amendment of the constitution. Freeman argues that Rawls's position implies that "the Supreme Court should have the power to overturn any such invalid amendment."

The suggestion that judicial nullification of constitutional amendments may be legally required raises a question, not addressed by Freeman, as to the implications that Rawls's views have for the questions about the nature of law exemplified by the classic debates between legal positivists and natural lawyers. If adherence to the procedures of Article V is not sufficient to make a provision an enforceable part of the Constitution that is legally binding on the Supreme Court, then one might argue that law is not content independent in the way required by legal positivists such as H.L.A. Hart. Based on the position Rawls takes in Political Liberalism, he would not, I think, accept this argument. It is not denial of the basic liberties, per se, that would invalidate a purported amendment abolishing the freedoms of speech and religion. Rather, "[t]he successful practice of [the constitution's] ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning." It is legal practice and not natural law that immunizes the freedoms of speech and religion from the amendment process.

The third essay, by Kent Greenawalt, is titled On Public Reason. Greenawalt explores Rawls's idea of public reason. Greenawalt points to several ambiguities in Rawls's idea. One of these is the question of sincerity. If public officials, including legislators and judges, must offer public reasons for their actions, must these reasons also be sincere ones? Greenawalt concludes that they must—a conclusion with which Rawls would surely agree on the simple ground that a statement of reasons that is insincere is at best misleading, at worst an outright lie, and in either event simply wrong.

Greenawalt also raises more fundamental questions about Rawls's idea of public reason. One issue concerns the possible underdeterminacy of public reason. Greenawalt argues that public

153. See Freeman, supra note 46, at 633.
154. Id.
156. Rawls, supra note 2, at 239.
158. This topic was discussed in Solum, supra note 36, at 1094.
159. The claim that public reason is indeterminate with respect to questions involving the constitutional essentials would be wholly implausible: even if public reason does not provide sufficient resources to completely specify the answer that justice as fairness would give to some constitutional questions, it will clearly suffice to rule out at least some possible answers. Thus, I
reason may not tell us how to resolve hard cases with respect to the freedoms of religion, such as the case of school prayer, and concludes that if present, this underdeterminacy would "increase the difficulty of defending any position that citizens should self-consciously try to limit their political justifications to public reasons."  

Greenawalt also considers the possibility that public reasons do suggest the resolution of a hard case concerning the interpretation of the constitutional essentials, but that those who "rely on comprehensive views to color their understanding of constitutional essential and publicly shared principles may reasonably arrive at a different outcome." He illustrates his point with the case of abortion, where he imagines that political values cannot tell us the moral worth of a fetus but a comprehensive conception can. Greenawalt argues that this case "calls into question the desirability of a standard of public reason that asks citizens to aim for justifications on particular issues that do not rely on comprehensive views."  

Greenawalt's question is an important one, and its importance is underscored by Rawls's discussion of the burdens of judgment. Recall that among these burdens are the differences in total life experience, including participation in forms of life that are shaped by comprehensive conceptions of the good, that influence the way we assess evidence and weigh moral and political values. Thus, one might expect reasonable disagreement about the constitutional essentials and their interpretation, even in a well-ordered society. Moreover, although contemporary American society may fall far short of a well-ordered society as understood in justice as fairness, our own experience regarding the constitutional essentials is at least some evidence that such disagreement is likely. But would reasonable disagreement about the constitutional essentials call into question a standard of public reason that asks citizens to give only public reasons as direct support for their views and reserve their comprehensive doctrines for a supporting role? Greenawalt does not offer a fully convincing case for an affirm-

interpret Greenawalt as claiming that public reason may underdetermine (limit the range of, but not completely specify) the answers to such questions. See Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462, 473 (1987) (elaborating distinction between indeterminacy and underdeterminacy).


161. Greenawalt, supra note 157, at 683.

162. See id. at 683-85.

163. Id. at 685.

164. See RAWLS, supra note 2, at 56-57; text, supra, accompanying note 84.

165. For valuable discussion on these points, see Freeman, supra note 46, at 646-55.
ative answer to this question. So long as disagreements about the constitutional essentials can be conducted in accord with an ideal of public reason, no problem arises for Rawls. The possibility of causal influence of one's comprehensive views on the public reasons one offers does not create a problem; such influence or coloring is an inevitable by-product of the burdens of judgment and does not taint what would otherwise be public reasons.¹⁶⁶

The problem of reasonable disagreement about constitutional essentials, then, is neither that of disagreement that can be expressed using public reason nor that of causal influence or coloring of public reasons by comprehensive views. Rather, the problem that Greenawalt identifies is that some essential issue in a debate about the constitutional essentials cannot be resolved except through reliance on a comprehensive view. Thus, in his description of the abortion case he imagines that a participant in public debate takes the following position: "Political values cannot tell us how much a fetus should be valued; they are either radically incomplete on this question or suggest that a fetus is probably of much less value than a new born baby."¹⁶⁷ This move is the crucial one and two points should be made with respect to it.

First, it is hardly clear that the case for the great political worth of a fetus cannot be made by appeal to public values—indeed, we are all familiar with public reasoning about the great importance of human life and the dangers of compromising this value in any case. Greenawalt assumes that the deep concern with the sanctity of human life that characterizes many religious traditions cannot be translated into public reason, but that assumption is dubious.

Second, if we do assume that public values cannot make the case against abortion, then Greenawalt will be correct: there will be citizens whose understanding of the balance between the value of equality for women and the value of fetuses differs from those understandings which can be justified by public reason. Moreover, Greenawalt is absolutely correct when he says that this example does raise a question about the desirability of a standard of public reason which would create this difference.¹⁶⁸

How might Rawls answer this question? Recall the liberal principle of legitimacy: political power can be justified only when author-

¹⁶⁷. Greenawalt, supra note 157, at 684.
¹⁶⁸. See id. at 685.
ized by a constitution the essentials of which all citizens could see as supported by principles that are reasonably and rationally acceptable to them. The corresponding duty is the duty of civility. Suppose our hypothetical citizen is asking herself the question whether she should support a revision in the constitutional essentials that would severely restrict a woman's right to choose whether to have an abortion. If she accepts the liberal principle of legitimacy, and believes that public reasons cannot be offered for the revision, then she has good reason not to support the revision, even though she believes that evil would be prevented by the revision. Two further possibilities should be considered. The first possibility is that the reason provided by the liberal principle of legitimacy is not only a good reason, but is a sufficient one. For example, she might reason that although permitting abortion is a very great evil, permitting choice is none-the-less fair, given the very great value of political legitimacy and that: (1) she remains free to attempt to persuade others to change their comprehensive views, and (2) the constitution that she is affirming is one that guarantees that no one can be forced to have an abortion.

The second possibility is that given her comprehensive views, the good reason is not sufficient, that the evil of permitting abortion is so great that it overrides even the liberal principle of legitimacy, which she accepts as a fundamental political value supported by her comprehensive conception. In this case, she will believe that she does not live in a well-ordered society and that she is outside of the ideal case that Rawls is considering. Moreover, her difficulty is even more profound than that faced by the abolitionist in the case of the very great evil of slavery; in that case, religious reasons given by abolitionists could be offered as supporting grounds for public reasons and hence could be used without infringing on the ideal of public reason. By hypothesis, she cannot translate her concerns (which might be based on a particular religious doctrine of ensoulment at the moment of conception) into public reasons.

Should our hypothetical citizen who believes that abortion is a very great evil accept the ideal of public reason despite all of this? Of course, the answer to this question depends on the perspective one takes. From our point of view, her comprehensive conceptions may be an unreasonable one, in which case she ought to accept the ideal of public reason and modify her comprehensive conception. From her

169. See Rawls, supra note 2, at 217.
170. See id. at 251.
point of view, if after due reflection she concludes that her comprehensive conception is not unreasonable, she should reject the duty of civility that makes the ideal of public reason obligatory. For her, the principled affirmanance of justice as fairness is no longer an option. Now, if modern democratic societies have many, many citizens who will face such difficulties on many pressing issues, then an overlapping consensus on justice as fairness will not be possible and hence would not provide a stable solution to the problems posed by the fact of (what turns out to be) unreasonable pluralism. One final note, even if our hypothetical citizen cannot affirm justice as fairness for principled reasons, she may still adhere to its ideal of public reason on strategic grounds; she may believe that her side would lose in all-out political struggle over enforcement of comprehensive conceptions of the good.

Greenawalt raises another important issue in his discussion of the difficulty in drawing lines between the constitutional essentials, on one hand, and both constitutional interpretation and ordinary legislation, on the other hand. Given the possibility that questions concerning the meaning of the constitutional essentials will infect both questions of interpretation and ordinary legislation, the line drawing problem could pose a major obstacle to the practicality of any ideal of public reason that asks citizens to refrain from direct reliance on their comprehensive religious and philosophical conceptions of the good only with respect to the constitutional essentials.\(^\text{171}\) It is important to note, however, that Rawls has not taken the position that the ideal of public reason applies only to the constitutional essentials; rather, his position is that this is the clearest case and that a complete theory of public reason must consider other cases, including ordinary legislation and the application of the constitutional essentials.\(^\text{172}\) Indeed, a good case can be made that public discussion about all uses of coercive state power should be governed by the norm that public reasons should be given and that ones comprehensive views should only enter in a supporting role.\(^\text{173}\)

171. See Greenawalt, \textit{supra} note 159, at 687.
172. See Rawls, \textit{supra} note 2, at 215. The passage which Greenawalt cites as evidence of an ambiguity in Rawls' position, Greenawalt, \textit{supra} note 159, comes in Rawls' discussion of the role of the Supreme Court as the exemplar of public reason. The court is \textit{required} to rely solely on public reason; citizens are not \textit{required} by their institutional role to do so. See Rawls, \textit{supra} note 2, at 235. This passage should not, I think, be read as an indication that Rawls has worked through the question whether the ideal of public reason should apply to all uses of coercive power by the state and not just the constitutional essentials.
The fourth essay, by Stephen Griffin, is titled *Political Philosophy Versus Political Theory: The Case of Rawls*. Griffin examines criticisms of Rawls's work by political scientists, who object that because Rawls's work is abstract and conceptual it fails to address the problems of actual political societies. Griffin makes convincing arguments that these objections are misfounded and that *Political Liberalism* is indeed a work with a practical aim, as Rawls claims it is.

The fifth essay, by Sharon Lloyd, is titled *Relativizing Rawls*. Lloyd takes up a challenge issued by Habermas to Rawls: isn't Rawls obligated to claim that his theory is not only correct but also true? This challenge is related to other objections to Rawls's recent work and in particular to his insistence on the idea that justice as fairness is a *political* theory. Lloyd points out that many of these objections rest upon a mistaken assumption, that Rawls believes that a truth claim cannot be made on behalf of political liberalism, because such a claim would require the advancement of some particular comprehensive conception of the good. Lloyd then argues that one can produce good and sufficient reasons for believing that the premises of justice as fairness are true, using the easy case of the fundamental equality of persons irrespective of race or ethnicity as an example. Particularly illuminating is Lloyd's discussion (in footnote 19 of her paper) of the relationship between the argument that Rawls makes for the two principles in comparison with the arguments that could be made from a variety of comprehensive conceptions of the good.

The central question that Lloyd addresses is interrelated with Rawls's elaboration of the three levels of the publicity condition for justice as fairness, presented in the second lecture in *Political Liberalism*. The third level of publicity requires that the full justification
for political liberalism be publicly available. The full justification includes everything we would say when we set up justice as fairness, as opposed to what we might later say when we evaluate this justice as fairness from within our comprehensive conceptions. Could claims that justice as fairness is true be made at the initial stage when the theory is worked out, without requiring justice as fairness to go beyond a political conception of justice and resolve questions of metaethics that implicate comprehensive philosophical and religious doctrines, thus violating the requirement that justice as fairness be a freestanding view? Lloyd's answer utilizes a distinction between deep and shallow reasons. Deep reasons, we might say, are those that appeal to controversial philosophical ideas, such as a theory of mind, or contested religious notions, such as a theory of God's will; shallow reasons do not. If I may be allowed deliberately to mix metaphors, I would put it as follows: if deep reasoning requires us to engage in intellectual flight, with wings supplied by theory; shallow reasoning proceeds on foot, supported by the solid ground of ordinary experience and common-sense judgment.

Lloyd argues that if we can produce good and sufficient shallow reasons for believing that the various premises of justice as fairness are true, and if the reasoning from those premises is sound, then we are entitled to claim that the resulting political conception of justice is itself true. But are shallow reasons even possibly good and sufficient? Lloyd argues against the claim that "it is a necessary condition of somethings being a good enough argument for a belief . . . that our argument for it be . . . derived from some comprehensive philosophical, moral or religious doctrine" on two grounds. First, many of our garden-variety beliefs do not rest on deep grounds, and second, there must be some beliefs that are not founded on grounds deeper than themselves if we are to avoid an infinite regress of ever deeper grounds—a black hole of argument. I think that Lloyd is correct about this, but adherents of at least some comprehensive conceptions may not agree. Consider the hypothetical adherents to a comprehensive religious conception of the good. These adherents may think that moral beliefs (including beliefs of political morality) are different from other garden-variety beliefs, because, for example, the truth of a moral judgment can only be established by reasons that tie them to

184. Id. at 67.
185. See Lloyd, supra note 177, at 718-21.
186. Id. at 722-23.
187. Id. at 723.
God's law as revealed in divine scripture. They may believe that infinite regress is avoided by the miracle of revelation and faith. Of course, they too may use shallow arguments (the content of God's law may be accessible to human reason unaided by revelation), but they will use them in conjunction with deep ones when they make claims of truth. Thus, they may accept Lloyd's shallow arguments about the equality of persons, but say that a bit more is needed to establish the truth of the premises of justice as fairness.

So then, is Lloyd correct when she says that "there is no reason for Rawls to object to our" claiming that his theory is true? Of course, he would not object to anyone claiming that justice as fairness is true from within their comprehensive conception of morality—that is the point of the overlapping consensus. But would he object to the contention that the initial case for justice as fairness can include the claim that shallow arguments provide good and sufficient reasons for the truth of justice as fairness—object, that is, on the ground that this claim of sufficient reason for truth violates the requirement that justice as fairness be a freestanding view that can be affirmed by all reasonable citizens? Might the claim that shallow arguments are sufficient for truth be inconsistent with the metaethical commitments of some comprehensive conceptions that could otherwise participate in an overlapping consensus and hence undermine the stability of justice as fairness? Could the incorporation of this view of truth into justice as fairness, which in turn will be part of the public culture of a well ordered society regulated by this conception, even be considered a form of intolerance of those with divergent metaethical views? My judgment is that Lloyd has not fully answered these questions, but her elegant and illuminating essay carries us far down the footpath to an answer.

The sixth essay, by Rex Martin, is titled Rawls's New Theory of Justice. Martin explores a number of problems with A Theory of

188. Id. at 727.
189. An answer might start with the observation that not everything in justice as fairness and its full justification will be acceptable to every comprehensive view that will make up the overlapping consensus. What is prohibited by the requirement that justice as fairness be a freestanding view is the incorporation of ideas on grounds that are drawn from and supported within a comprehensive conception. The use of shallow arguments does not offend this requirement. Moreover, recall that the criteria of stability is not used at the initial stage when justice as fairness is laid out; at this stage, we do not cater to particular comprehensive conceptions. Thus, it seems that Rawls could, in the end, accept the strategy that Lloyd outlines for arguing that justice as fairness is true as a freestanding view. The next question then must be posed to Rawls himself: why does he refrain from claiming truth for his theory? I am indebted to Sharon Lloyd for discussion on these points.
Justice and Rawls's attempts to deal with them in Political Liberalism. Interestingly, Martin argues that the fundamental ideas in Political Liberalism are not necessarily democratic in character. Thus, the two moral powers and the idea of society as a fair system of cooperation might be political ideas in an aristocratic society. I query, however, whether the idea that all citizens are free and equal could be seen as characteristic of the political culture of any society that is not democratic in some important sense.

The seventh essay, by James Nickel, is titled Rethinking Rawls's Theory of Liberty and Rights. Nickel evaluates and criticizes Rawls's theory of liberty, suggesting alterations and additions. He suggests that security rights (protections against wrongful injury) and privacy rights (including rights to make decisions regarding the family, lifestyle, and reproduction) should be added to the list of basic liberties protected by the first principle of justice. Nickel also offers a valuable analysis of the kinds of justifications that Rawls offers in support of the inclusion of particular rights on the list of basic liberties, noting three basic types: arguments that (1) the right is necessary in the pursuit of a good life, (2) necessary to develop and apply a sense of justice, and (3) necessary to the protection of other rights and liberties. Finally, Nickel poses an important and interesting question. Are there other moral powers besides the two, "a capacity for a sense of justice and a capacity for a conception of the good," that Rawls uses to structure the political conception of the person? Is there a case to be made that the capacity to engage in productive work should be considered as part of that conception on the ground that such a capacity is essential to participation in a fair system of social cooperation? Nickel provides us with some tentative reasons to believe that the case for this third moral power can be made.

The eighth and final essay, by David Richards, is titled Public Reason and Abolitionist Dissent. It takes up a potential difficulty for Rawls's ideal of public reason posed by the example of religious
arguments made by abolitionists against slavery.\textsuperscript{198} Richards's detailed investigation of the relationship between the abolitionist case against slavery and the arguments for religious tolerance offers important insights about the historical context of the reconstruction amendments.

Richards concludes that the arguments offered by the abolitionists were essentially arguments of public reason. Although there were religious elements to abolitionist dissent, abolitionism "was marked by its insistence, remarkable by the standards of its age, that religious inquiry (for example, Bible interpretation) be conducted in terms of public reason not hostage to illegitimately entrenched political epistemologies (including religious epistemologies)."\textsuperscript{199} Thus, the abolitionists subjected religious justification for, and tolerance of, the institution of slavery to the scrutiny of public reason and found such justification and tolerance to be utterly wanting.

If Richards's reading of the historical record is correct, does this entail the further conclusion that abolitionist dissent was consistent with "public reason as a measure of legitimate political argument?"\textsuperscript{200} The answer to this question is complex. Begin by noting the distinction between (1) religious criticism that points out the failure of the apologist's religious justifications for slavery as measured by the bar of public reason and (2) religious criticism of the apologist's religious beliefs as comprehensive doctrines on the basis that those doctrines do not meet the standards of public reason. As understood by Richards, abolitionist dissent operated at least in part as an internal criticism of the prevailing religious traditions. In one sense, these internal critics can be said to employ public reason because they asked for the public justification of positions that were either dogmatic or the result of power relationships that were themselves in question. In another and important sense, however, abolitionist dissent may have operated outside the sphere of public reason as that idea is deployed in political liberalism. This is because abolitionist dissent may not have limited itself to a political conception of justice; abolitionists made arguments about what was just from within comprehensive religious conceptions of the good and did not shy away from ultimate questions of value. To require of a religious doctrine that it meet the standards of public reason when addressing its adherents is to operate from a comprehensive

\textsuperscript{198} I first posed the case of the abolitionists to Rawls on the occasion of his Melden lectures and in subsequent correspondence. \textit{See Rawls, supra} note 2, at 247 n.36.

\textsuperscript{199} \textit{See} Richards, \textit{supra} note 197, at 836.

\textsuperscript{200} \textit{Id.} at 839.
The ideal of public reason that would be endorsed as a standard for all conduct, both public and private, by a comprehensive liberalism—note that there can be religious forms of comprehensive liberalism—would indeed support an abolitionist critique of the particular religious doctrine as tenable comprehensive conceptions, but the same is not necessarily true of political liberalism.

This is not to say that abolitionists did not adhere to a political idea of public reason when they called those who defended or tolerated slavery to a public accounting—Richards demonstrates they did. Nor is it to deny that the standard for public argument may have been different in an ante-bellum America in which Christian faith (broadly understood) might have been part of the political culture—I do not know. Nor, finally, is it to deny Richards's ultimate conclusion, that the abolitionists did adhere to an ideal of public reason; nothing in that ideal required the abolitionists to refrain from arguing both the public political case and the case against and within prevailing comprehensive conceptions. What a political idea of public reason would not sanction is making the case against slavery rest directly on a comprehensive religious doctrine, and Richards argues—persuasively, I think—that the abolitionist dissenters did not do this.

IV. Conclusion

Political Liberalism is a rich and complex text; it must be judged as a whole and in the context of the larger body of work by Rawls and others elaborating justice as fairness. Nonetheless, it is fair at this point to review the debits and credits in order to assess the health of the enterprise. It must surely be counted as a credit that Rawls has been willing to acknowledge the weaknesses of A Theory of Justice and to undertake a major new enterprise of theory construction. It would have been a less daunting task to make minor repairs in the account of stability offered in Part III of A Theory of Justice. Rawls could have added a moat to the castle, perhaps limiting the scope of the project to the hypothetical case of a well-ordered society in which all of the comprehensive conceptions were compatible with affirming the rationality of acting in accord with justice as fairness on the ground of the intrinsic goodness and supreme value of justice. Polit-

201. In this regard, see Smolin, supra note 67, at 1077. Translating a bit, we might say that Smolin's position is that religious faith requires adherents not to be open to public reason on some questions.
**Political Liberalism** tackles the problem of stability head on, and the result is a major new work—a cathedral and not simply a new turret. On the credit side, too, must be entered the new ideas that are put forth for the first time, or substantially revised in *Political Liberalism*: the idea of an overlapping consensus, the idea of public reason, the account of the two moral powers, and the account of political constructivism—all these are contributions to political philosophy of the very highest order.

But what of the debit side of the ledger? *Political Liberalism* intensifies the architectonic complexity represented by *A Theory of Justice*, but surely the urgent practical ends of justice as fairness are not served by a labyrinthine structure of argument. Another debit is the fact that *Political Liberalism* continues to issue promissory notes that seem unlikely to be redeemed by Rawls himself, given that making them good would require an even more extended effort than the forty years or so that have gone into the work so far.

Finally, it is a credit that *Political Liberalism* does discuss some of the most controversial issues of justice in our society; abortion is a good example. But is not the dominant focus on ideal theory a debit on the ledger for the works elaborating justice as fairness? Our society faces problems of justice that are urgent. Political discourse would be immeasurably enriched by the contributions that could be made by the author of *A Theory of Justice* and *Political Liberalism* to contemporary debates about religious freedom, welfare, health care, and so many other issues. Moreover, although the main work of applying political liberalism to concrete problems may be accomplished by others, only Rawls can provide the clarification of his views that comes from seeing him work them out in the context of concrete political problems. Indeed, many readers have already found his brief discussion of abortion to be of substantial help in understanding the theoretical framework of *Political Liberalism*.

In our intellectual tradition, it was Kant who best made the point that theory cannot be severed from practice. What was true in the heady years that followed the French Revolution is no less true at the close of a century that has witnessed political upheaval on a scale unmatched in human history. *Political Liberalism* will be read long after our immediate political controversies are resolved, but the book will


be better understood if its author turns his attention to the difficulties posed by the application of theory that is not ideal to a society that is not well ordered.