Political Liberalism and the Possibility of a Just Democratic Constitution

Samuel Freeman
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JUST DEMOCRATIC CONSTITUTION

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INTRODUCTION

My aim in this paper is to provide an overview of John Rawls's project in Political Liberalism.¹ I sketch how this book is designed to respond to certain problems internal to Rawls's argument in A Theory of Justice.² Political Liberalism is a development and extension of Rawls's original project, as stated in A Theory of Justice, to work out "the most appropriate moral basis for a democratic society."³ A Theory of Justice itself invokes assumptions and arguments that are at odds with Rawls's egalitarian liberalism. It is to respond to these internal tensions that Rawls recasts not the substantive content of justice as fairness or its principles, but how we are to conceive of their justification.

To say this recasting is internal to Rawls's original project means that Political Liberalism is not motivated by external criticisms.⁴ There is a widespread perception that the revisions Rawls has made over the past ten years have come largely in response to communitarian criticisms.⁵ Recall Michael Sandel's argument that Rawls's Kantian liberalism is saddled with a conception of the person as shorn of any substantive commitments, or deep attachments to persons or final ends.⁶ It is as if Rawlsian agents are cold, bare, rational choosing machines, hardly worthy of the deep respect Rawls, as a Kantian, would claim for persons. Given Rawls's description of the agents in the Original Position,⁷ one can see how this criticism might become so

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1. JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter POLITICAL LIBERALISM].
2. JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter A THEORY OF JUSTICE].
3. A THEORY OF JUSTICE, supra note 2, at viii.
4. The exception is chapter 8 of Political Liberalism, the 1982 Tanner Lecture, "The Basic Liberties and Their Priority," which constructively and appreciatively responds to H.L.A. Hart's criticisms of Rawls's initial argument for the first principle of justice and the specification of the basic liberties.
5. Rawls alludes to this in Political Liberalism, and says, "I do not believe there is a basis for saying this." POLITICAL LIBERALISM, supra note 1, at xvii n.6.
7. See A THEORY OF JUSTICE, supra note 2, at 17-22. The Original Position is the perspective from which rational, interested agents reach a unanimous agreement on the principles of
popular. (Still, to achieve this reading one must ignore the account of the person Rawls gives in *A Theory of Justice*, and substitute for it the account of the parties in the Original Position.)

It is also understandable why many would think that communitarian criticisms have prompted Rawls’s recent changes. Rawls, after all, does alter his account of the *role* of the conception of the person, at least so far as to contend that it is only an account of our conception of ourselves in our political relations. It is not then (as Sandel might have thought) a metaphysical account of the nature and identity of persons (a claim Rawls had already denied, long before Sandel’s book).

Nor is the conception of the person even a more general normative conception, that stems from an account of human agency or which is part of a comprehensive ethical view (something Rawls evidently did think in *A Theory of Justice*). Instead, the conception of the person as free and equal, and as defined by two moral powers (and a conception of the

justice, without knowledge of their individual talents, social position, ends, or any other information about their particular situation. Rawls says: “[T]his initial situation is fair between individuals as moral persons.” *Id.* at 12.

8. See id. §§ 63, 64 (discussing persons and rational plans). See also id. § 77, and pp. 12, 19, 329, 561 (discussing moral personality). Sandel completely ignores the role of the moral powers in defining the person, as well as Rawls’s claims regarding the connection of persons with their conception of the good. See, for example, Rawls’s statements in *A Theory of Justice*:

Here I adapt Royce’s thought that a person may be regarded as a human life lived according to a plan. For Royce an individual *says who he is* by describing his purposes and causes, what he intends to do in his life. . . . Royce uses the notion of a plan to characterize the coherent, systematic purposes of the individual, what makes him a conscious, unified moral person. . . . And I shall do the same.

*Id.* at 408, 408 n.10 (emphasis added). See also *Political Liberalism*, supra note 1, at 26-27 (addressing Sandel’s criticisms).

9. See John Rawls, *The Independence of Moral Theory*, XLVIII *PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION*, 1974-1975, at 5 (1975) (Presidential Address delivered before the Seventy-first Annual Eastern Meeting of the American Philosophical Association in Washington, D.C., December 28, 1974). Rawls argues why the conception of the person implicit in justice as fairness is normative, and not metaphysical, and thus is not susceptible to criticisms that have their basis in metaphysical accounts of personal identity. Rawls argues that the account of moral personality he relies on is not incompatible with a Humean account of personal identity, such as Derek Parfit’s, that contends that there is no deep fact about the identity and individuation of persons, but that personhood is simply a matter of the continuity and connectedness of experiences and activities.

10. See “The Unity of the Self,” *A Theory of Justice*, supra note 2, at § 85, as well as the widely misconstrued paragraph (e.g. by Sandel) on p. 560, where Rawls says, “For the self is prior to the ends that are affirmed by it . . . .” *Id.* at 560. This comes in the context of an argument against teleological moral views, which hold that form is given to our lives by non-moral ends, or aims that are defined independently of any moral requirements. Rawls’s point here, I take it, is that principles of justice are in some manner implicit in moral consciousness, and in our conception of ourselves as moral agents. It is in large part the purpose of moral philosophy to uncover and clarify these principles. So far as that goes, Rawls’s work in *Political Liberalism* leaves it unchanged, except to limit this claim to political principles implicit in our self-awareness as democratic citizens.
good), is said to be a purely "political conception," designed to capture our self-awareness as democratic citizens.11

As I will discuss, there is in Political Liberalism a distancing from the Kantian foundations of justice as fairness Rawls relies on in A Theory of Justice. But none of the significant changes leading up to and through Political Liberalism have been designed with communitarians in mind.12 This will not likely satisfy these critics for at least two reasons. First, while Rawls gives up certain Kantian foundations of his view, still, as far as the structure and content of justice as fairness is concerned, Political Liberalism affirms and develops the Kantian features of the view more than ever. (Here I mean the idea of political constructivism, the conception of free and equal moral persons, the priority of right, etc.) Second, contrary to communitarian arguments that Rawls's Kantian liberalism incorporates no shared conception of the good, the fact is that A Theory of Justice did rely on what Rawls would now call a "partially comprehensive" conception of the good common to all persons in a well-ordered democratic society.13 This was most prominent in Rawls’s argument for stability in Part III of A Theory of Justice, his "congruence" argument. One major change Political Liberalism makes is that it gives up this partially comprehensive conception, along with the general Kantian moral conception that grounded justice as fairness.

These are among the internal problems Rawls is addressing in Political Liberalism. "Theory . . . regards justice as fairness and utilitarianism as comprehensive, or partially comprehensive, doctrines."14 But "[n]o comprehensive doctrine is appropriate as a political conception for a constitutional regime."15 Now it may be that these changes will make Rawls’s view even more objectionable on some communitarian views. For Rawls's argument, as we shall see, is just that egalitarian liberalism cannot incorporate, consistent with its own principles, any general moral doctrine or comprehensive conception of the good. This denies what seems to be a fundamental communitarian thesis: that a comprehensive conception of the human good,

11. See POLITICAL LIBERALISM, supra note 1, at 29-35.
12. Rawls does briefly reply to Sandel's criticism that Rawlsian agents are abstract and independent of any attributes such as final ends and attachments. He says this reading is "an illusion caused by not seeing the original position as a device of representation." Id. at 28. It is not an ontological statement of the nature of the self, but an attempt to vividly represent and combine assumptions regarding the requirements of equality, rationality, etc., to see what they imply by way of principles of justice.
13. Id. at xvi, 13, 175.
14. Id. at xvi.
15. Id. at 135.
one that subordinates all other goods to the political, is a condition of social and political unity. Both *A Theory of Justice* and *Political Liberalism*, each in its own way, agree that some shared conception of the good of justice is a condition of social and political unity. But *Political Liberalism*, unlike the account in *A Theory of Justice*, requires that this good cannot be publicly recognized or affirmed as part of any comprehensive ethical view. If Rawls is right, this means that, in so far as communitarians aim for a view with egalitarian and liberal features, they fail to present a feasible alternative.

In section one I review the problem in *A Theory of Justice* which prompts the changes that lead to the doctrine of *Political Liberalism*. In section two I discuss the first major change in Rawls's view, the idea of overlapping consensus. Section three takes up a second major alteration, the idea of public reason. Finally, in section four I discuss the relevance of public reason to the role of the courts in a constitutional democracy.

My overall aims in this article are to explain and clarify, rather than to criticize, Rawls's account of political liberalism. Often one has the feeling, in reading and rereading Rawls, that increments of understanding are accompanied by increased confusion. This stems from the complexity of Rawls's view and the interrelatedness of his main ideas. Increased understanding in one area often requires that one rethink what one feels is already understood. My efforts here are directed at diminishing the sense of confusion many (including myself) have in finding their way through *Political Liberalism*.

I. The Relationship of "Political Liberalism" to "A Theory of Justice"

In the introduction to *Political Liberalism*, in explaining the changes in his view, Rawls says:

But to understand the nature and extent of the differences [between *Political Liberalism* and *A Theory of Justice*] one must see them as arising from trying to resolve a serious problem internal to justice as fairness, namely from the fact that the account of stability in Part III of *Theory* is not consistent with the view as a whole. I believe all differences are consequences of removing that inconsistency. Otherwise these lectures take the structure and content of *Theory* to remain substantially the same.\(^\text{16}\)

Rawls goes on to indicate that "the problem of stability has played very little role in the history of moral philosophy . . ."; still, it is "fun-

\(^{16}\) *Id.* at xv-xvi (emphasis added).
damental to political philosophy.” The extent to which moral philosophy has neglected the problem of stability is reflected in the degree to which treatment of Rawls’s work has neglected discussion of it. *A Theory of Justice* is one of the most discussed philosophical works of this century. But, of all the voluminous commentary on this work, very little of significance has been written on Rawls’s argument for stability in Part III of *A Theory of Justice*, and virtually nothing has been written on the central feature of that argument on “the congruence of the right and the good.” What is involved in the argument for stability?

In general, on Rawls’s account in *A Theory of Justice*, to show that a social scheme is stable is to show that it will be regularly complied with and its basic rules willingly acted upon, and also that when deviations or infractions occur that upset the social scheme, stabilizing forces come into play that prevent further deviation and tend to restore the arrangement. The primary example of this kind of argument is found in Hobbes’s work. The primary role of government for Hobbes is to give everyone sufficient assurance that the laws will be enforced. By enforcing a public system of coercive sanctions, government removes the grounds for believing that others are not complying with the laws. Without this assurance, it is not rational for individuals to observe the rules themselves. Hobbes argues, given his bleak assumptions about the predominant self-interest of human nature, that the only way to solve this problem is to endow one (legal) person, the “sovereign,” with nearly absolute political power. External forces then supply the primary basis for stability in Hobbes’s view. Rawls makes different assumptions about human nature. Rather than assuming that our sole primary motivations are interests in ourselves, he contends people normally have a sense of justice, including a desire to act on terms of cooperation that are fair and reasonable, and a desire to justify their actions to others on terms of mutual respect others can reasonably accept. Consequently, the stability problem, in Rawls’s view, is structured differently than in Hobbes’s, and has a different solution. His aim is to show how a just scheme can elicit its own support and achieve inherent stability.

17. *Id.* at xvii.
21. *Id.* at 479.
One way to approach the stability problem, as Rawls deals with it, is by focusing on a passage from Kant. In his essay, *Idea for a Universal History*, Kant raises the question: How is a just constitution possible? This is, Kant says, "the greatest problem for the human species."\(^{22}\) The reason this question is so difficult is that it requires, Kant says, "the correct concept" of a just constitution, "great experience during much of the world's course, and above all else a good will prepared to accept that constitution."\(^{23}\) Kant's question raises then three kinds of problems, each suggesting a host of more specific issues. First, there is the problem of conception: we need an account and justification of the principles that define a just constitution. Second, we encounter an institutional problem (Kant's problem of "experience"): how to describe the social and political institutions that are required to realize these principles in societies at particular periods. And third, a motivation problem arises: how to give an account of how people can acquire the will to do justice and the desire to support just institutions (as defined by answers to Kant's first two problems).

One way to look upon the structure of Rawls's *A Theory of Justice* is as an attempt to provide interconnected answers to these three general issues. Thus we find in Part I, "Theory," an undertaking to answer Kant's first problem, an account of the most appropriate conception of justice for the constitution (or more generally, the basic structure) of a democratic society. In line with the democratic social contract tradition, Rawls contends (with Kant) that a just constitution is possible only if it commands the reasonable agreement of free and rational individuals who are ideally situated, from a position of equal right. Appealing to certain moral convictions implicit in our sense of justice, Rawls elicits certain considered convictions regarding reasonable restrictions on arguments for principles of justice.\(^{24}\) This provides the basis for the Original Position, his version of the appropriate standpoint of equality from which to achieve a reasonable social agreement. From there Rawls makes his familiar argument for the principles of justice. This in large part is Rawls's account of the "correct concept" of the principles for regulating a just constitution.

Then, in Part II of *A Theory of Justice*, "Institutions," Rawls responds to Kant's second problem. Taking into account the workings of social systems under modern conditions conjoined with facts about


\(^{23}\) *Id.*

\(^{24}\) *A Theory of Justice*, *supra* note 2, at 18-21.
human nature, Rawls provides an account of the democratic institutions that satisfy his principles of justice. These are the institutions of a constitutional democracy which provide for a set of constitutional rights that protect basic liberties, laws that guarantee fair equality of opportunity, and a "property-owning democracy" (or perhaps some liberal socialist scheme), which provides a social minimum that enables each citizen to effectively exercise these rights and achieve individual independence.

The third of Kant's issues is the one he considers most difficult. (That Rawls too considers it the most difficult issue accounts for his returning to the problem in Political Liberalism, and revising his initial account of the stability argument). Assuming we have the correct conception of justice and have in place the institutions needed to achieve it, how are we to motivate individuals who are members of this social scheme, to affirm and support these institutions and the conception of justice that underlie them? This is not simply a problem of engaging peoples' moral beliefs about justice. If Rawls is right, this has been achieved already in the argument for a conception of justice and a just constitution that best fit with our considered moral judgments. The problem Rawls addresses in Part III of A Theory of Justice, "Ends," is largely that of showing how this conception can engage the will of those who live under a just social scheme (a "well-ordered society" of justice as fairness). Assuming that citizens in a well-ordered society have public knowledge and agreement on justice and just institutions, how do they come to care about them? Rawls contends from the outset that all have a sense of justice and a desire to justify their activities to others as just. In the moral psychology set forth in Chapter 8 of A Theory of Justice, he shows how people can come to acquire this disposition to abide by the principles of justice and their requirements in a well-ordered society. This is the first part of the argument for stability in A Theory of Justice.

But then a second problem arises: even assuming that each person has a sense of justice, why should they sufficiently care about justice, to the degree that they recognize and are willing to respect its demands even when these demands conflict with or impede individuals in the pursuit of their conceptions of their good? Even assuming we can get all in a well-ordered democratic society to agree in their judgments on the principles of a just constitution and the institutions

25. Id. at 274.
26. Id. at 280.
needed to support it, and even assuming that all citizens have a sense of justice and a desire to be just, there remains this significant problem of consistently engaging their will. It must be shown why people have sufficient reason, from within their individual perspectives, to observe and act on requirements of justice when these requirements constrain or oppose other ends and commitments they have. A just constitution is possible only if it sufficiently engages each person’s will, and to do this it must promote or affirm their good. To show that something promotes or affirms one’s good is, on Rawls’s account, to show that it is rational to desire. And this requires ultimately an argument that shows an activity, in this case the activity of justice, is compatible with human nature, such that it would be rational to incorporate this activity as a primary feature of one’s conception of the good (or “rational plan of life” as Rawls says in A Theory of Justice).

This basically is the problem of stability as it is set up within Rawls’s view. This is not the same problem that confronts Hobbes or the Hobbesian. A just constitution is possible only if its requirements harmonize with each person’s good. On this, both Hobbesian contract and democratic social contract views agree. But for Hobbesian views, no sharp distinction is made between the conceptual and motivational problems Kant delineates (hence no sharp distinction is made between what is “reasonable” and “rational” as Rawls uses those terms). There is in Hobbesian views no attempt to define justice independent of individuals’ particular perspectives and conceptions of the good, from an impartial point of view. Hobbesians define a just constitution basically in terms of agreement on those principles that are instrumental to each person’s given desires and interests, given the desires and expectations of others (as specified under cooperation-free circumstances and independent of any moral notions). Justice is then reduced to a rational compromise among essentially conflicting interests, or (in Kant’s terms) a “coalition of private wills.”

Rawls’s Kantian account employs both a different structure and a different moral psychology than Hobbesian views. Structurally, justice is articulated independent of individuals’ particular desires and interests, by reference to reasonable moral convictions. These then come to be articulated in terms of what everyone would jointly will as

27. See id. pts. I, II.
28. See id. ch. 8.
29. See id. at 398-99.
30. See id. ch. 7.
31. KANT, supra note 22, at 77.
free and equal from an impartial public perspective. The stability problem then becomes: How can persons come to have a will to do the public will, as defined by the social contract? "Stability is secured by sufficient motivation of the appropriate kind acquired under just institutions."32 Here Rawls's alternative moral psychology comes into play. Unlike Hobbes and Hobbesians, for Rawls "motivation of the appropriate kind" is not some external mechanism (positive or negative sanctions) that induces people with no independent interest in justice to comply with social rules.33 Instead Rawls aims to show how the principles and institutions of a constitutional democracy, justified as reasonable on grounds independent of each individual's particular point of view and conception of the good, are or can be internalized and incorporated into their desires, so that doing justice becomes a part of and even affirms each person's particular good. A just constitution is possible only if its citizens can freely endorse it, and it affirms their good. This requires ultimately an argument that shows that justice is compatible with human nature, such that it would be rational to incorporate this activity as a primary feature of one's conception of the good (or rational plan of life). Is it rational, integral to one's good, to develop and exercise one's sense of justice by doing justice? Or, alternatively, is the sense of justice irrelevant to, or (as Nietzsche held) ever destructive of, our well-being. That is how Rawls conceives the question of stability.

To summarize, a political conception is just only if it is reasonable. For Rawls this ultimately means it must match our considered moral judgments of justice in reflective equilibrium. And it is stable only so long as it is rational for the great majority of people to act on that conception's principles and incorporate it into their conceptions of the good. To show that a conception of justice is inherently stable then is to show that it is rational to be reasonable with respect to justice.

This is only a sketch of the stability problem Rawls confronts, but it should be sufficient to enable us to understand Rawls's enigmatic claim that the problem he is addressing in Political Liberalism is that the "account of stability in Part III of A Theory of Justice is not consistent with the view as a whole."34 Rawls says the problem is that in A Theory of Justice justice as fairness is a "partially comprehensive doc-

32. Political Liberalism, supra note 1, at 143.
33. "[T]he problem of stability is not that of bringing others who reject a conception to share it, or to act in accordance with it, by workable sanctions . . . ." Id. at 143.
34. Id. at xv-xvi.
trine."\textsuperscript{35} It is not immediately evident, from my description, how the argument in \textit{A Theory of Justice} dealt with the stability problem by invoking a (partially) comprehensive doctrine. In Part I of \textit{A Theory of Justice}, Rawls does mention, in passing, that, "the contractarian idea can be extended to the choice of more or less an entire ethical system. . . . Obviously if justice as fairness succeeds reasonably well, a next step would be to study the more general view suggested by the name ‘rightness as fairness.’"\textsuperscript{36} There is no suggestion here that justice as fairness \textit{must} be considered as part of such a more comprehensive ethical system, and no intimation this is required for stability. Indeed, from a reading of the first five hundred pages (chapters 1-8) of \textit{A Theory of Justice}, it is hard to see exactly where Rawls thinks he had to invoke a more comprehensive ethical doctrine to justify justice as fairness.\textsuperscript{37} And some of this material (especially chapter 7 on rational plans, and the moral psychology of chapter 8) contains much of Rawls's argument for stability. It is, I believe, only when we reach chapter 9, and the second stage of the argument for stability, from "congruence," that the deeper bases of the view in Kantian ethics become really apparent. The argument for "the congruence of the right and the good"\textsuperscript{38} aims to show that, under the circumstances of a well-ordered society, it is \textit{rational} to be \textit{reasonable}, not just by acting on requirements of justice, or even incorporating them into one's rational plan (or conception of the good). Justice is not simply an instrumental or even essential good in a well-ordered society of justice as fairness (though showing that is also a part of Rawls's argument for stability). In addition, the congruence argument seeks to show that (1) justice is an \textit{intrinsic good}, an end that is worth pursuing for its own sake; moreover (2) by its nature, justice is the \textit{supreme good}, in that, whatever else one's final ends may be, the requirements of justice are to take priority over them in the sense that the pursuit of other intrinsic goods is to be steadfastly \textit{regulated} by requirements of justice. As a good, justice is "supremely regulative"; it has "absolute priority" over all other goods.\textsuperscript{39}

If Rawls's congruence argument could go through, then one can see how justice as fairness could specify a stable social scheme. For it

\textsuperscript{35} Id. at xvi.
\textsuperscript{36} A \textit{Theory of Justice}, supra note 2, at 17.
\textsuperscript{37} Here one must except § 40, "The Kantian Interpretation of Justice as Fairness," where Rawls argues how his principles can be seen as part of a more general Kantian moral doctrine.
\textsuperscript{38} A \textit{Theory of Justice}, supra note 2, at 572.
\textsuperscript{39} Id. at 570-75.
would mean that under the ideal circumstances of a well-ordered society, where justice as fairness is in force, it is almost never rational for citizens to act in ways that violate requirements of justice, because by acting unjustly, they would be acting contrary to their (supreme) good. This ambitious argument is made in *A Theory of Justice* primarily on the basis of the “Kantian Interpretation,” of justice as fairness: by acting not simply in accordance with but also from a motive of justice, we realize our nature as free, equal, and rational beings, and are therefore *morally autonomous*.

The Kantian congruence argument says, roughly, that justice as a virtue and an end are goods worth pursuing for their own sake, because by so doing we fully realize our capacity for a sense of justice. But then the sense of justice is a settled disposition to act on principles of justice, and “[t]he desire to act justly and the desire to express our nature as free moral persons turn out to specify what is practically speaking the same desire.” So to develop and exercise the desire to act on principles of justice for their own sake is to realize one’s moral power of justice; and (by parallel with Kant’s notion of a Good Will), to realize one’s moral powers is to be morally autonomous. And according to Rawls’s “Aristotelian Principle,” it is rational, indeed essential to our good to realize the higher powers implicit in our nature. Moral autonomy is then an *intrinsic good*. Moreover, given its nature, it is not just one intrinsic good among others; because of the content of principles of justice, autonomy is a “supremely regulative” intrinsic good that is necessary if we are to realize “our nature” as “free and equal rational moral beings.” If so, then it is rational to be reasonable for its own sake, and to consistently subordinate one’s

40. *Cf. id.* § 40.
41. *Id.* at 572.
42. Here I mean that Rawls sees the desire to act justly as a highest-order desire, that all one’s other desires or ends conform to principles of justice. Given this content, justice is not the kind of end that can be scheduled in alongside other ends, to be pursued when one has the time for it. The only way to successfully realize the object of the supremely regulative desire is by constantly observing requirements of justice. *See id.* at 574.
43. *Id.* at 572.
44. *See generally id.* § 65.
45. This psychological principle of motivation basically says: 

[O]ther things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity. The intuitive idea here is that human beings take more pleasure in doing something as they become more proficient at it, and of two activities they do equally well, they prefer the one calling on a larger repertoire of more intricate and subtle discriminations.

*Id.* at 426. This principle Rawls invokes to explain the rationality of developing and exercising the sense of justice.
ends and regulate one’s pursuits according to justice. So we have the “congruence of the right and the good.”

This is barely a sketch of Rawls’s complicated Kantian congruence argument. It must suffice for our purposes. The important point to be extracted from this sketch is that the central aspect of Rawls’s argument for stability relies upon a general moral doctrine, one that specifies a partially comprehensive conception of the human good in terms of the moral autonomy of individuals. Note however that this deep Kantian argument plays no central role in solving the problems, dealt with in Parts I and II of *A Theory of Justice*, of (1) eliciting the reasonable principles of a just constitution, and (2) deciding the institutions that satisfy them. On Rawls’s view, even in *A Theory of Justice*, we can elicit the “correct concept” and the institutions of a just basic social structure, by appealing to the considered convictions of justice that we commonly share, along with our knowledge about the workings of social institutions. For these purposes, there is no need, even in *A Theory of Justice*, to appeal to deeper philosophical claims about the nature and conditions of human agency, and the intrinsic good of such agents. These kinds of considerations really come into play only in Part III of *A Theory of Justice*, in order to show that the scheme of moral principles justified as right and reasonable on independent grounds in Part I are also good and rational to conform to and pursue, and that, therefore, justice as fairness evinces not only justice but also inherent stability.

What now, according to *Political Liberalism*, is the problem with the argument for stability in *A Theory of Justice*? Rawls says the “fundamental question about political justice in a democratic society” is: “[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?” We have here, in effect, Kant’s original question—How is a just constitution possible?—phrased so as to apply to democratic citizens with conflicting comprehensive views and conceptions of the good. Rawls contends that in any democratic scheme in which individuals are regarded as equally free and as capable of formulating and pursuing their own conceptions of the good, it is inevitable that there will be a plurality of potentially conflicting religious, philosophical, and moral views, each

46. KANT, supra note 22, at 33.
47. A THEORY OF JUSTICE, supra note 2, at 498.
48. POLITICAL LIBERALISM, supra note 1, at 4.
of which is legitimate from the point of view of justice. This "fact of reasonable pluralism" is an inevitable feature of a democratic system that recognizes free institutions, as individuals freely exercise their reason to formulate religious, philosophical and moral views.\textsuperscript{49}

Consider now the well-ordered society of justice as fairness, as defended in \textit{A Theory of Justice}. Because of the protection of the basic liberties of freedom of thought, conscience, and association, this society (like any liberal society) is marked by a toleration of diverse comprehensive doctrines and ways of life, each of which is compatible with Rawls's liberal principles of justice. Moreover, according to Rawls a well-ordered society is a society in which, in spite of their differences in religious, philosophical, and moral convictions, citizens generally agree upon, and publicly affirm and accept, the principles of justice as regulative of their society; and this society, as well-ordered, generally realizes these principles.

A well-ordered society is, from the point of view of justice, an ideal social scheme. One would at least think so. But consider the following problem. There might be many religious, metaphysical, or ethical views which accept and endorse, as part of their doctrines, justice as fairness as the "correct concept" of justice. Yet suppose they affirm the principles of justice (including the argument for it from the Original Position), not (or not simply) because it matches their considered moral convictions in reflective equilibrium. Instead they endorse justice as fairness because it follows from their comprehensive religious and metaphysical views. So, we might imagine a liberal Catholic who sees the principles of justice as true as a matter of natural law.\textsuperscript{50} As such, she sees them as God's commands (or at least derived from them), which are knowable by the natural light of reason, and enjoined by God as part of the act of creating the universe, so that reasoning creatures might ultimately realize their essence and obtain the final ultimate and intrinsic good in the universe, the Beatific Vision of God.\textsuperscript{51} And this is the primary reason, indeed, it may be the only ultimate reason, she affirms and complies with the requirements of justice.

\textsuperscript{49} Id. at 4, 36, 55. For Rawls's explanation of the fact of reasonable pluralism in terms of certain limits of our reasoning powers which he calls the "burdens of judgment," see id. 54-58.

\textsuperscript{50} An example here would be the liberal Thomism of Jacques Marifain, as set forth in his \textit{MAN AND THE STATE} (1951) [hereinafter \textit{MAN AND STATE}], and his \textit{SCHOLASTICISM AND POLITICS} (1940) [hereinafter \textit{SCHOLASTICISM}].

\textsuperscript{51} See \textit{SCHOLASTICISM}, supra note 50, at 121-22 (discussing the Beatific Vision); \textit{MAN AND STATE}, supra note 50, at 84-101 (discussing natural law).
Now it is a feature of Rawls's view that, not just the account of justice, but also the complete justification of justice as fairness is to be publicly available, a part of the public culture. Nothing is, nor need be, hidden from public view, as it were. This is the "full publicity condition." If so, then, according to *A Theory of Justice*, the Kantian argument for stability from congruence, as well as the doctrine of rightness as fairness that supports it, would be publicly available, and may even be called upon to show individuals, when in doubt, why they have sufficient reason to comply with and support just laws and institutions. But the Kantian congruence argument, as we have seen, would motivate individuals by demonstrating that justice is in their interest, because by acting on and from principles of justice, they fully realize their own capacity for a sense of justice, and therewith the intrinsic good of moral autonomy. But this is just the problem from the liberal Catholic's (and many others') particular points of view. According to her comprehensive religious and moral views, God alone, not human reason, is the ultimate source of morality, justice, and value. Justice, natural law, and the human good are requirements of our created essence, not of unaided human reason. Ethical autonomy is *not* an intrinsic good; indeed, this value conflicts with what the liberal Thomist takes to be the only ultimate intrinsic good, the contemplation and enjoyment of God. These are the ultimate reasons she would accept for doing anything. If so, then the public conception of justice, whose principles she accepts and affirms as God's natural law, contains justifying features that contradict her religion.

This is one example of the kind of problem Rawls has in mind when he says "the account of stability in Part III of *Theory* is not consistent with the view as a whole." There will be individuals in the well-ordered society of justice as fairness who endorse the public conception of justice and the institutions it supports, but who, because of toleration and the free use of reason and reason's limitations ("the burdens of judgment") form religious, philosophical, and moral views that conflict with the beliefs and final ends citizens need entertain and accept for justice as fairness (on *A Theory of Justice*’s account) to be stable. There is then a kind of public intolerance of non-

52. *Political Liberalism*, supra note 1, at 66.
54. *Id.* at 83-84 (rejecting Rousseau's and Kant's arguments that natural law is based in autonomy of the will).
55. *Political Liberalism*, supra note 1, at xvi.
56. *Id.* at 54-58.
Kantian philosophical and moral views built into the full public justification of justice as fairness. This is not, of course, a legal intolerance that affects freedom of conscience, thought, and speech. But it is a cultural intolerance that, because the public conception of the good conflicts with many citizens' comprehensive views, could affect their sense of self-respect (one of the primary social goods), and even undermine their allegiance and support for just institutions. In this way, there is something self-undermining about Rawls's stability argument from congruence.

This is one way to understand the background for the revisions contained in Political Liberalism. It enables us to understand the need for such ideas as public reason, and overlapping consensus. They are intended as additions and revisions to the original argument, designed to show the possibility of a just and stable democratic constitution. This becomes apparent in Rawls's response to his "fundamental question about political justice in a democratic society,":

[T]hree conditions seem to be sufficient for a society to be a fair and stable system of cooperation between free and equal citizens who are deeply divided by the reasonable comprehensive doctrines they affirm. First, the basic structure of society is regulated by a political conception of justice; second, this political conception is the focus of an overlapping consensus of reasonable comprehensive doctrines; and third, public discussion, when constitutional essentials and questions of basic justice are at stake, is conducted in terms of the political conception of justice [the public reason of a well-ordered society].

The aim of the next two sections is to show how the two ideas Rawls mentions in the second and third components of his solution, overlapping consensus and public reason, play a role in the reformulation of justice as a fairness as a "freestanding" political conception that is not tied to any comprehensive doctrine or general moral conception.

II. OVERLAPPING CONSENSUS

Political Liberalism sets out to formulate an independent branch of ethics in response to the practical needs of a liberal and democratic society. It is the public ethics of the political domain of a democracy.

57. I am not saying that this is just the way that Rawls understands the problem he now finds in A Theory of Justice. His understanding of the problem is, I believe, a good deal more complicated than the way I present it.
58. POLITICAL LIBERALISM, supra note 1, at 44, 48.
59. Id. at 10, 12.
It has been held, both from within American pragmatism and Idealist continental thought, that ultimately all philosophy is in some way political or social in its origins, or (as the case may be) in its justification. This is the opposite of what Rawls has in mind by democratic political philosophy and “the domain of the political.” While democratic political philosophy has its origins in and is responsive to political needs, still, given the nature of these needs, it must restrict its aspirations so that it comes to occupy a discrete and insulated position. Democratic political philosophy does not seek to be explanatory of other domains; nor is it comprehensive in its normative ambitions. This is not to say there is no place for social and political criticism. Far from it. It means, rather, that such criticism is to be conducted in terms that are accessible and endorsable from many different perspectives. In one respect, this is a condition of justification and social criticism: it is the nature of these discourses that they proceed from agreement on shared premises. Otherwise, one is not engaged in justification or criticism, but in pure rhetoric, or some form of satire, or perhaps inflammatory speech. For Rawls, part of being reasonable (as opposed to rational) is to be willing to reason from shared premises, and to justify one’s conduct and its consequences according to principles that all can accept.

Rawls conceives of the primary purpose of political philosophy in a democratic society as practical (as opposed to epistemological or metaphysical): to provide bases for public justification and political agreement about basic social institutions. These bases consist of a set of concepts and principles, and standards of evidence and judgment, in terms of which citizens can debate public issues, criticize each other’s conduct, and justify their legitimate activities. But given free institutions that allow for such liberties as freedom of conscience, thought, speech, and inquiry, citizens inevitably will have diverse and conflicting religious, metaphysical, and moral views in any free demo-

60. Id. at 139.
62. See Political Liberalism, supra note 1, at 48-50. Of course, reasonableness, as a virtue of individuals, must involve more than this; one has to also reason and act in good faith. To get their way, purely self-interested persons normally seek to rationalize their actions on commonly accepted terms, but these terms play no role in motivating their activity. Such persons, though they may want to appear to be, are not reasonable. Reasonableness also involves a genuine willingness to guide one’s conduct according to principles which are commonly shared with others. And third, it involves taking into account the consequences of one’s actions on others’ well-being, and a willingness to modify one’s conduct when it adversely affects others and violates shared principles. For other components of reasonableness, see infra note 72.
63. Political Liberalism, supra note 1, at 8, 100.
This is the "fact of reasonable pluralism." This fact considerably restricts the terms of public justification and debate. The common considerations that can count as good *reasons* in public discussion must be acceptable to and compatible with a wide range of conflicting views. Otherwise these reasons cannot play a role in public justification, and democratic political philosophy cannot achieve its practical aim. Democratic political philosophy, if it is to be successful, must then be an expression of citizens’ "shared and public political reason." But to attain such a shared reason, the conception of justice should be, as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm. In formulating such a conception, political liberalism applies the principle of toleration to philosophy itself. It applies the principle of toleration to philosophy in that it seeks to present and justify a moral conception of justice that is compatible with a wide range of epistemological, metaphysical, and even ethical views, including non-Kantian perfectionist, intuitionist, and even utilitarian views.

If political philosophy is to achieve such a degree of "toleration" and achieve its purpose of providing a basis for public justification and agreement, then it must be "freestanding," and in a certain sense, autonomous. As freestanding, it is to be publicly expoundable and justifiable in terms of "fundamental ideas" that are a part of democratic culture, along with the considered convictions of justice democratic citizens share in common. It is not then to rely, in its public justification, on controversial metaphysical and epistemological premises, nor on comprehensive moral or religious doctrine. At the same time, its public justification as a freestanding view cannot rule out other kinds of arguments for these same principles. Rawls says it is desirable that democratic principles of justice have other nonpublic justifications provided for within the terms of different and even conflicting reasonable comprehensive views. Indeed, it would seem to be a practical necessity, if political liberalism is to be possible, that there be such nonpublic justifications; otherwise the political conception of justice

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64. *Id.* at 36.
65. *Id.* at 9.
66. *Id.* at 9-10.
67. *Cf.* *id.* ch. 3.
68. *Id.* at 10, 12. Rawls says political philosophy is to be "autonomous." As autonomous it is to be seen as a distinctly normative inquiry, not in need of reduction or explanation in terms of some natural science. *Id.* at 87-88. *See also id.* at 98-99 on "doctrinal autonomy."
69. "While we want a political conception to have a justification by reference to one or more comprehensive doctrines, it is neither presented as, nor as derived from, such a doctrine . . ." *Id.* at 12.
could not be stable, since it could not form the basis for an overlapping consensus.\textsuperscript{70}

Rawls then aspires to a conception of justice that satisfies two dimensions that might seem to pull in different directions. (Here he refers to a "dualism in political liberalism."\textsuperscript{71}) First, as freestanding, the conception must be \textit{publicly} justifiable. Given the "fact of reasonable pluralism" this means the political conception cannot be argued for in terms peculiar to any comprehensive moral doctrine or conception of the good, but rather only on the basis of premises and ideas all reasonable persons\textsuperscript{72} can accept and endorse in their capacity as democratic citizens.\textsuperscript{73} This first dimension is satisfied in "[t]he first three lectures [of \textit{Political Liberalism} which] set out the first stage of the exposition of justice as fairness as a freestanding view."\textsuperscript{74} "The second stage of the exposition" is the argument for stability.\textsuperscript{75} For purposes of stability, Rawls now contends, the conception of justice must \textit{also} be \textit{nonpublicly} justifiable, in terms of the various reasonable comprehensive doctrines that gain adherents in a well-ordered society.\textsuperscript{76} To convey this second dimension, Rawls speaks of the political conception of justice as a "module, an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it."\textsuperscript{77} It is a "theorem"\textsuperscript{78} that has the support of several different reasonable comprehensive views, each of which works from different premises. And so we are to imagine that there might well be several nonpublic justifications of a

\textsuperscript{70} Cf. \textit{id.} at 11, 15.

\textsuperscript{71} \textit{Id.} at xxi.

\textsuperscript{72} Rawls elaborates the complicated idea of reasonableness by specifying four of its aspects as virtues and characteristics of persons. \textit{See id.} ch. 2. Reasonable persons are those who (1) are willing to propose, govern, and justify their conduct according to public principles which they and others can accept, and who (2) accept the inevitable limitations of reasoning that come under what Rawls calls the "burdens of judgment," and therefore accept the limits on what can be reasonably justified to others. \textit{Id.} at 54-58. In particular, they recognize that no comprehensive ethical view can be the subject of reasonable agreement. Moreover, (3) reasonable persons not only are cooperative, but want to be recognized as such. Finally, (4) they have a "reasonable moral psychology," including an effective sense of justice, a desire to do what justice requires of them and to be just persons.

\textsuperscript{73} This requirement follows from the practical aim of political liberalism, which Rawls incorporates into his account via "the liberal principle of legitimacy:"

\textit{O}ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. \textit{Id.} at 137.

\textsuperscript{74} \textit{Id.} at 133.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.} at xix.

\textsuperscript{77} \textit{Id.} at 12.

\textsuperscript{78} \textit{Id.} at 242.
polITICAL CONCEPTION IN RELIGIOUS TERMS, AS WELL AS IN TERMS OF KANTIAN, NATURAL LAW, PERFECTIONIST, AND EVEN UTILITARIAN VIEWS. 79

RECALL THAT A POLITICAL CONCEPTION IS JUST IF IT IS REASONABLE AND MATCHES OUR CONSIDERED CONVICTIONS OF JUSTICE IN REFLECTIVE EQUILIBRIUM. IT IS STABLE IF THE POLITICAL CONCEPTION IS RATIONAL AND SO MOTIVATES CITIZENS, AS PART OF THEIR DIVERSE CONCEPTIONS OF THEIR RATIONAL GOOD. THE FIRST DIMENSION OF ARGUMENT RESTATES RAWL'S ORIGINAL ASPIRATIONS AND ARGUMENT FOR THE PRINCIPLES OF JUSTICE AND DEMOCRATIC INSTITUTIONS IN PARTS I AND II OF A THEORY OF JUSTICE. SO FAR AS POLITICAL LIBERALISM GOES, THAT ARGUMENT WHILE DEVELOPED AND CLARIFIED, REMAINS SUBSTANTIALLY UNCHANGED. IT IS STILL GROUNDED IN OUR SHARED CONSIDERED CONVICTIONS OF JUSTICE, NOW ELABORATED IN TERMS OF CERTAIN FUNDAMENTAL INTUITIVE IDEAS THAT ARE IMPLICIT IN DEMOCRATIC CULTURE (THE CONCEPTION OF FREE AND EQUAL MORA L PERSONS, ETC). IT IS ONLY WHEN WE CONSIDER "THE SECOND STAGE OF THE EXPOSITION," THE STABILITY ARGUMENT, THAT POLITICAL LIBERALISM MARKS A SUBSTANTIAL CHANGE FROM A THEORY OF JUSTICE.

IF WE ARE TO SEE JUSTICE AS FAIRNESS AS JUSTIFIABLE FROM WITHIN DIFFERENT COMPREHENSIVE POINTS OF VIEW, THEN RAWL'S MUST LIMIT, IF NOT ABANDON, APPEALS TO KANTIAN MORAL DOCTRINE AND THE KANTIAN CONGRUENCE ARGUMENT THAT UNGIRD S HIS CASE IN PART III OF A THEORY OF JUSTICE FOR STABILITY. RATHER THAN INVOKING SUCH A GENERAL ETHICAL THEORY AS PART OF THE PUBLIC CONCEPTION OF JUSTICE (AS IN A THEORY OF JUSTICE), THERE IS NOW NO COMPREHENSIVE-BASED PUBLIC ARGUMENT WHICH SHOWS WHY JUSTICE IS AN INTRINSIC GOOD, THE SAME GOOD FOR EVERY CITIZEN. INSTEAD, "CITIZENS [ARE TO] INDIVIDUALLY DECIDE FOR THEMSELVES IN WHAT WAY THE PUBLIC POLITICAL CONCEPTION ALL AFFIRM IS RELATED TO THEIR OWN MORE COMPREHENSIVE VIEWS." 80 This is, Rawls says, "part of the liberty of conscience." 81

Here we have a major change from the argument presented in A Theory of Justice. That argument was not "freestanding" with respect to stability. Nor was it, given its Kantian premises, justifiable from within diverse reasonable comprehensive views (e.g. liberal Catholicism, or a reasonable utilitarianism, to take two examples). If justice as fairness is to be publicly justifiable, then it can no longer rely on Kant's general moral doctrine. Rawls can no longer argue that justice

79. These two dimensions parallel Rawls's claim: "I assume, then, that citizens' overall views have two parts: one part can be seen to be, or to coincide with, the publicly recognized political conception of justice; the other part is a (fully or partially) comprehensive doctrine to which the political conception is in some manner related." Id. at 38.
80. Id. (emphasis added). See also id. at 140.
81. Id. at 140.
as fairness is part of a more general contractarian moral doctrine, rightness as fairness; nor contend on this basis that justice and moral autonomy are intrinsic goods of citizens in a well-ordered society. As an argument made from within a general and comprehensive moral doctrine, the Kantian congruence argument must be consigned to a position outside public justification and the political conception of justice.82

The removal of Kantian moral doctrine creates a gap in the stability argument, which carries over into the public justification of the theory. Recall the two stages of the stability argument. First, it is to be shown how citizens can acquire a sense of justice, including a willingness to act on and from principles of justice. In Political Liberalism, Rawls retains and further develops the moral psychology originally expounded in chapter 8 of A Theory of Justice that answers the first stability question.83 Second, it is to be shown how justice and the exercise of the sense of justice can be assigned sufficient importance within citizens’ conceptions of the good, so that, when justice puts demands on their other ends and commitments, these demands are assigned a degree of priority normally sufficient to move agents to modify their nonconforming activities. The Kantian congruence argument was designed to resolve this second stage of the stability argument. It is then the second stage that requires revision. The idea of overlapping consensus is designed in part to fill the gap left by the omission of congruence.84 What is the argument for stability from overlapping consensus?

Overlapping consensus is more a speculative hypothesis than a philosophical argument, for it is grounded in an “educated conjecture”85 regarding the moral psychology and social interaction of indi-

82. This does not mean Rawls must abandon the Kantian congruence argument altogether. As an argument made from within Kantian moral theory, it still demonstrates, at least to Kantians, how justice as a virtue is intrinsic to the human good.

83. See Political Liberalism, supra note 1, lecture II, § 7.

84. See id. at 141 (discussing the two aspects of the stability argument, and indicating the role of overlapping consensus in the second part of the stability argument). Rawls says:

Stability involves two questions: the first is whether people who grow up under just institutions (as the political conception defines them) acquire a normally sufficient sense of justice so that they generally comply with those institutions. The second question is whether in view of the general facts that characterize a democracy’s public political culture, and in particular the fact of reasonable pluralism, the political conception can be the focus of an overlapping consensus.

Id.

85. Id. at 15.
individuals in a well-ordered society of justice as fairness. Rawls’s hypothesis is: (1) that in the well-ordered society where justice as fairness is realized, the comprehensive doctrines that are reasonable will each affirm the freestanding public conception of justice, each for its own reasons; and (2) unreasonable comprehensive doctrines—“irrational, mad, and aggressive” views—will not gain enough adherents to undermine the stability of a just scheme. So, (to expand on Rawls’s examples) a Kantian view, a classical utilitarian view, a pluralist view, and a religious doctrine with an account of free faith such as a liberal Catholic view, are all “reasonable comprehensive doctrines” that would gain adherents under the free institutions of a well-ordered society. By hypothesis, we assume a state of affairs where justice as fairness is publicly recognized, and is generally adhered to and enforced. Rawls’s “educated conjecture” is that each of these comprehensive views could and likely would affirm justice as fairness as reasonable and/or true based on its own reasons and resources, according to the values and principles affirmed within each respective view.

So, Kantians can accept the political conception for reasons of ethical autonomy (as set forth, for example, in the congruence argument); utilitarians, because they might well believe (truly or falsely) that justice as fairness is the best workable approximation to the requirements of utility in a democracy; a liberal Catholic because she sees justice as fairness as compatible with natural law; and pluralists, because they accept the public justification of justice as fairness as suffi-

86. The dependence of the argument on conjectured facts is apparent when Rawls leaves open the possibility that an overlapping consensus among reasonable comprehensive views may never develop. Id. at 36, 65-66, 168. In that case, justice as fairness would be “in difficulty”, id. at 66, perhaps utopian; it would not sufficiently instill in individuals, even under the best of circumstances, a settled disposition to maintain and support just institutions as that political conception defines them. To show that justice as fairness is not utopian, Rawls traces the social development of acceptance of the principles of a political democracy from a modus vivendi, to a constitutional consensus. From there, he contends this consensus should develop in its depth, breadth, and specificity, and evolve into an overlapping consensus on justice as fairness, or at least on a set of liberal conceptions with justice as fairness as its “focal point.” This argument showing how an overlapping consensus is possible is found in Political Liberalism. Id. at 158-68.

87. Id. at 39, 170-71.

88. Rawls says “[reasonable comprehensive doctrines] are in part the work of free practical reason within the framework of free institutions.” Id. at 37. He defines them as doctrines that cover the major religious, philosophical, and moral aspects of human life in a coherent manner, and that call on three forms of reason, the exercise of both theoretical reason and practical reason, and the evolution of its doctrine in response to some notion of “good and sufficient reasons.” Id. at 59. For Rawls to call such doctrines “reasonable” is potentially confusing, given the other uses of this term within his view. The looseness of the notion of “reasonable comprehensive doctrines” is indicated by Rawls’s claim that it potentially applies to all of the main historical religions, except for certain kinds of fundamentalism. Id. at 170.

89. Id. at 170-71.
cient moral argument, not in further need of justification in more
comprehensive terms. In each case, the political conception is af-
ámérm for reasons distinctive to each doctrine. If so, then none of the
comprehensive views accepts the political conception as a matter of
concession or compromise,90 and all of them accept it for the moral
reasons specified by each respective view. (Here again, contrast
Hobbesian views, for whom justice is always a compromise or conces-
sion.) Instead, in an overlapping consensus, the public conception of
justice resembles, if it is not identical with, the requirements of justice
affirmed by each respective view. Moreover, it is compatible with and
may even affirm each doctrine's nonpolitical values.

To recognize classical and average utilitarianism (or for that mat-
ter, a Thomistic Catholic view) as compatible with justice as fairness
marks a major departure from A Theory of Justice. Rawls there enter-
tained the idea of a form of indirect utilitarianism which held that
overall utility is best maximized by the public recognition and general
acceptance of justice as fairness. But such a view, he claimed, was not
genuinely utilitarian since it did not appeal to the principle of utility
for regulative or even justificatory purposes. For the most part, A
Theory of Justice was a sustained argument against the reasonableness
of any utilitarian view. His criticism of the classical utilitarianism of
Bentham and Sidgwick culminates with the claim that, like other
"dominant end" conceptions of the good, it is “irrational, or more
likely . . . mad. The self is disfigured and put in the service of one of
its ends for the sake of system.”91 In Political Liberalism Rawls dis-
penses with any such attempt to so disqualify teleological views on
grounds of such defects in their conception of the good. He even de-
picts them as compatible with, and capable of accepting, justice as fair-
ness. This is indicative of the degree to which political liberalism
departs from A Theory of Justice.92

We have then, in the idea of an overlapping consensus, what
might be seen as a different kind of congruence argument. It is the
congruence of public and nonpublic reasons and points of view. The
freestanding democratic conception of justice that is found commonly
and publicly justifiable, on the basis of shared democratic ideas, as
reasonable from the public point of view, is at the same time held to
be nonpublicly justifiable as reasonable or, as the case may be, true,

90. Id. at 169-71.
91. A Theory of Justice, supra note 2, at 554.
92. It does not, however, mean that Rawls, from within his own comprehensive view, some-
thing not at issue, does not still harbor the same judgments about utilitarianism.
from various nonpublic comprehensive points of view. It is because the public conception of justice can be seen as reasonable and/or true from all the reasonable comprehensive perspectives, and requires none of them to compromise their nonpolitical values, that there can be an overlapping consensus on the publicly justifiable conception of justice. This is no longer the congruence of the Right with a shared intrinsic Good within a single comprehensive doctrine, as in *A Theory of Justice*. It is rather the congruence of the publicly justifiable conception of justice with different and competing comprehensive ethical views, each of which affirms justice as a good (intrinsic, or instrumental, as the case may be) for its own reasons.

Assume now that Rawls's "educated conjecture" is right. It is still not clear how overlapping consensus deals with the problem formulated in *A Theory of Justice*? For even supposing that all in a well-ordered society have an effective sense of justice and a desire to act on just laws and institutions as defined by justice as fairness, what is to insure that justice will not give way when it conflicts with other values which people affirm within their comprehensive views? To resolve this problem of the priority of justice, Rawls can no longer appeal to the intrinsic ethical good of justice, and especially not to its normative supremacy. For, the idea that justice can be an intrinsic ethical good for each person has been given up along with the Kantian congruence argument. He now recognizes that for many people nonpolitical values are likely to be seen as more significant than justice within many comprehensive views. It may then be that, on many views, justice is simply an essential good (essential to social cooperation), important but nonetheless instrumental to their realizing the independent nonpolitical values that form their intrinsic good. If justice is merely instrumental within the terms of some reasonable comprehensive doctrines, then how can people be expected to comply with justice when it conflicts with other more fundamental values?

It may be that many people cannot be expected to subordinate their nonpolitical ends to justice. But Rawls can say several things here (as he seems to). First, given the content of the principles of justice, the occasions on which people will be called upon to make such decisions are rare, rare enough so as not to undermine stability. For, with liberty of conscience and other basic liberties in place, each person is free to affirm and act on the normal requirements of a wide variety of reasonable conceptions of the good. A liberal conception of
justice, like justice as fairness, puts minimal restrictions on the free pursuit of reasonable comprehensive views.\footnote{\textit{Political Liberalism}, \textit{supra} note 1, at 157.}

Second, we have to take into account that people brought up within a democratic culture are educated to its public conception of justice. They are made aware of the benefits of justice and toleration in enabling them to successfully pursue their own comprehensive views. Also they are encouraged by the public culture to respect others’ basic rights and adhere to justice; and they are educated to the duty of civility, to give publicly acceptable reasons to justify their actions when they adversely affect others’ interests.\footnote{\textit{Cf. id.} at 217.} There are then forces within democratic culture itself which mitigate the likelihood that individuals will depart from justice in the event of conflicts.

Third, there are forces within their own comprehensive views which have similar effects. In a well-ordered society, the requirements of justice are themselves seen as normally compatible with the basic religious, philosophical, and moral values affirmed within reasonable comprehensive views. And there are few conceptions of the good that will admit that it is generally permissible to breach justice for the sake of other values. For example, hardly any of the major religions (again excluding fundamentalist sects) would admit, doctrinally, that justice is a value that can be dispensed with. Instead, they expound their doctrine to teach that conflicts between justice and more fundamental religious values which require sacrificing justice for the sake of the greater good, are situations that hardly, if ever, arise. (For example, in Thomist doctrine, natural law is a necessary means to the Vision of God, not ever an impediment to it.)\footnote{See \textit{Man and State}, \textit{supra} note 50, at 86:}

Fourth, as Rawls argues, the values of democratic justice, and the virtues of political cooperation (tolerance, reasonableness, the sense of fairness, and a willingness to meet others halfway), are themselves “very great virtues” and values.\footnote{\textit{Political Liberalism}, \textit{supra} note 1, at 157.} There will be many reasonable comprehensive views in a well-ordered society which assign to the values of justice a significant or even preeminent position, so that when other values conflict with them, they will be outweighed by political means that there is, by the very virtue of human nature, an order or a disposition which human reason can discover and according to which human will must act in order to attune itself to the essential and necessary ends of the human being. The unwritten law, or natural law, is nothing more than that.
values. This is true of the comprehensive liberal views that develop from Kant and Mill; it is also true of the pluralist comprehensive view Rawls mentions.97

Finally, perhaps most importantly, Rawls emphasizes that most people do not adhere to fully comprehensive doctrines, but partial ones instead; moreover there is “a certain looseness in our comprehensive views.”98 This allows many ways for liberal principles of justice to cohere with comprehensive doctrines. Most people come to affirm principles of justice incorporated into the constitution without seeing any particular connection between justice and their other views. Because they come to appreciate the good justice realizes for them and those they care for, when an incompatibility later arises, they are more likely to adjust or revise their comprehensive views to cohere with justice, than they are to reject justice.99

What now of the second strand of overlapping consensus, the contention that unreasonable comprehensive views in a well-ordered liberal society will not gain sufficient adherents to undermine stability? To begin with, why exclude these views from an overlapping consensus anyway? We saw in section I that Rawls’s project is not the Hobbesian one of devising and justifying a conception of justice that would accommodate peoples’ preferences and ends, whatever they might be. Unreasonable conceptions of the good are not to be accommodated by justice; they are to be contained by it. This reiterates the important point that democratic justice is not to be viewed as a compromise among given and essentially conflicting desires and interests. It is not a modus vivendi. Rather it is from the beginning worked up independently of particular desires and interests, from democratic self-awareness and convictions, and is displayed as an articulation of a free and equal moral person’s self-conception.100 Only then is it to be shown how justice is compatible with people’s good. Given the structure of Rawls’s argument, clearly unreasonable conceptions of the good—intolerant, bigoted, or aggressive views—will be excluded from an overlapping consensus because their conceptions of the good are incompatible with liberal requirements of justice. This does not mean Rawls simply dismisses the problem unreasonable views pose for stability. Intolerance, bigotry, and aggressiveness will likely be present, even under the best of circumstances. Still, Rawls speculates that,

97. Id. at 145, 155-56.
98. Id. at 159-60.
99. Id. at 160.
100. See id. lecture 3 (discussing political constructivism).
given the circumstances of a well-ordered society, conceptions of the good which require these antiliberal vices will not gain sufficient adherents to destabilize that ideal scheme. His thought seems to be that antiliberal vices are largely sustained by social and political conditions that encourage them (lack of toleration in the public culture, poverty and unemployment, lack of fair opportunities, etc.). These are not the conditions of a well-ordered liberal constitution.

These arguments for stability may not satisfy many, since they depend on hypothetical conjectures. In one respect, they are not as strong as the original congruence argument, which argued for the strict priority of the intrinsic good of justice over other values. Still, in another respect, Rawls's revisions make the modified case for stability more realistic. With the idea of an overlapping consensus Rawls no longer has to rely on a contestable general and partially comprehensive Kantian ethical view to prove stability. Public toleration of other equally comprehensive views is considerably increased. This fact itself should increase the forces of stability.

Joseph Raz contests Rawls's entire approach to stability. See Joseph Raz, Facing Diversity: The Case of Epistemic Abstinence, 19 Phil. & Pub. Aff. 3 (1990). He contends that the stability of a political system depends not so much on common acceptance of a public justification of a conception of justice; rather, "affective and symbolic elements may well be the crucial cement of society." Id. at 30. Such factors as "identification of individuals with their society" and its culture ("language, literature, foods, flag, and anthem," etc.), its "history of past conflicts, the depth of feeling concerning current rivalries," and so on, are more important forces of stability. People are "only partially sensitive to the existence of anything remotely like Rawls's overlapping consensus." Id. at 30-31. So far as this criticism goes, it may be right, but Rawls's stability condition is simply that an overlapping consensus exist, not that people be sensitive to or want it to exist. Moreover, the idea of overlapping consensus does not concern common acceptance of the public justification of a conception of justice. It concerns rather the convergence of many nonpublic justifications, each made in the terms of different reasonable conceptions of the good, on the same public conception of justice. Raz's "affective and symbolic elements" may well be part of these comprehensive views.

Stephen Holmes goes further than Raz: "Contrary to Rawls, the chances for consensus will not necessarily improve when we banish questions of the good and focus single-mindedly on questions of the right." Because of the inevitability of pluralism, "democratic politics will remain a battlefield on which rival conceptions of the right will clash. The theory of justice is not the shortest or the smoothest road to social harmony." Advocating a distinction between toleration and justice, Holmes suggests that stability (or social harmony) is better promoted so long as people are tolerant of other views, and then allow issues of justice (e.g. abortion) to be settled by democratic debate and the resolution of conflicting interests in ordinary democratic procedures. See Stephen Holmes, The Gatekeeper: John Rawls and the Limits of Tolerance, New Republic, October 11, 1993, at 39, 47. Holmes's view resembles the account of "procedural justice" expressed by Stuart Hampshire in his review of Rawls's book. See Stuart Hampshire, Liberalism: The New Twist, N.Y. Rev. Books, Aug. 12, 1993, at 43 (reviewing John Rawls, Political Liberalism (1993)). See also Stuart Hampshire, Innocence and Experience chs. 2, 4 (1989). Neither Hampshire nor Holmes says enough about why people should accept toleration and the results of ordinary democratic procedures when their basic rights and interests are consistently undercut by these same procedures.
Moreover, there is one further complication I will only allude to before we are finally through which strengthens the stability argument even further. Recall that Rawls says that in the absence of public acceptance of a comprehensive doctrine, citizens must each in their own way decide how justice is part of their good on the basis of their own comprehensive views. But there is more to it than this. For the public conception of justice itself contains an account of political goods. By "political goods" Rawls does not just mean goods that are desirable or necessary in political contexts, but goods that are part of the freestanding public justification of the conception of justice. In chapter 5, "The Priority of Right and Ideas of the Good," Rawls sets out five ideas of the good that are part of the public justification of justice as fairness: (1) a thin account of (goodness as) rationality, which is (he claims) appropriate for a political conception of justice; (2) the account of primary social goods as needs of free and equal citizens; (3) the idea of permissible comprehensive conceptions of the good; (4) an account of the political virtues; and (5) the idea of the good of a well-ordered (political) society. Among these ideas of the good that are part of the public conception of justice are not just instrumental goods like the primary goods; Rawls suggests that justice and "political society itself can be an intrinsic good," within the terms of the public political conception.

It appears then that what Rawls has taken away with one hand (the congruence argument in Theory) he reshapes and now gives back with the other. It seems peculiar to say that justice is an intrinsic good, not for purposes of a comprehensive doctrine, but in the limited terms of the political conception itself. Either an activity is intrinsically good or it is not, one might think. What can Rawls mean here? Perhaps one balks at Rawls's claim because of the philosophical obscurity of the concept of the good. The concept of goodness, for Rawls, means that which is rational to want (from a standpoint of deliberative rationality) compatible with certain principles of rational choice. A political good is that which is rational to want in one's capacity as a citizen, if one is to fulfill the demands, expectations, and opportunities of that position. The primary social goods are instrumental political goods in that they are needed to exercise the moral powers and realize permissible conceptions of the good. These powers in turn are goods, since their exercise is necessary to one's taking

102. Political Liberalism, supra note 1, at 38, 140.
103. Id. at 176.
104. Id. at 207.
part in and gaining the benefits of social cooperation. Rawls claims political goods need not be merely instrumental for citizens. To say that justice is an intrinsic good within the terms of the public conception of justice then seems to mean, for Rawls, that in our capacity as citizens, it can be rational to want something for its own sake, and not simply for the sake of other ends we have. Bracketing the question of what is a person's complete good, it can be rational as a citizen to want: (1) to realize the moral powers by doing justice, thereby becoming politically autonomous; (2) to be publicly recognized as having the status of an equal citizen; and (3) to be a participating member of a well-ordered society. These are (along with the political good of social union) among the intrinsic political goods Rawls mentions as part of the public justification of justice as fairness.105

I will not go any further into the complications this argument raises, except to note that Rawls's contention is that a just political society can be an intrinsic good, within the terms of the political conception. His qualification implies his claim is defeasible: once a person's complete good is taken into account, justice may not be an intrinsic good, from within one's comprehensive perspective. But the important point is that (assuming Rawls's contentions make sense) the public justification of the conception of justice does not depend on a purely instrumental account of the good of justice. In the end, and even though Rawls has given up the Kantian congruence argument, there remains a place, within the public conception, for the intrinsic political good of justice, desirable for its own sake in one's capacity as citizen. As Rawls says, this further strengthens the argument for stability.106

III. PUBLIC REASON

Recall now Rawls's fundamental question: How is a just and stable constitution possible among free and equal persons with conflicting conceptions of the good?107 I focus now on the third component

105. Id. at 201-07.
106. Id. at 209. Rawls says it needs to be shown how justice is a good, so the political conception can be "complete." Recall that a political conception of justice admits of two justifications, a public one that is the same for everyone, and a nonpublic one, in terms of one's reasonable comprehensive view. As political liberalism is reasonable from both perspectives, public and nonpublic, so it needs be shown how it can be rational from public and nonpublic points of view. Overlapping consensus is the conjecture that the political conception is rational from the point of view of each reasonable comprehensive view. For purposes of "completeness," Rawls says, it must be shown how justice, as a political good, can be rational within the terms of the public political conception itself.
107. Again, Rawls summarizes his answer as follows:
of his answer, the idea of public reason. Overlapping consensus is a substantial revision to Rawls’s argument in *A Theory of Justice*. By contrast, the idea of public reason is more of a natural extension, though one that becomes all the more necessary because of Rawls’s reliance on overlapping consensus for stability. The idea of public reason is an elaboration and development of the social contract idea and publicity requirement that occupy such an important place in the original argument for justice as fairness. That political principles be publicly known and accepted is a natural feature of any social contract view. Rawls develops the idea of publicity in *Political Liberalism* so that it comes to play a central role in many of his key notions. It is, to begin with, part of the idea of reasonableness. On Rawls’s account, to be *reasonable* (as opposed to rational) is, in part, to be willing to guide one’s (rational) conduct and ends, and justify one’s actions, according to public standards. By acting reasonably, “we enter as equals the public world of others . . .”,108 in governing our conduct by standards from which we can reason in common, and by taking into account the effect of our rational plans on their well-being.109 Publicity is also implicit in the practical aim Rawls sets for democratic political philosophy, viz. to discover the appropriate bases for public justification among free and equal persons.110 As such, the (full) publicity of principles of justice is incorporated as one of the reasonable conditions on agreement in the Original Position. A publicly recognized conception of justice then comes to be part of a well-ordered society, where everyone accepts, and knows everyone else accepts, the same principles of justice.111

Why is publicity such a pervasive component of Rawls’s view?112 Here I can only mention that, aside from its connection with the idea of reasonableness (noted above), the idea that reasons be public is connected with the democratic values of freedom and equality that Rawls seeks to elucidate. Henry Sidgwick said that the principle of

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[1] the basic structure of such a society is effectively regulated by a political conception of justice [2] that is the focus of an overlapping consensus of at least the reasonable comprehensive doctrines affirmed by its citizens. [3] This enables that shared political conception to serve as the basis of public reason in debates about political questions when constitutional essentials and matters of basic justice are at stake.

*Id.* at 48.

108. *Id.* at 53.

109. *Id.* at 49 n.1.

110. *Id.* at 9.

111. *Id.* at 35.

112. For a recent criticism of the idea of publicity in Rawls’s and others’ views, see Bruce W. Brower, *The Limits of Public Reason*, 91 J. PHIL. 5 (1994). My remarks here only partly respond to his concerns.
utility may require that utilitarianism be nonpublic, an “esoteric morality . . . which it is expedient to confine to an enlightened few,” that is used to structure social relations, but which is not known or acknowledged by people.\textsuperscript{113} The consequence of such a doctrine is that agents must have false beliefs about the basis of their relations in order for the ends of utilitarianism to be achieved. Who is to enforce such an “esoteric morality” politically? Its undemocratic consequences seem unavoidable. From Rawls’s Kantian perspective, this view undermines democratic freedom and makes political autonomy impossible. “Freedom at the deepest level calls upon the freedom of reason, both theoretical and practical.”\textsuperscript{114} That we be in a position to know why our political relations are as they are, and not forced to suffer mistaken impressions about this, is a condition of freedom. Otherwise, we are subject to controllable forces that have been placed beyond our control, either by circumstances we create or by others’ conscious manipulation. Publicity is then a condition of our realizing our status as free, equal, reasonable and rational democratic citizens.\textsuperscript{115}

Now, what is the role of the idea of public reason? One way to approach this idea is by synthesizing it with the other two components of Rawls’s answer to his problem of the possibility of a just constitution. Assume a well-ordered society in which there is public recognition of a common conception of justice, and there is available a public justification of this conception as a freestanding view in terms implicit in the idea of the rule of law. This is not so much a requirement of publicity, (conceived as an independent moral or political requirement) as it is of fairness (due process) and the effectiveness of law. \textit{Cf. id. at 71.} Publicity, as a separate requirement of justice, requires at a minimum (1) that people know the principles that underlie laws and social and economic norms. This is a standard feature of any social contract view (including Hobbes’s). On Rawls’s Kantian account, however, publicity must be “fuller” than this. In addition, the grounds of laws and political institutions must be such as to “stand up to public scrutiny.” \textit{id. at 68.} People should then have available the ultimate reasons for political requirements on what they must do. This requires (2) that there be publicly shared methods of inquiry and forms of reasoning by which these principles are applied, and (3) the public availability of the full justification of the conception of justice of which these principles are a part. Anything short of that means that the bases of our political relations are hidden from view, perhaps based in illusions that would undermine the freedom of politically autonomous democratic citizens. Full publicity is appropriate because it enables democratic citizens to realize their moral powers (in particular their capacity for justice), the development and exercise of which are essential to their realizing their good as democratic citizens. \textit{See id. at 66-71 (discussing full publicity).}
possibility of a just democratic constitution

in democratic culture. In this society there exists a reasonable pluralism of comprehensive doctrines, each of which affirms the public conception for its own moral reasons, and so there is an overlapping consensus. Now, how is the conception of justice to be interpreted and applied to specify a constitution, and make laws and social policies? What role does it have in citizens' and officials' deliberations and arguments about public issues? It is assumed that the conception of justice is compatible with all the reasonable conceptions of the good that gain adherents in this society. But what is to prevent citizens, or for that matter legislators and judges, from appealing to non-public values and principles implicit in their comprehensive views to interpret and apply the conception of justice in setting up and interpreting the constitution? Suppose citizens, or legislators, interpret freedom of thought by appealing to their religious or moral views so as to narrowly define freedom of speech. Or they interpret liberty of conscience according to their religious views (as John Locke and perhaps Justice Rehnquist), so that while it allows freedom of all (reasonable) religions, it does not rule out special government support to encourage religious over nonreligious belief, or even special support for a particular religion. Or they interpret freedom of the person (another vaguely defined basic liberty) according to their religious views about what is appropriate sexual conduct (deciding then that homosexuality, or any sex outside of legal marriage, should be legally prohibited). Nothing on the face of these abstract basic liberties would prevent such interpretations.

To provide a basis for public justification that will enable citizens to accept the laws and institutions of a democratic society, it is not enough that everyone be able to accept, individually, principles of justice and a constitution on the basis of their own reasons, stemming from their particular conceptions of the good. It is not even enough that there exist, too, a public justification of the political conception of justice, as a freestanding view. For the common conception of justice still must be interpreted and applied to specify the constitution, make laws, and shape policies and institutions. If each relied on his own conception of the good to interpret and apply these abstract principles, there would be widespread disagreement as to what justice requires. (Consider a parallel situation now in our applying the U.S. Constitution. Though we may agree on many of its most essential provisions (free speech, due process, equal protection, no cruel and unusual punishment, etc.) people interpret these provisions differently, often because they primarily rely on their comprehensive religious
and moral views.) For this reason, there is a need for a shared set of reasons and methods of inquiry and reasoning, upon which to ground our interpretations.

[I]t is essential that a liberal political conception include, besides its principles of justice, guidelines of inquiry that specify ways of reasoning and criteria for the kinds of information relevant for political questions. Without such guidelines substantive principles cannot be applied and this leaves the political conception incomplete and fragmentary.¹¹⁶

To achieve this we must be able to reason from the same standards of interpretation of the public conception of justice, endorsing and applying its principles to the constitution and laws for the same reasons.

The idea of public reason is then introduced by Rawls to deal with the problem of the interpretation and application of the public conception of justice in a liberal society in which citizens endorse the conception from several different nonpublic points of view. This problem of application of the public conception of justice to specify the constitution and laws arises because Rawls now admits the legitimacy of alternative justifications for the conception of justice, within the nonpublic terms of diverse reasonable conceptions of the good. The problem did not exist (not to this extent) in A Theory of Justice, for there the assumption was that most everyone accepted the same partially comprehensive moral doctrine, a general Kantian moral theory. Once that doctrine has been given up as part of the public understanding of justice, and replaced by reasonable pluralism and an overlapping consensus of diverse doctrines, a problem arises of sustaining agreement on the interpretation and application of the political conception of justice. Because they have different religious, metaphysical, and ethical doctrines, people have different standards for assessing evidence, different criteria of truth, and they will interpret shared principles of justice differently. It is in this context that the special need for an idea of public reason arises: it is needed to forestall undue reliance on the reasons and ways of reasoning implicit in conflicting conceptions of the good in settling matters of basic justice and essentials of the constitution, so as to be able to carry through the practical aim of discovering a basis for public justification in a democratic society.

Rawls responds to this problem by proposing a "liberal principle of legitimacy" along with the idea of public reason. Because of the freedom and equality of democratic citizens:

¹¹⁶. *Id.* at 223-24.
[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy.\textsuperscript{117}

Only a constitution that all citizens can reasonably be expected to endorse on the basis of \textit{common} reasons can serve as a basis for public justification. This immediately gives rise to a natural duty of democratic citizens, to appeal to public reason: "[T]he ideal of citizenship imposes a moral, not a legal, duty—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 \textit{public reason}."\textsuperscript{118} Both principles, Rawls says, would be endorsed from the Original Position,\textsuperscript{119} along with guidelines for public inquiry and standards of interpretation (familiar to common sense and not dependent on any particular comprehensive view) needed to apply norms of justice.\textsuperscript{120}

Rawls characterizes public reason as the reason of democratic citizens. Its subject is the good of the public in matters of fundamental justice. And its content is given by the ideals and principles expressed by a democratic society's conception of political justice.\textsuperscript{121} By contrast, nonpublic reason, while social, consists of the reasons and methods of inquiry that are peculiar to the many associations, conceptions

\begin{itemize}
  \item[\textsuperscript{117}] \textit{Id.} at 137. Rawls goes on to say: "Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification." \textit{Id.}
  \item[\textsuperscript{118}] \textit{Id.} at 217 (emphasis added). Rawls continues: "This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made." \textit{Id.} The duty of civility is present in nascent form in \textit{A Theory of Justice}, as part of the natural duty of mutual respect (one of the natural duties the parties would agree to in the Original Position). Rawls says this duty involves, among other things, "our willingness to see the situation of others from their point of view, from the perspective of their conception of their good; and in our being prepared to give reasons for our actions whenever the interests of others are materially affected." \textit{A Theory of Justice, supra} note 2, at 337. In matters of justice, this means:

  [offering reasons] in good faith, in the belief that they are sound reasons as defined by a mutually acceptable conception of justice which takes the good of everyone into account. Thus to respect another as a moral person is to try to understand his aims and interests from his standpoint and to present him with considerations that enable him to accept the constraints on his conduct. . . . [in terms of] principles to which all could agree.
  
  \textit{Id.} at 338.
  \item[\textsuperscript{119}] \textit{Political Liberalism, supra} note 1, at 137 n.5.
  \item[\textsuperscript{120}] \textit{Id.} at 225.
  \item[\textsuperscript{121}] \textit{Id.} at 213.
\end{itemize}
of the good, and reasonable comprehensive doctrines that coexist in a democratic society.\textsuperscript{122}

Rawls speaks of public reason as both an idea and an ideal. Roughly, the ideal of public reason seems to be that citizens, in the course of public argument and debate, and even in their private deliberations before voting on candidates, laws and social policies, will appeal to considerations that are acceptable to everyone consistent with the freedom and equality of citizens. They will apply public, not non-public, reasons and standards of justification in coming to decisions about political issues of basic justice. To fully realize this ideal, public reason has to have a certain content. First, the reasons citizens appeal to must be stated in terms compatible with a liberal conception of justice, which forms the basic content of public reason. Second, there must be guidelines for public inquiry and reasoning, based in common sense and amenable to the wide range of reasonable conceptions of the good, which specify how these principles are to be applied. The third component of the ideal of public reason is the full public justification of the liberal conception of justice and its guidelines for inquiry independent of any comprehensive doctrine, in terms of fundamental political ideas implicit in the public political culture of a democracy.

As an ideal with this content, public reason is realized only in a well-ordered society governed by a liberal public conception of justice (such as justice as fairness). The ideal of public reason is not something realized in our constitutional system since we are not well-ordered (in Rawls's sense); we only faintly approximate this ideal. We have a written Constitution, a public charter, which serves as a sort of basis for public reasoning on constitutional essentials, but we have no agreement on the conception of justice which our Constitution incorporates. (This is one deficiency in our political culture which Rawls seeks to remedy by proposing justice as fairness as the most appropriate political conception for a democratic society.) Still, though we do not satisfy the ideal of public reason, the idea applies to us, for the principle of legitimacy and duty of civility are requirements on any democratic scheme, whether or not they are effectively regulated by a public conception of justice. In any democracy, these principles require that laws and policies be justified (so far as they affect what Rawls calls "constitutional essentials and questions of basic justice,"\textsuperscript{123}) according to common reasons all can accept as democratic

\begin{footnotesize}
\item[122.] Id. at 220.
\item[123.] Id. at 227-30.
\end{footnotesize}
POSSIBILITY OF A JUST DEMOCRATIC CONSTITUTION

citizens. And indeed, public reason is to a large degree implicitly recognized as part of our constitution, for there is a sense in our political culture of the kinds of reasons that are and are not appropriate to invoke in support of laws and in interpreting the Constitution. Most everyone accepts that to argue for laws purely on grounds of their own religion, or on religious grounds in general, is not sufficient justification for political measures, and that often it is not even appropriate to appeal to religious reasons in democratic debate. Some may still claim we are a "Christian nation," but claims of this kind are not taken seriously in wider public debate, where non-Christians are addressed. Appeals to Christian doctrine simply do not count as good public reasons in our political culture. This raises the question of the appropriateness of appeals to religion and comprehensive ethical considerations in a democracy. To clarify how the idea of public reason addresses this issue, I will, momentarily, compare Rawls's view with Kent Greenawalt's view.

But first, it is important to keep in mind the distinction between the ideal of public reason, which we do not realize, and the idea itself, which is applicable to us in any case. This will help forestall misreadings of certain claims Rawls makes (in chapter 6) that might otherwise appear to be a retraction of his earlier views. For example, Rawls says: "public reason does not ask us to accept the very same principles of justice . . . ."124; furthermore:

It is inevitable and often desirable that citizens have different views as to the most appropriate political conception; for the public political culture is bound to contain different fundamental ideas that can be developed in different ways. An orderly contest between them over time is a reliable way to find which one, if any, is most reasonable.125

Soon following this passage, Rawls says of the difference principle: "[T]hough a social minimum providing for the basic needs of all citizens is also a[ ][constitutional] essential, what I have called the 'difference principle' is more demanding and is not."126 The same holds true for fair equality of opportunity; while some conception of equal opportunity is a constitutional essential in a democracy, Rawls says his particular interpretation of that value is not.127 Following this, Rawls says "about many economic and social issues that legislative bodies must regularly consider. . . . To resolve these more particular and de-

124. Id. at 241.
125. Id. at 227.
126. Id. at 228-29.
127. Id. at 230.
tailed issues it is often more reasonable to go beyond the political conception and the values its principles express, and to invoke nonpolitical values that such a view does not include.\textsuperscript{128}

These passages, taken together, invite a misreading. They might suggest to some that Rawls is giving up his commitment to the second principle of justice as the ideal standard for structuring access to social positions, economic systems, and property schemes, and is conceding to other proposals. This is not, however, what he means. \textit{Justice as fairness is the public reason of a well-ordered democratic society.} (Or at least, so Rawls believes.) This is the \textit{ideal} social scheme. This ideal and its regulative principles of justice are \textit{implicit}, Rawls contends, in the considered convictions of justice and certain fundamental intuitive ideas of our democratic culture.\textsuperscript{129} It is part of Rawls's task to bring to public awareness the principles of justice we are committed to, to provide an agreed basis for public reasoning about justice. Our public reason now is confused and in need of clarification. Especially on questions of economic justice, there is widespread disagreement even about the constitutional necessity for a social minimum. Indeed, there is still disagreement about some of the basic constitutional liberties (e.g. freedom of association and the right of privacy, for example, or equal rights for women). It would be a mistake, then, to incorporate this sophisticated philosophical conception of justice into the constitution of our less than ideal liberal scheme, because it is not yet part of public reason of this society. Presently it might even be self-defeating, given our political culture, for the Supreme Court, or even the legislature, to attempt to restructure property arrangements so as to realize the difference principle. Moreover, Rawls does not see it as the appropriate role of the Courts, even in a well-ordered society, to review legislation bearing on the economy and property in terms of the difference principle.\textsuperscript{130} It is the Court's role to enforce a social minimum, even now, since that is a "constitutional essential" in a democracy. But it would be a mistake for the Court, both now and any time in the future, to second guess legislative decisions regarding whether this social minimum has been accurately decided according to the difference principle. As he held in \textit{A Theory of Justice}, for strategic and other reasons the difference principle should not be part of the (written) constitution of a well-ordered society.\textsuperscript{131}

\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Cf. id. at 26.}
\textsuperscript{130} \textit{See id. at 230 (summarizing reasons for this view).}
\textsuperscript{131} \textit{See A Theory of Justice, supra note 2, at 199.}
So, the point is that Rawls's principles of justice are not now part of our public reason. He hopes that some day they will be. Before that point can be reached, there will need be widespread revisions in people's judgements about justice, especially economic justice. It is in this context that Rawls (as quoted above) says it is a good thing that citizens have and debate their "different views as to the most appropriate political conception." An "orderly contest between them over time" is necessary to bring to public awareness and public reason the principles of justice implicit in our democratic culture. When the debate is all over and done with (if it ever will be) Rawls hopes that his conception of justice will be accepted as the bases for our public reasoning, since he is as confident as ever that it is the most reasonable conception of justice for a democratic society.

Now to address the bearing of the idea of public reason on the role of religion, or any comprehensive doctrine, in citizens' political conduct. Rawls's liberal principle of legitimacy and duty of civility primarily address the reasons it is permissible for citizens and officials to publicly cite to one another, in political discussion and debate in the public forum, to justify or criticize laws and proposals that bear on constitutional essentials. As Rawls says, the duty of civility is a "duty to adopt a certain form of public discourse." These principles do not mean that citizens cannot appeal to nonpublic religious or ethical reasons in their private or associational deliberations on laws and policies. Indeed, Rawls says that it would be contrary to the idea of overlapping consensus for public reason to prohibit people from relying politically on their religious or other comprehensive views. But these political principles do require that citizens be prepared to justify, publicly, their decisions in terms of political values amenable to democratic reason.

Compare an ostensibly similar view by Kent Greenawalt in his important book, Religious Convictions and Political Choice. He argues that liberal democracy does not require the wholesale exclusion of religion as a basis for political decisions by citizens. Many religious persons cannot reason about moral issues independent of their religious views, so their political reliance on religious reasons is neces-
sary for them to come to political decisions. It would be unfair to require religious believers to abandon their faith in politics. The most that liberal doctrine can require, Greenawalt seems to say, is that religious persons address others in "publicly accessible terms." With certain qualifications, "Public discourse about political issues with those who do not share religious premises should be cast in other than religious terms."

These claims, as far as they go, are compatible with Rawls's account of public reason, and Rawls seems to agree with them. On the other hand, for Rawls, voting is not "a private [or] even personal matter." To vote one's private prejudices, unconstrained preferences, or economic interests, or even one's comprehensive religious or metaphysical views, and to do this without regard to the requirements of public reason, is to refuse to recognize the "duty of civility." Again, this duty requires that the policies and principles we politically advocate be supportable "by the political values of public reason."

This requires that we vote our sincere judgments regarding the common good, as informed by considerations of justice. It cannot then be that democratic liberalism merely requires that public discourse be conducted in terms of public reasons. To require only that, but then to allow people to vote their personal preferences and comprehensive views with impunity, is a kind of hypocrisy that public reason could not survive. Even if Greenawalt's claim is true, that people cannot reason about political matters independent of their religion (or other comprehensive views), still, when their decisions are not amenable to the public political values of a democracy, they violate the liberal prin-

138. Id. at 155.
139. Id. at 87.
140. Id. at 155-56; see also id. ch. 12.
141. Id. at 217.
142. See POLITICAL LIBERALISM, supra note 1, at 244 n.33.
143. Id. at 219.
144. Id. at 217.
145. Cf. id. at 219-20.
146. Greenawalt, interestingly enough, must contemplate just the opposite position, for he strongly advocates the legitimacy of coming to political decisions from within one's own nonpublic conception of the good. He asks, if people come to their political positions on the grounds of personal beliefs that stem from their religious and other comprehensive views (or for that matter, out of pure self-interest), is it not likewise a kind of "concealment that is immoral and unwise" for them not to publicly make known their religious reasons? GREENAWALT, supra note 136, at 220. The problem is to encourage people to publicly argue for their positions on sectarian grounds is socially divisive. Greenawalt seems to realize this, and does not endorse full religious disclosure. His grounds seem to be strategic and conventional: (1) It would not be "effective persuasion" to be perfectly candid about one's religious or other personal reasons, and (2) "Present practices permit much less than full candor about personal starting points generally . . . ." Id. at 222.
ciple of legitimacy. For they are proposing that state power be exercised in ways that cannot be justified on the basis of reasons all democratic citizens can endorse. State power then becomes an "unreasonable force," and violates the freedom and equality of citizens.

But is it true that religious persons, or for that matter anyone who affirms a metaphysical or ethical doctrine, can only conduct their political deliberations by appealing to their comprehensive views? Or, is democratic culture sufficiently robust that it contains implicit in itself an independent, or "freestanding," political morality that citizens can also appeal to? If it is true that we can only reason in terms of our particular views, this suggests that shared public reasons are not very extensive, and in so far as they exist, are an accidental confluence of different comprehensive views. Moreover, it would seem to deny the possibility of Rawls's entire project in Political Liberalism, to discover a (freestanding) basis for public justification, that is the focus of an overlapping consensus, and which can serve as a basis for public reasoning among citizens with different reasonable conceptions of the good. Greenawalt appears to be skeptical about both the depth of public reason and the success of Rawls's project. 

Greenawalt's lack of confidence in the depth or completeness of public reason is paralleled by the reduced significance he assigns to it where it exists. He contends that publicly accessible reasons and arguments do not always take priority over nonpublic ones, especially when majority will sufficiently outweighs a minority.

147. POLITICAL LIBERALISM, supra note 1, at 247.
148. For his criticisms of Rawls, see GREENAWALT, supra note 136, at 183-87. His arguments against Rawls largely depend upon denying that public reason and shared political intuitions are strong or deep enough to do with them all that Rawls needs.
149. Id. at 222; see also id. at 146-47.
150. Id. at 224.
151. According to Greenawalt: When the great majority of citizens agree about priority between two competing claims, liberal democracy does not require that citizens forgo use of the law to protect a claim that rests finally on bases that are not commonly accessible against a claim that can be supported exclusively on ordinary reasons. In a liberal society in which 90 percent of the people regarded an early fetus as having the same moral status as a newborn, legal implementation of that judgment by a restrictive law would be apt even if
to an implicit rejection of Rawls’s liberal principle of legitimacy and the duty of civility. It suggests that an overlapping consensus on a conception of justice that provides an independent basis for public justification to all citizens is not only not possible, but is not even desirable.

My purpose here is not so much to criticize Greenawalt’s view, as to point out that one should not misread Rawls’s claim that “the idea of public reason . . . is consistent with the view of Greenawalt.”152 For it appears that Greenawalt commits himself to a very different conception of democracy and the possibilities of liberalism than that for which Rawls argues. For Greenawalt to support his claim that nonpublic religious or other doctrinal reasons should take precedence over publicly available reasons on certain issues of justice, and to say this is true because of the weight of majority will and/or “deep-seated feeling,”153 makes it seem, on the face of it, that he is relying on considerations more amenable to a utilitarian conception of democracy (democracy as a means of discovering the greater weight of preferences.)154 If so, then Greenawalt needs to address Rawls’s claim:

[S]trong feelings and zealous aspirations for certain goals do not, as such, give people . . . a claim to design public institutions to achieve these goals. Desires and wants, however intense, are not by themselves reasons in matters of constitutional essentials and basic justice. The fact that we have a compelling desire in such cases does not argue for the propriety of its satisfaction any more than the strength of a conviction argues for its truth.155

Not only can we not take such a conception of democracy as Greenawalt suggests for granted; his conception seems to require undemocratic reliance on the sectarian claims of religion and a comprehensive moral view.

people recognized that a woman’s claim to abort could be grounded on rational arguments alone, whereas belief in the moral status of the fetus required a critical judgment beyond reason.

Whether the claim based on ordinary reasons should take priority if it is roughly equal in power and if opinion is closely divided is much more troublesome. I am inclined to reject even that notion, believing that it assigns too high a place for the products of rational analysis as opposed to deep-seated feeling . . . .”

Id. at 167.

152. POLITICAL LIBERALISM, supra note 1, at 244 n.33.

153. GREENAWALT, supra note 136, at 167.

154. I do not mean to suggest that Greenawalt is a utilitarian—he is not—but to suggest that he relies on seemingly utilitarian reasons to argue why majority will can outweigh public reasons.

155. POLITICAL LIBERALISM, supra note 1, at 190. Also relevant here is Rawls’s claim: “[G]overnment can no more act to maximize the fulfillment of citizens’ rational preferences, or wants (as in utilitarianism) . . . than it can act to advance Catholicism or Protestantism, or any other religion.” Id. at 180.
IV. Public Reason and Judicial Review

To clarify the idea of public reason, I conclude with some remarks on Rawls's account of the Supreme Court as the "exemplar of public reason," and the role of the Court in judicial review.

Rawls had little to say in *A Theory of Justice* about the American institution of judicial review, but from what he does say about democracy, it is clear that he sees judicial review as a legitimate democratic institution under certain circumstances. To the standard criticism that judicial review is antidemocratic, Rawls would respond that it is a mistake to see democracy as simply a voting procedure, or a form of government where laws are decided by majority rule. Rather, at a more fundamental level, democracy is a kind of constitution which specifies the equal status of free citizens, who themselves join together as equals to make the constitution. While democracy, as a kind of constitution, provides for equal political rights and majority legislative rule, it also affords other equal basic liberties to all citizens, provides for equality of opportunity of some form, and insures each person a social minimum. It is the proper role of a democratic government to promote these ends of justice as specified in a democratic constitution. And majoritarian legislative procedures, insuring equal political rights of participation, are the primary means for doing this. But when ordinary democratic procedures, for whatever reason, consistently fail to promote the requirements of a just democratic constitution, it is democratically legitimate to impose limitations on these procedures (so long as they effectively remedy the injustice.) This justifies, Rawls claims in *A Theory of Justice*, many of the constraints on majority rule that presently exist in representative democracies, for example, bicameralism, various checks and balances, separation of powers, a bill of rights. Judicial review, Rawls contends, is among the legitimate institutions that may be needed in certain constitutions to constrain potential abuses of majority legislative rule in the interests of maintaining the requirements of a democratic constitution. Whether judicial review is appropriate for a democracy is then, according to the account in *A Theory of Justice*, a strategic issue, which can only be decided by looking at the historical circumstances of a

156. *Id.* at 231-40.

particular democracy, and asking whether judicial review is needed to maintain the basic justice of a democratic constitution.¹⁵⁸

So, to the standard critique that judicial review is antidemocratic, Rawls would respond that when this is true, it cannot be simply because judicial review contravenes majority will. Sometimes majority will itself contravenes the basic demands of a constitutional democracy (for example, where majorities unduly limit the exercise, or allow for the unequal application, of the basic liberties, such as the right to vote, or freedom of religion). Judicial review is antidemocratic only when it is unnecessary to maintain constitutional essentials and basic justice, or when courts exercise this power to overturn legitimately enacted laws that are designed to promote democratic justice and the effective exercise of the basic liberties of citizens. An example of the antidemocratic exercise of judicial review on Rawls’s account, would be the Court’s holdings, after Reconstruction and during the Lochner era, that the Fourteenth Amendment, designed to eradicate the evils of slavery and servitude and provide for the equality of citizens, was really a protection for laissez-faire capitalist liberties.¹⁶⁰ The Court abused judicial review in that it forbade democratic legislatures from exercising their legitimate powers to enact measures regulating the legal institution of property and the economy, which measures were designed to alleviate abuse in the workplace, provide a social minimum, and enable citizens to effectively exercise the basic rights of democratic citizens.

The account of judicial review Rawls gives in Political Liberalism is more explicit, and allows for a more robust role for the Supreme Court. Rawls still seems to maintain that judicial review is not necessary for a constitutional democracy, but that it is defensible “given certain historical circumstances and conditions of political culture.”¹⁶¹ As such, judicial review serves two roles. First, there is the “defensive” role, alluded to in A Theory of Justice, of maintaining the constitutional essentials of a democracy, in particular the basic liberties. Rawls develops the defensive role of judicial review, now in terms of the idea of public reason. Borrowing from Locke a distinction be-

¹⁵⁸. For an account of the democratic legitimacy of judicial review worked out along similar lines, see Samuel Freeman, Constitutional Democracy and the Legitimacy of Judicial Review, 9 L. & PHIL. 327 (1990).
¹⁶⁰. See POLITICAL LIBERALISM, supra note 1, at 233 n.18 (alluding to Lochner and other judicial failures to realize democratic justice).
¹⁶¹. Id. at 240.
between the constituent power of the people to establish the “higher law” of the constitution as opposed to the ordinary powers of government, to make and apply ordinary laws, Rawls says the “aim of public reason is to articulate this ideal” expressed in higher law by the people in the exercise of their constituent power. So we have (in Bruce Ackerman’s terms) the idea of a “dualist constitutional democracy,” where democratic government, acting as agents of the people, make ordinary law so as to realize the principles and ends of justice set forth in the higher law that is the product of the people’s will. A supreme court could be one of the institutions set up by the people in the exercise of their constituent power “to protect the higher law.” Where it is adopted, “the political values of public reason provide the Court’s basis for interpretation.” By applying public reason one of the court’s roles is to prevent higher law from being eroded by “the legislation of transient majorities” and well-organized narrow interests. When the court effectively maintains the higher law enacted by the people, it cannot be said to be antidemocratic, for it executes the people’s will in matters of basic justice.

The second role of judicial review in a democracy is that the supreme court serves as “the exemplar of public reason,” It does this in three ways. First, unlike other branches of government, the political values of public reason are the only reasons appropriate for the court in judicial review. Second, Rawls contends that in applying the political values of public reason as the basis for constitutional interpretation, the supreme court serves the “educative role of public reason,” bringing to public awareness the principles of justice underlying the constitution, while developing and refining constitutional essentials in publicly acceptable terms. A third aspect of the court’s role as institutional exemplar is that, through its authoritative judgments, the court gives public reason “vividness and vitality in the public forum.” By this Rawls seems to mean that the court’s judgments focus public attention upon the political values of public reason that are

162. Id. at 232.
163. Id. at 233.
164. Id. at 234.
165. Id. at 233.
166. Id. at 233-34.
167. Id. at 236. Alexander Bickel, among others, discussed the somewhat similar idea of the “educative role” of judicial review. See Alexander Bickel, The Least Dangerous Branch 26 (1962).
168. Political Liberalism, supra note 1, at 237.
at stake in constitutional debate, and provide the locus for further public discussion and reasoned controversy.

Rawls contends (against Greenawalt) that public reason is "complete," that shared democratic political values are sufficient to address controversial issues of basic justice without appeal to particular conceptions of the good. To illustrate the completeness of public reason Rawls alludes to the question of abortion and the political values that are sufficient to resolve that issue for constitutional purposes. But his most extended illustration of the applicability of the political values of public reason to constitutional issues comes at the end of the book, in his extended discussion of political liberties and freedom of speech. There is here a very significant assessment of the history of freedom of speech doctrine, ending with an argument about what is democratically wrong with the Court's holding in *Buckley v. Valeo*, striking down congressional limits on campaign expenditures in the name of freedom of speech.

Rather than pursuing further either of these constitutional discussions, I want to conclude with some remarks on an even more controversial claim of Rawls's. In discussing the supreme court's role as the exemplar of public reason, Rawls endorses Bruce Ackerman's view that Article V of the U.S. Constitution is not the sole legitimate means of amendment for our constitution (conceived, not as a document, but as the set of democratic institutions of which that document is a part). But he goes beyond Ackerman in embracing the radical idea that not everything enacted according to Article V procedures constitutes a valid amendment to the constitution. This implies that the Court could legitimately find constitutionally invalid enactments that, on the face of it, procedurally satisfy Article V's terms. On what grounds could an amendment by the people of higher law in accordance with Article V procedures be considered invalid? Rawls's answer would have to be that not only is democracy not simply majoritarianism in the making of ordinary laws; it is also not even supermajoritarianism in the making of higher law. Not everything that the people actually will in the exercise of their constituent power can count as a valid amendment.

169. Id. at 240-41, 244-46.
170. See id. at 243 n.32.
171. See id. at 340-68.
173. **Political Liberalism**, supra note 1, at 238.
Rawls implies this position when he claims that an amendment, under Article V, is not simply a change.¹⁷⁴ To be a valid amendment, constituent power must be exercised in a way that either (1) adapts basic institutions to remove weaknesses revealed by constitutional practice (as in the case of the many amendments that concern the institutional design of government, such as the Twenty-second Amendment limiting the president to two terms); or (2) adjusts basic constitutional values to changing circumstances; or (3) incorporates into the constitution a more inclusive understanding of those values (as in the case of the Thirteenth-Fifteenth Amendments, the Nineteenth, and the failed Equal Rights amendment, all of which sought to extend the ideal of equality to oppressed classes.) But, taking Ackerman's example, an amendment to repeal the Religion Clause, or, more generally, the First Amendment, and replace it with its opposite would be invalid, Rawls says, since it is not a true amendment, but a breakdown of the constitution.¹⁷⁵

Rawls's thought here seems to be that the First Amendment, in its protection of freedom of religion and of speech and assembly, specifies the most fundamental democratic liberties—liberty of conscience and freedom of thought. These basic liberties are the most fundamental democratic freedoms, in part because they provide the basis for public reason. Without freedom of thought, inquiry, and discussion, public reasoning about the constitution and democracy itself would not be possible. For the sovereign people to attempt to give up these liberties for the sake of other values is not a legitimate amendment to the constitution. It is constitutional suicide, the destruction of the most fundamental features of a democratic society. These basic liberties are then "inalienable," to use the eighteenth century term; they cannot be bartered away. As such they are constitutionally entrenched. If so, then, Rawls implies, the U.S. Supreme Court should have the power to overturn any such invalid amendment, to save the basic political values on which our constitution is based.

In so far as these claims appear peculiar, or even false, to lawyers (and to many they surely will), this reveals the extent to which the legal community envisions a particular conception of democracy as part of our constitution. We might call this a "procedural conception" of democracy, one which holds that democracy essentially consists in bare majoritarian or, at most, supermajoritarian procedures that place

¹⁷⁴ Id.
¹⁷⁵ Id. at 239.
no substantive restrictions on what majorities can will, at least at the constitutional level. I am not sure what the constitutional argument would be that would support this conception of our constitution. It cannot be found in the written Constitution. Nor am I aware of Supreme Court opinions that commit us to view the constitution (considered as either the document or the practices of which that document is a part) in such a way. And even if such opinions existed, there would be an especially good reason for ignoring them as establishing any kind of precedent in this instance. As Rawls contends, the constitution is not what the Court says it is.\(^{176}\) It is a mistaken conception of both constitutional practice and the authority of judicial review to make the Supreme Court the supreme arbiter in a constitutional democracy. Rather, the people are supreme, and the constitution is “what the people acting constitutionally through the other branches . . . allow the Court to say it is.”\(^{177}\) Rawls’s view here resembles Abraham Lincoln’s view of the Court, expressed in connection with *Dred Scott*,\(^ {178}\) that the decisions of the Supreme Court, while binding in a particular case, are not by themselves binding on Congress or the President in making or enforcing future laws until they have been, as Lincoln said, “acquiesced in by the people.”\(^ {179}\)

But according to Rawls, even the people can conceivably make mistakes, as in his example of an effort to repeal the First Amendment.\(^ {180}\) These passages seem to imply that, for Rawls, “the people” cannot be identified even with the actual will of transient supermajorities. It is no more legitimate for the supermajorities of one period to perpetually bind some or all of their descendants (or even themselves) to the deprivation of basic democratic freedoms, as it is for a deranged court to deprive the people (or even some of them, as in *Dred Scott*) of those same freedoms. Not only is a democratic constitution not what the Court says it is, it is not what our ancestors say it is, nor even simply what actual current supermajorities say it is. In the end, Rawls seems to commit himself to the view that the “people” is an *ideal* im-

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176. *Id.* at 237.
177. *Id.*
179. See *Lincoln: Selected Speeches and Writings* 140-41, 150-53, 163, 182, 185 (Don Fehrenbacher ed., 1989). Rawls refers to Lincoln’s view in claiming that ultimate political power is not held by either the legislature or the supreme court in a democracy, but “by the three branches in a duly specified relation with one another with each responsible to the people.” *Political Liberalism*, *supra* note 1, at 232. Bruce Ackerman and Robert Burt also rely on Lincoln’s views of judicial review in developing their recent accounts. See *Bruce Ackerman, We the People* (1991); *Robert A. Burt, The Constitution in Conflict* 77-102 (1992).
180. *Political Liberalism*, *supra* note 1, at 238.
plicit in democratic political culture: that of free and equal persons, united together as one legal body, the body politic, which exercises constituent power to make the higher law in such a way that it realizes the political values of public reason, thereby enabling them to realize the (moral) powers that make them free and equal democratic citizens. This conception of the person and the people seems to be the basis for the nonprocedural conception of democracy that Rawls sees as implicit, if not in our constitution as historically interpreted by the Supreme Court, then in the public political culture of which that constitution is an integral part. His view in the end seems to be that we (at least as citizens, if not also the Court) cannot fully legitimately interpret our constitution without appealing to the political values of public reason and the ideal of democratic citizens that are a part of our democratic culture.

This is not to say that Rawls sees justice as fairness as implicit in our Constitution. He does say (later in chapter 8): “These principles [of justice] enable us to account for many if not most of our fundamental constitutional rights and liberties, and they provide a way to decide the remaining questions of justice at the legislative stage.” But this is simply a proposal; it does not commit him to the claim (made by David Richards) that justice as fairness is implicit in our constitution. Rawls is not trying to justify the American, or any other, actual historical constitution. Nor does he seek to offer a method of constitutional interpretation that would enable jurists to apply justice as fairness to our constitution. At most, he says, justice as fairness can be used by jurists to “orient their reflections, complement their knowledge, and assist their judgment.” In the first instance, justice as fairness is designed to overcome “the impasse concerning the understanding of freedom and equality” that now exists in the public reason of our democratic culture. It is then “addressed not so much to constitutional jurists as to citizens in a constitutional regime.” For justice as fairness (or any other liberal conception of justice) to be found implicit in our constitution, it would first have to be endorsed by citizens, taken up by them as the basic content of public reason.

181. Id. at 339.
183. POLITICAL LIBERALISM, supra note 1, at 368.
184. Id. at 369.
Of course, given the educative role of the Supreme Court as exemplar of public reason, jurists have a very significant role in shaping and guiding citizens’ views about which liberal conception of justice is articulated by the constitution. But this does not give the Court license to impress a particular conception on the constitution. The Court has no authority to do this. It is the agent of the people’s will and of public reason. Its duty is to interpret the constitution in the course of carrying out its normal functions, according to the political values of public reason, so as to protect constitutional essentials and basic justice. It must then formulate and apply some view of the basic liberties implicit in our constitution, as well as equal opportunity and a social minimum (the three constitutional essentials). In performing this role, it may over time itself come to discover the ideal of the person and of social cooperation most congenial to democratic culture, and from there assist the public reason of citizens to accept a particular conception of justice, like justice as fairness, as the basis for our public reason. If and when that occurs, it would be a major step towards realizing Rawls’s ideal of a well-ordered society of justice as fairness. But to enforce that conception now, under our less than ideal circumstances, where our public reason regarding the requirements of freedom and equality is divided and confused (as is that of the Court itself—justices are after all citizens first, like the rest of us) would undermine the Court’s effectiveness and its role as defender and exemplar of the political values of public reason.

Finally, it warrants emphasizing that one of the main contributions of Rawls’s work to liberal and constitutional theory is the idea that the liberties and procedures historically associated with constitutional democracy, and with different versions of liberalism, depend upon a conception of the person as free and equal citizen. As applied to constitutional interpretation and judicial review, this means that essential to interpretation in a democracy, to the clarification and specification of constitutional rights and procedures, is a conception of the person, and of those features of persons that are most central to their being free and equal citizens. As he says, regarding the basis of a democratic constitution: “This conception of the constitution does not found it, in the first instance, on principles of justice, or on basic (or

185. See id. at 303-04. Rawls says his aim is to carry liberal theory one step further than the nineteenth-century views of Mill, Toqueville, and Constant, by showing how the liberties of democratic citizens and the inevitable plurality of conceptions of the good that is a fact of modern life under free institutions, must be accounted for in terms of ideas of the person as free and equal and their capacities for social cooperation.
natural) rights. Rather, its foundation is in the conceptions of the person and of social cooperation most likely to be congenial to the public culture of a modern democratic society. ¹⁸⁶ Rawls presents us with a political conception of persons that serves such a role in constitutional interpretation. It is based in his (Kantian) account of the centrality of the moral powers of practical reasoning as applied to justice, as the powers of citizens that enable them to be free, equal, and fully cooperative members of a democratic society. There are alternative conceptions of the person that some have found implicit in democratic culture and our constitution. Clearly, jurists such as Robert Bork and Richard Posner rely on a very different conceptions of persons than Rawls to make their arguments. Bork, Posner, et al. see us as rational utility-maximizers, willing to make trade-offs between all desires and interests (perhaps even trade-offs that would jeopardize basic liberties and the powers that enable us to be democratic citizens if the stakes are high enough). Moreover, constitutional proponents of Fourteenth Amendment absolute property rights and the Contract Clause's protection of capitalist freedoms (such as Richard Epstein and Bernard Siegan) must rely upon an equally different conception of personhood than Rawls. The important point is that jurists should be aware that the conception of the person as democratic citizen is ultimately what is at issue in constitutional interpretation. In interpreting constitutional provisions, not only do we implicitly rely upon some such conception, but we also shape the kinds of persons that we and others will come to be. Given the importance of a conception of the person as free and equal citizen to specifying and interpreting constitutional rights and procedures, it is best that we, jurists and citizens, seek to clarify, publicly, the conception of citizens and their powers that underlie proposed interpretations. Not only would this seem to be required by the liberal principle of legitimacy, the duty of civility, and public reason; it is also essential to our good as individuals, a matter of our self-knowledge as democratic citizens.

Conclusion

In the Introduction to *Political Liberalism*, Rawls says: "The account of the stability of a well-ordered society in Part III [of *A Theory of Justice*] is . . . unrealistic and must be recast. . . . Surprisingly, this change in turn forces many other changes and calls for a family of

¹⁸⁶. *Id.* at 339.
ideas not needed before."187 I have indicated one way to perceive the
problem with Rawls's original stability argument, and have shown
how the ideas of overlapping consensus and public reason respond to
this difficulty.

To summarize, in Political Liberalism Rawls seeks to carry the
liberal idea of toleration down through the justification of liberalism
itself.188 The inherent stability of a liberal society requires not simply
the free acceptance of its institutions, but also the willing support of its
members. Externally coercive measures of the kind envisioned by
Hobbes, while they may make for stability in a nonliberal regime, are
incompatible with the basic institutions of a liberal and democratic
society. But if such fundamental liberal institutions as liberty of con-
science, freedom of thought, and toleration of diverse ways of life are
to be taken seriously and securely established within a stable liberal
scheme, society must allow for the full development of different and
conflicting reasonable comprehensive doctrines, and, consequently,
different justifications of liberal institutions. The acceptance and sup-
port of liberal institutions requires then (1) an overlapping consensus
for inherent stability. But the different comprehensive views forming
this consensus themselves give rise to the need for common standards,
independent of any comprehensive view, for interpreting and applying
basic liberal values and institutions. Here arises the need for (2) a
shared public reason. If public reason is to be of sufficient depth,
breadth, and completeness, it must have a certain content, which is
provided by (3) a political conception of justice. The political concep-
tion provides a public justification of liberal institutions that is "free-
standing," hence based in fundamental ideals democratic citizens
share in common, and independent of the comprehensive views that
form an overlapping consensus. A society which is effectively regu-
lated by such a political conception of justice that is both the focus of
an overlapping consensus and the basis of its public reason is a just
and stable liberal scheme.

187. Id. at xvii.
188. Cf. id. at 10, 154.