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# PUBLIC REASON AND PRECLUDED REASONS

*Dennis F. Thompson\**

Public reason seems an odd idea. Refraining from telling the whole truth—deliberately ignoring reasons that are relevant to reaching a well-grounded decision—seems more like a vice than a virtue. It is like swearing to tell the partial truth, and nothing but the partial truth. Yet for Rawls, something like this oath is a duty of all citizens—a “moral . . . duty of civility.”<sup>1</sup> In justifying the policies they advocate and deciding how they should vote, all citizens are supposed to rely on values that can be supported by public reason. They are supposed to appeal “only to a public conception of justice, and not the whole truth as they see it.”<sup>2</sup>

Gradually, Rawls loosened this requirement. He no longer insisted that citizens appeal “only” to a public conception. They should not be limited to “*nothing* but the whole truth.” In the first modification, he added a proviso that allowed reasonable comprehensive conceptions to be introduced in non-ideal circumstances if they are supplemented by the appropriate political reasons “in due course.”<sup>3</sup> Later he lifted part of that constraint and affirmed the value of presenting comprehensive conceptions even in ideal circumstances.<sup>4</sup> Nevertheless, citizens must still justify their views and votes by appeals within the limits of public reason, whatever other appeals they may make. The partial truth is still both necessary and sufficient.

Rawls himself recognized that the idea of public reason seems odd. The “basic difficulty” with the idea is that the duty to refrain from

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1. John Rawls, *Political Liberalism* 217 (1996).

2. *Id.* at 216.

3. This is the “proviso” stipulated in John Rawls, *The Idea of Public Reason Revisited* (1997), reprinted in *Collected Papers* 573, 591-92 (Samuel Freeman ed., 1999).

4. This is the “wide view” of public reason as distinct from his previous view, which is merely “inclusive.” John Rawls, *Justice as Fairness: A Restatement* 90 & n.12 (Erin Kelly ed., 2001).

telling the whole truth seems “paradoxical.”<sup>5</sup> But it is a difficulty that must be resolved because Rawls came to see his own theory of justice (as presented in *A Theory of Justice*<sup>6</sup>) as resting on values such as autonomy and self-realization that could be subjects of reasonable disagreement. To impose such values on citizens would be itself unreasonable, and perhaps (as Samuel Freeman suggests<sup>7</sup>) is even “border[ing] on a violation of liberty of conscience.”<sup>8</sup> At the same time, Rawls recognized that his own theory of justice was not the only mutually acceptable political conception.<sup>9</sup> Therefore, he needed a theory of legitimacy—criteria for identifying reasons that could justify political authority—that does not rely on comprehensive conceptions of justice such as his original theory, or even on any single political conception of justice.

The idea of public reason is a key component of this theory of legitimacy. It requires that justifications for political authority satisfy a principle of reciprocity in two ways: the justifications should contain only reasons that could be accepted by persons motivated to find fair terms of cooperation, and should rely only on methods and knowledge “accessible to citizens’ common reason.”<sup>10</sup> Rawls hoped that these requirements would provide enough latitude to allow for the reasonable pluralism that is inevitable (and desirable) in modern democracies, but enough constraint to keep the justifications and, therefore, the political outcomes within the bounds of political liberalism.

The requirements of public reason are themselves justified in large measure by an appeal to the values of a stable democracy. In a democracy, the coercive power of the state should be under the ultimate control of “free and equal citizens [acting] as a corporate body.”<sup>11</sup> Each citizen therefore has a right to expect that this power will be exercised “in ways that all citizens can publicly endorse in the light of their own reason.”<sup>12</sup> The requirements of public reason define these “ways.” In effect, the requirements represent the minimal terms of cooperation that no citizen could reasonably reject.<sup>13</sup> Citizens refrain from demanding more—from insisting on the whole truth as they see it—because they expect that others, who have a different view of what the whole truth is, will exercise similar restraint.

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5. Rawls, *Political Liberalism*, *supra* note 1, at 216.

6. John Rawls, *A Theory of Justice* (rev. ed. 1999).

7. Samuel Freeman, *Public Reason and Political Conceptions*, 72 *Fordham L. Rev.* 2021, 2025 (2004).

8. *Id.*

9. Rawls, *The Idea of Public Reason Revisited*, *supra* note 3, at 581.

10. Rawls, *Justice as Fairness: A Restatement*, *supra* note 4, at 90.

11. *Id.*

12. *Id.* at 91; *see also* Rawls, *Political Liberalism*, *supra* note 1, at 216-17.

13. Rawls’s formulation is “closely connected with T.M. Scanlon’s principle of moral motivation.” Rawls, *Political Liberalism*, *supra* note 1, at 49 n.2.

To make the idea of public reason seem less paradoxical and more acceptable, Rawls draws several analogies, all from the law. He wants to remind us that there are familiar cases where we accept the idea of not appealing to the whole truth even when it is readily available. He cites the exclusionary rules of evidence in criminal trials, testimonial privileges, and protections against self-incrimination.<sup>14</sup> I want to suggest that we should take the analogy with legal practices seriously, not simply to make the idea of public reason seem more familiar, but to reveal some important structural properties it shares with these other practices. Taking the analogy with the law seriously—emphasizing the similarities between the logic of some legal practices and public reason—can bring out some features of public reason that have been neglected, explain some otherwise puzzling features of public reason, and suggest the need to broaden the concept beyond the version that Rawls presents.

Public reason is one of a family of practices which I call “preclusionary justification.” The defining characteristic of the practices is that they require us to prescind from (set aside, bracket, or ignore) reasons that would otherwise be relevant to justifying a decision. The practice in effect imposes a filter on our reasoning, and forces us to adopt an incomplete perspective. It precludes certain kinds of reasons from being considered at all, or from being given the weight they would otherwise have.<sup>15</sup> There are many such practices in public life, more than are commonly recognized.<sup>16</sup> But to keep the discussion manageable, I concentrate on only one—the role obligations of lawyers in an adversarial system.

The role of the lawyer in an adversarial system imposes requirements of zealous advocacy that obligate individual lawyers to present the best possible case for their client without regard to guilt or innocence or the merits of the case, and to withhold from the court certain kinds of information that may be relevant to establishing the

14. *Id.* at 218.

15. Joseph Raz’s “exclusionary reasons” are comparable to “preclusionary justifications.” See Joseph Raz, *Practical Reason and Norms* 36-48, 182-86 (1990).

16. Two other examples from the law may be mentioned. Indiscriminate generality includes overbroad regulations, such as the Federal Aviation Administration’s rule that forces pilots to retire at 60, the age requirement for voting in elections, and the federal sentencing guidelines. It also includes profiling in law enforcement, presumed offenses (possession of certain quantities of drugs) and irrebuttable presumptions (residence requirements for state benefits). For a defense of these and other practices, see Frederick Schauer, *Profiles, Probabilities and Stereotypes* (2003). Another practice creates what has been called an acoustic separation between conduct rules (which tell citizens that if they engage in certain conduct, they will be punished in certain ways) and decision rules (which tell officials how to apply the conduct rules). The legal system itself thus fails to tell citizens the whole truth (for example, contrary to what the conduct rules say and what citizens generally believe, officials will accept certain excuses and will fail to enforce certain rules or laws). See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984).

truth.<sup>17</sup> Some critics of the system object to these requirements (just as some critics of public reason object to its limitations). In response, some of the rules such as client confidentiality have been modified in recent years. But in general the rules of the system still obligate attorneys to set aside or ignore certain reasons that would be relevant to deciding the merits of the case. Even stronger advocacy is permitted and required in the role of a criminal lawyer. The lawyer may not commit perjury (or allow a client to do so),<sup>18</sup> but she is not only permitted but obligated to refrain from disclosing incriminating evidence that she learns from her client.<sup>19</sup> She is also routinely expected to present the case in the best possible light for the client, even if she knows that the presentation is likely to mislead the jury.

How is the zealous advocacy of the lawyer's role similar to the requirements of public reason? Although Rawls does not consider this analogy, he does address this question with regard to his own analogies. He believes that what his analogies have in common is that they are "[a]ll . . . cases where we recognize a duty not to decide in view of the whole truth so as to honor a right or duty, or to advance an ideal good."<sup>20</sup>

This answer to the question is not quite right. It misses the distinctive character of these practices. It suggests that the requirements of public reason represent simply another instance of balancing or trading-off some values in order to promote others. If precluding appeals to certain reasons is seen as a choice to promote some values over others, then this (mistaken) objection naturally arises: We have no reason to assume that the values supported by preclusion should always take priority over other kinds of values. "We arrive at rules of evidence by weighing the importance of deciding in the light of the whole truth against the importance of the ideals that would be sacrificed if all evidence were admissible."<sup>21</sup> By the same token, some citizens may place a higher value on promulgating their comprehensive religious views than on promoting the civility or stability that public reason promotes.

We can see more clearly what is wrong with this objection if we notice what public reason has in common with other forms of preclusionary justification. Balancing or trading-off values has to be decided collectively, and in a process that already presupposes the conditions that are supposed to be included in the balancing. The preclusion is required to get the process of balancing going in the first place. In the case of all the examples, it is a presupposition of the

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17. See, e.g., David Luban, *Lawyers and Justice: An Ethical Study* (1988).

18. Model Rules of Prof'l Conduct R. 1.2 (d) (2002).

19. *Id.* R. 1.6.

20. Rawls, *Political Liberalism*, *supra* note 1, at 219.

21. Michael J. Sandel, *Political Liberalism*, 107 Harv. L. Rev. 1765, 1792 (1994) (book review).

practice's taking place at all. In the case of public reason, it is a presupposition of making any collective decision legitimately, including a decision about what "we" would balance or trade-off. In a conception of legitimacy, "we" has no meaning in the absence of a mutually justifiable procedure for making collective decisions.

What all the cases of preclusion have in common—and what justifies the preclusion—are three conditions: (1) a binding collective decision must be made; (2) the decision must be made in an institution that can be reasonably accepted by those who are bound by its decisions; and (3) the practice of precluding certain reasons is necessary to sustaining the institution. It is not simply that some set of values outweighs another set, but rather that the institution in which the weighing of values takes place itself is constituted by the preclusion.

Consider now the similarities and differences between public reason and zealous advocacy with respect to each of these three conditions.

### I. BINDING DECISIONS: THE DEGREES OF PUBLIC REASON

As courtroom proceedings result in final verdicts, so the forum of public reason produces laws that bind. Lawyers have more demanding obligations and more discretion because they are agents of parties whose future will be decisively determined by what happens in the courtroom. The proceedings are not merely a debate; the verdicts bind all who take part. Similarly, in the forum where citizens and their representatives are presenting their reasons for legislation, they are not merely debating. They are proposing to coerce their fellow citizens. The decisions are binding. As Rawls says in his most explicitly Weberian moment: "[P]olitical power is always coercive—backed by the government's monopoly of legal force."<sup>22</sup>

The fact that the decisions are binding has a significant implication, which both Rawls and Freeman seem to neglect (if not reject). The requirements of public reason, like those of zealous advocacy, apply more rigorously to individuals and institutions who have power over other people and responsibilities to others on whose behalf they act. Those who have the power to make the decisions binding have a greater obligation to observe the requirements of public reason. Just as the role requirements are more stringent in the courtroom than outside, and permit more zeal on the part of defense attorneys (whose clients face the formidable powers of the state) than on the part of civil litigators, so the requirements of public reason should constrain governmental proceedings more than other parts of political life, and public officials more than ordinary citizens. Rawls seems to recognize that the requirements can be more or less strict; he expects the Supreme Court to follow them more rigorously than other

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22. Rawls, *Justice as Fairness: A Restatement*, *supra* note 4, at 90.

institutions. But his rationale for holding the Court to more stringent standards turns less on its political power than on its institutional competence and constitutional role (which requires explicit justifications).<sup>23</sup>

If the stringency of the requirements vary with degrees of political power, we should also place greater demands on majorities than on minorities in the political forum, at least if the majorities are relatively permanent, and the minorities relatively discrete. This is not to say that minorities do not have any duty of civility. They should try to understand that when their claims are rejected because they fall outside the limits of public reason, they are not being treated unfairly. They should accept the legitimacy of the decision, or at least the legitimacy of the regime and its constitution. But the implications for those who exercise power are even more important. When those in power reject such claims, they must do so on public reason grounds, not on the ground that they believe that the claims are wrong on the merits. Furthermore, those in power should have stronger obligations to seek accommodations with minorities on other matters, and even to support a minority's cause to which they might not otherwise assign a high priority.

In a case much discussed in the public reason literature, the local school board and ultimately the courts denied the claim of fundamentalist Christian parents who sought exemptions for their children from the standard reading curriculum in a public school in Tennessee.<sup>24</sup> The parents claimed that the content of the required textbooks conflicted with their religious convictions because the textbooks encouraged their children to make their own critical judgments in areas where the Bible provides the answer.<sup>25</sup> The claim of the fundamentalists could be rejected on public reason grounds: No parent in a democratic society should be granted, on the basis of an esoteric Biblical interpretation, the power to deny their children the opportunities for future democratic citizenship that other children enjoy. But the claim should not be—and was not—rejected on the grounds that the parents' interpretation of the Bible was wrong, or even that their views about the role of women in society or their criticisms of other religions were mistaken. This may not seem much of a concession to the parents, but it is a significant affirmation of the kind civility that a deliberative democracy should try to sustain. Consider the very different message that would be sent if authorities denied the claims of believers on the ground that their beliefs are wrong.

If public reason is a matter of degree within the political realm, why

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23. Rawls, *Political Liberalism*, *supra* note 1, at 231-40.

24. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

25. *Id.* at 1060-61.

should the difference between the political and nonpolitical realms not also be a matter of degree? Some of the decisions made in civil society—Rawls’s “background culture” where nonpublic reason is permitted to prevail<sup>26</sup>—have to some degree the same binding character that decisions in the political realm have. The main difference Rawls cites—that we can evade the authority of government only by leaving the country, whereas we can always resign from associations within civil society—marks only a difference of degree. Even with a right of emigration, he acknowledges, we still cannot completely escape the effects of governmental authority because the “bonds of society and culture, of history and social place of origin[] begin so early to shape our life.”<sup>27</sup> Similar bonds also make it difficult to leave some of the associations to which we belong—most obviously religious groups, but also professional organizations, trade unions, and even corporations if we have few other options to pursue our careers or to earn our living. We may also feel committed to an association more or less permanently because we have developed attachments and loyalties that we do not wish to abandon. In such circumstances, we may experience the collective decisions as no less binding than those of the government. They may actually limit our choices more than do many of those the government makes.

Because the scope of the authority of these associations is less than that of government, and because their very purpose is often to put into practice comprehensive views that may not be accepted by or accessible to nonmembers, public reason demands less of associational life. It precludes fewer reasons, and permits substantive justifications that would not be appropriate in the political arena. Nevertheless, the reasons that members give to justify the collective decisions of an association must still be acceptable to one another, as reciprocity requires, and therefore may still exclude the whole truth as some members see it.

## II. INSTITUTIONAL CONTEXT: THE PREREQUISITES OF PUBLIC REASON

The role of a lawyer makes sense only in an adversarial system, which presumes that each side has access to counsel, ideally (though of course not actually) of equal competence and with equal resources. The role also presupposes a division of labor, in which some participants put forward partial truths but others (the jury and judge) consider the whole truth (within the limits of the law). The special duties and permissions of the role are justified not as a free floating ideal, but as part of a practice, embedded in specific institutions.

This is obvious enough in the case of the lawyer’s role, but is often

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26. Rawls, *Political Liberalism*, *supra* note 1, at 14, 213, 220.

27. *Id.* at 222.



not appreciated in the case of public reason. Both Rawls and Freeman sometimes seem to treat public reason as simply an idea. When Rawls writes that all citizens should “think of themselves ideally as if they were legislators,” he implies that public reason is a principle that can be applied in any political context.<sup>28</sup> Even his discussion of the Supreme Court as the “exemplar” of public reason ignores the wider institutional context in which the Court functions.<sup>29</sup> He does not consider the different roles a constitutional court might perform in a democracy. More generally, “political liberalism . . . does not assert or deny . . . claims”<sup>30</sup> about “the relative merits of . . . forms of democratic institutions.”<sup>31</sup> That is perhaps why Freeman finds it surprising that Rawls, in the second edition of *Political Liberalism*, prescribes a robust set of institutions, including public financing of campaigns, educational reform, income redistribution, welfare support, and universal health care, and declares that they are necessary for the form of deliberation that public reason requires to be possible at all.<sup>32</sup>

This institutionalization of public reason is less surprising if we appreciate that public reason should be understood as a practice, like zealous advocacy and other practices of preclusion, that must be situated in an institutional context not only to function well, but even to serve its stated aim at all. Political liberalism may not have to decide between parliamentary and presidential forms of democracy, but it does have to adopt the institutions of a certain kind of deliberative democracy.<sup>33</sup> The requirements of public reason are supposed to put citizens on an equal footing in justifying the laws to which they are bound. No group imposes its will on other groups by appealing to reasons which other groups could reasonably reject. This aim would be completely undermined if the resources to which various groups had access were radically unequal. The reciprocity in the reason-giving would be overwhelmed by the disparity in the bargaining power. As Freeman recognizes, Rawls’s insistence on these institutional prerequisites does not mean that public reason has no place in politics unless deliberative democracy is fully realized.<sup>34</sup> But it does mean that the efforts to realize the requirements of public reason must proceed in tandem with efforts to promote the institutional prerequisites.

The other feature of the adversarial system I mentioned—the division of labor—also suggests an important implication for how we

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28. Rawls, *The Idea of Public Reason Revisited*, *supra* note 3, at 578.

29. Rawls, *Political Liberalism*, *supra* note 1, at 231-40.

30. *Id.* at 235.

31. *Id.* at 235 n.21.

32. Freeman, *supra* note 7, at 2033 (citing John Rawls, *Political Liberalism* lvii, lix-lx (1996)).

33. Rawls, *The Idea of Public Reason Revisited*, *supra* note 3, at 579-81.

34. Freeman, *supra* note 7, at 2023.

should think about public reason. We accept the norm that a lawyer should present only a partial case, not only because another lawyer (or prosecutor) presents a partial case on the other side, but also because the judge and the jury are supposed to consider the whole case on its merits. That is, other agents or other roles provide a check on the partiality of lawyers.

But the forum of public reason does not have a division of labor of this kind: Every citizen (and all officials) are supposed to set aside their comprehensive views when making laws and other binding decisions. In the public forum, there is no analogue of the judge or jury who could correct this partial view and supply as far as possible the whole truth as they know it. The Supreme Court does not serve this role—not because its democratic credentials are suspect, but because it is supposed to exemplify public reason even more than other public institutions. Its opinions are pure partial truth.

One might think that there is no need for the functional equivalent of a judge or jury because the partial truth that public reason expresses is not false or misleading like the partial truth that a lawyer or prosecutor may present. The partial truth of public reason is true as far as it goes. It is merely incomplete. The “political conception” that public reason expresses is supported by an overlapping consensus, which is composed of parts of comprehensive views, each of which represents the whole truth as some citizens see it. But to many citizens the political conception does not look merely incomplete. For those who hold religious views that obligate them to proselytize, the political conception contradicts their strongest convictions. But even if we disregard these claims, we should still appreciate that the truth in the political conception may appear not only thin but irrelevant to many citizens. Even if it does not contradict their comprehensive views, it may include only incidental parts of their views in the overlapping consensus. Typically, it includes no core principles of any comprehensive view, but only statements to the effect that the core principles are consistent with or supported by values that public reason expresses. Rawls quotes with approval (“a perfect example of overlapping consensus”<sup>35</sup>) an Islamic reformer who writes that the “Qur’an does not mention constitutionalism, but human rational thinking and experience have shown that constitutionalism is necessary for realizing the just and good society prescribed by the Qur’an.”<sup>36</sup> But to establish this conclusion in a democratic society it would seem that some deliberation would be required. How can anyone have good grounds for believing that constitutionalism is necessary to fulfill the

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35. Rawls, *The Idea of Public Reason Revisited*, *supra* note 3, at 591 n.46.

36. *Id.* at 590 n.46 (quoting Abdullahi Ahmed An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* 52-57 (1990) (internal quotation marks omitted)).

prescriptions of the Qur'an without deliberating about the meaning of the comprehensive view and its relationship to constitutionalism?

Rawls recognizes the need for such deliberation, but he believes it should take place in the "background culture."<sup>37</sup> Citizens deliberate about such matters in their religious associations and other institutions in civil society, where public reason does not rule. Civil society in this way provides an institutional check on public reason (as judges and juries provide a check in the adversarial system). The background culture supplies the comprehensive view (or set of comprehensive views) that can be used at least indirectly to supplement or correct the conclusions reached in the public forum. There is no division of labor in the public sphere, but there is a division of labor between the role of citizen and the role of member of society.

But this division seems unduly restrictive. It is as if a judge or jury were permitted to influence the judicial proceedings only indirectly by preparing the lawyers in advance, or by commenting outside of the courtroom in unofficial ways. If Muslims have good grounds for believing that their religion supports constitutionalism, why cannot those grounds be part of the justification they offer in the public forum, and even part of the justification for the constitutional provisions and other laws they support? It would not only be valuable for other citizens to understand the connection between the religious views and the constitutional principles (a point Rawls recognizes<sup>38</sup>), but it should also be acceptable for Muslims to consider these views as the primary reasons they support some legislation, and for non-Muslims to recognize the legitimacy of that kind of support in the public forum as long as the legislation itself is consistent with some conception of political liberalism.<sup>39</sup>

In this way, there would be room for some division of labor even in the public forum, or at least a less sharp division between public and nonpublic reason than Rawls seems to allow. The comprehensive views could serve more directly as a check on the anorexic tendency of the political conception (its impulse toward lowest common denominator deliberation and legislation). With less restrictive requirements, citizens might find that they could—without flouting the principle of reciprocity—welcome comprehensive views into public deliberation and the content of the grounds for legislation. They could engage in more free-wheeling political debate, with greater prospects for changing their minds not only about the legislation but also about the reasons for it. This capacity for change

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37. *Id.* at 576.

38. Rawls, *Justice as Fairness: A Restatement*, *supra* note 4, at 90.

39. For a more stringent view (closer to Rawls's) that would interpret the "duty of civility" as precluding Muslims and other citizens from appealing to such religious claims as a basis for legislation, see Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 Chi.-Kent L. Rev. 301, 343-48 (2000).

through reasoned discussion is one of the hallmarks of deliberative democracy, a conception that Rawls otherwise favors.<sup>40</sup>

For similar reasons, we should welcome into the public forum the Quaker pacifists and the Catholic pro-lifers whom Rawls permits to “witness” their dissent from, respectively, a decision to go to war and a law that permits abortion.<sup>41</sup> Freeman believes that Rawls intends to confine this kind of “dissent from public reason” to the background culture.<sup>42</sup> Rawls would not permit it in the political forum.<sup>43</sup> Freeman observes that on this point Amy Gutmann and I in *Democracy and Disagreement* disagree with Rawls.<sup>44</sup> Whether we actually disagree with Rawls depends on how one interprets the proviso and how much weight one places on the modification Rawls makes in *Justice as Fairness*.<sup>45</sup>

Nevertheless, it is fair to say that Gutmann and I allow some appeals to moral values that Rawls regards as belonging to comprehensive doctrines.<sup>46</sup> In that respect, we do regard public reason as “incomplete” because Rawls’s political values do not provide a final resolution for some kinds of disputes, namely those that we call “deliberative disagreements.”<sup>47</sup> These include the question of abortion, which in our view cannot be resolved in the political forum on terms that no one could reasonably reject. The U.S. Constitution as presently interpreted may provide a practical resolution, but that does not mean that the question is no longer subject to reasonable disagreement. Contrary to Rawls and Freeman, we believe that the public forum should make room for deliberation about such questions (specifically, those about which there are deliberative disagreements), even at the risk of a stand-off in which parties on both sides of the dispute continue to appeal to their comprehensive conceptions rather than to only free-standing political values. The value of reciprocity itself as well as deliberative

40. Charles Larmore, however, argues that, though Rawls’s public reason should permit more free-wheeling debate that includes comprehensive conceptions, Rawls should have maintained his earlier position that public reason should permit comprehensive views “only when its most elementary ingredients are in wide dispute.” Charles Larmore, *Public Reason*, in *The Cambridge Companion to Rawls* 368, 387 (Samuel Freeman ed., 2003).

41. Rawls, *The Idea of Public Reason Revisited*, *supra* note 3, at 594-95 & n.57.

42. Freeman, *supra* note 7, at 2057.

43. See Freeman, *supra* note 7, at 2058.

44. Amy Gutmann & Dennis F. Thompson, *Democracy and Disagreement* 54-55, 54 n.3, 67, 73-74, 77, 93 (1996).

45. See *supra* note 4.

46. Freeman, *supra* note 7, at 2058; see also Gutmann & Thompson, *supra* note 44, at 54, 63-64, 73-74, 77, 79-91. Contrary to what might seem to be the import of a comment Rawls makes, Gutmann and I do not “work from a comprehensive doctrine.” Rawls, *The Idea of Public Reason Revisited*, *supra* note 3, at 578 n.19, but rather argue for permitting in the public forum parts of the some comprehensive conceptions of others.

47. Gutmann & Thompson, *supra* note 43, at 2-3, 60, 73-79.

democracy provide good reasons to adopt this wider view of public reason.

In contrast, Rawls believes that, just as in cases where legal arguments seem evenly balanced, judges should not decide on the basis of their personal views, so in disputes in the public forum where moral arguments seem evenly balanced, citizens should not decide on the basis of their comprehensive views. Instead, they should "vote for the ordering of political values they sincerely think the most reasonable."<sup>48</sup> Yet it is difficult to see how citizens could decide what is the most reasonable ordering of political values without relying to some extent on their own comprehensive conceptions. To resolve conflicts among political values, it seems that they would need to adopt a perspective independent of the political values. If so, they should be able to introduce into the public forum those aspects of the comprehensive conceptions necessary to justify the most reasonable ordering.

Even on the wider view that I favor, public reason would still impose some limits. But the essential constraint should be not the lack of comprehensiveness, but accessibility (grounded in reciprocity). The reason that the claim that God commands that we adopt a certain law does not count as a justification for a law is not because it is part of a comprehensive view, but because it is not accessible to citizens who do not have a special link to this particular supreme being. Rawls himself emphasizes a criterion similar to accessibility in his later work. Interestingly, he interprets it so that it also rules out some secular views, such as "elaborate economic theories of general equilibrium," if they are in dispute.<sup>49</sup> But to the extent that Rawls's conception is more restrictive with respect to comprehensive conceptions, I believe that we should adopt a more permissive set of requirements. All citizens should be able to appeal to the whole truth as they see it within the public forum, as long as it is a truth that others can appreciate (if not accept), and as long as it is a truth that can be reasonably seen as consistent with one of the several conceptions of justice that express political liberalism.<sup>50</sup> In this way the commitment to reciprocity would be preserved as far as necessary but not so far as to preclude all reasons that appeal to comprehensive conceptions.

### III. ESSENTIAL CONTENT: THE SUBJECTS OF PUBLIC REASON

In the adversarial system, the scope of lawyers' obligations to their clients is not generally defined by differences in the content or subjects of the proceedings. On subjects that directly implicate the lawyer, such as decisions about legal strategy or disputes about fees,

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48. Rawls, *The Idea of Public Reason Revisited*, *supra* note 3, at 605.

49. Rawls, *Justice as Fairness: A Restatement*, *supra* note 4, at 90.

50. Rawls, *The Idea of Public Reason Revisited*, *supra* note 3, at 581-82.

the lawyer may be permitted to relax somewhat her deference to the client, but otherwise she is expected to respect zealous advocacy across the whole range of legal representation—from arraignment to sentencing, from deposition to settlement or judgment. The role itself defines the scope: Within the system there is almost no significant distinction between the subjects on which lawyers must be zealous advocates for clients and those subjects on which they have discretion. Although some aspects of the role may be more necessary than others to maintaining the system, the assumption is that it is not possible or desirable to try to distinguish obligations of zeal on the basis of what is essential to the role and what is not. Everything within the legal process is treated as if it were essential because there is no way in advance to tell what might be necessary to the defense of the client. The duties to set aside or bracket some reasons in order to press a client's case are, as a practical matter, regarded as essential in all the aspects of the lawyer's role.

In the case of public reason, Rawls believes that we can distinguish what is essential on the basis of the subjects or content of the deliberation. We can identify the subjects to which public reason applies by distinguishing both “constitutional essentials” (such as freedom of movement and a social minimum) and “basic justice” (such as fair equality of opportunity) from other political decisions that involve “many economic and social issues that legislative bodies must regularly consider” (such as tax legislation).<sup>51</sup> The main grounds for the distinction is that in making decisions about these other economic and social issues it is “often more reasonable to go beyond the political conception . . . and to invoke non-political values.”<sup>52</sup>

However, this distinction does not seem to be sufficiently sharp to support the limitation Rawls wishes to impose on public reason. For some questions of basic justice, we have to appeal to considerations that go beyond the political conception; and for some legislation that goes beyond the political conception, we have to invoke considerations of basic justice. Both political and non-political considerations, as Rawls uses the terms, are often equally relevant in applying the difference principle to the distribution of income over time (a matter of basic justice) and in deciding on the optimal tax policy (a matter beyond the political conception). Furthermore, none of the grounds for requiring public reason—the binding character of

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51. Rawls, *Political Liberalism*, *supra* note 1, at 227-30; *see also* Rawls, *Justice as Fairness: A Restatement*, *supra* note 4, at 91. In some passages Rawls writes as if public reason applies only to constitutional essentials: “[I]f a political conception of justice covers the constitutional essentials, it is already of enormous importance even if it has little to say about many economic and social issues that legislative bodies must consider.” *Id.* at 28. But his more precisely stated view is that public reason “holds for” both “questions about the constitutional essentials and questions of basic justice.” *Id.* at 91.

52. Rawls, *Political Liberalism*, *supra* note 1, at 230.

decisions, the need for reciprocity and the impact on the basic structure—serve to distinguish constitutional essentials and basic justice from many other public policies about which citizens should deliberate together.

In his restatement of the theory, Rawls suggests that public reason might well apply beyond constitutional essentials and basic justice, though “not in the same way or so stringently.”<sup>53</sup> Such an extension would be facilitated if we accept (as I have suggested) the idea that public reason is a matter of degree. Just as the requirements may vary by degree in different spheres (in political and civil society), so they should vary by degree on different subjects (political values and non-political values).<sup>54</sup> Insofar as we can identify constitutional essentials and basic justice, we could then insist that deliberation about them observe the requirements of public reason more strictly. But we might also take a stronger view, and follow the analogy of the adversarial system. We could decline to draw any sharp distinction between legislation that “concern[s]” constitutional essentials and basic justice on the one hand and at least some legislation that “touches upon” them.<sup>55</sup>

It would be desirable, I believe, to broaden the scope of the subjects to which public reason applies within the public forum. On this view, public reason would apply (at least to some extent) to a wider range of issues, such as tax legislation, property rights, and environmental regulation (all of which Rawls explicitly excludes from the domain of public reason). These and other issues often involve fundamental moral disagreement and affect the basic structure of society no less than those that more explicitly concern constitutional essentials and basic justice. They all involve issues that reciprocity appropriately governs.<sup>56</sup>

Freeman elsewhere identifies this broader conception of public reason with the view presented in *Democracy and Disagreement*.<sup>57</sup> He resists this broader conception, and defends the narrower conception that he believes Rawls favors. In the face of disagreement, citizens have to appeal to some common principles to justify their collective decisions. “What could these justifying principles . . . be,” Freeman

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53. Rawls, Justice as Fairness: A Restatement, *supra* note 4, at 91.

54. Rawls already accepts criteria that are a matter of degree to distinguish the two types of values within the category of political values to which public reason applies. The differences between constitutional essentials and questions of basic justice are chiefly that it is “more urgent” to decide, and “easier to gain agreement” on, the former than the latter. Rawls, Political Liberalism, *supra* note 1, at 230.

55. Rawls, Justice as Fairness: A Restatement, *supra* note 4, at 91.

56. *See id.*

57. Samuel Freeman, *Deliberative Democracy: A Sympathetic Comment*, 29 Phil. & Pub. Aff. 371, 409 n.80 (2000). Freeman mistakenly considers our view all-embracing. As I indicated earlier, our view of public reason still imposes constraints on justifications, such as mutual accessibility.

asks, “except substantive principles of justice and other moral norms?”<sup>58</sup> The idea seems to be that public reason establishes the constitutional essentials (and basic justice), which then provide the necessary framework for any deliberation about the nonessentials (and refinements of justice).

But as Freeman acknowledges, citizens appeal not only to substantive principles of justice, but also to “other moral norms.” We should further recognize that citizens cannot escape appealing to some other moral norms—such as reciprocity—when they disagree about the interpretation of the principles of justice, or when they disagree about which principles of justice should take precedence. Of course, they cannot challenge all the principles and norms at once. They have to maintain some framework in which to make the challenge. But the framework at any particular time does not have to include the full set of principles of justice, or even any single principle of justice. Moral norms may be sufficient. If so, public reason can extend beyond basic justice. It can range beyond constitutional essentials to constitutional concomitants—those issues that significantly “touch upon” the essentials.

#### CONCLUSION

By comparing public reason with other preclusionary practices such as the role of a lawyer in an adversarial system, we can see its structural properties and proper scope more clearly. But in one significant respect, public reason differs from other preclusionary practices: It is practiced prior to the adversarial system and other preclusionary practices in public life. It is the means by which we collectively decide whether to establish and maintain these practices, and what kind of preclusions they justify. Public reason is in this way the meta-precluder.

It is therefore all the more important that we try to develop the best possible account of public reason for contemporary democracy. Rawls was perceptive here (as he was in so many other aspects of political philosophy) in recognizing the need for a distinctive concept—in this case, a concept of public reason. He characterized the problem and developed a solution more cogently than any previous philosopher. Using analogies to some legal practices, I have suggested some (relatively modest) modifications to Rawls’s idea of public reason. I have argued that his aim (and that of deliberative democracy generally) would be better served by a conception that is both more differentiated and broader. We should adopt a conception that applies the requirements of public reason more stringently to those who exercise greater political power than to those who exercise lesser power. Our conception of public reason should also apply the

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58. *Id.* at 409.



requirements more extensively so that they cover citizens in civil society, more permissively so that they welcome some comprehensive conceptions into the public forum, and more generally so that they deal with legislation that “touches upon” constitutional essentials and basic justice.