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Aaron-Andrew P. Bruhl

William & Mary Law School, apbruhl@wm.edu

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PUBLIC REASON AS A PUBLIC GOOD

AARON-ANDREW P. BRUHL *

INTRODUCTION

Contemporary liberal theorists see value pluralism as a permanent social fact, the natural and inevitable result of living under free institutions.¹ It is, too, a normatively desirable circumstance, for the diversity of values provides a broad range of options from which each individual can choose a uniquely satisfying conception of the good life.² Yet this same pluralism can threaten the efficacy and the authority of the state. Where can a government ground a legitimating doctrine when its citizens endorse radically divergent systems of meaning? How can political debate succeed when its participants find different values controlling? More fundamentally, how does one prevent irreconcilable value conflicts from exploding into violent civil strife that ultimately leads to the disintegration of the pluralistic state itself?

It often appears that we have tamed the threatening potential of value pluralism, at least to the extent we are concerned only with our own domestic politics, but that conclusion risks hubris and shortsightedness. After all, two millennia of political philosophizing generally taught that a society so divided cannot long endure, and even here and now, apparently so settled in our peaceful liberal ways, events such as bombings of abortion clinics occasionally demonstrate

* J.D., Yale Law School, 2003; M.Phil., University of Cambridge, 2000. I would like to thank Dan Kahan and Daniel Markovits for helpful comments on earlier drafts.

1. *See* JOHN RAWLS, *POLITICAL LIBERALISM* xvi-xvii, xxiv-xxv, 36-37 (1993).

2. This thought is most closely identified with John Stuart Mill. *See also* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 398-99 (1986) ("Autonomy is exercised through choice, and choice requires a variety of options to choose from . . . [V]aluing autonomy leads to the endorsement of moral pluralism.").

the power of value conflicts to break free of the confines of bloodless liberal politics. Perhaps chastened by such events, the later work of one of the leading English-speaking political philosophers turned to grappling with the basic question of the liberal state's tenability: "How is it possible," John Rawls asked, "that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"³ Rawls is by no means alone in so framing the problem. According to Bruce Ackerman, the fundamental liberal problematic is captured in the question of "how people who disagree about the moral truth might nonetheless reasonably solve their ongoing problem of living together."⁴

Rawls's solution draws to a great extent on notions of *public reason*. As will be developed at greater length below,⁵ public reason requires citizens (when acting in their political capacity) to forsake potentially divisive appeals to inherently contestable theories of the good life. Arguments rooted in public reason appeal instead to common ground. They are accessible to all citizens for they appeal to political values shared by all reasonable inhabitants of a liberal democracy. Public reason does not express the whole truth as any citizen sees it—for free people will never agree on the whole truth—but it at least allows citizens to engage in reasoned debate about the most appropriate means of securing outcomes the citizenry agrees are worthwhile. Articulating the widely shared values that allegedly undergird public reason—and demonstrating that this common ground possesses sufficient content and specificity to generate non-trivial answers to actual political problems—forms the heart of Rawls's project.

A number of other leading contemporary political and legal theorists also urge that citizens engaged in public political discourse refrain from making arguments based on their private moral, spiritual,

3. RAWLS, *supra* note 1, at xviii; *see also id.* at xxv, 3.

4. Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 8 (1989).

5. *See infra* Section I.B.1.

or aesthetic doctrines.⁶ Ackerman, for instance, requires that citizens obey a principle of neutrality that bars appeals to their ideas of the good life. The school of thought known as deliberative democracy similarly requires that participants in public debate give reasons that would have persuasive force for citizens with values unlike the speaker's. Though the different approaches vary in some important ways, they all require that citizens constrain their public dialogue in a similar manner, and I shall generally refer to all of them as theories of public reason.

Theories of public reason are prevalent, but is the ideal practicable? Surely it is *possible* for citizens to speak in the register of public reason some of the time, for we observe people doing so. The current debate over whether a higher rate of gun ownership leads to less rather than more crime⁷ is an example of the operation of public reason: The contending parties agree on the desirability of reducing crime and accept the validity of scientific hypothesis testing, both of which fall within the confines of public reason's accepted values and methods.⁸ In many other cases, however, such as when citizens

6. The views mentioned in this paragraph are treated in greater depth *infra* at Sections I.B.2-3.

7. Compare JOHN R. LOTT, JR., MORE GUNS, LESS CRIME (1998) (arguing that liberalized concealed weapons laws lead to lower rates of violent crime) with Ian Ayres & John J. Donohue III, *Nondiscretionary Concealed Weapons Laws: A Case Study of Statistics, Standards of Proof, and Public Policy*, 1 AM. L. & ECON. REV. 436 (1999) (questioning Lott's statistical analysis).

8. One could object that the gun debate is merely masquerading as a disagreement over statistics when in fact it is actually a conflict over values—in particular over the status of gun ownership as normal versus deviant. Cf. Wendy Kaminer, *Second Thoughts on the Second Amendment*, ATLANTIC MONTHLY, Mar. 1996, at 32 ("Debates about gun ownership and gun control are driven more by values and ideology than by pragmatism—and hardly at all by the existing empirical research, which is complex and inconclusive.") Perhaps so, but this in no way makes the debate any less paradigmatic an example of public reason. Even if an argument based on public reason is often merely a proxy, conscious or not, for an underlying clash of private reasons, speaking in the register of public reason still serves its goal of reducing divisiveness in public discourse. It is unclear whether Rawls himself would endorse such a reading of public reason, but he does say that citizens can support a position because of their comprehensive doctrines, as long as they can also

support (or condemn) capital punishment on the grounds that their religion endorses (or forbids) it, political discourse evidently does not obey the dictates of public reason.

Skeptical of public reason's grand ambitions of neutral public discourse, and having witnessed its frequent failures, some commentators have criticized it as unrealistic or impossible.⁹ For how can a person whose view on abortion, gun control, or capital punishment really *is* wholly based on fervently felt religious or cultural commitments be expected to express herself in the cool, neutral terms of public reason? This isn't just a question about whether the liberals' dialogic requirement is fair to such citizens—though it very well might not be—but rather about whether it is even psychologically possible always to separate oneself from one's commitments in the way the ideal requires.

This article also expresses concerns about public reason, but not on the grounds that the ideal is psychologically unrealistic. Instead, my argument is that public reason is strategically underdeveloped. Even assuming citizens of good faith, who are motivated and able to engage in public reason, it might be irrational for them to do so. The trouble is that public reason, no less than more common examples like lighthouses or clean air, is what economists recognize as a public good.¹⁰ No individual can be excluded from the benefits of a public sphere in which the ideal prevails, and so there is

justify it according to public reason. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 783-87 (1997). For a discussion of deterrence and other consequentialistic idioms as means of sublimating cultural conflict, see generally Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

9. See *infra* notes 59-60 and accompanying text.

10. As suggested in passing by Kahan, *supra* note 8, at 488. Apart from this brief reference, the point seems to have been neglected in the literature. Note that I am assuming that citizens will be persuaded by the liberals' argument that a public sphere regulated by norms of neutrality really is a public *good* rather than a *bad*. If some citizens regard it as a *bad*, that further reduces public reason's strategic prospects. Cf. *infra* Section III.D.1 (discussing the problem of zealotry).

an incentive to free ride on the dialogic sacrifices of others. And if most others are not heeding public reason, can liberals really expect their followers unilaterally to disarm in the face of an opposition fully willing to wage cultural war? From the perspective of the standard theory of collective action, public reason presupposes either irrationality or a taste for self-sacrifice.

Now, as those schooled in liberal political philosophy will be quick to point out, theorists of public reason do not conceive of persons as the one-dimensional rational egoists familiar from some economic models. For Rawls, men are both rational *and* reasonable.¹¹ As reasonable, they possess a sense of justice. Reasonable persons should pursue public reason not because it is to their selfish advantage to do so (though, in the long run, it might be), but because public reason is morally justified. Therefore, it cannot count as an argument against public reason that honoring it can sometimes conflict with self-interest. A crude rational choice critique is therefore inapposite.

Nonetheless, political philosophy cannot be insensitive to strategic rationality. For even if the conventional theory of collective action is crude, it too captures some of the truth about how citizens, as both rational and reasonable, respond to the demands of public reason. The public goods analysis can help provide an account of why public reason often fails us, and it can generate modest prescriptions to alleviate the problem. Most importantly, it can show how public reason can fail even if most citizens are convinced by its proponents. To say that public reason conflicts with strategic rationality is not to assume that citizens should act on the basis of self-interest; it is just to suggest that the theory of collective action might shed light upon why public reason frequently fails us, as well as upon what might be done about it. These are considerations that persons sympathetic to public reason's aims—among whom I count myself—can ignore only to their detriment.

Part I of this article lays the foundation for the later discussion by explaining public reason and its purposes in more detail. While Rawls is the primary exponent of public reason, I also address other

11. RAWLS, *supra* note 1, at 48-54.

leading theorists, particularly Ackerman, who likewise urge citizens to constrain their dialogue, for all of them are susceptible to the same critique. Part II introduces a number of concepts from game theory and the theory of collective action, which framework suggests that the ideal of public reason is incompatible with a rational, strategically aware citizenry. Part II also explores standard responses to public goods situations, finding that the usual prescriptions offer little help. Part III expounds an alternative theory of collective action, one based on an empirically observed norm of reciprocity, that complicates somewhat the uniformly pessimistic diagnosis of the standard view. Yet, Part III in no way rescues public reason from all strategic worries. On the contrary, public reason emerges as precarious and much more complex than its adherents have supposed. In particular, the success of public reason hinges upon citizens' perceptions of their fellow citizens' intentions, which perceptions may be shaped largely by the actions of a relative few people. Intended as a means of promoting political stability, public reason is itself in fact highly unstable.

I. PUBLIC REASON AND ITS PROMISE

Dialogic accounts of justice have occupied a leading position in recent political theorizing.¹² Public reason is one such account, and, as explained below, its key feature is that it envisions a dialogue constrained in certain ways. This Part sets the stage for the strategic critique of constrained dialogue by providing a brief description of public reason, its task, and its promised benefits.

A. *Illiberal discourse as the problem*

From reading the Introduction to Rawls's *Political Liberalism*, one can get the impression that sixteenth-century Europe's wars of religion are still the enemy that political liberalism, and public

12. See MARK KINGWELL, A CIVIL TONGUE 5-6 (1995) (noting the rise of such accounts).

reason more particularly, is supposed to be combating. While it is true that the horror of that age did much to illustrate the necessity of religious tolerance, and thereby spark the development of liberalism, religiously motivated bloodshed is not public reason's sole, or even primary, target. Rather, in contemporary politics, the main antagonist in the public reason story is rival status groups' struggle over the expressive power of the law. If one is to understand the magnitude of the task that public reason confronts, it is useful to have at least a brief overview of the problem.

The recent work of Richard McAdams, one of the leading figures in the law-and-norms movement, has attempted to explain why ideological groups care so deeply about which set of contending social norms the law shall endorse.¹³ McAdams begins with the assumption that individuals seek the esteem and approval of others, which leads them to try to conform their behavior to community norms.¹⁴ Yet people can be mistaken about approval patterns, and norms are often ambiguous.¹⁵ Legislation, however, serves as a reliable signal of what behavior is approved or valued, and, since individuals seek social approval, valorizing a norm through the law will therefore influence behavior.¹⁶ This provides a ready explanation for why people care so deeply about political pronouncements in areas where norms are contested. "Because government expression influences behavior, we can more easily

13. See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2001) [hereinafter Adams, *Expressive Law*]; see also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) [hereinafter Adams, *Norms*]. Status, esteem, and related notions are relative newcomers to legal scholarship, but in other disciplines they have long and detailed histories that the narrow analysis offered here does not attempt to capture.

14. McAdams, *Expressive Law*, *supra* note 13, at 343-49; McAdams, *Norms*, *supra* note 13, at 358-75.

15. McAdams, *Expressive Law*, *supra* note 13, at 349-58.

16. *Id.* at 358-72.

understand why ideological interest groups invest so heavily in capturing and exploiting the expressive power of the state.”¹⁷

McAdams perhaps overstates the extent to which participants in expressive contests are interested in influencing others' behavior, but people still have ample reason to compete for the law's endorsement of their values regardless of any behavior-shaping impact. For when the state takes a position on a matter of social dissensus, it elevates the social status—that is, the prestige and honor that an individual or group enjoys—of those who identify with the system of values or way of life the law has endorsed.¹⁸ Status groups therefore compete vigorously to win political affirmation, both because status is a valuable good and because, as Jack Balkin describes it, status is “non-Paretian”—one cannot increase the status of one group without decreasing that of another.¹⁹

Many heated political debates can be understood through the lens of status competition. Balkin's leading example is Colorado's Amendment 2, which he describes as an effort to reassert traditional values that confer higher social status on heterosexuals than homosexuals.²⁰ In a similar vein, the political sociologist Joseph Gusfield's study of the Temperance movement casts it as an attempt on the part of traditional rural Protestants to maintain their social prestige against threats from a rising urban and largely immigrant working class.²¹ Even if prohibition laws did little to affect the actual behavior of drinkers, “[t]he public support of one conception of morality at the expense of another enhances the prestige and self-

17. *Id.* at 378; *see also id.* at 381-82 (emphasizing the role of symbolic government actions in influencing behavior).

18. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

19. *Id.* at 2327-29.

20. *Id.* at 2335-36.

21. JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (2d ed. 1986).

esteem of the victors and degrades the culture of the losers.”²² The abortion struggle too, while obviously concerned with regulating behavior, can also be viewed as status competition between groups with divergent conceptions of the social role of women.²³

Status politics and cultural battles of the sort just canvassed exemplify the kinds of public discourse that, as we will see below, the ideal of public reason is intended to combat. The forces that push status conflicts into the law are deeply rooted and, when compared to conflicts over economic resources, highly resistant to compromise or moderation.²⁴ When evaluating the prospects of public reason, one must keep in mind the magnitude of the dialogic sacrifices it asks citizens to make.

B. Public reason as the solution

Having sketched the task that public reason confronts, the following sections now elaborate upon the liberal ideal of appropriately constrained public discourse. The explication focuses on the work of John Rawls and Bruce Ackerman, then concludes by explaining the shared features of various liberal accounts that make them all similarly susceptible to the strategic critique developed in Part II.

22. *Id.* at 4-5.

23. See generally KRISTEN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984). Similarly, while hate crimes legislation is meant to have an impact on behavior, it also makes a profound statement about the relative status of traditionally subordinated groups. See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227 (2000).

24. GUSFIELD, *supra* note 21, at 177-78, 183-85; NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS* 338-39 (1998) (“Political compromises are intolerable if they are seen as compromises of who we are rather than as efforts to secure for members their share, fair or not, of jobs and positions, opportunities and influence.”).

1. Rawls

As indicated earlier, Rawls sees his recent work as an attempt to vindicate the possibility of a stable and non-repressive state, given a citizenry deeply and abidingly divided over questions of ultimate value. Public reason is of course one of the centerpieces of his project, but to understand its role one has to appreciate the important distinction between comprehensive doctrines on the one hand and a political conception of justice on the other.²⁵

Comprehensive doctrines are overall conceptions of the good life, and as such they touch many facets of one's existence. An experimental liberalism of the sort expounded by John Stuart Mill is a comprehensive view, as is evangelical Christianity, and so again are Nietzscheanism, full Kantianism, and Buddhism. Different comprehensive doctrines will disagree on any number of questions, and, as between contending doctrines, these conflicts can be irreconcilable. The Christian and the Nietzschean simply cannot come to an agreement, *qua* affirmers of their comprehensive views, on the attitude one should take toward the downtrodden. Any politics requiring such agreement, therefore, is doomed to strife or oppression.

But while reasonable persons cannot reach agreement on many questions of tremendous philosophical and moral importance, Rawls believes that they can find shared political propositions that all of them, *as citizens*, can affirm. That is, notwithstanding the great diversity of comprehensive views that free citizens may endorse, one can find within the culture of a democratic regime what Rawls calls an "overlapping consensus" that supports the principles of a political (not a comprehensive) liberalism.²⁶ This shared political conception of

25. On the difference between the two, see especially RAWLS, *supra* note 1, at 11-15, 174-76. For accessible expositions of Rawls's views on public reason and related concepts, see Charles Larmore, *Public Reason*, in THE CAMBRIDGE COMPANION TO RAWLS 368 (Samuel Freeman ed., 2003); and Samuel Freeman, *Introduction*, in *id.* at 1, 28-44.

26. See RAWLS, *supra* note 1, at 133-72. It is a hugely important question whether there can actually be any shared political conception sufficiently detailed to provide solutions to contentious matters such as abortion and affirmative action. It is Rawls's burden to provide that demonstration, and it is for him to defend his particular

justice stands separate from any particular comprehensive doctrine, and it does not claim to speak to the multitude of questions those doctrines must address.²⁷ In deliberating about broad questions of how one ought to live a good life, a person may surely appeal to the reasons provided by her comprehensive doctrine, reasons that may be persuasive only to others who share it. But when a polity deliberates about matters within its limited range of authority, citizens must not rely on disputed values and modes of reasoning given by their comprehensive doctrines.²⁸ Instead, they can only appeal to reasons and methods cognizable within the polity's shared public conception of political justice. This kind of debate, constrained by the requirement of arguing from a polity's shared political values, is the exercise of *public reason*.²⁹ As Rawls sums up this point:

Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens.³⁰

conception of justice as the true content of our shared political consensus. The analysis developed here will assume that Rawls is able show the existence of a shared set of public values to which citizens are supposed to appeal in the practice of public reason

27. *Id.* at 11-13. In later work Rawls allows the possibility of there existing a family of related liberal political conceptions that would satisfy his requirements, not only a single such conception. See RAWLS, *supra* note 8, at 773-74.

28. RAWLS, *supra* note 1, at 224-35.

29. *Id.* at 213.

30. Rawls, *supra* note 8, at 766.

The duty of public reason applies to all public debate over questions of basic justice.³¹ It applies to ordinary citizens engaged in public advocacy and voting, to candidates and parties in devising their platforms and making speeches, to legislators debating laws, to public pronouncements of the executive, and, most centrally, it applies to judicial opinions.³² Public reason ought to be exemplified by the reasoning of a constitutional court.³³ We would think it illegitimate if the majority of the Supreme Court based its decisions on the revealed word of God, or even on its reading of Sartre.³⁴ Instead, we expect them to appeal to publicly accessible constitutional precepts. Ordinary citizens engaged in voting or public debate bear this same duty because, in a democratic society, they too exercise the coercive power of the state.³⁵

Rawls devotes relatively little attention to how the ideal of public reason would play out in actual public debates. He does, however, briefly discuss it in relation to the controversy over same-sex

31. RAWLS, *supra* note 1, at 214-15.

32. *Id.* at 215-16. Although public reason applies to all of these actors, my critique questions the prospects for compliance by ordinary citizens. With respect to parties and public officials, in contrast, compliance with public reason is much less strategically problematic. *See infra* note 113 and accompanying text.

33. RAWLS, *supra* note 1, at 231; *see also id.* at 254 ("To check whether we are following public reason we might ask: how would our argument strike us presented in the form of a supreme court opinion?").

34. "The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views." *Id.* at 236. As a matter of description of current practice, Rawls surely goes too far. While justices do not (openly, anyway) appeal to their own *personal* moral and religious views, what they perceive as the cultural majority's moral and religious precepts appear to be acceptable sources of constitutional law. *See infra* note 102 and accompanying text.

35. RAWLS, *supra* note 1, at 217-18 (emphasizing that the duty of public reason does not apply only to public acts of state officials).

marriage.³⁶ A position limiting marriage to combinations of one man and one woman would, he thinks, almost certainly draw on contentious notions of human flourishing provided by some comprehensive view, religious or otherwise. In public reason, one cannot rely on such arguments. One can, however, defend (or condemn) the traditional male-female couple by using political values such as equal citizenship and the social interest in raising and educating children.

In the example just given, the arguments most obviously excluded by the strictures of public reason would be religious condemnations of homosexuality. Yet Rawls is at pains to emphasize that public reason is not the same thing as secularism. Public reason excludes appeals to all forms of comprehensive doctrine, whether religious *or* humanist.³⁷ Public reason would thus exclude, for example, contentious Aristotelian or Social Darwinist arguments in favor of limiting marriage to heterosexual couples. (Contrary to Rawls's protestations, it might be true that public reason stacks the deck in favor of secular comprehensive doctrines, but it is not my task here to explore that objection.)

Confining one's public speech to the domain of shared political values requires significant forbearance on the part of citizens. Namely, it requires them to forgo appeals to what they see as the whole truth and to refrain from relying upon the most deeply held reasons for their positions.³⁸ Surely this will often prove burdensome. Why should citizens bear this cost?

36. See Rawls, *supra* note 8, at 779.

37. *Id.* at 775-76, 779-80.

38. RAWLS, *supra* note 1, at 216, 241-43. In later work, Rawls says that public reason does not bar the introduction of comprehensive doctrines in public debate. It still requires, however, that citizens also provide public reasons sufficient to support the position dictated by their comprehensive doctrine. Rawls, *supra* note 8, at 783-87; see also Larmore, *supra* note 25, at 385-86 (discussing—and criticizing—the relaxed version of public reason). This requirement to give public reasons is still taxing. Moreover, it still bars positions given by one's comprehensive doctrine that cannot be supported by public reasons.

Rawls answers with the promise of legitimacy: The exercise of the coercive power of the state is legitimate only when exercised in accordance with a political structure justifiable according to reasons that all citizens might reasonably affirm.³⁹ Political power vindicated through public reason, precisely because based upon considerations all can accept, will therefore be legitimate. Public reason, then, offers an escape from the oppressive politics that has dominated human history. A public sphere governed by public reason offers advantages to all citizens, whatever their substantive political commitments, so long as they are at least minimally committed to constitutional democracy.

2. Ackerman

As we have seen, the idea of public reason is a key component of Rawls's demonstration of the possibility of political liberalism. Bruce Ackerman goes even further, contending that "the notion of constrained conversation should serve as *the* organizing principle of liberal thought."⁴⁰ For Ackerman, questions of justice are implicated whenever one citizen claims some form of power over a fellow citizen, and all legitimate assertions of power must be justified through dialogue using the right kinds of reasons.⁴¹ His constraint on permissible reasons takes the form of a stringent principle of neutrality that governs all public discussions and decisions in a liberal state. Neutrality bars any citizen from grounding a public justification of power on a claim that his conception of the good is better than any other citizen's or that he is intrinsically superior to his comrades.⁴² As explained in Section I.A, precisely such assertions of the superiority of a group and its values are implicit, or even explicit, in many public debates, including those involving welfare, abortion, and same-sex marriage.

39. RAWLS, *supra* note 1, at 217, 243.

40. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10 (1980).

41. *Id.* at 4-10.

42. *Id.* at 11, 43-44.

Ackerman is largely concerned with describing liberal justice under ideal conditions, but his requirement of constrained dialogue arguably plays an even greater role in his explication of second-best theory. In second-best theory, as Ackerman defines it,⁴³ we lack a perfect technology of justice that permits the honest, instant, and costless implementation of whatever result our neutral dialogue shows is required. Since implementation is imperfect, injustices must be prioritized for remediation; given the imperfect state of empirical science, perhaps not every deviation from the ideal will even be identified. Where ideal theory always arrived at a uniquely just answer, second-best debate will instead leave room for good-faith disagreement about how to proceed.⁴⁴ The citizens' freedom reasonably to disagree about policy provides a cover under which to introduce contestable conceptions of the good life into public debate, and so it is in the more familiar second-best world that the constraints of neutrality are most critical.

Ackerman concedes that observing the constraints of neutral dialogue requires citizens to make a real sacrifice. "Doubtless the exercise of conversational constraint will prove extremely frustrating," he writes, "for it will prevent each of us from justifying our political actions by appealing to many of the things we hold to be among the deepest and most revealing truths known to humanity."⁴⁵ Nonetheless, we the citizens of Ackerman's liberal state are supposed to recognize that "our mutual act of conversational restraint allows all of us to win a priceless advantage"—namely that no member of the polity will be forced to endorse any proposition about the moral truth that he

43. *See id.* at 232, 234-35.

44. *Id.* at 231-34, 273-77.

45. Ackerman, *supra* note 4, at 16-17; *see also id.* at 19-20 ("I am asking [citizens] to make a special kind of emotional sacrifice. . . . [E]ach must try to repress their desire to say many things which they believe are true, but which will divert the group's energy away from the elaboration of the pragmatic implications of the [set of shared moral propositions]."). Neutrality also requires citizens to forsake the political advantages that might be won by unrestrainedly attempting to impose a conception of the good on fellow citizens. ACKERMAN, *supra* note 40, at 371.

believes false.⁴⁶ Additionally, one might also embrace neutrality because of skepticism about transcendent truth, because one is confident about the truth but equally confident in the value of finding one's own way to it, or due to the rational fear of suffering oppression at the hands of those who claim a contrary insight into the good.⁴⁷ Ultimately, too, there is "the supreme pragmatic imperative": Finding themselves divided by irreconcilable views of the moral truth, citizens will have to accept the constraints of neutrality in order to get along and get anything done.⁴⁸

Whichever reasons motivate people to accept it, Ackerman believes that non-coerced adherence to the constraints of neutral dialogue can reasonably be expected of citizens.⁴⁹ Whether we can reasonably expect such voluntary restraint, even to secure what we concededly regard as a "priceless advantage," is a central concern of this article.

3. Other theorists, common themes

Rawls and Ackerman are two of the most prominent and systematic exponents of doctrines of constrained public discourse, but they are certainly not the only ones.⁵⁰ The political theorist Stephen

46. Ackerman, *supra* note 4, at 17.

47. ACKERMAN, *supra* note 40, at 10-12, 359-69.

48. Ackerman, *supra* note 4, at 10.

49. ACKERMAN, *supra* note 40, at 232; Ackerman, *supra* note 4, at 20-21; *see also* KINGWELL, *supra* note 12, at 56 (emphasizing the voluntary nature of compliance).

50. For another recent example, *see* KINGWELL, *supra* note 12. Charles Larmore similarly supports norms of conversational constraint and retreat from contested views of the good life, though his treatment of the subject is much less extensive. *See* CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 53-55 (1987). Jürgen Habermas is probably the world's most prominent dialogic theorist, but I do not specifically include him in the argument here because he claims that his theory does not constrain debate in the way theorists of public reason demand. *See* JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 107-08, 308-09 (William Rehg trans., 1996). *But*

Holmes has asserted that conversational constraint is a long-standing feature of the liberal tradition.⁵¹ Indeed, one finds such requirements even in the work of those critics who explicitly disavow conversational constraints. Amy Guttmann and Dennis Thompson, representatives of the school known as deliberative democracy, claim that the public debate they envision does not prevent a person from going to the contested moral truth of the matter,⁵² yet the central requirement of their theory is that citizens "appeal to reasons that are shared or could come to be shared by our fellow citizens,"⁵³ a requirement apparently very close to Rawls's. Similarly, Kent Greenawalt, who criticizes Rawls for requiring religious citizens to distance themselves from their faith when speaking in public, in fact concedes that religious people should speak in "publicly accessible terms" when addressing those who do not share their beliefs.⁵⁴

The various theories of liberal dialogue canvassed in this part of the article differ in their formulations, but for my purposes the important thing is what they have in common. All of them ask citizens to restrain their public political speech and refrain from invoking contentious notions of the good life. If citizens agree not to make the

see Michael Walzer, *A Critique of Philosophical Conversation*, 21 PHIL. FORUM 182, 186 (1989) (questioning whether Habermasian discourse is actually unconstrained).

51. See STEPHEN HOLMES, *Gag Rules, or the Politics of Omission*, in PASSIONS AND CONSTRAINT (1995). Holmes's notion of gag rules can be distinguished from the doctrines under discussion here in that gag rules, as Holmes describes them, act to block discussion of particular *topics*, as opposed to restricting the range of permissible *reasons*. See KINGWELL, *supra* note 12, at 75; Ackerman, *supra* note 4, at 17-18. Gag rules are equally susceptible to the criticism developed in this article, however.

52. AMY GUTTMAN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 371 n.68 (1996).

53. *Id.* at 14.

54. KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 155-56, 216-17 (1988).

law into a battleground for cultural supremacy, they are promised the benefits of civil tranquility, political legitimacy, psychic peace, and so forth. These are valuable things, perhaps well worth the cost, but, as explained in what follows, that is by no means sufficient to guarantee public reason's triumph.

II. THE STRATEGY OF PUBLIC REASON

Ideals of public reason and constrained conversation can and have been criticized on a number of grounds. It might be the case that confining public debate to mutually acceptable premises simply entrenches and reifies the power of culturally dominant groups, silencing the voices of dissenters by ruling their views out of order.⁵⁵ It could also be true that supposedly neutral dialogue in fact systematically disadvantages or trivializes certain conceptions of the good, such as those that rely on deeply felt spiritual convictions.⁵⁶ But then if public reason were capacious enough to be fair to such views, its content might be too generalized to provide us with any real answers.⁵⁷ And, of course, many postmodern critics would insist that neutrality and impartiality are mere illusions.⁵⁸

55. See KINGWELL, *supra* note 12, at 48 (“[F]or most of human history, conversational restraint has been used as a means of preventing the subordinate group from gaining a voice in the conversation . . .”); see also Seyla Benhabib, *Liberal Dialogue vs. a Critical Theory of Discursive Legitimation*, in *LIBERALISM AND THE MORAL LIFE* (Nancy Rosenblum, ed. 1989); cf. Thomas Kochman, *The Politics of Politeness: Social Warrants in Mainstream American Public Etiquette*, in *MEANING, FORM, AND USE IN CONTEXT: LINGUISTIC APPLICATIONS* 200-201, 208 (Deborah Schiffrin, ed. 1984) (arguing that norms of politeness benefit mainstream authorities).

56. See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 44-56, 213-32 (1993); John A. Coleman, *Public Religion and Religion in Public*, 36 *WAKE FOREST L. REV.* 279, 298-304 (2001).

57. See GREENAWALT, *supra* note 54, at 183-87. Even Larmore, who is sympathetic to the ideal of neutrality, fears that it could be “too empty to generate any substantive political principles.” LARMORE, *supra* note 50, at 67.

58. See, e.g., IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 102-

A type of criticism somewhat more relevant to the argument of this article takes a rather different tack. Instead of questioning the *desirability* and defensibility of public reason as a normative ideal, some critics challenge its *possibility*. When public reason (and liberalism more generally) asks people to separate themselves from their deeply held commitments, one argument runs, it asks more than citizens can give.⁵⁹ Citizens are, on this view, constituted by their commitments and values, and so asking them to speak in the register of public reason is like asking them to speak in a strange foreign tongue. In the same vein, Kent Greenawalt, in a discussion focusing on religious belief, points to the severe “psychological impediments” that confront a person’s attempt to separate his public from nonpublic reasons for a position, concluding that the task is “unrealistic” and “impossible.”⁶⁰

The central concern explored here is similar in that it also concludes that public reason might ask too much of individuals. However, instead of locating the problem in an alleged psychic impossibility, here the problem is public reason’s clash with strategic rationality.

A. Public reason as a (behavioral) public good

1. The basic analysis

For purposes of argument, assume first that a public sphere in which the norms of public reason prevail is universally preferred to one in which citizens regularly make divisive appeals to private values.⁶¹ Second, however, recall too that public reason is a genuine

07 (1990).

59. See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 1-65 (2d ed. 1998).

60. GREENAWALT, *supra* note 54, at 153-55.

61. Now it might be that some citizens do not in fact share this preference. As we have seen, it might be an unfair ideal. Or perhaps some citizens—call them zealots—

constraint—that is, it requires citizens to do something they might otherwise not do: There are times when the atheist will not want to (or not be able to) give publicly defensible reasons for his campaign to abolish private religious schools, or when the fundamentalist will prefer to give a biblical condemnation of same-sex marriage. Public reason requires that these citizens find a publicly accessible explanation for their programs or else abandon their positions. This is a real sacrifice. We nonetheless assume, however, that citizens prefer that public reason, rather than private assertion, controls the public sphere. People are willing to pay the price for public reason, in other words. They may do so because they think public reason is justified, or because they at least find it an advantageous *modus vivendi*.

One might think that our charitable assumption of the preferability of public reason would be enough to ensure its triumph. We are assuming, after all, that citizens believe public reason is worth its cost. For those familiar with the logic of game theory and collective action, however, it is clear that citizens' desire for public reason is by no means sufficient to ensure that public reason will prevail.

The problem is that public reason appears to be what economists term a public good. A paradigmatic form of market failure, public goods are typified by goods like national defense, radio broadcasts, and law and order. Such goods possess two features that distinguish them from private goods like cars and books.⁶² First, such goods exhibit *nonrivalry*, also called jointness of supply.⁶³ That is,

simply enjoy strife, or at any rate are willing to risk it for the sake of forcing their values on the polity. For now, however, we are giving public reason the benefit of the doubt by ignoring such problems. I take up the problem of zealotry later. See *infra* Section III.D.1.

62. For discussions of the characteristics of public goods, see, e.g., RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 6-7 (1986); WALTER NICHOLSON, *INTERMEDIATE MICROECONOMICS AND ITS APPLICATIONS* 510-12 (7th ed. 1997). The seminal modern discussion of public goods is Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 *REV. ECON. & STAT.* 387 (1954).

63. Nonrivalry and jointness of supply (as well as the related concept of

once a radio program has been broadcast or a nuclear deterrent established, an additional person can enjoy the good at no additional cost and without reducing the amount available to others. In the same way, the addition of one more citizen does not reduce the benefits of a public sphere governed by public reason.

The second, and much more important, feature of public goods is that they are *nonexclusive*; they provide benefits that no one can be prevented from enjoying. Those who do not pay can easily be excluded from a showing of a film, but they cannot readily be excluded from military protection or mosquito control programs.⁶⁴ In the same way, absent exile or imprisonment, nobody can be excluded from the public sphere. Everyone enjoys the advantages of a climate in which citizens generally vindicate their normative political claims through constrained discourse, even those who do not constrain themselves.

The proponents of public reason argue that it is a most valuable thing. Ackerman called it "a priceless advantage." Nonetheless, even when every member of a large group wants a public good, nonexclusivity dictates a depressing logic of collective failure.⁶⁵ If others are willing to pay for public television or volunteer to clean up the beach, I should not contribute, for I will benefit from those activities anyway. If others do not pay, then once more I should not

nondepletable) are not strictly synonymous, see MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* 7 (1987), but the slight differences are not important here.

64. There is nothing inherent in a good that makes it exclusive or not; rather, excludability depends on technology and social organization, both of which can change over time. Radio broadcasts have traditionally been nonexclusive in that anyone with a radio could hear them. But signals can also be scrambled, accessible only to those who pay a user fee. Even quintessential public goods like sidewalks could conceivably be closed to all but those who pay for them, but the cost of exclusion is prohibitive, at least for now.

65. The classic exposition is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); cf. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). The basic insight is routinely cited in any microeconomics text. See, e.g., NICHOLSON, *supra* note 62, at 515-16.

contribute, because my contribution will not bring appreciable benefits to me.⁶⁶ Regardless of what others do, the rational person should withhold cooperation.⁶⁷ “[E]ven if all of the individuals in a large group are rational and self-interested, and would gain if, as a group, they acted to achieve their common interest or objective, they will still not voluntarily act to achieve that common or group interest.”⁶⁸ Provision of a public good, it is widely agreed, can therefore be had only through compulsion.⁶⁹

It is relatively straightforward to see how this same dynamic can play out in the context of public reason. A climate of public reason exists when most citizens, most of the time, follow the dictates of neutrality. If others are providing a climate of peaceful and legitimate discourse by restraining their particularistic appeals, and since they cannot prevent me from enjoying the benefits of such a public sphere, I could stubbornly continue to advance impermissible arguments. And if others are engaged in a battle for the expressive capital of the law, then wouldn't I be irrational—either a fool or an altruist—to restrain myself unilaterally?⁷⁰

66. The statements in the text are true enough for present purposes, but there are qualifications. For example, if a public good is produced in discontinuous chunks, and my contribution is the critical factor in bringing the next chunk into existence, then the private benefit of contributing might exceed the private cost. See *infra* notes 80-81 and accompanying text.

67. Noncooperation is therefore, in the language of game theory, a *dominant strategy*: It is the optimal choice regardless of what others do. The classic logic of collective action problems is in fact analogous to the problem presented by the well-known prisoner's dilemma game. See RUSSELL HARDIN, *COLLECTIVE ACTION* 25-28 (1982) (demonstrating the equivalence). In both cases, the equilibrium solution is noncooperation, even though the cooperative outcome would make each player better off.

68. OLSON, *supra* note 65, at 2.

69. NICHOLSON, *supra* note 62, at 516 (“[T]he free rider problem can be solved only by some sort of compulsion.”); OLSON, *supra* note 65, at 2, 44.

70. Rawls requires citizens to be reasonable as well as rational, but he should not be taken to require pure altruism in such a situation. See *infra* notes 92-96 and

It is true that public reason differs from more familiar public goods such as bridges and lighthouses for the obvious reason that public reason is not a material object. Rather, it is more properly thought of as a norm of public behavior. But this in no way means it does not share the interactional structure of a public good. Indeed, the public good paradigm is very well suited to the study of social norms.⁷¹ “[A] social norm can be thought of as a sort of behavioral public good, in which everybody should make a positive contribution—that is, follow the social norm—and also where individuals must be willing to enforce the social norm with informal social sanctions, even at some immediate cost to themselves.”⁷² In this way public reason is much like the behavioral public good of public order (as opposed to the related, but distinct, material public good of a police force). It does no good for advocates of public reason to resist the public goods analysis simply by saying that public reason is a normative requirement, something people are *supposed to do*. Philosophers like Rawls and Ackerman do not propose to fund roads by simply asserting the rectitude of voluntarily mailing in a fair contribution.⁷³ On the contrary, they attend to micro-level dynamics, and these are common across various forms of public goods.

One should not take anything in the preceding paragraphs to mean that the conventional theory predicts that public goods will never be provided to any degree, for it is not true that rational agents, even in

accompanying text.

71. Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSPECTIVES 159, 166 (2000) (“[W]e believe that the analytical structure of the public good problem is a good approximation to the question of how social norms are established and maintained.”).

72. *Id.*

73. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 267 (1971) (“[A]rranging for and financing public goods must be taken over by the state and some binding rule requiring payment must be enforced.”).

large groups, should never voluntarily contribute anything to the provision of public goods. Even the most self-interested citizens might sometimes pay taxes even if there were no IRS special agents, if only to signal to others that they are honest and conscientious—and therefore attractive candidates for high-payoff long-term undertakings in contexts where it is difficult to monitor behavior.⁷⁴ And, of course, a person living near a stagnant pond or dirty river might very well engage in some mosquito control or water purification just for the sake of the private benefits accruing therefrom. The key point is simply that the level of public good-creating activity will be less than the socially optimal level. The explanation is that the rational agent will engage in the activity only to the extent that the private benefit exceeds the private cost. But the overall social benefits of water purification or taxpaying or other public good-creating activities are greater than the benefit realized by the individual contributor. Since these external benefits cannot be captured by the individual, her privately optimal level of contribution is lower than the social optimum. None of this is at all controversial within rational choice theory, economics, or indeed mainstream liberal political theory. The point here is that voluntarily contributing to public reason makes no more (and no less) sense than voluntarily contributing to other, more familiar public goods. The mere fact that we observe some amount of compliance with its constraints in no way shows that the public goods pathologies are not present.

2. Defining the public good more precisely

While all public goods have the properties of nonrivalry and (more importantly) nonexclusivity, they vary along other dimensions. These differences can make a strategic difference, with some types of public goods having greater prospects of voluntary provision than others.

74. See Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1786-91 (2000).

First, public goods vary along the dimension of jointness of production.⁷⁵ Some goods can be produced by one individual, or a small group, acting alone. With sufficient resources and inclination, one person could provide the public good of a lighthouse, a clean beach, or a precedent-setting civil rights lawsuit, for example. In contrast, a good is purely jointly produced if everyone must contribute to it. Many public goods exhibit an intermediate degree of joint production in that they require the cooperation of much, though not all, of the relevant population. Boycotts, traffic decongestion, and public order have this feature.

The fact that a certain public good could potentially be provided by one person or small group acting alone should enhance its prospects of provision, at least if such a highly interested person can be found.⁷⁶ At the same time, *pure* jointness of production might also offer an advantage. If each person knows that her participation is crucial to a valued good's continued provision, nobody has an incentive to free ride.⁷⁷

While recognizing that the question is somewhat speculative, we might ask where public reason fits along the scale of jointness of production. The nature of the good, recall, is that it obtains when appropriately constrained dialogue is the dominant mode of public justification. The public good of public reason therefore appears to be partly jointly produced. The most devoted followers of Rawls could not provide a general climate of public reason all by themselves, but neither must every citizen always comply. Yet though a general climate of public reason can prevail despite the nonparticipation of some zealots and free riders, it requires the cooperation of many

75. This feature must be distinguished from jointness of supply, the property that one person's use of the public good does not diminish the amount available to others. Jointness of supply is one of the two defining characteristics of all public goods. See *supra* notes 62-63 and accompanying text.

76. Olson believes that such a possibility is most likely in small groups. See *infra* notes 105-107 and accompanying text.

77. See DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* 14-15 (1991).

citizens. The intermediate nature of public reason, falling between the extremes of pure jointness and pure non-jointness of production, makes its provision (in the optimal amount) still more problematic than in most public goods situations.⁷⁸

Public goods also differ in terms of the quantum of supply. On the one hand, it might be that some public goods have an all-or-nothing character (that is, the public good is provided either completely or not at all). A lighthouse might be an example of such a good. But surely most public goods admit of degrees of provision: A lake can be cleaner or dirtier, a police force more or less effective, and so on.⁷⁹ Within the category of public goods that admit of degrees of provision, we can distinguish those that are continuously variable from those that are "lumpy," that is, that come into existence in discrete chunks.⁸⁰ A railroad system is lumpy in that its capacity grows only when there are enough resources to add another set of tracks, but not before. If a public good is of the sort produced in discontinuous lumps, and my contribution could be the critical factor in bringing the next chunk into existence, then the private benefit of contributing might exceed my private cost. Prospects for the provision of lumpy goods might therefore be somewhat brighter than the prospects for smooth goods.⁸¹ Unfortunately, it seems that public reason resembles more a smooth than a lumpy public good in that it exists to a greater or lesser extent depending on how many citizens constrain themselves and how conscientiously they do so.

78. Moreover, to the extent that the committed Rawlsians do more than their fair share to promote public reason, there is a problem of exploitation. See Part II.B *infra*.

79. In fact, even apparently all-or-nothing public goods can to some extent be provided in degrees, for while a lighthouse is either there or not, it can be taller rather than shorter, the beam can be brighter or dimmer, etc.

80. See generally Michael Taylor & Hugh Ward, *Chickens, Whales and Lumpy Goods: Alternative Models of Public Goods Provision*, 30 POL. STUD. 350 (1982).

81. See *id.*; HARDIN, *supra* note 67, at 57; see also THEO OFFERMAN, BELIEFS AND DECISION RULES IN PUBLIC GOOD GAMES (1997) (emphasizing the importance of contributors' beliefs about their probability of being a critical contributor).

In addition to public reason itself being a public good, enforcing it through voluntary action poses a second-order collective action problem.⁸² Taking someone to task for violating neutrality imposes a cost on the punisher. In addition to the (admittedly modest) amount of time involved, publicly chastising a fellow citizen is, for most people, a dreadful prospect, and there is at least a small amount of personal risk involved.⁸³ (In fact, it might be that those persons most committed to public reason—who might be expected to be willing to do the most to enforce its requirements—would often happen to be persons who are most averse to publicly reproofing others.⁸⁴) The benefit of providing such correction is unlikely to accrue to the person making the recrimination, at least in the usual case where one does not interact with the violator on a regular basis.⁸⁵ Since the recriminator cannot capture all of the benefits of his scolding, his enforcement activity will fall short of the optimal level.

That public reason has the features of a public good, with all the consequences that implies, pretty obviously cannot be a good thing for the proponents of public reason. A plausible political theory should, after all, be sensitive to such dynamics, even if it rejects a one-dimensional view of human reasoning. And, to be sure, mainstream political theorists certainly do not expect spontaneous contribution to other public goods.⁸⁶ So it's no wonder we see so much less neutral debate than its champions desire; it's the same reason we see so little voluntary, private production of clean air.

Now, it might be that people in fact adhere to the constraints of public reason to a greater extent than the conventional theory of

82. Cf. JON ELSTER, *THE CEMENT OF SOCIETY* 40-41 (1989) (describing enforcement activities as collective action problems).

83. *See id.* at 132-33.

84. *See infra* notes 88-89 and accompanying text (opining on the character of those attracted to public reason).

85. The issue of repeat interaction is discussed in more detail in Section II.C.2.

86. *See supra* note 73.

collective action would predict. It would be a difficult empirical question to find out, especially since people can sometimes disagree over whether a reason is neutral or not. But if an investigation finds compliance in excess of what the model predicts, that would perhaps be a Pyrrhic victory for the proponents of public reason, for it would tend to undermine many of the assumptions upon which mainstream political theorizing relies. Part III of this article shall indeed suggest that the prospects for public reason (and other public goods) are possibly not quite so grim as they look under the analysis laid out here. But to the extent that the more hopeful diagnosis is correct, and to the extent we want to further encourage public reason, we would need to look to rather different models of collective action than the standard theory expounded above.

Before proceeding to that discussion, however, we should continue to draw out the implications of understanding public reason as a public good.

B. Exploitation

The most well-known problem with public goods is that they are not (sufficiently) produced. But there is more. Whenever the provision of a public good is possible with less than full cooperation from every citizen, there is the prospect of a disproportionate bearing of burdens. While a climate of public reason cannot be provided by a small handful of citizens acting alone, nor does it require that everyone restrain himself on every occasion. Thus, a certain amount of free riding is always safe, and we can expect that many citizens would like to be those lucky free riders.

It might be that the resulting pattern of contribution and free riding will be arbitrary and fluid, but it might also be systematically skewed against certain groups. So far we have simply said that everyone wants public reason to prevail, but individuals can vary in their level of commitment. Parents of young children, for instance, probably value municipal parks more highly than do the bed-ridden, and the largest firms in a regulated industry will have more to gain from waging a lobbying campaign (a public good to members of the industry) than would smaller producers.

The conventional model of collective action recognizes the possibility of such asymmetries of interest and predicts that they will lead to asymmetrical contributions to public goods.⁸⁷ When some individuals benefit from the public good more than other people, it will be rational for them to make contributions (or make larger contributions) in situations when those with lower valuations would not find it in their own interest to do so. Those who care relatively less about the public good can then free ride on the efforts of those for whom the public good is dearer. A small tobacco farmer knows that Phillip Morris will annually spend millions on lawyers and lobbyists to protect its own corporate interests, and since the small farmer will benefit as well, he can safely contribute little or nothing to the industry's efforts.

Are there identifiable subgroups of citizens for whom a climate of public reason is especially rewarding? It seems quite clear that there are, even if only as a matter of historical accident. They are likely to be tolerant, public-spirited, open-minded, cosmopolitan, and probably generally liberal in their political sympathies.⁸⁸ Less charitably, the fans of public reason are the wishy-washy and uncommitted. In any case, they are, above all, readers of people like Rawls and Ackerman.⁸⁹

Such persons will not only find the climate of public reason more advantageous than would the average citizen, but they might

87. See ANTHONY DE JASAY, *SOCIAL CONTRACT, FREE RIDE: A STUDY OF THE PUBLIC GOODS PROBLEM* 205-18, 242-44 (1989); OLSON, *supra* note 65, at 27-29, 35.

88. See Kahan, *supra* note 8, at 489 ("Citizens who support egalitarianism and civic solidarity are more likely to see appeal in liberal public reason, whether out of principle or pragmatic calculation; citizens who support hierarchy and individualism tend to put little value on liberal public reason . . .").

89. Perhaps more subtly, the beneficiaries of public reason are those with a facility in empirical analysis and consequentialistic reasoning. While all dialogic theories favor those who are good talkers, see JOHN E. SEERY, *POLITICAL THEORY FOR MORTALS* 172 (1996), public reason especially favors those who can talk in the registers of statistics and public policy analysis.

very well find the very act of engaging in public reason less costly than it is for other citizens. For all of Rawls's insistence that public reason constrains secular humanists from appealing to their contested secular comprehensive doctrines,⁹⁰ we would be deceiving ourselves if we thought that public reason required as much of a sacrifice from them as it does from, say, Southern Baptists.

Since some citizens benefit more from public reason and find contributing to it less costly, the conventional model predicts that we should see them footing a disproportionate portion of the bill for it, to the extent it exists at all. Those who care less about public reason will contribute much less to its provision and enforcement, secure in the knowledge that others will do enough to maintain a moderately tolerable public sphere. And whenever things don't go their way, those with low valuations can always credibly threaten to withdraw themselves from the regime of public reason altogether, a prospect frightening to Rawlsians. The ideal of public reason thus makes its proponents into targets for exploitation. For anyone who obeys its dictates, public reason offers unilateral disarmament in the face of an actual cultural war.⁹¹

It might be that some obligations are unconditional in that way: One must not commit murder even in a crime-ridden society, for instance. But can public reason honestly make that claim? Rawls at times speaks of persons' "natural duties"—i.e., duties not conditioned upon any voluntary act or receipt of benefits—as including a duty to support just institutions and a duty of showing respect, along with familiar duties to avoid injuring innocents and the like.⁹² But Rawls probably should not be taken to require unconditional commitment

90. See *supra* note 37 and accompanying text; see also JOHN RAWLS, *Commonweal Interview with John Rawls*, in COLLECTED PAPERS (Samuel Freeman, ed. 1999) (denying, in interview with Catholic magazine, that public reason favors secularism).

91. Dan Kahan makes a similar observation. See Kahan, *supra* note 8, at 489 ("If [progressives] give up on enhanced penalties for gay bashing, [social conservatives] will still insist on the Defense of Marriage Act.").

92. RAWLS, *supra* note 73, at 109, 114-15, 334, 337-38.

when it comes to public reason. For while he sees citizens as reasonable as well as rational, the reasonable is not the same as self-sacrificial altruism.⁹³ Rather, persons are reasonable when they are "ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, *given the assurance that others will likewise do so*."⁹⁴

It is therefore best to think of the project of public reason as falling under Rawls's general principle of fairness governing participants engaged in mutually advantageous cooperative ventures. That principle holds that one who takes advantage of the benefits of others' cooperative restraint ought to do his fair share by likewise conforming his own conduct to the same rules.⁹⁵ Rawls's own general approach would thus at most generate a duty to adhere to public reason if others were engaged in the same project,⁹⁶ but it would not demand unilateral contribution to a nonexistent cooperative venture. And regardless of what Rawls has to say about it, surely most citizens are unwilling to be so demure. Even the proscription of homicide, after all, allows an exception for self-defense. Would public reason ask its adherents to be angels, or just fools?

C. *Providing public reason*

93. RAWLS, *supra* note 1, at 54. See generally Allan Gibbard, *Constructing Justice*, 20 PHIL. & PUB. AFFAIRS 264 (1991) (arguing that the dominant motivational paradigm of Rawls's theory is neither impartial altruism nor rational advantage-seeking but instead a notion of fair reciprocity).

94. RAWLS, *supra* note 1, at 49 (emphasis added).

95. *Id.* at 111-12, 342-43. Rawls attributes the principle to Hart. See H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 185-86 (1955), reprinted in READINGS IN THE PHILOSOPHY OF LAW 209, 219-20 (Jules L. Coleman ed., 1999).

96. It might not even achieve this much. Would widespread observance of public reason impose a duty of compliance upon expressive zealots who view public reason as worthless or even immoral? For a general criticism of the Hart/Rawls fairness principle, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 90-95 (1974).

The conventional theory of collective action predicts that rational individuals, if left to their own devices, will not contribute (enough) to the provision of public goods they value; and, to the extent the goods are produced, the costs are likely to be unevenly distributed. But individuals are not, of course, left to their own devices in these matters, and we see public goods being provided all around us. Identifying something as a public good is therefore usually a call to action, not a consignment to despair. In the sections that follow, I describe two common solutions to public goods problems. Yet while these strategies succeed for many public goods, they offer only slim hope of resolving the liberals' predicament.

1. Help from the state?

The standard solution to the public goods problem has traditionally been a top-down system of enforced compliance.⁹⁷ Nobody can be excluded from the benefits of sidewalks, for example, so the government provides them and forces everyone to pay. Behavioral public goods are also provided through compulsory contribution systems: The state ensures the public good of public order, for instance, by creating the machinery to detect and sanction those who transgress against the community. Might the same work for the public good of public reason? Cannot compliance with its constraints, which (we are assuming) all citizens desire, simply be compelled in the same way the state compels contributions to other public goods?

At first glance, such a suggestion seems absurd, at least in a country that cherishes free speech as much as ours, but the idea cannot be dismissed out of hand. Indeed, proponents of public reason can point to a number of social and political institutions that foster neutral debate. For example, judicial review can be viewed as a way of enforcing the constraints of public reason upon political action.⁹⁸

97. See *supra* note 69 and accompanying text.

98. Ackerman, for example, imagines that citizens of a liberal polity might institute a supreme court that would invalidate any action that its proponents could not defend through a neutral, liberal dialogue. ACKERMAN, *supra* note 40, at 311.

Judicial opinions, in addition to being exemplars of public reason, as Rawls said they should be, would on this view also be public reason's enforcement arm. That is, not only would the courts have to avoid reliance on contested private sensibilities in reaching their own decisions, they would in addition have to invalidate any political decision that did rely on such factors.

The actual practice of the United States Supreme Court can to a limited extent be understood in this way. Even when scrutinizing a statute under rational basis review, an extremely lenient standard, the Court still requires that the law advance a legitimate government purpose, and, at least sometimes, the mere desire to exalt one group's set of contested values (and denigrate another's) does not count as a legitimate purpose.⁹⁹ When governmental actions burden fundamental rights such as the free exercise of religion, or differentiate between citizens based on suspect classifications such as race, the Court will scrutinize the asserted governmental purposes much more searchingly, carefully looking beyond allegedly neutral justifications to see if animus lies behind them.¹⁰⁰

Plainly, however, the Supreme Court is in many ways much less than a guardian of public reason. A status group's attempt to enlist the law to declare the superiority of its values need not involve a bare desire to harm its opponents; cultural struggle need not implicate the irrational animus the Court will forbid.¹⁰¹ Laws openly enacting contested moralities and particular conceptions of the good regularly pass constitutional muster.¹⁰² It simply isn't true that courts think their

99. *E.g.*, *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (striking down state statute the apparent purpose of which was expression of animus toward gays and lesbians); *Dep't. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (stating that a desire to harm hippies is not a legitimate government purpose).

100. *See, e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating, over city's claimed public health justification, an ordinance targeting practices of the Santeria religion).

101. Balkin, *supra* note 18, at 2317-18, 2332.

102. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (ruling that the

purpose is to invalidate any governmental action that enshrines values that lie outside the domain of the overlapping consensus of public political culture.

Looking beyond judicial review, institutions that foster public reason go deep into the structure of our polity. The two-party system, for example, encourages each party to build platforms of relative moderation and compromise, for fear that zealotry on any particular issue would alienate its heterogeneous audience. The president, who is often the leading public voice on issues of political concern, must satisfy a nationwide constituency and therefore is similarly driven towards public reason rather than particularism. Lower elected officials still represent large numbers of people and therefore must likewise moderate their zeal. Structural considerations such as these brilliantly inform the political science of the *Federalist*, and a modern critic of public reason would be remiss to neglect the extent to which they can promote public reason, even in a society committed to freedom of speech.

Yet even in Madison's view, the structure of the American republic could only help control the dangerous *effects* of contentious factions. "[T]he *causes* of faction," Madison believed, "cannot be removed. . . ."¹⁰³ So too, although the outputs of the policy process are perhaps to some degree encouraged to conform to public reason, the *process* of public debate among citizens really is not. University speech codes and workplace harassment laws certainly attempt to constrain debate (though not necessarily in accordance with public reason), but these are of marginal importance when one looks at political discourse as a whole. Such regulation notwithstanding, the First Amendment gives citizens an extraordinary immunity with

majority's moral condemnation of homosexual sodomy is a legitimate basis for a criminal statute). *But see id.* at 216 (Stevens, J., dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . .")

103. THE FEDERALIST NO. 10 (Madison). I do not claim that the problem of public reason maps exactly onto the Framers' concern with faction, though the dynamics are in many ways similar.

respect to their participation in public discourse. They may publicly assert any values they like, even absolutely vicious values that deny the equality and dignity of their fellow citizens.¹⁰⁴ What the First Amendment fundamentally means, one could say, is that there can be no leviathan to tame the dialogic state of nature.

Of course, pointing to current practice and Supreme Court precedent does not necessarily show that a top-down approach cannot work. On the contrary, in light of the severity of the strategic difficulty so far identified, one could argue that our permissive free speech doctrines need rethinking. Yet even those willing to consider radical measures have to admit that the project of compelling compliance with the dictates of public reason faces tremendous obstacles, both of principle and of implementation. But while state compulsion is the standard response to collective action problems, there are other possibilities.

2. Small talk?

The pessimistic logic of collective action depends to some extent on group size, with the prospects for the provision of public goods shrinking as groups grow larger.¹⁰⁵ This is so for several reasons. First, each individual can capture a greater portion of the benefit of a public good in a small group than in a large one, making it rational to invest more in the good's production.¹⁰⁶ Relatedly, as the size of a group and its public good grows, it becomes less and less likely that any individual or subset of individuals with unusually high

104. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding unconstitutional an ordinance that criminalized the "communicat[ion of] messages of racial, gender, or religious intolerance.").

105. OLSON, *supra* note 65, at 35 ("[T]he larger the group, the farther it will fall short of providing an optimal amount of a collective good.").

106. *Id.* at 48.

valuations of the good will find it profitable to provide the good on their own.¹⁰⁷

More importantly, smaller groups are more effective at monitoring compliance and, at least when interactions are repeated, applying social sanctions.¹⁰⁸ In a household of three, it is relatively easy to tell who is contributing to the public good of a clean kitchen and who is shirking. The housemate who fails to do his part can be pressured or reprimanded by his fellows, whom he must see everyday. Moreover, given that the same actors will face the collective action problem over and over, threats to punish are credible. In a large communal living group, in contrast, it is much more difficult to detect non-compliance, which explains why we see so few such arrangements.¹⁰⁹

Of course, it isn't only households that manage to provide public goods without the state. Elinor Ostrom, in studies of villages in rural Japan, Spain, Switzerland, and the Philippines, has found that the villagers' use of shared open-access resources avoids the tragic results predicted by the conventional theory of collective action.¹¹⁰ These resource management regimes have in some cases endured for hundreds of years.¹¹¹ Robert Ellickson's now-classic study of Shasta County ranchers found that beneficial cooperation did not require top-down legal rules.¹¹²

107. *Id.*

108. This point is widely recognized. *See, e.g., id.* at 62-63; CHONG, *supra* note 77, at 35; TAYLOR, *supra* note 63, at 105.

109. According to the Census Bureau's 1999 American Housing Survey, households of three or more unrelated persons make up less than 1% of U.S. households. *See* U.S. Census Bureau, American Housing Survey: Detailed Tables for Total Occupied Housing Units, *available at* <http://www.census.gov/hhes/www/housing/ahs/99dtchrt/tab2-9.html>.

110. *See* ELINOR OSTROM, GOVERNING THE COMMONS 58-102 (1990).

111. *Id.* at 58.

112. ROBERT C. ELICKSON, ORDER WITHOUT LAW (1991).

But such results, interesting and important as they are, offer little hope to proponents of public reason, at least when it comes to interactions among ordinary citizens, whose (non-)compliance with public reason is my primary topic.¹¹³ To begin with, while a Swiss mountain village is larger than a household, it is certainly smaller than a country. Such a community succeeds because it is relatively stable¹¹⁴ and thick with communal ties,¹¹⁵ both of which mean that encounters are likely to be repeated rather than one-off.¹¹⁶ Reputation, also known as gossip, is extremely important in such communities. Preserving one's reputation and social standing, and that of one's family, gives powerful incentives to contribute to the public good. In contrast, the types of societies that most urgently need public reason—large, demographically diverse, anonymous, culturally divided—have little to do with Ostrom's mountain hamlets.

113. The situation is different with respect to political parties and public officials. A legislature is relatively small, and so its members can be expected to restrain themselves for the sake of smoothing future interactions. See DONALD R. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 92 (1960) (“‘There is a great pressure for conformity in the Senate,’ one of its influential members said. ‘It’s just like living in a small town.’”); see also *id.* at 97-101 (discussing norms of courtesy and reciprocity in the Senate).

114. OSTROM, *supra* note 110, at 88 (“[T]he populations in these locations have remained stable over long periods of time. Individuals have shared a past and expect to share a future. It is important for individuals to maintain their reputations as reliable members of the community. These individuals live side by side and farm the same plots year after year.”)

115. For studies from different disciplines emphasizing the importance of social ties, see, e.g., MICHAEL TAYLOR, *COMMUNITY, ANARCHY, AND LIBERTY* (1982); and Gerald Marwell et al., *Social Networks and Collective Action: A Theory of the Critical Mass III*, 94 AM. J. SOCIOLOGY 502, 502, 505 (1988); see also ELLICKSON, *supra* note 112, at 167, 177-83 (discussing the cooperative success of close-knit groups).

116. It is well known that repeated interaction, coupled with the ability to monitor compliance, can lead to cooperation among rational egoists. See generally ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984). When one moves beyond Axelrod's two-player game, however, cooperation is less likely because monitoring becomes increasingly difficult. TAYLOR, *supra* note 63, at 105.

Thus, while Madison thought a continent-wide republic would salve the potential zealotry of democracy,¹¹⁷ the scholarship canvassed above suggests that localism and subsidiarity might actually offer the best hope to those who wish to see ordinary citizens engaging in public reason. A large group, if organized as a confederation of smaller organized units, can take advantage of the incentives and pressures that make its smaller component units more successful providers of public goods.¹¹⁸ So even if public reason cannot succeed across a continent, it might succeed within each individual community, each with its matrix of familial, social, professional, and religious ties. The political recommendation, therefore, would be to push as many political debates as possible down to the smallest practical unit of government. Instead of having a national debate on some divisive issue or another, we would have thousands of local debates, each drawing on Ellickson/Axelrod dynamics to provide the incentives necessary to overcome the collective action problem. Thus, while one popular argument for federalism is that it promotes greater citizen involvement in politics,¹¹⁹ the argument here would be that it can encourage compliance with public reason.

Now there might be something to this argument, but to whatever extent local political discourse features less cultural combat than national debate, at least a large part of the reason is simply that a small community is likely to be less diverse than a larger one. The values shared by all reasonable members of a small community—its public reason, as it were—might be given by a literal reading of the Bible in one locale and by the child-rearing advice of Dr. Benjamin Spock in another. Within such a community, we might indeed find

117. THE FEDERALIST NO. 10 (Madison).

118. Dennis Chong makes this observation in a discussion of collective action in the civil rights movement. See CHONG, *supra* note 77, at 35-36.

119. *E.g.*, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CITIZEN PARTICIPATION IN THE AMERICAN FEDERAL SYSTEM 95 (1980); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("[Federalism] increases opportunity for citizen involvement in democratic processes.").

very little rancorous clash of values, if only because there is little opportunity for disagreement.

But even if devolved debate is better for reasons besides in-built homogeneity, surely liberals should feel uncomfortable with solutions that rely so heavily on provincialism and gossip social control. Localizing every political question might in fact further fragment an already divided polity, denigrating the importance of whatever national values there are.¹²⁰ Anyway, it is not clear that local debates generally score better in terms of neutral dialogue than national ones: School board elections can bring out some of the fiercest clashes of values.¹²¹ Since it is local attitudes that matter most in our daily lives—members of a far-off community will not be able to disapprove of my interracial relationship, even if they would be inclined to—local politics contains greater expressive capital.¹²² That local politics therefore engenders such intense interest can of course be a reason to celebrate it, but it also increases the cost of complying with public reason.

III. PUBLIC REASON AS AN ASSURANCE PROBLEM

Drawing upon the conventional theory of collective action, Part II paints a rather grim picture for supporters of public reason. Because public reason is a public good, citizens are faced with a collective action problem. In these situations, we know from economic theory that provision of the good will fall short of the optimum. Moreover, to the extent that public reason does exist, I

120. Steven Teles makes this point in relation to the effort to decentralize the welfare reform debate. See STEVEN M. TELES, *WHOSE WELFARE? AFDC AND ELITE POLITICS* 175 (1996).

121. "Cultural conflicts become easily centered upon school curricula because the content of education depends on cultural assumptions. . . . Whose values shall be legitimized and made dominant by being the content of education? . . . [C]urricular changes 'bear witness' to . . . the domination of one cultural group and the subordination of another." GUSFIELD, *supra* note 21, at 181-82.

122. McAdams, *Expressive Law*, *supra* note 13, at 373-74.

argued that contributions would be spread unevenly, with the most committed Rawlsians in effect being exploited by their fellow citizens. The standard solution to public goods problems is of course government provision, but in this case the First Amendment and the liberal principles that underlie public reason foreclose such a plan. Without the usual remedy, we are left with a full-blown case of the free rider pathology. Since the program of public reason does not work, or works only if its adherents are suckers, it is not an attractive ideal.

It is true that there are other theoretically and empirically documented ways around collective action problems. These approaches, however, are most promising in contexts of repeated interactions within small, thick communities. They might work in legislatures, and they might in some cases provide another argument for decentralized government, but all in all they offer little hope to partisans of public reason.

This final part of the article presents hope for a partial strategic resuscitation of the ideal of public reason. As will come out below, the project of public reason need not be strategically doomed to collective failure. Real world experience shows that large, dispersed, anonymous groups of citizens do sometimes manage to provide public goods voluntarily. It would be unfair to consign public reason to the grave of Part II if it turns out that the familiar story of collective action presented there captures only some of the truth about human interaction in public goods situations.

The model of public goods provision elaborated below still features a collective action problem, but now it is seen as a problem of coordination of expectations. Even if this new understanding is correct—and there is good reason to think it is at least partly accurate—public reason cannot always be had even if almost everyone is willing to restrain himself. The problem here is not one of motivation but of information.

A. *The assurance game*

In the conventional theory of collective action, contributing to public goods is modeled as a many-player prisoner's dilemma.¹²³ Cooperation is doomed to failure in such a game because there is a dominant strategy of noncooperation: whatever the other players do, it is always in the individual's interest not to contribute to the public good.

An alternative way of representing the relevant features of a public goods interaction is the game of *assurance*.¹²⁴ The game could describe the choices individuals face in any number of public goods situations, including the decision whether to carry a concealed weapon and the decision whether to join a strike.¹²⁵ The chart below illustrates such a game, using concealed weapons as an example.

123. See *supra* note 67.

124. For a discussion of the structure of the assurance game and its relevance to public goods problems, see TAYLOR, *supra* note 63, at 37-39. Amartya Sen was among the first to recognize the assurance problem and its significance. See Amartya K. Sen, *Isolation, Assurance and the Social Rate of Discount*, 80 Q.J. ECON. 112 (1967).

125. The weapons example comes from Thomas C. Schelling, *Hockey Helmets, Concealed Weapons, and Daylight Savings*, 17 J. CONFLICT RESOLUTION 381, 403 n.11 (1973), though Schelling does not explicitly mention the assurance game in the passage. For a discussion of the decision whether to join a strike as an assurance game, see CHONG, *supra* note 108, at 118-20.

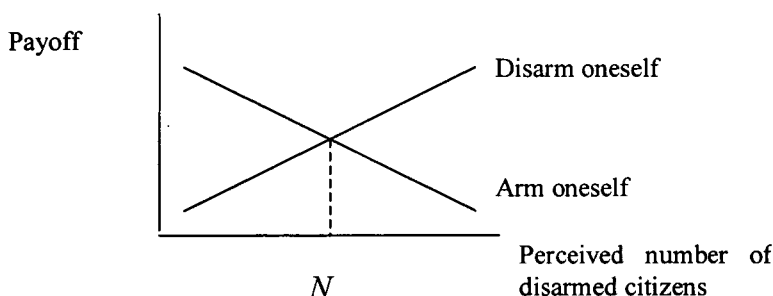
		PERSON A	
		Disarm	Arm
PERSON B	Disarm	<div style="text-align: center;">1</div> <div style="text-align: center;">1</div>	<div style="text-align: center;">2</div> <div style="text-align: center;">4</div>
	Arm	<div style="text-align: center;">4</div> <div style="text-align: center;">2</div>	<div style="text-align: center;">3</div> <div style="text-align: center;">3</div>

The numerals indicate each player's ordinal rankings of the outcomes. Thus, the combination of an armed Person A and a disarmed Person B represents the second-best outcome for Person A and the fourth-best (i.e. the worst) outcome for Person B.

Regardless of how one feels about gun ownership, everyone has to admit that carrying a concealed weapon in public has a cost, both in terms of money and in terms of the risk of accidental death of the owner (or someone else) from a misfire; yet, at the same time, carrying a weapon also offers protection from armed intimidation by the other player, and (we'll assume) the protection gained by evening the playing field outweighs the cost of carrying. The central dynamic of the situation, then, is that each player would prefer not to carry a weapon in public but also wants to have one *if* the other person does. If he can be assured that the other will not carry a weapon, he won't do so either (the outcome represented by the upper-left cell). But if he thinks the other person is (or might be¹²⁶) carrying a weapon, he will want to have one to defend himself (as happens in the lower-right cell).

126. I typically will not know with certainty whether or not you are carrying a weapon. The confidence level at which I will switch strategies depends on the relative magnitudes of the various payoffs.

The game becomes a bit more realistic if we expand it to an indefinite number of players and admit that each person's knowledge of the other players' preferences is incomplete. Presenting such a game in matrix form is impracticable, but the following chart helpfully illustrates the payoffs, as a function of other players' choices, facing any one player in the n -person assurance game.



As the curves indicate, which strategy is best depends on one's estimation of the number of people who have chosen each one. For the person whose preferences are modeled in the graph, the payoff from disarming surpasses the payoff from arming as long as the number of disarmed citizens exceeds N ; if fewer than N of his fellows are disarmed, on the other hand, he should arm himself. Similarly, it is safe to go on strike when most other workers in the factory strike as well, but I will probably get fired if I am one of a few agitators.

One might wonder how there really could be a collective action problem in situations like these. After all, if everyone prefers not to carry a weapon as long as nobody else does, and if everyone knows that everyone knows this, shouldn't the players automatically fix upon the strategy of universal non-carrying? Realizing that everybody knows that nobody will get fired if all go on strike for better wages, why doesn't everyone strike?

In real life, the situation is in fact more complex and uncertain. Suppose for instance that a very few citizens prefer (or are merely *believed* to prefer) to carry a gun even when others are disarmed, or that some citizens will not disarm unless they are absolutely certain that everyone else has. The belief, even an unreasonable belief, that a few people might be armed will lead the most skittish citizens to keep their own weapons. Seeing now that an appreciable number of people

are armed, other citizens will do the same, and this will cause even more to follow suit until everyone is carrying a weapon, much to the detriment of all.

Both the prisoner's dilemma and the assurance game posit that the players prefer mutual cooperation to mutual defection. Both models also agree that nobody wants to be a sucker: If the others aren't cooperating, then I won't either. The key difference is found in the payoff I get when other people are cooperating. In the prisoner's dilemma, free riding is preferred to cooperating with the other participants, but in the assurance game it is not.

According to the conventional theory of collective action, modeled as a prisoner's dilemma, it is therefore best to withhold cooperation regardless of what the other player does, so there is only one equilibrium: mutual noncooperation. In the assurance game, as we have seen, mutual cooperation and mutual noncooperation are both possible equilibrium outcomes.¹²⁷ The public good of a weapon-free public space is strategically stable, but so is the Wild West. This stability is a good thing if we find ourselves in the cooperative equilibrium, but a bad thing if we find ourselves in the noncooperative one. The bad outcome can stubbornly persist, precisely because it is a strategic equilibrium, even if everyone finds it worse than the cooperative equilibrium. But, at least, there is the possibility of a better outcome, if only perceptions and expectations would change. Might the same be true of the abortion debate and other instances in which public reason is currently scarce? Would everyone limit herself to neutral dialogue if only she expected others to do the same?

B. Reciprocity theory

127. As those familiar with game theory will recognize, the concept of equilibrium employed here is the standard notion of Nash equilibrium. An outcome of a game is in Nash equilibrium if each player's decision is the best response to the other player's decision. In such a situation, neither player has any reason to switch strategies, so the outcome is stable. NICHOLSON, *supra* note 62, at 342.

Before applying the assurance model to public debate, it is proper to inquire into the model's underpinnings. After all, it hardly counts as a successful argument to draw a chart of an assurance game and then assert that it captures the truth about some particular collective interaction. One can draw lots of different charts, each with a different tautological answer, and one should not simply pick a graph and solve the problem by *ipse dixit*. What is required is a psychologically and empirically credible story that shows that the assurance model captures some of the truth here.

Support for the assurance model comes from an alternative theory of collective action, sometimes called reciprocity theory, which posits that most people will contribute to public goods (or, more generally, cooperate in collective action) if they believe that others are contributing, but not contribute if they believe that others are not.¹²⁸ The theory thus predicts greater prospects for successful collective action, and, more importantly, makes significantly different policy recommendations than the standard framework. Significantly, reciprocity dynamics do not necessarily require communal ties or repeated interaction to succeed.

Reciprocity theory finds support in laboratory experiments and real world evidence. One experiment for testing the behavioral predictions generated by the two contending theories is the so-called public goods game.¹²⁹ This game involves a number of participants, each of whom is given an initial endowment of money or tokens. Each person can either keep his private resources or contribute to a

128. My description of this contending account of collective action draws on the work of Dan Kahan, who is largely responsible for introducing it into the legal literature. See Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 335-40 (2001) [hereinafter Kahan, *Trust*]; Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. (forthcoming 2003) [hereinafter Kahan, *Reciprocity*]. Others have presented similar theories. See, e.g., Robert Sugden, *Reciprocity: The Supply of Public Goods Through Voluntary Contributions*, 94 ECON. J. 772 (1984) (providing an economic model of conditional contribution to public goods).

129. For a description, see Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSPECTIVES 137, 139 (2000).

common fund, which is multiplied and then distributed equally to everyone, contributors and noncontributors alike. The socially optimal outcome is for each person to contribute all of his endowment to the public good, but it is in each individual's interest to keep his tokens and free ride on the contributions (if any) of the other players. These games are typically anonymous, so that participants need not fear sanctions outside the laboratory.

These experiments have found not only that people often do contribute a significant portion of their endowment, but that people who *believe others will contribute* are themselves more likely to contribute.¹³⁰ (In the standard model, believing that others will foolishly contribute in no way changes the fact that my expected income is greatest when I contribute nothing.) Subjects' response to others' behavior can also be tested by looking at trends in multi-period public good games. Subjects typically contribute an intermediate amount of resources in the early rounds, but the game soon tends toward one of two directions in the remaining rounds: consistently high (but not quite socially optimal) contributions in some cases and repeated near-zero contribution in the others.¹³¹ In a similar result, bad experiences playing the prisoner's dilemma game can cause subjects to prefer free riding to cooperating when earlier they expressed an aversion to free riding.¹³²

As I noted previously, the conventional theory foresees a problem of exploitation: To whatever extent provision of a public good is possible with less than complete cooperation from everyone, some citizens—perhaps always the same ones—will be able to contribute less than others. The experimental evidence, however,

130. *Id.* at 140 (summarizing the results of many studies); see also OFFERMAN, *supra* note 81, at 107-08 (concluding that the observed correlation between own contributions and expectations of others' contributions is most adequately explained by the hypothesis that the latter determines the former).

131. John O. Ledyard, *Public Goods: A Survey of Experimental Research*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 139-40 (John H. Kagel & Alvin E. Roth eds., 1995).

132. Ostrom, *supra* note 129, at 146.

should lead us to doubt that proposition. Individuals who know that other participants in a public goods game have a much higher valuation of the public good do not in fact always free ride on the predictably higher contributions of those with high valuations.¹³³ Contrary to the conventional theory's implication that citizens will vie to be a lucky free rider whenever a public good can be produced with less than universal cooperation, evidence shows that citizens' dislike of making redundant contributions is less important than their desire to avoid making futile contributions.¹³⁴ In other words, they certainly don't want to contribute when too few others are contributing, but they don't much bother with seeking out opportunities to free ride when contribution is the norm.

What the results indicate, in sum, is that people who find themselves in public goods situations are capable of multiple behavioral responses and that their responses depend in large part upon their observations of others' tendency to cooperate or not. Since either choice tends to encourage others to match it, these interactions exhibit two relatively stable equilibria, one of widespread contribution and the other of near universal defection.

The same dynamics are evident in collective action situations outside the laboratory. A recent study of tax compliance, for example, found that sending taxpayers a letter telling them that the overwhelming majority of citizens pay all of their taxes was more effective in promoting compliance than a letter telling them that their returns were especially likely to be audited.¹³⁵ Other evidence from the tax compliance literature also shows that the perceived level of tax

133. Gerald Marwell & Ruth E. Ames, *Experiments on the Provision of Public Goods I: Resources, Interest, Group Size, and the Free-Rider Problem*, 84 AM. J. SOCIOLOGY 1335, 1355 (1979).

134. OFFERMAN, *supra* note 81, at 120.

135. See STEPHEN COLEMAN, MINN. DEP'T OF REVENUE, THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT 19, 24-25 (1996).

compliance is the most important factor in an individual's decision.¹³⁶ Reaching a parallel conclusion is a study of citizens' reactions to a judicially mandated busing plan intended to desegregate Boston's public schools. Citizens opposed to the plan became more disposed toward taking part in boycotts and protests—public goods for busing opponents—to the extent that they perceived higher levels of collective action and public opinion against the court order.¹³⁷

If the same dynamics characterize the public good of public reason, we would expect to see citizens restraining themselves when they see others doing so, but not when they do not. As the school desegregation study shows (and others also affirm¹³⁸) such an assurance/reciprocity dynamic can apply in the context of real-world political activity. The following section considers whether the same dynamic is applicable to political *discourse* in particular.

C. *Mutually assured dialogue*

It is quite clear that our micro-level economies of public speech militate against rancorous clashes of values in public debate. Sociolinguists have shown, for instance, that powerful and widespread norms require speakers to soften, or abstain altogether from, speech acts that threaten hearers' ever-vulnerable sense of "face."¹³⁹ Significantly, among those face-threatening acts are those statements

136. See Kahan, *Trust*, *supra* note 128, at 340-44 (citing studies); cf. John T. Scholz & Mark Lubell, *Trust and Taxpaying: Testing the Heuristic Approach to Collective Action*, 42 AM. J. POL. SCI. 398 (1998) (finding that level of trust in government and fellow citizens has a significant and substantial effect on tax compliance, independent of fear of sanctions or feelings of duty).

137. D. GARTH TAYLOR, PUBLIC OPINION AND COLLECTIVE ACTION: THE BOSTON SCHOOL DESEGREGATION CONFLICT 166-70 (1986).

138. See also CHONG, *supra* note 77, at 103-140 (discussing aspects of the 1960s civil rights movement in terms of assurance games).

139. See, e.g., PENELOPE BROWN & STEPHEN LEVINSON, POLITENESS 59-71 (rev. ed. 1987).

that express disapproval of a hearer's values or beliefs.¹⁴⁰ Other investigations of conversational rules have elaborated upon the public norm of "showing consideration for the sensibilities of others," which requires that speakers refrain from provocative assertions of disagreement.¹⁴¹ Yet they have also argued that the norm is conditional: A speaker who does not show adequate self-restraint risks forfeiting his claim to respectful consideration by his hearers.¹⁴² These findings surely resonate with experience, and they tend to provide a micro-level foundation for public reason, including its apparent reciprocal aspect.

We certainly do observe some debates in which public reason seems to be ascendant. Much of the recent debate over the death penalty, for example, has taken such a turn. While the death penalty debate can create divisive cleavages pitting citizens with more authoritarian and fundamentalist outlooks against citizens with more egalitarian views,¹⁴³ both sides share basic values of rationality and due process that condemn execution of the innocent. Considerations based on that shared concern led the Republican governor of Illinois, a death penalty supporter, to impose a temporary moratorium on executions.¹⁴⁴ In the case of abortion, in contrast, posters of bloody fetuses and the vehement rejection of the other side's values seem to be the dominant modes of argument, at least in this country.¹⁴⁵

140. *Id.* at 66-67, 101-29.

141. Kochman, *supra* note 55, at 203-05.

142. *Id.* at 204-06.

143. See Kahan, *supra* note 8, at 439-45 (casting the death penalty debate as a clash of two opposed cultural styles). See generally *supra* Section I.A. (discussing status competition and symbolic politics).

144. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty; Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at 1. The moratorium phenomenon does of course have a more strategic aspect as well. See Jack Hitt, *The Moratorium Gambit*, N.Y. TIMES, Dec. 9, 2001, at 82.

145. This is not a necessary feature of debating abortion. Mary Ann Glendon has contended that European countries have conducted the abortion debate in less

That we should see the same citizens following the strictures of public reason in some debates but not in others should not come as a surprise, for experimental evidence shows that rates of contribution in public goods games are highly context-specific and susceptible to framing effects.¹⁴⁶ Outside of the laboratory, the same Americans who voluntarily comply with tax laws at the same time withhold contributions to the public good of waste disposal by refusing to have a facility sited in their communities.¹⁴⁷ There are no universal cooperators and defectors across all contexts. History matters, and so do frames of perception; both inform individuals' beliefs about the likely behavior of others in the particular social dilemma, which in turn shapes their own behavior in that specific context.

The public's knowledge of how the abortion debate has usually been conducted—"Either you're for killing babies or you're against killing babies," as one pro-life leader put it¹⁴⁸—dooms citizens to continue that style of interaction, even if (almost) everyone would prefer that things were different. Since any halfway-informed pro-choice citizen knows that the other side is going to level the charge of baby killing—an assertion phrased in such inflammatory terms that the pro-choicer cannot in any way admit to it or try to explain it—the pro-choicer's natural response is to deny the premise that the fetus is alive or indeed deny that it is an entity worthy of any concern whatsoever. But to someone unfamiliar with the strategic dynamics of the abortion debate, that response would seem to evince a willful blindness to the obvious reality that *something* of value is at stake.¹⁴⁹ Yet given the

strident terms. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 10-62 (1987).

146. Ostrom, *supra* note 129, at 140-41.

147. See Kahan, *Reciprocity*, *supra* note 128 (showing that the U.S. has a higher level of tax compliance than Europe but a worse NIMBY problem).

148. Quoted in JOSEPH A. CALIFANO, GOVERNING AMERICA 84 (1981).

149. Rawls thinks that a debate over abortion conducted on the basis of public reason would include consideration of the political value of due respect for human life, though he also believes that the balance of public reasons favors a right to

anticipated pro-life strategy, there's really no other option than a hardline one, even if it leads to the otherwise strange insistence that assailants who kill a fetus while assaulting a pregnant woman should face punishment no different than that for assault.¹⁵⁰ And can a poster of a bloody fetus be matched by anything other than a bloody coat hanger, and vice versa? The current style of debate perpetuates itself, on the reciprocity view, by shaping expectations of how others will behave in this situation.

D. Prescriptions and implications

The conventional model of collective action recommends the application of sanctions or incentives, in effect redefining individuals' payoffs so that they would find it advantageous to contribute to the public good. The assurance/reciprocity model of public goods provision, while less uniformly pessimistic than the conventional model, does not eliminate the collective action problem but rather recasts it as a problem of coordination of expectations. Citizens who find themselves in the bad equilibrium—whether because of history, chance, or whatever—would be willing to contribute, but only if they came to believe, despite what they saw before them, that (enough of) their fellows would do the same. How might they all come to believe this?

The following sections briefly consider how a switch from the noncooperative to the cooperative equilibrium can be brought about and how the reverse can be prevented. Formal game theory has relatively little to say about this issue.¹⁵¹ The reciprocity theory of

abortion in the first trimester (and possibly later). See RAWLS, *supra* note 1, at 243 n.32.

150. See American Civil Liberties Union, What's Wrong with Fetal Rights: A Look at Fetal Protection Statutes and Wrongful Death Actions on Behalf of Fetuses, July 1996, at <http://www.aclu.org/issues/reproduct/fetal.html>.

151. As conceded in DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELLING 95-97 (1990).

collective action, though it falls far short of generating anything like a complete policy program, does indicate a few important factors that recommend themselves to the attention of public reason's friends.

1. Containing zealots

Reciprocity theory posits, and experimental evidence indicates, that individuals vary in their propensity to contribute to public goods and in their tolerance of free riding.¹⁵² Some people will report all of their income even when they see quite a few people padding deductions, but others will bolt whenever they see any free riding. Still others, though they still prefer that the public good be provided, are determined to free ride even when everyone else is contributing. With a public good such as public reason, however, there is the additional problem that some citizens will see a climate of public reason as a bad, not a good. These are citizens who thrive on conflict and intolerance, those who so value the chance to impose their value system on others that they will risk being oppressed themselves. Their defection from public reason is not a case of free riding on a common effort but rather an indication that they are working toward a completely different goal. This is the problem of zealotry.¹⁵³

Non-zealots might very well be able to tolerate the actions of a small number of determined zealots. Knowledge that there are a relative few government-hating tax protestors out there doesn't bother the average taxpayer, precisely because those protestors are few and extreme, and thus can safely be thought of as lunatics, people wholly

152. OFFERMAN, *supra* note 81, at 120; Kahan, *Reciprocity*, *supra* note 128; Ostrom, *supra* note 129, at 141-43.

153. Note that zealots face the collective action problem of getting potential followers to participate in expressive campaigns in support of their cultural style and values, which campaigns are public goods to members of that status group. A status group, however, is by definition smaller, more homogeneous, and more tightly bonded than society at large, so the forces of zeal have an inherent comparative advantage over the forces of public reason when it comes to solving collective action problems.

unlike one's reliable fellow taxpayers. The real problem occurs when zealots are so perceptible (even if not necessarily so numerous) that their behavior starts to look less like an anomaly and more like an acceptable position in the particular debate at issue.¹⁵⁴ Zealots provoke, and those non-zealots least committed to the restraints of public reason will soon abandon the project as well. Starting to sense that many others are not willing to restrain themselves, average citizens' support for public reason will erode, domino-like, until only the most determined cooperators remain.

One aim for those who wish to sustain public reason is therefore to contain the effect of zealots. This could mean controlling their numbers, but much more importantly the task is to control the meaning of the zealots' acts and words, marking them out as aberrant. This is something that the criminal law is quite good at doing. As one can readily imagine, of course, there are a great many weighty considerations militating against allowing the law to fetter public debate, even the speech of zealots. Yet unlike with the conventional theory, under which everyone needs to be given an incentive to contribute to a public good, here the sanctions would need to be aimed at only a few—indeed, they must be targeted at only a few if the penalties are to send the proper message. The law could safely focus on only the worst zealots, such as those that couple their discursive zealotry with criminal action. This is an argument for sentence-enhancement laws, for instance, which can designate certain intolerant values as aberrant without violating the Constitution.¹⁵⁵

Yet the law should not focus too much on preventing bad outcomes. For some reason, individuals seem to contribute more when told about the positive consequences of contributing to the public good than when told of the negative consequences of

154. Nancy Rosenblum has made a similar observation about the militia movement. See ROSENBLUM, *supra* note 24, at 287 (“[M]ilitias cannot be handily dismissed as ‘paranoid fringe’ if their alarm about overweening federal government is reinforced by a flood of similar assertions by groups that never describe themselves as extremist . . .”).

155. See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

refusing.¹⁵⁶ Emphasis should therefore be placed on the good that public reason promises rather than on the bad of divisive, clash-of-values politics.

2. Leadership

Theorists employing an economically oriented "political entrepreneur" model have contended that political leaders can play a pivotal role in facilitating the provision of public goods.¹⁵⁷ Individuals value public goods, but, as we have seen, they have trouble providing them on their own. The public's willingness to pay creates an opportunity for the profitable provision of those goods, if only the requisite degree of organization can be found. Enter the entrepreneurial politician, whose actions can be understood as providing the good through contributions from the public and then skimming off a portion of the contributions as profit.¹⁵⁸

The model of collective action adduced in this part also envisions an important role for leaders, but it is a very different kind of role. According to this model, recall, we should expect to see higher levels of contribution to public goods when citizens believe that their fellow citizens are contributing or are willing to contribute. To some extent a person can make such an assessment by directly observing others' behavior. Yet, it is not clear what one should conclude from seeing nonprovision of a public good, for the mere observation of current nonprovision is ambiguous with respect to the public's preference for the good. The brave individuals who try to switch the equilibrium, if any such persons can be found, will bear heavy costs even if it turns out that others decide to follow.¹⁵⁹ But, even worse,

156. OFFERMAN, *supra* note 81, at 171-72.

157. *See, e.g.*, NORMAN FROHLICH ET AL., *POLITICAL LEADERSHIP AND COLLECTIVE GOODS* (1971).

158. *Id.* at 5-8, 57.

159. Successful voluntary provision of many public goods in fact depends on the existence of a critical mass of individuals willing to bear the start-up costs. Pamela

the first contributors may fail in their attempt to switch equilibria, either because they are too few to make a perceptible impact or because, in this situation at least, too many of their fellows prefer free riding or zealotry. Because of the lack of good information, deciding to contribute is thus a risky proposition.

Fortunately, citizens contemplating contributing can gather information about their fellows' predispositions by looking to the opinions of community leaders and using those views as signals of more widespread dispositions toward contribution. Real-world evidence in fact shows that citizens' assessment of the level of public cooperation in collective action situations responds significantly to the perceived views of political leaders and other "attention-callers." In the Boston schools case discussed above,¹⁶⁰ citizens who perceived strong and consistent opposition to integration on the part of a few prominent community leaders were more likely to believe that there was widespread public support for collective action against busing, and those citizens also predicted greater levels of public participation in protests in the subsequent time period.¹⁶¹

According to the reciprocity theory of public reason, therefore, leaders can play a very helpful role in signaling the proper mode of public debate. And, as we saw earlier, there are significant institutional incentives for public officials to abide by the dictates of public reason.¹⁶² Perversely, however, on many issues it is precisely the zealots, not sober officials with broad constituencies and electoral worries, who are the real opinion leaders. The follow-the-leader aspect of public reason predicted by reciprocity theory can thus be quite destructive. Bearing out this theoretical prediction, a recent

Oliver et al., *A Theory of the Critical Mass I: Interdependence, Group Heterogeneity, and the Production of Collective Action*, 91 AM. J. SOCIOLOGY 522, 542-43 (1985); see also Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929-30 (1996) (discussing the role of "norm entrepreneurs").

160. *Supra* note 137 and accompanying text.

161. TAYLOR, *supra* note 137, at 82-84.

162. *Supra* Section II.C.

study of the politics of welfare reform finds that a solid public consensus—which emphasizes the value of work, as well as the value of truly aiding those who cannot find it—has been thwarted by opinion elites who are determined to use welfare reform as a symbolic weapon of cultural conflict.¹⁶³ The same might be true of abortion.¹⁶⁴ If the most prominent voices on a particular question eschew public reason, then there is little hope for the ordinary citizens who use those voices as dialogic cues. Once more, this can happen even if almost everyone would actually prefer a different climate to prevail.

CONCLUSION

Led by the influential writings of John Rawls and Bruce Ackerman, recent liberal political theorizing has relied upon an ideal of constrained dialogue as a means of securing peace and legitimacy in politics riven by deep and irreconcilable clashes of basic values. The public reason project can be criticized on any number of grounds, but I have focused on the strategic plausibility of public reason, an issue largely unexplored in the literature. Public reason is a public good and, depending on one's conception of collective action, it is at worst strategically untenable and at best discomfitingly unstable. This article thus provides an account of why neutral dialogue seems so often to fail us.

How bad is the prognosis? According to the standard logic of collective action, developed in Part II, the success of public reason is almost beyond hoping for. No individual can make an appreciable difference in the tone of public debate, and none can be excluded or sanctioned for ignoring the strictures of public reason. As such, only

163. TELES, *supra* note 120, at 12-17, 76-78, 165.

164. According to Kristen Luker, the abortion debate can best be understood as a contest over the meaning of sexuality and family carried on by activists with radically differing worldviews. See LUKER, *supra* note 23, at 192-245. This might help explain why progress has proven nearly impossible despite the apparently more consensualist opinions held by the public at large. See GLENDON, *supra* note 145, at 40-42.

fools, altruists, or masochists would listen to the call of Rawls and Ackerman, but surely no plausible theory can rest on that psychological foundation. The usual solutions recommended by the conventional account of collective action—namely, state compulsion or thick communities—offer little promise in the context of public reason.

Part III kept the focus on strategic concerns but recast the collective action problem as a problem of information. Drawing on work in sociology, experimental economics, and linguistics, it explored the implications for public debate of a contending, somewhat less pessimistic, model of public goods provision. According to that theory, individuals can in many instances be expected voluntarily to contribute to public goods, but only when they believe that others are similarly disposed.

The alternative account can accommodate what seems like the accurate observation that we see public reason operating in some cases but not in others. More importantly, it generates a different understanding of *why* public reason succeeds or fails and what can be done about it. In the standard model, individuals respond mechanistically to incentives to cooperate or free ride. In the alternative account, one has to deal with the much muddier stuff of perceptions and social meanings, which are sticky, hard to predict, and sometimes unreasonable. History informs them, and so do the media. Those who wish to promote public reason will therefore need to study particular debates at a level of detail more characteristic of cultural anthropology than political philosophy.

One of the primary conclusions one draws from viewing public reason through the lens of the assurance model is that the strategy of public reason can be quite sensitive to the actions of a relative few agents. This is troubling in that it means that a few zealots can push a debate into an equilibrium that almost nobody wants. In a sense, this conclusion brings us full circle, for the assurance account has led, though for a different reason, to the same perversity Mancur Olson identified: A group of individuals, though rational and sharing a common interest, might not be able to cooperate to achieve their aim. Yet if anything the conclusion is now even more unfortunate, for here the blame does not lie with each person's self-interested incentive to free ride (as it does on the conventional theory), but rather it lies with

the power of a few individuals to determine the equilibrium behavior of the public at large. Even if the vast majority of citizens prefer that public reason prevail *and* prefer cooperating to free riding—conditions sufficient to solve Olson's problem—their aim might still be frustrated. The assurance model, therefore, might in the end prove even more disheartening to the proponent of neutral discourse than would the standard Olsonian logic.

The more positive side of the assurance model is that small groups committed to public reason's success can also have a disproportionate impact. It might be that a good equilibrium is sustainable in some situations currently characterized by bad equilibria. (The mere observation of a noncooperative state of affairs, recall, is ambiguous with respect to the possibility of a better outcome.) Any who rhetorically disarm in such a situation risk much, but on the other hand people seem to respond favorably to a show of trust in otherwise uncooperative environments.¹⁶⁵ This is a cause for hope among devotees of public reason. In any case, regardless of whether public reason's sensitivity to small minorities is on balance helpful or harmful to its proponents, it certainly makes public reason's success (or failure) more contingent and idiosyncratic than either its supporters or the conventional model of public goods would have imagined.

165. See Joyce Berg et al., *Trust, Reciprocity, and Social History*, 10 GAMES & ECON. BEHAVIOR 122, 137 (1994).