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THE IDEA OF PUBLIC REASON RESUSCITATED

James P. Madigan*

In this Article, James Madigan examines the role of public reason in a democratic government, including what views should play a role in determining public reason. Madigan criticizes John Rawls for including comprehensive views in constitutional debates, and argues that only reasons grounded in political values should be used when debating constitutional issues and fundamental rights.

I stand for the separation of church and state, and the reason that I stand for that is the same reason that I believe our forefathers did. It is not there to protect religion from the grasp of government, but to protect our government from the grasp of religious fanaticism. I may be an atheist, but that does not mean I do not go to church. I do go to church. The church I go to is the one that emancipated the slaves. It gave women the right to vote. It gave us every freedom that we hold dear.

My church is this very chapel of democracy that we sit in together, and I do not need God to tell me what are my moral absolutes. I need my heart, my brain, and this church.

— THE CONTENDER (DreamWorks Pictures 2000)

I. INTRODUCTION

For philosophers and legal scholars who wonder whether the general public could ever understand or apply academic ideas about public reason, this excerpt from a recent critically acclaimed film should prove heartening. Without the help of complex theoretic tests, these lines capture the essence of an ideal democratic deliberation: decision-makers relying on common political values rather than unknowable truths from the heavens.

In the past decade, John Rawls has become the central architect of an idea of public reason. The motivating force for his move from *A Theory of Justice*¹ to

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¹ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

*Political Liberalism*² was a recognition that modern democratic society was marked by reasonable pluralism — a panoply of incompatible yet reasonable comprehensive doctrines.³ The project for political liberals has been to come up with a method of governance in which coercive state power treats citizens as free and equal, and so a central problem is how to make decisions without relying on religious comprehensive doctrines while at the same time securing space for their articulated existence.

Public reason, in one form or another, provides the solution. Briefly put, it is the decision-making methodology of the citizenry and its government (public reason) consisting of the principles and values that gird or justify particular decisions (public reasons).⁴ The only way to make decisions that do not exalt some comprehensive doctrines over others is to ensure that the public's reason is drawn from shared political conceptions of justice.⁵ Thus, Rawls originally envisioned his own version of public reason as exclusive: *Only* reasons drawing on these political values could be introduced in debates governed by public reason.⁶ But from that original impulse, he capitulated. He went on to construct an idea of public reason that permitted the introduction of comprehensive views along with public reasons into political debates.⁷ Most scholars' versions of public reason range from such partial inclusion to full outright reliance on comprehensive doctrines.⁸

This Article is a critique of Rawls's surrender to the inclusion of comprehensive views within the confines of deliberation governed by public reason. My aim is to resuscitate an exclusive view, by which I mean that *only* reasons grounded in political values should be introduced when debating constitutional essentials and matters of basic justice such as fundamental rights. Part II traces the idea of public reason in Rawls's work focusing on his recent tinkering with the issues of how and

² JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter PL].

³ *Id.* at xviii-xix. A comprehensive doctrine refers to a moral conception of the good life. A conception is general when it refers to a wide range of subjects, and comprehensive when it includes ideals of personal virtue premised on a notion of what is of value in a human life. *Id.* at 174-75.

⁴ I will track the more elaborate definition of public reason from Rawls in Part II.

⁵ A political conception is like other moral doctrines except that its scope is much narrower, devoted solely to society's basic structure of political, social, and economic institutions. PL, *supra* note 2, at 11, 175. It exists "freestanding," apart from any comprehensive doctrine, though it can (and hopefully will) fit in like a module to various comprehensive views. *Id.* at 12. Finally, and most significantly for my discussion, its content derives from values implicit in the public's political culture. *Id.* at 13-14.

⁶ *Id.* at 247 n.36. Rawls only applies his idea of public reason to debates over constitutional essentials and matters of basic justice. Deliberations over ordinary political matters are not covered. *Id.* at 214-15, 227-30.

⁷ See *id.* at l-lvi; John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997) [hereinafter IPRR].

⁸ See Part VI, *infra*.

when comprehensive ideas may enter such debates.⁹ Part III questions the workability of Rawls's "proviso" that comprehensive views may come in as long as citizens follow them up with public reasons drawn on political values.¹⁰ Part IV challenges the notion that the justification of a constitutional decision is unchanged by the presence of comprehensive views accompanying public reasons.¹¹ Part V identifies a listeners' dilemma in Rawlsian public reason that exposes citizens to comprehensive doctrinal "preaching," but withholds from them the ability to criticize the merits of such comprehensive views.¹² Finally, Part VI surveys some other scholars' versions of public reason and tries to defend an exclusive view against those other views.¹³

This paper aims to persuade those with views akin or sympathetic to Rawlsian political liberalism. The bulk of the argument is framed as a critique of the wide view of public reason. Hopefully, the considerations supporting an exclusive view will be not only identifiable within, but also severable from, that critique. To the extent that my argument appears too reactionary or too embedded in *Political Liberalism*, I would offer two exculpatory pleas. First, nearly all of the current scholarship on this subject situates itself in relation to Rawls. And second, criticizing so eminent a philosopher is not a task to be taken lightly. I have tried to provide a more precise and complete treatment of his views on public reason than is usually offered, and that is driven mainly by admiration for his philosophic endeavor.

II. EVOLUTION OF RAWLS'S PUBLIC REASON

A. *The Concept*

To understand *Political Liberalism*'s version of public reason, one must first recognize that John Rawls's understanding of the subject has evolved quite a bit. By tracing the changes in his vision, we can identify the concerns pushing him toward the inclusion of comprehensive views within political deliberation. For those unfamiliar with Rawls or the notion of public reason, this section will lay out the ideal and explain how it has changed so far.¹⁴

⁹ See *infra* notes 14-70 and accompanying text.

¹⁰ See PL, *supra* note 2, at li-iii; IPRR, *supra* note 7, at 784; *infra* notes 71-122 and accompanying text.

¹¹ See *infra* notes 123-44 and accompanying text.

¹² See *infra* notes 145-60 and accompanying text.

¹³ See *infra* notes 161-211 and accompanying text.

¹⁴ Readers familiar with Rawls's version of public reason and its permutations might want to skip most of this part. However, the end of this section takes up serious ambiguities in Rawls's current position that have not been plumbed in prior scholarship and that later serve as the basis for my critique of Rawls and my defense of an exclusive view of public

Like any organization, a political society must have some way of enunciating goals and prioritizing values so that it can create alternative plans and select among them. That process, and the capacity of members to engage in it, is an organized body's *reason*. Rawls then distinguishes *public* reason from the reason of private associations such as churches, universities or families, and he sees a special role for public reason in a democracy: "[I]ts nature and content is public, being given by the ideals and principles expressed by society's conception of political justice, and conducted open to view on that basis."¹⁵

While political decisions are all public, as such, Rawls reserves the idea of public reason to constitutional essentials and matters of basic justice only.¹⁶ Ordinary political decisions that do not touch upon these fundamental concerns are not bound by the dictates of public reason. Why not? The answer lies in its restrictive content. Only certain types of reasons are public, and these alone are the basis for questions of governmental design, equality of opportunity, basic liberties, and the like.¹⁷ While such public reasons might well be potential grounds for the countless other political decisions that must be made in a democracy, Rawls is content to limit his restrictive ideal to the most fundamental matters.¹⁸ Though he does not express it quite this way, one can imagine that, if a proper balance of fundamental equality and liberty are secured via the shared values within the scope of public reason, then the resultant rights of the people probably shield them from any political decisions that would seriously transgress those values.¹⁹

Thus, of critical importance is the realm or content of reasons that may legitimately ground public decisions on issues of constitutional and fundamental justice. A family of liberal political conceptions of justice provide the content of public reason.²⁰ They are *political* conceptions in that they: (1) apply to basic political and social institutions; (2) are presented independent of any comprehensive or religious doctrine; and (3) can be drawn from ideas implicit in the public political

reason.

¹⁵ PL, *supra* note 2, at 213.

¹⁶ *See id.* at 214, 227-30.

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *Cf. id.* at 230 (commenting that as "long as there is firm agreement on the constitutional essentials and established political procedures are reasonably regarded as fair," cooperation between citizens is maintainable).

²⁰ IPRR, *supra* note 7, at 773. Note that Rawls emphasizes in this later article that there is not one single political conception that formulates public reason's content. This was implicit in parts of *Political Liberalism*, PL, *supra* note 2, at 226, despite his reference to "a '*political conception of justice*,'" *id.* at 223 (emphasis added). These conceptions are liberal in that they: (1) list basic liberties; (2) prioritize them; and (3) ensure to citizens adequate primary goods, or all-purpose means to effectively use their freedoms. *Id.* at 223; IPRR, *supra* note 7, at 774.

culture.²¹ Principles and values drawn from these conceptions become a *justificatory realm*, as it were — a body of reasons that justify decisions on fundamental matters.²²

Public reason is not merely a garden of rationales, however. It operates like rules of evidence to delineate proper reasons by distinguishing them from non-public ones.²³ Non-public reasons come in various sorts, as they are employed in the diverse associations and organizations of civic society, or “background culture,” as Rawls calls it.²⁴ These reasons are not public because we cannot reasonably expect for them to be endorsed by those who do not subscribe to the particular comprehensive doctrine from which they come. What distinguishes public reason from non-public reasons is not simply that its purview is the public political culture, but also that its content springs from shared values borne out of political conceptions of justice.

And so “[t]o engage in public reason is to appeal to one of these political conceptions . . . when debating fundamental political questions.”²⁵ The point of the ideal is for citizens to discuss such issues within a framework of reasons that others could reasonably be expected to endorse.²⁶ That expectation is founded on two considerations. First, public reasons are those drawn from shared political values and methods of reasoning that rest on plain truths and common sense.²⁷ Second, Rawls insists that each person must have some criterion of reciprocity by which to determine what principles and guidelines could be accepted by other free and equal citizens as reasonable.²⁸ The upshot is that citizens must recognize *ex ante* that some reasons are not public because they fail to meet the criterion by which we might say that others could be expected to endorse the reasons.²⁹ Such reasons might not be reasonable either because they fail to treat other citizens as free and equal, or because they rest on a comprehensive doctrine that others do not share.

The ideal of public reason, if realized, then, is a dynamic social force that cultivates democratic citizenship by “taking people as a just and well-ordered society would encourage them to be.”³⁰ Essential to deliberative democracy, Rawls

²¹ PL, *supra* note 2, at 223; IPRR, *supra* note 7, at 776.

²² PL, *supra* note 2, at 224; IPRR, *supra* note 7, at 777.

²³ See PL, *supra* note 2, at 218, 221; IPRR, *supra* note 7, at 786, 805 n.95.

²⁴ PL, *supra* note 2, at 220.

²⁵ IPRR, *supra* note 7, at 776.

²⁶ PL, *supra* note 2, at 226.

²⁷ *Id.* at 224-26.

²⁸ *Id.* at li, 226; IPRR, *supra* note 7, at 773.

²⁹ Note here that to expect other citizens to consider our reasons reasonable does not mean that they will also draw the same conclusion or support our particular end. The idea is simply to ensure that a reason given in favor of a particular conclusion is in fact one that *could be* endorsed because it draws on shared political values.

³⁰ PL, *supra* note 2, at 213.

claims, is a "knowledge and desire on the part of citizens generally to follow public reason and to realize its ideal in their political conduct."³¹ Though essential, citizens have only a moral (not a legal) duty of civility toward one another to follow its dictates.³² That moral obligation pushes citizens to advocate and vote — and to *explain* their positions and votes — using the political values of public reason at least for matters of constitutional import. Civility also involves a willingness to listen to others.³³ Before focusing on Rawls's evolving notion of the limits of citizens' public reason (or the degree to which comprehensive views may infiltrate), it is useful to see how it applies to government actors.

While the *ideal* of public reason is realized whenever citizens or government actors follow public reason in their actions and explanations, Rawls's *idea* of public reason has a more narrow, particularized scope.³⁴ Like the general discussion of public reason above, the idea applies to fundamental questions with a content derived exclusively from reasonable political conceptions of justice marked by a criterion of reciprocity. The idea only applies to certain actors, however, within what Rawls calls the public political forum, which has three parts: the discourse of (1) judges; (2) government officials; and (3) political candidates.³⁵

This idea-ideal distinction is both helpful and confusing. It is useful in that the idea has specific features — namely, the issues it covers, the persons obliged by it, its content, its deliberative discussion, and its criterion of reciprocity.³⁶ The ideal is realized whenever the idea is followed. The relationship of citizens to the ideal is the potentially confusing part, both because it is hard to follow how private citizens meet the ideal if they are not covered by the idea, and because the way citizens meet the ideal is related to how judges, officials, and candidates do so (who are all covered by the idea). In his most recent work, Rawls explains that citizens fulfill the *ideal* of public reason when they act or deliberate according to bounds of political values during discussion of fundamental rights.³⁷ They support the *idea* of public reason by holding government actors accountable for following it.³⁸

B. *The Limits*

With this account laid out, we can now consider the part of *Political Liberalism*

³¹ IPRR, *supra* note 7, at 772.

³² PL, *supra* note 2, at 217.

³³ *Id.* at 217, 253.

³⁴ See IPRR, *supra* note 7, at 768-69.

³⁵ *Id.* at 767. Judges' contributions to the public political forum lie in their opinions, whereas candidates are responsible for party platforms, campaign workers' speech, and their own public oratory. *Id.*

³⁶ *Id.*

³⁷ *Id.* at 769.

³⁸ *Id.*

that has undergone the most change — the limits of public reason. An *exclusive* view of public reason would hold that in public political debate on fundamental matters, no reasons could be given that were explicitly based on comprehensive doctrines. Only public reasons drawing on political values that others could reasonably be expected to endorse may be introduced. This was the version to which Rawls was originally drawn as he moved from comprehensive to political liberalism.³⁹

But instead, Rawls opted for what he called an *inclusive* view that permitted citizens to introduce comprehensive doctrinal reasons in certain situations.⁴⁰ Driven primarily by a desire to make the ideal of public reason accord with the experience of antebellum abolitionists and Martin Luther King, Jr., Rawls permitted the introduction of reasons based on religious doctrines.⁴¹ His rationale was that the pre-Civil War and Civil Rights eras were both unjust societies that could not be considered well-ordered given the deep disagreement on constitutional essentials. The introduction of Christian rationales to secure the freedom and equality of African Americans actually made the societies more just and thereby strengthened the ideal of public reason.⁴²

The inclusive view was meant to provide flexibility. While a well-ordered society might indeed be best suited by an exclusive view of public reason, Rawls recognized that societies marked by serious fundamental disputes might not be capable of progressing toward agreement by reference to shared political values alone.⁴³ Thus, historical and social conditions would dictate the degree to which public reason should operate exclusively (on political values alone) or inclusively (with comprehensive doctrines).⁴⁴ An inclusive view would allow citizens to “present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen the ideal of public reason itself.”⁴⁵

By the time *Political Liberalism* went to paperback, Rawls was dissatisfied with the inclusive view. He dropped the conditions on the introduction of comprehensive views: no longer would society need to be unjust or would the

³⁹ PL, *supra* note 2, at 247 n.36.

⁴⁰ *Id.* at 247.

⁴¹ *See id.* at 248.

⁴² *Id.* at 247–51.

⁴³ *Id.* at 248–49.

⁴⁴ *Id.* at 251.

⁴⁵ *Id.* at 247. Initially, Rawls’s assumption sounds right because it makes little sense to rely on a shared set of political values if those values are in fact highly contested and not yet agreed upon. Alternatively, one could say that such societies lack a complete set of public reasons because profound disagreement over fundamental matters might signal that no shared political values yet cover certain questions.

introduction of such views need to help make it stronger.⁴⁶ Instead, comprehensive doctrines could be introduced at any time, so long as reasons from a political conception that would support the same argument were introduced in due course. Rawls called this the *proviso* and made it the defining trait of “the *wide* view of public reason.”⁴⁷ Still preoccupied with the abolitionists and the civil rights movement, he took solace in the fact that, whether or not these noble Americans ever satisfied the proviso, they certainly could have done so⁴⁸ — presumably by reference to political values like individual liberty, the basic equality of all persons, and the overarching right to pursue happiness. The wide view with its proviso would show citizens how allegiances to the political conception were rooted in particular comprehensive views.⁴⁹

It was not long before Rawls felt the need to say more. *The Idea of Public Reason Revisited* was not really a change, but instead an attempt to clarify the idea and the ideal given the new wide view.⁵⁰ Pertinent to my interests, Rawls set up a discussion of the wide view by considering the relationship between religion and democracy.

The compatibility of religious doctrines with a political conception must occur for the right reasons; religions cannot accept democratic government as a *modus vivendi* alone.⁵¹ In other words, a religion cannot embrace toleration merely because it lacks the power to impose its will. Nor can it honor freedom of conscience only up to the point at which it might lose influence.⁵² Instead, religious comprehensive views — like their secular counterparts — must affirm a political conception as the balance of equal liberties for its own adherents as well as others. People of faith must recognize the legitimacy of law even where their own religion might lose ground, and they must not attempt to use law to establish the hegemony of their own comprehensive views.⁵³ The exercise of public reason is a manifestation of this deeper commitment to democracy. Sometimes this involves reasoning by conjecture, where we suggest to others how, given what we know of their comprehensive views, they could still endorse a reasonable political

⁴⁶ *Id.* at lii.

⁴⁷ *Id.* (emphasis added).

⁴⁸ *See id.* at lii n.27 and accompanying text.

⁴⁹ *Id.* at lii.

⁵⁰ The article recounted the concepts discussed above and offered a new discussion of the family's dual roles as part of the basic structure and the background culture — a response to feminist critiques regarding the lack of treatment given the family in *Political Liberalism*. *See* IPRR, *supra* note 7, at § 5, 787-94 (take particular note of page 787, note 58).

⁵¹ *Id.* at 780.

⁵² *Id.* at 781.

⁵³ *Id.* at 782.

conception of justice.⁵⁴

Of course, such forays into comprehensive views might not ever come into public political debates were it not for the proviso. Interestingly, Rawls no longer refers to the wide view of public reason, but instead refers to “the wide view of public political culture.”⁵⁵ One explanation for this slight terminological change would be to situate the wide view with its proviso solely within the ideal of public reason. This would remove the proviso from the *idea* of public reason and thereby keep comprehensive views out of its domain: the public political forum, which includes the discourse of judges, government officials, and candidates. After all, Rawls still uses the terms public political *forum* and public political *culture* distinctly.⁵⁶

This explanation proves difficult, however, given the definition of public political culture in *Political Liberalism* incorporated into Rawls’s later discussion.⁵⁷ In both works, Rawls uses public political culture to contrast its distinct and separate sphere from that of the background culture.⁵⁸ “This public culture comprises the *political institutions* of a constitutional regime and the public traditions of their interpretation (*including those of the judiciary*) as well as historic texts and documents that are common knowledge.”⁵⁹ Political institutions and judicial interpretations are clearly within the idea of public reason. Taken together, Rawls’s description of the wide view suggests that the proviso — which is the defining trait of the wide view — will operate within the discourse of judges, government officials, and candidates. Thus, the public reason grounding decisions over fundamental matters will include comprehensive views as long as they are buttressed by proper political reasons.

To be fair, this point never comes through explicitly in Rawls’s discussion. On the one hand, he repeatedly referred to “citizens” when he first introduced his inclusive view⁶⁰ and then when he switched to the wide view.⁶¹ His defense of the proviso is entirely worded in the good it does for citizens to have mutual knowledge

⁵⁴ *Id.* at 783, 786-87.

⁵⁵ Compare PL, *supra* note 2, at lii, with IPRR, *supra* note 7, at 783.

⁵⁶ Compare IPRR, *supra* note 7, at 767, with IPRR, *supra* note 7, at 783-84.

⁵⁷ See IPRR, *supra* note 7, at 784 n.48; PL, *supra* note 2, at 13-14.

⁵⁸ PL, *supra* note 2, at 14; IPRR, *supra* note 7, at 784. Interestingly for my purposes, the definition of public culture is immediately followed with an attempt to separate it from comprehensive views: “Comprehensive doctrines of all kinds — religious, philosophical, and moral — belong to what we may call the ‘background culture’ of civil society. This is the culture of the social, not of the political.” PL, *supra* note 2, at 14. Here we see the seeds of the tension that develops when Rawls capitulates 233 pages later to embrace comprehensive doctrinal reasons into an inclusive view, and then again two years later, with the wide view.

⁵⁹ PL, *supra* note 2, at 13-14 (emphasis added).

⁶⁰ *Id.* at 247.

⁶¹ *Id.* at lii.

of one another's comprehensive doctrines.⁶² But the definition of public political culture is surely inclusive (dare I use the word) of governmental actors, and Rawls asks, but does not answer, the question of "on whom does the obligation to honor [the proviso] fall?"⁶³ He does emphasize "political discussion" as the operative realm of the wide view,⁶⁴ perhaps enabling him to permit comprehensive views with the proviso in government decisions and elections that touch on fundamental matters, but to rely exclusively on public reasons in judges' opinions, which are not political discourse.⁶⁵ Of course, even that reading does not necessarily prevent the operation of the proviso in lawyers' arguments to a court or during judicial deliberation.

In the end, the main reason that Rawls leaves this issue unresolved is also the best evidence for thinking that the wide view *does* apply to the idea of public reason (discussion of fundamental matters by government officials, candidates, and judges) as well as to citizens' discourse. Basically, he thinks the inclusion of comprehensive views never changes the result: "It is important also to observe that the introduction into public political culture of religious and secular doctrines, provided the proviso is met, does not change the nature and content of justification in public reason itself."⁶⁶ There would be no purpose for this sentence were it not for the understanding that the "introduction" of comprehensive views occurs in the same sphere where there is debated and found the "justification" for a decision regarding constitutional essentials and matters of fundamental justice. I will later focus in on this sentence to attack the assumption underlying it. For now, it suffices to see that it is not just the public square that has been widened to include comprehensive views, but also the discourse of government actors who make the binding decisions affecting the constitutional order and basic freedoms.

To conclude this evolutionary account of Rawls's public reason, it is useful to touch upon the one concern that originally pushed Rawls toward the inclusive view and still girds his current wide view. In societies facing fundamental disagreements, Rawls presumes that citizens on different sides will come to doubt one another's commitment to political values.⁶⁷ Three features of the wide view purportedly quell that doubt. The introduction of comprehensive views to show how they affirm a political conception will improve mutual trust and confidence; it will show that the commitment to political values is not merely a *modus vivendi*.⁶⁸ It may also

⁶² IPRR, *supra* note 7, at 784-86.

⁶³ *Id.* at 784.

⁶⁴ *Id.*

⁶⁵ This seems in accord with Rawls's notion that the Supreme Court is the exemplar of public reason. See PL, *supra* note 2, at 231-40.

⁶⁶ IPRR, *supra* note 7, at 784.

⁶⁷ PL, *supra* note 2, at 248-49; IPRR, *supra* note 7, at 785.

⁶⁸ PL, *supra* note 2, at 249.

promote the stability of an overlapping consensus on political values [OC].⁶⁹ Finally, introducing comprehensive doctrines can “open the way” to explain to others how one’s own views support basic political values.⁷⁰ As we begin to think critically about the wide view, it is important to keep in mind this doubt that Rawls identifies and the three advantages that purportedly come from answering it with comprehensive views. If it turns out that the wide view does not erase such doubt or threatens, rather than bolsters, the three features identified above (as I contend), then we might have reason to reverse trajectory and move back toward an exclusive view of public reason.

III. PROBLEMS WITH THE PROVISIO

The best way to consider why the exclusive view of public reason is better suited for *Political Liberalism* may be to consider the difficulties and consequences of the wide view. The proviso allows comprehensive doctrines to be “introduced in public political discussion at any time, provided that in due course proper political reasons . . . [given by a reasonable political conception] are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support.”⁷¹ The wide view is flawed because it encourages citizens — speakers as well as listeners — to treat public reason as an afterthought. There are two particular issues that demonstrate this flaw: what is meant by “due course” and whether citizens have to know that they can satisfy the proviso before they offer any nonpublic reasons.

A. *Different Audiences*

The “due course” standard poses significant problems for the wide view. I will focus on one issue that highlights some of my fundamental concerns — would the proviso require that the public reasons (*i.e.*, the follow-up to the comprehensive views) be given in the same presentation (*e.g.*, a writing, a speech, a debate)? Or perhaps in the same forum?⁷²

Before delving into the details of this issue, it is helpful to remember that Rawls treats public reason as a means for achieving public justification:

⁶⁹ *Id.* at lii.

⁷⁰ IPRR, *supra* note 7, at 785.

⁷¹ PL, *supra* note 2, at li-iii; *see also* IPRR, *supra* note 7, at 784.

⁷² Rawls does not work out the particulars himself, though he does think that it ought to be clear and established how the proviso is to be satisfied. PL, *supra* note 2, at lii n.26. In IPRR, Rawls explains that advance rules in this regard need not be made. The details of how to satisfy the proviso must be worked out in practice. IPRR, *supra* note 7, at 784.

Public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept. This meets the duty of civility, since in due course the proviso is satisfied.⁷³

Persuasion occurs, then, where both premises and conclusions are presented that meet the criterion of reciprocity. The following proposition inheres: In a constitutional debate, citizens who hear *only* religious doctrinal premises, which they do not share, will think that the speaker is being unreasonable. The whole point of Rawls's idea of public reason, after all, is that a speaker's reasonableness is demonstrated by offering premises that others can reasonably be expected to accept. The proviso is designed to be sure that such reasons are eventually introduced. Public reason, thus, is designed to influence other citizens, but it does so only insofar as speakers offer reasonable reasons to fellow citizens.

With that premise in mind, we can now take up the issue of whether the wide view requires that the proviso be satisfied in the same public presentation (or at least in the same particular forum) as the one in which comprehensive doctrines were introduced. If the proviso does not require that a person offer public reasons in the same speech or writing, then the citizens who heard the initial comprehensive views may not ever be exposed to the subsequent justification. There are actually two dimensions to this problem. First, an initial group of citizens may only receive reasons grounded in a comprehensive doctrine. Second, the wide view does not require citizens to explain that they are satisfying the proviso when, in due course, they offer public reasons; thus, a later group of citizens may not realize that the public reasons they hear are designed to gird the previously introduced non-public ones. These risks run if the proviso is satisfied in a different forum as well.

We should not be confused by my use of the words "presentation" and "forum" here; I use them in a rather conventional sense. A public debate between candidates or legislative deliberation over a bill are each a political forum in which multiple presentations, such as speeches, questions, and written commentary, can be made. Satisfying the proviso within the same presentation would mean that public reasons come into the same speech or writing as did comprehensive views. Satisfying the proviso merely within the same particular forum would mean that public reasons might come in a subsequent presentation within the same debate or decision-making process. The crucial insight is that the public political culture to which Rawls refers covers multiple individual forums and presentations within what might be called a cultural political dialogue.⁷⁴ We ought not forget that this dialogue is multifaceted

⁷³ IPRR, *supra* note 7, at 786

⁷⁴ We might read Rawls to require public reasons to come in anywhere in his public political tripartite forum or public political culture, which would mean subsequent speeches

and ongoing, especially when thinking about the proviso.

The “due course” standard fails as a means of justification because it does not ensure that comprehensive and political premises are introduced to the same public audience. The proviso is of little import if the citizens who hear the nonpublic reasons are never exposed to the public ones. For those listeners, there is nothing to show that a speaker’s allegiance to the political conception is rooted in the comprehensive reasons being offered.⁷⁵ Unfortunately, there are indications in Rawls’s work that he would not support a stricter proviso requiring public reasons in the same speech or work, or even in the same forum.⁷⁶ Of the wide view, he writes:

It is wise, then, for all sides to introduce their comprehensive doctrines, whether religious or secular, so as to open the way for them to explain to one another how their views do indeed support those basic political values.⁷⁷

There are at least two complications with his analysis. First, “open[ing] the way” sounds like Rawls is content to allow the proviso to come later — after the debate has begun and after listeners have already been engaged by comprehensive views. There is no indication that the audience listening in due course will have the same composition of citizens. Second, he never addresses the serious possibility that when debating constitutional essentials, a person may “tune out” those fellow citizens who invoke comprehensive doctrines instead of reasonable political values. Note that Rawls does not even commit the proviso to being satisfied on the same day.⁷⁸ People may not wait patiently for more premises when they cannot accept the premises they have heard thus far.⁷⁹

These two features are of critical importance because nothing in the proviso requires the introduction of comprehensive views to alert fellow citizens that public reasons will follow. In other words, the wide view contains no mechanism that distinguishes what we might call permissible non-public reasons (*i.e.*, those that will

or presentations to bolster previous ones.

⁷⁵ See IPRR, *supra* note 7, at 784-85.

⁷⁶ First, Rawls emphasizes that comprehensive doctrines may be introduced at any time. In addition, when he addresses questions about the specifics of the proviso, he wonders whether it needs to be satisfied in the same day or on another day. IPRR, *supra* note 7, at 783-84. Apparently Rawls has not considered my concern that a subsequent justification by reference to public reasons is of no use if the same citizens are not the ones hearing it.

⁷⁷ IPRR, *supra* note 7, at 785.

⁷⁸ See IPRR, *supra* note 7, at 784.

⁷⁹ This problem is compounded if citizens are not obligated to ascertain whether political reasons exist to justify their desired conclusion before they introduce comprehensive doctrines. I take up that issue next. See *infra* Part III.B.

be followed with reasons from political values sufficient to support the same conclusion) from the impermissible ones (*i.e.*, those that will not be buttressed with proper public reasons). Note that the key point in time is that point at which religious views are introduced and heard by citizens in the public forum. The proviso does not alert public audiences as to when they should keep listening and when they should tune out. In Rawlsian terms, there is no way to know which comprehensive doctrines are being introduced reasonably (*i.e.*, to be later accompanied by reasons others could be expected to endorse) and which ones are being introduced unreasonably (*i.e.*, to be left alone despite the fact that others who do not share the comprehensive view cannot accept them). Even if we work out the particulars of the due course standard, therefore, it misses the point: what to do about the citizens in the public forum who are exposed to comprehensive views and have no way to know whether the exponent of those is being reasonable — because she will later introduce public reasons to satisfy the proviso — or whether she is being unreasonable — because she has only reasons that could not be accepted by those who do not share the comprehensive view.⁸⁰

I will return later to this issue because it is even worse than mere uncertainty: The duty of civility creates a listeners' dilemma that prevents the discouragement of unreasonable reasons. For now, two points are worth noting. First, the due course standard treats the public political culture as if it were one stationary set of ears waiting to take in all the reasons voiced in its presence; but audiences are not "on call" awaiting the fulfillment of the proviso. A political forum is a dynamic exchange not only because it involves a back-and-forth deliberation, but also because participants in a free society enter and leave political debates on their own accord. "Due course" cannot account for that, so it fails to coordinate comprehensive views with their public reason reinforcements. A second point is one to which I shall return: When comprehensive views are introduced to support a particular position, audiences have no way to know whether public reasons to support such a view exist or — if they do — when or if the speaker ever plans to offer them. The due course standard is a shell game of sorts that moves our attention to the public reasons to come and allows us to miss the problem of the non-public reasons floating about on their own. Those engaged in public debates do not have that luxury — they are left grappling with comprehensive doctrinal reasons already presented. And there is no way to tell whether such reasons can or will magically *become* reasonable by appeals to political values in due course.

⁸⁰ Because Rawls considers the ideal fulfilled whenever citizens abide by public reason, he must recognize that sometimes citizens will not behave ideally. Unfortunately, he never addresses this problem or the relation between those who adhere to public reason and those who blatantly disregard it. This is part of a larger issue that he neglects: how to figure out what reasons count as justificatory (as opposed to superfluous) in a sea of reasoned deliberation. I will try to take up this problem in Part IV.

B. *Strategic Conundrum*

I assume that, to satisfy the wide view, citizens would have to know that they could meet the proviso *before* they offer any non-public reasons. This assumption seems consistent with Rawls's prediction that doctrines would accept the proviso and *then* come into a political debate.⁸¹ Presumably, if a citizen desired a conclusion that could not be justified by public reasons, there would exist a moral duty *not* to introduce comprehensive views in a constitutional debate.⁸² It is worth mentioning here that the exclusive view of public reason, which I advocate, asks little more from citizens than the wide view. Because one's public reasons have already been determined under the wide view anyway, the exclusive view merely asks citizens to offer only those views. Put another way, the criterion of reciprocity distinguishes the public reasons from the unreasonable ones, and the wide view requires that the distinction be made in advance. The only difference in my exclusive view is that reasons failing the reciprocity test (*e.g.*, other free and equal citizens will not reasonably be expected to endorse them) would then be left out of public political discourse.

But even a skeptic of the exclusive view could find Rawlsian grounds for concluding that the wide view is unnecessary. If citizens know in advance that there are public reasons to support their desired conclusion, why would they not simply offer those reasons? There is a much better chance of being persuasive since, *by definition*, a public reason is one reasonably expected to be endorsed by others.⁸³ Public reasons draw on shared political values and common-sense methods of inquiry. They are not based upon comprehensive doctrines that listeners will not

⁸¹ "When these doctrines accept the proviso and only then come into political debate, the commitment to constitutional democracy is publicly manifested." IPRR, *supra* note 7, at 785. Notice two implicit assumptions that are not supported by the wide view. First, this notion of public manifestation and proviso acceptance makes it sound as though there is some articulated embrace of the proviso that occurs *ex ante* in the political forum. Nothing of the kind occurs in Rawlsian public reason, however; any acceptance of the proviso is articulated only by offering public reasons to support comprehensive views introduced into the public political debate. The second, and related, assumption is that entering the debate amounts to a manifested commitment to democracy. But of course Rawls has structured the wide view so that entering the debate can begin by the introduction of comprehensive views first. As noted in the previous section, this may look as much like unreasonable behavior as committed public reasoning, because the reasons drawing on political values come later in due course. Thus, entering the debate itself really indicates nothing as far as public reason goes. If ever, the commitment to democracy would be shown after the satisfaction of the proviso, which comes after a doctrine enters public discourse and after nonpublic reasons have been given.

⁸² Note that the duty to follow the dictates of public reason is not a legal one. It is only a moral duty. IPRR, *supra* note 7, at 769.

⁸³ PL, *supra* note 2, at 226.

share. Thus, the wide view has strange incentives that seem counterintuitive for persuasion. A citizen realizes that there are reasons others may accept, but then, with that realization, the citizen offers reasons that cannot be accepted by others because they depend on a comprehensive view. If one's aim is truly to persuade and to forge a majority or consensus, it makes sense to center one's argument around shared premises.

Later in this Article, I will suggest what I think are the real motives for introducing comprehensive views, and these are all corrosive of public justification. For now, though, the point is simply this: Given the need to be certain that there are public reasons to support a conclusion *before* one introduces a comprehensive view, it is strategically unnecessary and downright risky to offer reasons that others cannot be expected to endorse. On the one hand, these reasons could dilute the message of one's public reasons drawn on political values. On the other, assertions based on religion are unreasonable insofar as they depend upon beliefs that some listeners do not share; audiences may be offended by unreasonable reasons and either: (a) discount the accompanying public reasons; or (b) tune out the moment speakers engage in reasoning that draws upon controversial comprehensive doctrinal premises. In sum, if the logic of Rawls's notion of reasonableness and the reciprocity criterion makes sense, then the introduction of non-public reasons should be a strategic persuasive error.

Because Rawls is not explicit that citizens must know *ex ante* that they will be capable of satisfying the proviso *ex post*, I should say a quick word on the possible interpretation that citizens would (or should) *not* have to realize or to pinpoint public reasons justifying a conclusion before offering a comprehensive view in a constitutional debate. This would present a different, yet more damaging, flaw for the wide view. First, there would be a significant risk that some comprehensive views would be introduced that ultimately could not be justifiable in terms of public reasons — that is, comprehensive views would enter constitutional debates without assurance that the proviso can be satisfied. Even if the doctrines ultimately were justifiable, however, it would be hard to say that the wide view so conceived best supports the ideal of public reason. Citizens would then be supporting conclusions in a constitutional debate without first ascertaining whether reasonable premises exist. Public reason would become a fortuity rather than a constraint, so I contend that we should read Rawls's wide view as requiring *identification* of public reasons in advance, even though their articulation need only come in due course.

But even if citizens must come up with political reasons before they introduce comprehensive doctrines, the wide view remains problematic. If citizens formulate public reasons first, why would they offer reasons based upon unshared truths? The criterion of reciprocity takes on a strange role in the wide view. It does not separate permissible public reasons from those we should keep to ourselves or keep within our background cultural discussions. Instead, it distinguishes reasonable from

unreasonable reasons, although citizens are allowed to offer those very reasons that they themselves understand to be unreasonable to others. The wide view actually encourages citizens to put forward reasons in public debate that are not drawn on any common shared political values and that other citizens will consider unacceptable.

C. *Further Doubt*

Now I will question whether the proviso Rawls constructs lives up to his hopes for the wide view. One of the main concerns driving Rawls toward the inclusive, and then wide, views of public reason is that citizens with different comprehensive doctrines in a debate may come to doubt one another's allegiance to fundamental political values.⁸⁴ "One way this doubt might be put to rest," he argues, "is for leaders of the opposing groups to present in the public forum how their comprehensive doctrines do indeed affirm those values."⁸⁵ Rawls presumes that knowledge of others' allegiance strengthens public confidence and mutual trust.⁸⁶

At first blush, the existence of this doubt seems to contradict the defining traits of a well-ordered society: "[E]veryone accepts [and *knows that everyone else accepts*] and publicly endorses, the very same principles of justice."⁸⁷ Remember that the lingering doubt rationale for the wide view does not simply refer to societies that are not well-ordered; Rawls dropped the inclusive view's condition that comprehensive views could only be introduced in those situations of unjust conditions. As for specific doubt about a religious *doctrine's* commitment to democratic values, *Political Liberalism* takes that as a given so long as its adherents behave reasonably, "it being understood by everyone that of course the plurality of reasonable comprehensive doctrines held by citizens is thought by them to provide further and often transcendent backing for those values."⁸⁸ Utilizing only reasonable reasons would seem to be a way of demonstrating the reasonableness of one's view. Despite the initial mutual recognition that others share a political conception of justice, Rawls insists that suspicion and doubt will creep in when faced with "highly contested" issues.⁸⁹

⁸⁴ PL, *supra* note 2, at 248; IPRR, *supra* note 7, at 785.

⁸⁵ PL, *supra* note 2, at 249; IPRR, *supra* note 7, at 785. Note that this justification for the wide view of public reason is not limited to leaders. It applies to citizens as well: "The proviso of citizens' justifying their conclusions in due course by public reasons secures what is needed. It has the further advantage of showing to other citizens the roots in our comprehensive doctrines of our allegiance to the political conception, which strengthens stability . . ." PL, *supra* note 2, at lii.

⁸⁶ PL, *supra* note 2, at lii.

⁸⁷ *Id.* at 201 (emphasis added).

⁸⁸ *Id.* at 243.

⁸⁹ IPRR, *supra* note 7, at 785; see also PL, *supra* note 2, at 248 (noting that, in a nearly

What is especially strange is the underlying tension in his account of the proviso as a response to that doubt. To see the contradiction upon which the wide view is premised, consider that Rawls frames the entire public reason project as an attribute of democracy, and he argues that understanding what it means to be a citizen includes understanding how to follow public reason.⁹⁰ "Citizens realize that they cannot reach agreement *or even approach mutual understanding* on the basis of their irreconcilable comprehensive doctrines."⁹¹ Thus, they propose terms of fair cooperation based on a reasonable political conception of justice "provided that other citizens also accept those terms."⁹² The public reason component of those fair terms asks citizens to view themselves as legislators and to offer reasons that others can accept.⁹³ "The zeal to embody the whole truth in politics," he poignantly stresses, "is incompatible with an idea of public reason that belongs with democratic citizenship."⁹⁴

The inescapable lesson is that citizens demonstrate their commitment by limiting their own reasons and resorting to political values that others can be expected to endorse. Resisting the urge to incorporate one's version of the whole truth is a mark of virtue and a sign of willingness to cooperate. Besides, Rawlsian citizens see from the outset that mutual understanding based on comprehensive views rather than shared political values is nearly impossible. But if all this is right, then it makes no sense for Rawls to argue simultaneously that limiting ourselves to public reasons is the source of skepticism and doubt. What he portrays in one breath as the way we show other citizens that we embrace the cooperative enterprise, he later characterizes as the very basis for their doubt about that same commitment! And Rawls then prescribes for that doubt the very opposite of shared political values — the introduction of comprehensive views that offer (if only a glimpse) our vision of the whole truth.⁹⁵

But of all the people whose commitment to democracy we might question, why would it be the citizens who faithfully advance public reasons alone? It seems much more likely that citizens would be suspicious of those who seek to inject religious views into constitutional debates. In my view, such doubt is itself the defect to be cured. To discount public reasons based on some ethereal doubt is itself unreasonable. In other words, it is not fair to expect citizens to do more than behave reasonably, which they do by offering reasons others could be expected to endorse. When citizens and government officials are complying with the dictates

well-ordered society, a serious dispute over the proper application of a principle of justice can produce the same doubt).

⁹⁰ IPRR, *supra* note 7, at 765; PL, *supra* note 2, at 218.

⁹¹ IPRR, *supra* note 7, at 766.

⁹² *Id.* at 770.

⁹³ *Id.* at 770-71.

⁹⁴ *Id.* at 767. See also *id.* at 771; PL, *supra* note 2, at 218.

⁹⁵ PL, *supra* note 2, at 249; IPRR, *supra* note 7, at 785.

of public reason and we still find ourselves doubting their commitment to democratic reciprocity, we should begin to consider the possibility that it is our own prejudice that produces doubt. It might be our own distaste for the opponents' comprehensive views or enthusiastic loyalty to our own that prompts us to doubt their allegiance to constitutionalism. Either way, it is unreasonable to question citizens' loyalty to democratic equality and liberty when they endeavor to demonstrate that very commitment by reliance on political conceptions of justice rather than their own comprehensive doctrine.⁹⁶

It is no answer for Rawls to say, as he might, that his worries about doubt were only for "highly contested political issue[s],"⁹⁷ "serious dispute[s] . . . in applying . . . principles of justice,"⁹⁸ or "profound division about constitutional essentials."⁹⁹ Such are the questions to which public reason applies. After all, Rawls chose not to cover ordinary political decisions within his ideal;¹⁰⁰ public reason is for the big questions. So while he sees the willingness to forego the whole truth as both (a) desirable for making decisions over constitutional essentials and fundamental liberties and (b) the mark of "civic friendship,"¹⁰¹ he immediately succumbs to the notion that that same willingness also breeds suspicion and doubt.¹⁰² Moreover, that doubt is enough to change trajectories and begin explaining one's comprehensive view — the very dialogue we sought to remove from fundamental political deliberation.

One final note on this point: It is hard to imagine when questions over constitutional essentials and fundamental justice will *ever* be anything but contested matters of dispute and division. While we may share an overlapping political value set, disagreement is to be expected. And if the subject matter of a disagreement is fundamental, *ipso facto* the division will run deep; stakes and values will be at their highest ebb. And so the moment Rawls capitulated his ideal to the fear that citizens might doubt one another's commitment to democracy,¹⁰³ it was inevitable that his "inclusive" allowance for comprehensive views would come to swallow the rule.

⁹⁶ We might also worry about the implications of Rawls's use of doubt as a reason for preferring the wide view. If he is correct that doubt will persist, the solution for which is an explanation of comprehensive views, then there may be pressure to utilize the wide view. In other words, citizens might feel compelled to invoke their doctrine and then satisfy the proviso rather than relying on public reasons only. While it is certainly desirable to have citizens satisfy the proviso if they decide to introduce comprehensive views, we should be hesitant to embrace a proviso that actually encourages reliance on comprehensive views.

⁹⁷ IPRR, *supra* note 7, at 785.

⁹⁸ PL, *supra* note 2, at 248.

⁹⁹ *Id.* at 249.

¹⁰⁰ See *supra* text accompanying notes 16-19.

¹⁰¹ IPRR, *supra* note 7, at 771.

¹⁰² *Id.*

¹⁰³ See *supra* note 67 and accompanying text.

This is a far cry from the original impulse beckoning people to aspire to an ideal citizenship with public reason that "describes what is possible and can be, yet may never be, though no less fundamental for that."¹⁰⁴

D. *Sufficiency as Insufficient*

Moving past my disappointment that Rawls succumbed to the specter of doubt, we can now consider the possibility that he was right. Thus, I will now take as a given that citizens may come to doubt one another's allegiance to shared political values. The problem here is not necessarily with Rawls's presumption: Knowing that fellow citizens are committed to public reason may indeed inspire a person to make such a commitment herself, and may also reassure her that the public reasons give by her opponents are genuine. I just do not see how the wide view of public reason accomplishes as much as Rawls suggests. In the wide view, religious reasons may be introduced at any time and in any fashion.¹⁰⁵ To satisfy the proviso, all a citizen need do is (1) give a non-public reason and (2) in due course give a public reason. The two sets of reasons must only justify the same conclusion.¹⁰⁶

Rawls never suggests that the proviso's moral duty to offer a public reason includes the duty to explain how one's comprehensive *doctrine* affirms the political conception.¹⁰⁷ In other words, the wide view of public reason allows particular non-public reasons to come into the constitutional debate assuming that subsequent public reasons (sufficient to justify the same conclusion) will come in also. The proviso does nothing to demonstrate the connection between comprehensive doctrine and public political conception.

Take an abortion debate as an example. A Catholic argues that the right to an abortion ought not be constitutionally protected. In the debate, the Catholic argues from her comprehensive view that life begins at conception, that interference with reproduction is against God's law, and that the soul inheres at the moment of conception. These are obviously nonpublic reasons. The wide view, as Rawls presently conceives of it, asks only that the Catholic citizen in due course argue

¹⁰⁴ PL, *supra* note 2, at 213.

¹⁰⁵ *Id.* at li; IPRR, *supra* note 7, at 784.

¹⁰⁶ See IPRR, *supra* note 7, at 784.

¹⁰⁷ An interesting question is why it would have to be one's own doctrine at all. Presumably, Rawls's affinity for sincerity would make him hesitant about a rule that allowed anyone to give non-public reasons regardless of whether those reasons come from the doctrine one really cares about. We can imagine two scenarios where someone might want to convey a doctrine she does not share, one good and one not so good. First, legislators might want to convey constituents' comprehensive views even though the particular representative does not share the view. Second, citizens might want to capitalize on what they believe is a doctrine's persuasive force, so they might incorporate views from doctrines to which they do not subscribe *in toto*.

something like: abortion was not a right protected historically in the United States; and is not implicit in the modern concept of ordered liberty. The right to life is inalienable, and government has a compelling interest in preserving lives incapable of asserting their own rights.

The proviso actually does little to demonstrate the Catholic *doctrine's* commitment to political values; it makes those values seem like the citizen's *post hoc* justifications. Now, of course, some citizens might choose to make more elaborate connections between Catholicism and political justice, but the proviso certainly does not require that. *Sufficiency* of subsequent public reasons is all that Rawls requires — those reasons must adequately support the point pressed earlier with comprehensive views.¹⁰⁸

The proviso could be refashioned to do more, of course. For example, the wide view could ask a citizen who offers reasons from his comprehensive doctrine to later say why or how his comprehensive view affirms a political conception. This sort of proviso would actually quell the doubt about which Rawls worries, because it would illustrate either where, why, or how a doctrine joins the overlapping consensus. Such a revised proviso might ask the Catholic to say: "Catholicism is committed to the free exercise and non-establishment of religion in this country. And so here are public reasons that support my claims against abortion based on Catholic teaching." Rather than a recitation of just any political reasons, this shows at least one point where the comprehensive doctrine falls within the overlapping consensus. Why might this be a better proviso than Rawls's? The focus is on the speaker's comprehensive view. If nothing else, it articulates a religious *doctrine's* commitment to certain political values instead of just a citizen's recitation of those values. That commitment is what Rawls wanted to highlight with his wide view.

I ultimately conclude, however, that a wide view of public reason (even with a revised proviso) is inferior to an exclusive view as a means of democratic deliberative justification and as a component of Rawlsian political liberalism. Apart from the fact that the proviso *could*, but really does not, show how comprehensive doctrines affirm political conceptions of justice, its sufficiency standard also poses a problem for deliberation.

E. *Sufficiency as Overwhelming*

While Rawls wanted to leave the details of the proviso to be worked out in practice,¹⁰⁹ we can at least focus in on the one criterion for public reasons that it requires. Having considered the inability of the proviso to alert citizens as to when and how a correlative set of comprehensive views and public reasons will be presented, the sufficiency standard itself need be addressed. Recall that religious

¹⁰⁸ IPRR, *supra* note 7, at 784; PL, *supra* note 2, at lii.

¹⁰⁹ See IPRR, *supra* note 7, at 784.

reasons may be introduced "at any time" provided that political reasons are presented in due course "that are sufficient to support whatever the comprehensive doctrines introduced are said to support."¹¹⁰ Two related conclusions about the wide view follow from this rule. First, public reasons need only be sufficient to support one's position in a constitutional or basic justice debate; there is no relation between the volume or content of public reasons and of comprehensive views. Second, comprehensive doctrine exhortations may dominate one's political discourse on any given issue as long as one offers up a sufficient public reason foundation supportive of one's position.

The first point is rather basic, but can be easily overlooked when fixating on the degree to which comprehensive views may be introduced. Rawls's proviso ensures that adequate public reasons ground one's public positions. This "sufficiency" standard reflects Rawls's notion that deliberative justification for law depends on the public reasons advanced for it and is unchanged by additional comprehensive views should they tag along.¹¹¹ I will challenge that (mis)understanding in Part IV.¹¹² For now, the first salient trait of the proviso lies in its different standards for comprehensive views and public reasons. The former have no bounds — religious reasons may be included within public political argument at any time and in any fashion one sees fit.¹¹³ The latter need only be sufficient to support one's conclusion. The second salient trait is that there is no relation between the two standards.

Notice that the sufficiency standard proves my point in the previous section that satisfaction of the proviso will not necessarily demonstrate (a) any explicit personal commitment to political ideals beyond that which would come by using public reasons alone and (b) any specific doctrinal affirmation of political values.¹¹⁴ Again, the proviso adds reasons that *complement* what one has said before from one's comprehensive view, but it does not necessarily *explain* any further commitments. The reason why the proviso does less than Rawls suggests can be found in the sufficiency standard: It contains no guidance as to the relationship between comprehensive and public reasons aside from their mutual conclusion.

¹¹⁰ *Id.* at 783-84. This definition is slightly different from the explanation of proviso in the paperback edition, where public reasons must be "sufficient to support whatever the comprehensive doctrines are introduced to support." PL, *supra* note 2, at lii. The only difference in the later formation is the use of the phrase "said to," which I take to mean that comprehensive views ought to be anchored somehow to the subject matter of a debate over constitutional essentials or matters of basic justice. That is, there would not be free form comprehensive views devoid of any stated linkage to some question at play in the public political culture.

¹¹¹ See IPRR, *supra* note 7, at 784.

¹¹² See *infra* Part IV.

¹¹³ I take up the temporal issue next and the stylistic issue in Parts IV and V-B.

¹¹⁴ See *supra* note 107 and accompanying text.

By ensuring a fit between public reasons and one's position, but omitting any linkage between those public reasons and comprehensive views, the proviso allows for deliberation dominated by reasons that fail the reciprocity criterion. Citizens essentially may offer a deluge of comprehensive views without constraint on any given constitutional question, so long as their ultimate answer can be supported by public reason. That means speeches satisfying the proviso may be ninety percent religious if in fact ten percent is enough to articulate a sufficient public reason for one's position. In fact, once one identifies public reasons adequate to support an argument, comprehensive views can go on *ad infinitum*. Public reason is a disclaimer of sorts that can be added on to any unreasonable position taken by a reasonable doctrine. Public reason compliance requires no parity of time, effort, rhetoric, or attention between comprehensive views and the political values that buttress their conclusion.

For Rawls, this might be acceptable, because he allows practical incentives to do the work of policing the style and content of comprehensive views. As will become clear in Part V-B,¹¹⁵ he may not have considered a claim, such as mine, that references to comprehensive doctrines in political debates may not be persuasive, given the controversial premises on which they are based. For now, we should merely recognize the possibility that, if one wanted to emphasize one's doctrine but remain compliant with public reason, there is no disincentive to making one's public reasons sufficient to support a conclusion but letting comprehensive views pervade and dominate one's contribution to public political debate. Satisfaction of the proviso is license to pontificate at will. I find that possibility disturbing.

As a way out of this dilemma, we should probably rethink the reciprocity criterion. As it stands, every citizen must have some test by which to decide "what principles and guidelines we think other citizens (who are also free and equal) may reasonably be expected to endorse along with us."¹¹⁶ While this suffices to devise proper political reasons, it fails to account for the possibility that what we articulate *along with* those political values may in fact be determinative of others' reaction and estimation. Two possibilities are worth considering. First, the *style* by which we articulate arguments may in fact be supportive or corrosive of others' ability to endorse our reasons. In other words, unreasonable statements accompanying even proper public reasons might inhibit fellow citizens' ability to endorse the public reasons. Just as Rawls thinks that the justification of law is unchanged by additional comprehensive views in deliberation,¹¹⁷ he probably thinks the reciprocity determination of what reasons draw on political values is unchanged by the content of accompanying statements. I find that hard to believe, and I will press the issue more as a persuasive defect of the wide view. Second, the *relative weight*

¹¹⁵ See *infra* Part V.B.

¹¹⁶ PL, *supra* note 2, at 226.

¹¹⁷ See IPRR, *supra* note 7, at 784.

or *numerosity* of arguments may bear on their reasonableness. This is different from the stylistic problem, whereby political reasons appear unreasonable because of the tenor of what is said in the context of religious views. The numerosity problem exists where political values as well as comprehensive views are presented with a respectful style and substance, but the relative attention given to religion is so pronounced that the overall contribution to dialogue is patently inaccessible by those who do not subscribe to the doctrine.

For both problems, what others find reasonable may be determined by more than the sufficiency of the political values portion of a speech or presentation. Instead, the total effect of what is said in a debate may determine the willingness of citizens to endorse reasons. There is not much in Rawls's work to demand that that should not be the case, especially because he sees the justification of law as bound up in citizens' assessment that reasonable political values are responsible for the constitutional order.¹¹⁸ And the duty of civility should probably extend to all of one's contributions in public debates. After all, the duty to listen presumably includes comprehensive views as well as public reasons. If that is the case, and citizens know it, why should they not formulate their own reciprocity criteria on the proposition that the reasonableness of their position rests in all that they put forward? Once such considerations enter the reciprocity criteria, the absence of any link between the type or amount of comprehensive views and their public reason counterparts beckons for solution.

Because I see the total content of deliberation as comprising the justification for resulting decisions, I cannot subscribe to the proviso; public reasons sufficient to support one position should not enable citizens to infuse debates with religious views without limitation or mitigation. Defenders of a proviso need to give some assurance of parity, or else public debates may become inflated with nonpublic reasons. Before moving to related persuasive problems for a wide view in a deliberative democracy, I offer one more thought on the proviso — why does Rawls not think about chronology?

F. *Proviso Ex Ante*

A final problem with the wide view is the implicit understanding that the satisfaction of the proviso will occur *after* comprehensive views have been introduced. Rawls leaves the "when?" question open, but he considers only how long after the introduction of comprehensive views the public reasons will come.¹¹⁹ To borrow from Merriam-Webster, "in due course" means "after [a] natural passage of time."¹²⁰ We can safely assume, therefore, that the wide view is designed so that

¹¹⁸ See IPRR, *supra* note 7, at 766.

¹¹⁹ See IPRR, *supra* note 7, at 784; PL, *supra* note 2 at lii, n.26.

¹²⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE

public reasons sufficient to support conclusions urged by reference to comprehensive views will be introduced *after* their non-public counterparts.

Never does Rawls consider that the comprehensive views might instead come in due course. That is, all descriptions of the proviso read out the possibility that it should be satisfied *ex ante*. I will call this the *up front proviso*. Note that its burden on citizens is really no greater. We have already established that citizens should know that they can satisfy the proviso before bringing in comprehensive views. Not only is that the fairer reading of the wide view, but it also resonates with Rawls's demand that the proviso must be satisfied in good faith.¹²¹ The criterion of reciprocity needs to determine which reasons others can or cannot be expected to endorse. The up front proviso merely flips the order in which reasons are introduced so that the public ones come first.

I do not mean to defend the up front proviso so much as to consider why it might be more desirable and to point out that no one seems to have contemplated it. It would at least solve the problem of distinguishing reasonable from unreasonable discourse. Citizens would know from the start whether a speaker would satisfy the proviso by offering public reasons; they would no longer have to wait through comprehensive views, unsure whether sufficient public reasons were on the way. This would enable appropriate "tune-outs," whereby citizens would stop engaging peers who refused to live up to the ideal of public reason. By the time the ordinary proviso is *not* satisfied, it is too late — a citizen has already fulfilled the duty to listen to the comprehensive views.

Of course, the up front proviso does little or nothing about two other problems already noted. Merely flipping the order does not contain an additional alert so that citizens would know that additional reasons drawn from comprehensive views were on the due course horizon. Moreover, there still exists the problem of a dynamic, fluid public audience within the political culture. There still is no guarantee that the same people will be exposed to religious views and their correlative public reasons.

The lesson here is simply that Rawls did not think enough about chronology and citizens' perspectives while listening to public debates. If one wanted to demonstrate that one's own views were reasonable, it would seem logical to start with shared political premises rather than controversial ones drawn from unshared truths. Moreover, the people to whom such persuasive appeals are directed would at least know that the proviso had been satisfied, so that the following comprehensive views were not being introduced unreasonably. Despite the still-present duration uncertainty for due course, the up front proviso at least allows citizens to be sure that the proviso is satisfied before their duty to listen exposes them to unreasonable arguments. I assume here that the duty of civility to listen subsides at the point where another person starts speaking unreasonably.

UNABRIDGED 522 (1986).

¹²¹ IPRR, *supra* note 7, at 784.

A rigid reading of Rawls's due course proviso would hold that he insists upon public reasons coming after comprehensive views, the idea being that he chose the order purposefully and not because he never thought of calling for public reasons up front. After all, he does envision the introduction of comprehensive views as opening the way for subsequent discussion of political values.¹²² I will not pursue that interpretation, but if it is right, then the following holds: a person who offers public reasons sufficient to support a conclusion to which he thereafter offers religious views would still need to offer public reasons again. I am not sure if Rawls would find some magic in having the public reasons come later, but it is notable that he consistently describes that order as he defends the wide view.

IV. PERSUASIVE PROBLEMS WITH THE WIDE VIEW

The primary rationale for an exclusive view of public reason comes from the recognition that justification of constitutional law in a democracy stems from all the reasons put forward in deliberation and attributed to a decision. In this section, therefore, my overarching goal is to contest a statement found in Rawls's most recent exposition on public reason: "It is important also to observe that the introduction into public political culture of religious and secular doctrines, provided the proviso is met, *does not change the nature and content of justification* in public reason itself."¹²³

This reflects a misconception about deliberative democracy. Essentially, Rawls assumes that, as long as there are public reasons sufficient to support a conclusion, then the nature of the justification itself is not changed regardless of what additional premises are introduced.¹²⁴ In terms of pure logic, he may be right.¹²⁵ Yet I find this assumption both troubling for public debate and inconsistent with other aspects his work.

A. *Unfiltered Deliberation*

To set up the issue, it may be best to use an example. Imagine a constitutional debate over whether homosexuals have a fundamental right to marry same-sex

¹²² See IPRR, *supra* note 7, at 785.

¹²³ *Id.* at 784 (emphasis added).

¹²⁴ *Id.*

¹²⁵ Consider the theorem: "Only if public reason A, then constitutional result X." Citizen says A but also says B, C, and D. Decision X follows; B, C, and D are superfluous, therefore, because A was necessary and sufficient. Most public reasons on constitutional essentials will not be "only ifs," though. So the more likely theorem would be "if public reason A, then constitutional result X." Citizen says A, B, C, and D. Again, decision X follows; A is sufficient, though not necessary if other premises can result in X. Query whether the resulting decision X is suggestive that B, C or D are contributory reasons for X.

partners. A government official explains that her Christian faith incorporates biblical proscriptions of homosexual conduct; thus, she is reluctant to recognize any right to a government imprimatur on same-sex sexual relationships. A citizen puts his opposition more crisply, noting that by facilitating homosexual conduct and protecting it through marriage, America will suffer the same fate as Sodom, the city purportedly destroyed by God's wrath for its citizens' illicit conduct.¹²⁶ Accordingly, he holds up placards reading "God hates fags" outside legislative debates and court proceedings where same-sex unions are considered.¹²⁷ Both the official and the citizen later explain that: (1) marriage is constitutionally protected because of its procreative potential, an absent feature in a same-sex union; (2) Western civilization traditionally has not afforded the same rights to same-sex couples that it has to opposite-sex couples; (3) one man-one woman marriage rights are open to homosexuals the same as everyone else, so they are not treated unequally; and (4) there is no fundamental right to engage in homosexual sodomy,¹²⁸ so no corresponding marriage right should be recognized to insulate such conduct. Now both the official and the citizen have satisfied the wide view. The subsequent reasons drawing on political values support a conclusion that same-sex marriages are not constitutionally compelled.

At the outset, it is important to realize that "God hates fags" is *not* beyond the confines of what is allowed by the wide view. First, there are *no* limitations in the wide view on how such religious doctrines are expressed.¹²⁹ Rawls leaves that to the discretion of the speaker. Second, although Rawls limits the wide view to reasonable comprehensive *doctrines*, he does not prevent those doctrines from introducing unreasonable comments.¹³⁰ He admits that *even reasonable doctrines may sometimes take unreasonable positions*, though it appears that any conclusion is rendered reasonable as long as the proviso can be met for it.¹³¹

¹²⁶ See Genesis 13:13, 19:1-29.

¹²⁷ This example is not facetious. Fred Phelps, Sr., and the Westboro Baptist Church of Topeka, Kansas, have launched an anti-homosexual crusade ranging from debates over school curricula to domestic partnership benefits. *God Hates Fags*, at <http://www.godhatesfags.com/main/aboutwbc.html> (last visited 2/20/2002). Though Phelps and his followers usually make public demonstrations at churches, schools, and funerals of AIDS patients, the group also pickets government bodies when homosexual-related topics are under consideration. The organization's website at <http://www.godhatesfags.com> provides a thorough, rather frightening, account of its views.

¹²⁸ See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹²⁹ "However, there are no restrictions or requirements on how religious or secular doctrines are themselves to be expressed; these doctrines need not, for example, be by some standards logically correct, or open to rational appraisal, or evidentially supportable." IPRR, *supra* note 7, at 784.

¹³⁰ *Id.* at 798, n.80.

¹³¹ *Id.* "Of course, a comprehensive doctrine can be unreasonable on one or several issues without being simply unreasonable." *Id.*

Finally, this particular expression, though crude, does support a legal conclusion that is defensible by reasonable political values.¹³² For example, many fundamentalist religious doctrines hold that homosexual sex is a sin, yet many of these *are* reasonable ones that share in the overlapping consensus. Fundamentalists may not advocate stripping homosexuals of basic liberties or denying them an adequate share of primary goods; instead, these doctrines could merely oppose public affirmation or support for homosexual physical relations, which gay marriage would provide. Moreover, claims like “God hates fags,” though crude and potentially hurtful, do not treat homosexuals as less free or less equal when: (a) they claim religious truths that do not question *political* freedom and equality; and (b) the underlying position on same-sex marriage is supported by public reasons.

Thus, our hypothetical official abides by the idea of public reason, and our citizen fulfills the ideal of public reason; both offer public reasons sufficient to support the conclusion that there is no fundamental right to same-sex marriage. The fact that one religious citizen opposes gay marriage by quoting the Leviticus passage calling homosexual conduct an “abomination,”¹³³ and another adds rhetorical punch with “God hates fags,” does not matter for the wide view — both are permissible manifestations of religious doctrines if supported by sufficient public reasons.

Now here is the odd part. Rawls asserts that the nature and content of the justification for a decision rejecting a constitutional right for persons of the same sex to marry are *not* altered by the inclusion of Christian doctrine, Biblical references, and claims about God’s will. The claim is counterintuitive. First, the nature of the justification is altered because it now includes reasons beyond the realm of political values. Appeals to God’s law have a different “nature” than appeals to reasonable political values because only the latter are situated within the very consensus that gives legitimacy to constitutional decisions in the first place. The content of justification is changed as well. Although there are sufficient public reasons offered in the wide view, they do not erase the existence of religious reasons used to oppose same-sex marriage.

Apparently Rawls presumes that, as long as a conclusion is supported by public reasons, then the comprehensive views do not interfere with that justification. In other words, the wide view ensures that constitutional decisions are supported by public reasons; beyond that, it does not matter that nonpublic reasons are also

¹³² I assume that the subsequent reasons offered in the example are reasonable and therefore public.

¹³³ “Thou shalt not lie with mankind, as with womankind: it is abomination. Neither shalt thou lie with any beast to defile thyself therewith: neither shall any woman stand before a beast to lie down thereto: it is confusion.” *Leviticus* 18:22-23. “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood *shall be upon them*.” *Leviticus* 20:13.

introduced. The problem is that deliberative democracy has no apparatus to filter reasons that are unnecessary to a particular conclusion. Instead, reasons are simply put forward so that other citizens may evaluate them. There is no basis to think that citizens will not consider *all* the reasons given in a constitutional debate (*i.e.*, the religious beliefs and political values) as justifying a conclusion. And here is the rub: Public justification in a democracy depends solely on what is said and done in the course of deliberation. Unless citizens will not perceive the comprehensive doctrines they hear as part of the public reason for a decision, Rawls should not simply shed those doctrines just because underneath there was — all along — an adequate justification from the political values alone.

In a deliberative democracy, moreover, the justification given for any constitutional essential is not merely the rational connection between premises and conclusion. Legitimacy depends not only upon a rational connection between premises and conclusions, but also upon some level of consensus on those premises. Even the Supreme Court (Rawls's exemplar of public reason) must give reasons that not only justify a result in the case at hand, but also carry enough weight themselves to be sustained in future decisions. Once such premises no longer curry favor with a majority of the Court, the previous conclusion may be overruled. The same is generally true of constitutional decisions and legislation: Once the premises underlying the status quo are considered unreasonable, we can expect a move toward revision.

To sum up, legitimacy in a constitutional democracy stems not only from the validity of a conclusion (*i.e.*, that it follows logically from the premises), but also from the reasonableness of its premises (*i.e.*, that they can be accepted even if not affirmed as being true). Because democracy is deliberative and because there is freedom of speech, there is really no advance mechanism by which reasons are labeled public or non-public. Instead, citizens hear all the reasons. It is not enough for Rawls simply to declare that the justification in a public debate is unchanged by the presence of comprehensive doctrines — he would have explain why citizens and government officials to whom reasons are presented think the justification is the same with or without the comprehensive views. In other words, if the infusion of religious rhetoric changes the nature and bases upon which listeners justify a conclusion, then the justification itself *is* different.

B. *Amalgamated Reasons*

Rawls's work shows why the inclusion of comprehensive doctrines *does* have the ability to alter the nature of public justification. He tries to enable public discussion by limiting reasoning to rest on the sort of "truths" that are accepted or available to citizens generally.¹³⁴ Thus, it is surprising that Rawls would take the

¹³⁴ PL, *supra* note 2, at 225.

line that justification is adequate if a speaker includes some public reasons — even though other citizens are also exposed to comprehensive views that they cannot be expected to endorse. The very test of reasonableness is, in fact, the way arguments are perceived *by others*.¹³⁵ That is why Rawls refers to a criterion of reciprocity.

Here we can identify three potential limitations in citizens' capacity that belie Rawls's presumption that justification does not change with the addition of comprehensive doctrinal premises — distinction, severability, and justificatory logic. First, that a citizen using his criterion of reciprocity can figure out which of his arguments are reasonable and which of them depend on comprehensive views does *not* ensure that listeners in the public political forum will be able to distinguish between the two. Actually, two phenomena are at work: the inability of speakers to articulate the distinction and the inability of listeners to apprehend it. Rawls glosses over this problem by portraying the proviso as subsequent: distinctions seem likely and readily apparent in the abstract. It is doubtful that government officials and citizens will always present public reasons separately, however. Much more likely is a mix of political values and comprehensive views within one presentation.¹³⁶ And so there is even a third phenomenon worth identifying: the potential disparity between the distinction a speaker articulates between his public and his comprehensive doctrinal reasons and the distinction as listeners perceive it. In other words, both speaker and listener are trying to distinguish public reason from comprehensive views; they are just drawing a different line between the two. While this problem might not seem likely when the comprehensive views are somehow religious or blatantly non-public, it might be difficult to distinguish secular comprehensive philosophies (such as comprehensive liberalism or utilitarianism) from political values. In sum, the critique here is not that citizens completely lack the capacity to distinguish public reasons from comprehensive doctrines; instead, the problem is that they might not successfully articulate the distinction when speaking or perceive the distinction when listening. And it would seem vital to public reason that such distinctions not merely exist but that they be recognizable.

Beyond the initial problem of whether reasons can be properly distinguished when introduced into public debates, there is still a problem of severability. That is, assuming now that citizens do realize which reasons are not drawn on political values, what can they do with them? Here I am pressing on Rawls's claim that the

¹³⁵ "Public reason further asks of us that the balance of those values we hold to be reasonable in a particular case is a balance we sincerely think can be seen to be reasonable by others." *Id.* at 253.

¹³⁶ Notice that this problem is the opposite of the one that inheres when citizens do separate their public reasons from their introduction of comprehensive views. In that case, the dilemma is how to figure out when and if the public reasons will follow. Here, I identify the problem when everything is given in one lump contribution to the political debate.

nature of justification is not changed by the addition of comprehensive views. Perhaps the best way to frame my objection is to use his own example — rules of evidence.

The claim that public reason is somewhat akin to evidentiary rules enables Rawls to explain that sometimes we prefer decisions reached without appeals to the “whole truth.”¹³⁷ I agree with him that some evidence is kept out in order to secure rights and duties as well as to promote ideals.¹³⁸ The problem is that Rawls fails to grasp the underlying premise behind rules of evidence: we assume that all evidence that comes in will likely affect the outcome, so we keep some things out. That simple premise goes far in understanding the flaw in the wide view.

The exclusion of evidence procured by unconstitutional searches and seizures is an example. While the rationales for excluding such evidence have to do with respect for a defendant’s rights that were violated and deterrence of bad police practices, the operation of the exclusionary rule is premised on the notion that all evidence admitted has an impact on a jury’s decision. The implication, then, is that keeping some evidence out *does* change the decision somehow. Insofar as we can draw a lesson for public reason, it seems the nature and content of justification for a decision is in fact related to all the reasons offered.

More generally, some evidence is excluded because of its prejudicial effect. Prejudice occurs when certain evidence arouses sympathy or hostility without regard to its probative value. In addition, some evidence is prejudicial because it can mislead or confuse a jury. Finally, the nature of some evidence can distract a jury from the main issues under consideration or from other pieces of evidence.¹³⁹ One concrete example is the privilege against self-incrimination, premised on the belief that defendants may give an erroneous impression of guilt that prejudices their case without regard to the accuracy of their testimony.¹⁴⁰ Here we see not only that all evidence introduced has an effect, but also that some types of evidence inherently are inflammatory or emotion-stroking to a degree that eclipses their proper probative value.

The analogy to public reason is quite stark, and it raises an issue to which I shall return. Unreasonable positions or views can provoke hostility, like inflammatory evidence, if listeners focus on the premises that they cannot endorse. Conversely, religious rhetoric can evoke sympathy (like evidence that inordinately plays upon the emotions) in listeners who *do* in fact share the same comprehensive view. We should at least consider (though Rawls does not) whether comprehensive views

¹³⁷ PL, *supra* note 2, at 218.

¹³⁸ *See id.* at 219.

¹³⁹ FED. R. EVID. 403; 1 MCCORMICK ON EVIDENCE 780-81 (4th ed., John William Strong et al. eds., 1992).

¹⁴⁰ U.S. CONST. amend. V; 1 MCCORMICK ON EVIDENCE 431-35 (4th ed., John William Strong et al. eds., 1992).

have such prejudicial effects. If they distract attention from political values or arouse emotion that distorts citizens' perception of those values, then their very presence in public reason is detrimental. Evidence of limited admissibility is probably the closest analog to the wide view, since comprehensive reasons enter political dialogue but do not (in Rawls's estimation) affect the justification. Evidence often is admitted for one purpose but not for another in the same trial. In such cases, the general rule is to admit the evidence but to explicitly instruct a jury as to which questions it may take the evidence into account.¹⁴¹ Even if we concluded from limited admissibility that people do have the capacity to hear certain evidence for limited purposes without allowing it to taint their decisions on other questions, notice how the Rules operate. Explicit instruction is necessary to remind jurors that the admitted evidence should not affect their decision on issues for which the evidence was not admitted. A lesson for public reason, therefore, may be that citizens are capable of segregating their reasoning and applying reasons only to certain questions, but that such an endeavor requires some explicit instruction on how to do that. Again, the underlying assumption is that all reasons will be utilized when making a decision unless there is some directive not to do so.

The general theme underlying rules of evidence is our recognition that, when making a decision, human beings ordinarily take into account all reasons put before them. Only with explicit instruction do we expect people to ignore reasons put before them. However, even such instructions are insufficient where reasons are overly emotive or distracting. The proviso lacks any explicit identification of certain reasons as public to distinguish them from comprehensive views. Moreover, it fails to remind listeners who hear comprehensive views that these reasons should *not* be used to justify a particular result in a constitutional question. Insofar as comprehensive views themselves do not contain reasons that others can be expected to endorse, we should be especially mindful of their effect. That is, there may be comprehensive views that prejudice the reasoning process, because the portrait of the "whole truth" dwarfs the political values upon which decisions are to made.

The final problem with citizens' capacity is an amalgam of these other two. Rawls's claim that the *content* of justification remains the same with the introduction of comprehensive views depends upon the citizenry's ability to identify the exact fit between premises and conclusions — to know which reasons are necessary and/or sufficient to reach a particular decision. The identification of public reasons and the severability of non-public ones is necessary in order to comprehend the link between public reason and particular decisions — that is, one must cling to that which is public and put aside that which is not, if only to see exactly what premises justify a result. This is what should go on during jury deliberation and as government officials decide or citizens vote. But once a decision is reached, a related but slightly different capacity must be engaged.

¹⁴¹ See, e.g., FED. R. EVID. 105.

Citizens must be able to take a decision and isolate the reasoning behind it, for public reason is both dynamic and enduring.

We can think about the capacity to comprehend the logic of justification for constitutional essentials and basic liberties by considering what happens after fundamental decisions are made. The content of judicial opinions, for example, tracks a court's reasoning, which will be used by subsequent courts to decide future cases. The deliberation over a law affecting fundamental questions of justice will inform later efforts by agencies to administer the law, by courts to interpret it, and perhaps by citizens (often with their lawyers' advice) to comply with it. The ratification debates over a constitutional amendment can breathe a spirit into the rights that it secures; again, later interpretation will draw guidance from the public reason that produced the decision to amend. Lawmakers' and citizens' efforts to change or repeal a law affecting fundamental questions of justice will have to understand it as a product of prior public reason; their persuasive maneuvers will have to confront a set of public reasons that produced the status quo. When citizens decide whether to vote for an incumbent, they must ascertain the public reasons justifying (or not) her decisions while in office. In sum, the import of public reason does not dissipate once a decision is made; thus, it is crucial that people be capable of understanding the fit between premises and actions. Citizens must somehow come to know not only whether reasons are public or not, but also which ones are necessary and/or sufficient to justify what has been done.

Here is where the wide view of public reason becomes prickly. Not only must citizens engaged in a current debate be able to advocate for particular conclusions, but they must also be able to hone in on public reasons after the decision is reached in order to decipher the justification for the law that results. Given that law's legitimacy rests in a pedigree of procedures and reasons that draw on political conceptions of justice, it is essential that the link to such political values be both articulable at the time of decision and demonstrable afterwards. Why, then, should we worry about the wide view of public reason? One reason may be that, even if we believe that participants in political dialogue will be able identify public reasons, separate them from comprehensive views, and then link public reasons alone to a conclusion being urged, it might be much harder for subsequent citizens bound by such decisions to divorce a constitutional rule from the comprehensive doctrinal rhetoric that marked its passage. To return to my earlier example, it will be very difficult for homosexuals to accept a decision concluding that there is no right to same-sex marriage as a product of public reason alone if the reasoning process that yielded the decision is sprinkled with religious fundamentalist rhetoric. How can homosexuals recognize the legitimacy of a law (*i.e.*, recognize that they have been treated as free and equal citizens by a decision drawing on political values) when the decision was made by persons who at some point in the deliberation argued from a comprehensive view that homosexuality is an anathema?

Rawls makes a critical (and questionable) assumption when he says that a citizen acts reasonably by urging a particular result with a combination of comprehensive doctrines and also public reasons (to satisfy the proviso): He assumes that *other* citizens will find this mix of comprehensive and political arguments reasonable. While this might be the case, Rawls has seriously discounted the effect that certain controversial comprehensive views may have. The point here is that the justification of a constitutional conclusion has as much to do with the reasonableness of the premises offered as it does with the rational relationship between those premises and the conclusion itself. Whether the nature and content of the justification are reasonable depends — in a deliberative democracy — on the reaction of fellow citizens. We should be mindful that citizens engaged in the throes of life may not be able to distinguish and then sever nonpublic reasons as they deliberate. And either the salve of comforting comprehensive views or the sting of hostile ones may make it impossible to believe that those views played no part in the creation and operation of the current constitutional order.

C. Distinguishing Public Reason

Because I have questioned the impact of comprehensive views on the nature and content of democratic justification, I should say a word about what might be gained by excluding them. After all, Rawls admitted from the outset that placing limits on public reason must be justified either as being required by rights and duties or as advancing certain values or both.¹⁴² Public reason itself needs some instrumental justification, it seems, to explain why citizens should resist the impulse to decide fundamental matters based on visions of the whole truth.

It is worth remembering that an exclusive view of public reason does not prevent the public articulation of comprehensive views. It only keeps those reasons out of public political debates over questions of constitutional essentials and basic justice. Thus, the background culture and the media still provide public fora in which religious doctrines' commitment to political values can be demonstrated. The aim here is to think about why we might want the public political deliberation over constitutional essentials and fundamental rights to be conducted solely within the realm of shared political values.

The first advantage of an exclusive view is that it best enables the educative role of public reason. A debate relying exclusively on public reasons cannot help but educate its participants about the family of political conceptions of justice. While the wide view might allow the same public reasons to come in, the exclusive view has the advantage of focusing attention solely on that which may legitimately justify a particular result. Thus, all reasons given in the exclusive view can be seen as contributing to a decision, making the entire deliberation one justificatory realm for

¹⁴² PL, *supra* note 2, at 219.

whatever decision results. Public reason is easier to identify, then, and citizens will not be confused by the introduction of comprehensive views — non-premises, as it were — with the exclusive view. One comes to what public reason *is* and what public reasons *are* simply by paying attention to public political debates over fundamental questions.

But the educative role for public reason is not just in citizens' passive voyeurism of public debate. Because the exclusive view of public reason operates solely within shared political values, it will (and ought to) spark questions about what has been left out. When citizens hearing a debate over same-sex marriage wonder why no mention is made about the sinfulness of homosexuality, the answer turns out to teach the distinction between public reasons and their counterparts from comprehensive doctrines. Omitted reasons will not always be impermissible ones, of course. To press new reasons in an exclusive view of public reason requires that they draw on political values. The hope is that public reason will avoid stagnation by encouraging citizens and politicians to introduce fresh interpretations of political conceptions of justice. Thus, the exclusive view of public reason teaches citizens about the political values at the core of their social relation, and it also forces them to think about such values when they press novel additional reasons within their deliberative contributions.¹⁴³

Notice finally how these two educative features — the visible realm drawn exclusively on public reasons and the learned requirement that additional reasons must pass the reciprocity criterion before entering the realm — elucidate the distinction between public and nonpublic reason. In a mix of political values and religious doctrines, it is more difficult to grasp just what is or is not included in the justification of a constitutional result. The reason for the confusion is that a wide view of public reason looks almost exactly like debates over ordinary political questions and discourse in the background culture — a mix of political and comprehensive views.

Thus, related to its educative role is the exclusive view's tendency to distinguish itself from deliberative endeavors to which public reason does not apply. First, there is the contrast with the background culture. While a mix of political values and religions pervade the media and civic life, the exclusive view conducts itself quite differently: all reasons are those which others can be expected to endorse because they draw exclusive on political conceptions of justice. The wide of public political culture is hard to distinguish from the background culture, and the proviso does not help much because it merely produces additional public reasons whenever comprehensive views come in. But naturally, the background culture will have its own share of political values invoked, so there is a similar kind of mix. Granted, the background culture will have more in the way of nonpublic reason as private entities make their own decisions. But I am most concerned here

¹⁴³ See Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L. REV. 1459 (1996).

with the points at which the background culture, including mass media, takes up fundamental questions that are or will be confronted in the public political culture or forum.

It will be quite difficult for citizens to distinguish public political deliberation from background cultural discourse when the two take up the same subject, such as a constitutional right or fundamental liberty. This is due in part to the fact that what goes on in public political dialogue may be reported to citizens through the media, to which public reason limits do not apply. The problem is compounded, however, when public reason includes a panoply of comprehensive views within it. At that point, you have the same sorts of reasons in both the public political and the background cultures; moreover, the same media may be reporting on both. Consider, for example, newscasts that cover state legislative debates over domestic partnership laws, court challenges by gay couples asserting a constitutional right to marry, and churches debating whether to solemnize same-sex marriage. Certainly the wide view cannot be blamed for the overlap, but we should ask ourselves how public reason should operate given the convergence of issues and sources of citizens' information about political and cultural deliberation. Most significantly, the overlap between the background and the wide public political cultures, and the resulting similar mix of public reason and comprehensive views, may make it impossible to pinpoint the linkage anticipated by the proviso. It will be even harder to make the connection between doctrines and the public reasons that come in due course to buttress them.

The exclusive view of public reason responds to that concern by distinguishing itself from background discourse. The proviso is inadequate because it provides more reasons (public ones to accompany comprehensive ones) but does not demonstrate a distinct reasoning process. The exclusive reliance on public reasons differentiates the content of deliberation and thereby engages the citizenry solely on political grounds. This ensures that even where public political deliberation overlaps with the background culture or is reported by the media, citizens might at least notice a difference and come to see the value of restricting reason.¹⁴⁴

A related point can be made about ordinary political issues. Recall that public reason only applies when matters of constitutional import or basic justice are at stake. As for ordinary political questions, there is no restriction on comprehensive views. The virtue of the exclusive view may be that a pronounced difference in the deliberative process — no comprehensive views or unreasonable positions at all — will redouble attention and seriousness to the issues at hand. In other words, a debate conducted solely in terms of shared political values may remind citizens as well as those in government that issues of the highest order are at play. After all, we restrict ourselves to reasons drawn from shared political values because we

¹⁴⁴ Consider how the news media can report facts or opinions about a defendant even though such information is inadmissible at his trial.

recognize that our decision will add something new or different to the very constitutional order from which we draw those values. A certain reverence hopefully inheres in such a discussion. Those fearful of an exclusive view of public reason should notice two features. First, the subjects covered by public reason (constitutional essentials and basic matters of justice) can and will be discussed in the background culture as well as assessed privately. Comprehensive views enter both of those types of consideration. Second, such views may be articulated throughout ordinary political discourse. The idea is simply to restrict reason to political values when we touch issues at the core of our social compact. Next, I take up reasons why the wide view invites resentment from citizens in a public forum.

V. THE LISTENERS' DILEMMA IN THE WIDE VIEW

A. *Sitting Through Sermons*

To begin to understand why the wide view of public reason may breed more aggravation than cooperation, it is first necessary to consider Rawls's duty of civility. Restricting one's reasons to publicly accessible political values is one aspect of the duty;¹⁴⁵ satisfaction of the proviso after introducing a comprehensive view is another.¹⁴⁶ Civility "also involves a willingness to listen to others"¹⁴⁷

It is the last feature that I wish to explore here. "Citizens learn and profit from debate and argument," Rawls assures us.¹⁴⁸ Specifically, he has hopes for what can be learned from the introduction of comprehensive doctrines. First, he argues that citizens will recognize the roots of other doctrines' allegiance to the political conception.¹⁴⁹ I have already explained why Rawls assumes more than his proviso requires: The subsequent introduction of public reasons does not point out where a doctrine itself either affirms shared political values or joins the overlapping consensus on political values. Second, he argues that the fact that doctrines accept the proviso before they enter a debate is a public manifestation of their commitment to constitutional democracy.¹⁵⁰ Even if doctrines do accept the proviso, though, there is really no public display of that commitment until the proviso is actually fulfilled, and even then, it is not so much the commitment that is articulated as it is a set of more reasons. Thus, there are serious questions whether the wide view has the potential Rawls attributes to it.

¹⁴⁵ PL, *supra* note 2, at 217-18.

¹⁴⁶ IPRR, *supra* note 7, at 784.

¹⁴⁷ PL, *supra* note 2, at 217.

¹⁴⁸ IPRR, *supra* note 7, at 799.

¹⁴⁹ *Id.* at 784.

¹⁵⁰ *Id.* at 785.

Even more troubling, the duty of civility actually becomes a duty to listen to comprehensive views that one does not share.¹⁵¹ The background culture gives citizens the chance to learn more about different doctrines and views, but the wide view attaches a moral obligation to be exposed to them. So while no citizen is morally obliged to subject herself to unreasonable views in civic life, the public political culture does ask her to listen.¹⁵² One could argue that if liberty of conscience and disestablishment mean anything, then citizens should be able to participate in a constitutional debate without being subjected to another person's comprehensive views. In other words, with the duty to listen should come assurance that there will be no claims of "truth" tossed about, the idea being that fundamental questions are those on which all citizens have an enhanced interest in participation or at least awareness. It is precisely then that they ought to be free from an atmosphere of competing truths.

Basically, it is difficult to distinguish proselytizing from public reasoning. In a constitutional debate, citizens are not merely listing reasons; they are trying to persuade one another to accept those reasons. When comprehensive doctrines are introduced into such public deliberation, there is a serious chance that listeners will perceive those views as attempts to win support for the doctrine itself as well as for the particular constitutional conclusion being urged. The fact that there are no limits on the way these doctrines are presented only increases the chances of this problem. The wide view allows, if not encourages, doctrines to be "preachy," and fellow citizens are stuck with a duty to listen.

B. *Keeping Believers in Line*

To these problems, Rawls offers incentives. Comprehensive doctrines "will normally have practical reasons for wanting to make their views acceptable to a broader audience," so it is up to the presenters to decide "how they want what they say to be taken."¹⁵³ There are no requirements to make comprehensive views sound couth within Rawls's moral duty to follow the wide view.¹⁵⁴ He misses the fact that the introduction of comprehensive views will probably not be used to win over opponents.

Reasons that others may be expected to accept must be offered at some point to satisfy the proviso. Those reasons are the ones that can persuade persons who do not share the same doctrine. So why introduce the comprehensive doctrine at all? Rawls's only answer is that the doctrine shows allegiance to political values.¹⁵⁵

¹⁵¹ See *id.* at 799.

¹⁵² *Id.* at 800.

¹⁵³ *Id.* at 784.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 785.

That makes little sense — reliance on political values alone would be the best indicator that one's comprehensive view is not dictating one's position. Thus, I would suggest that the real reason comprehensive doctrines will usually come in is to galvanize support for the doctrine itself as well as its desired conclusion.

The doctrine's reasons only carry persuasive force for those individuals who recognize the authority of the doctrine itself. By introducing those reasons into a constitutional debate, advocates use the leverage of shared truths to ensure that fellow adherents of the doctrine do not allow themselves to be persuaded by another side's political values. This is a real possibility because presumably those political values on the other side are reasonable ones.

Insofar as the doctrine is introduced with non-adherents in mind, one could make the opposite assumption from Rawls's. Because there is only a slim chance that these other citizens will be motivated by a doctrine they do not share, one may as well throw out all the fire and brimstone one can. If nothing else, such reasons might scare an undecided citizen into agreement. The "lesson" from Sodom is an example of that approach.

My problem with the wide view, then, is that it injects reasons into a constitutional debate that could stunt a citizen's ability to reorder her values. In the case of religion, for example, some adherents might be willing to accept something like gay rights or abortion rights based on the deliberation of public political values, but the introduction of comprehensive views, *whether intentionally or not*, manipulates that process because it puts the fear of God (so to speak) into the discussion. Because there may be viable political values on both sides of a debate, comprehensive reasons will make one ordering of political values seem more reasonable to the citizen who accepts the doctrine's authority.¹⁵⁶ The wide view will circumvent Rawls's admonition that in evenly balanced political debates, comprehensive doctrines ought not tip the balance.¹⁵⁷ This is yet another reason why I see the wide view as a potential alteration of the content and nature of public justification.

C. *Irrefutable Arguments*

¹⁵⁶ See PL, *supra* note 2, at lv.

The same holds for public reason: if when stand-offs occur, citizens invoke the grounding reasons of their comprehensive views, then the principle of reciprocity is violated From the point of view of public reason citizens should simply vote for the ordering of political values they sincerely think the most reasonable.

Id.

¹⁵⁷ *Id.*

One final element of the listeners' dilemma is an inability to publicly reject the comprehensive doctrines to which they are exposed in the wide view: "Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity."¹⁵⁸ Because the wide view itself permits the inclusion of comprehensive doctrines, public reason is not violated. Thus, religious reasons appear immune from public criticism. This puts listeners in a bind, because normally "[w]hen citizens deliberate, they exchange views and *debate their supporting reasons* concerning public political questions."¹⁵⁹ Not only must listeners figure out which reasons require subsequent justification through the proviso, but they must also be careful not to attack those reasons in the meantime. The tension here results from public reason's deliberative dimension. At the very least, one would think that a citizen has a right (if not an obligation) to tell others that she finds their reasons unreasonable. This might mean that the others have advocated positions that do not treat fellow citizens as free and equal, but it might also be because the reasons were premised on a comprehensive doctrine. Recall the problem noted earlier, that citizens have no way to know whether comprehensive views will later be buttressed by political values, so they cannot know when to tune out an unreasonable presentation. It is impossible to know whether a doctrine is "incompatible with the essentials of public reason,"¹⁶⁰ though, until one sees whether the proviso is satisfied. So how long must citizens wait to criticize a doctrine? When can they be sure that the proviso will not be met? Perhaps if Rawls permitted the criticism of any reason or doctrine put forward in a public political debate over constitutional essentials, then citizens' complaints might spur speakers to offer up public reasons and satisfy the proviso. As it stands, however, the wide view invites reasons that cannot be criticized into public political debates, forcing citizens to listen to truths they do not share and depriving them of the ability to attack the veracity of those supposed truths.

It is this aspect of the listeners' dilemma that will prove most corrosive to public reason. Whereas the background culture allows for comprehensive doctrines to battle it out with criticism and competing truths, the wide public political culture will become a haven where controversial truths can be floated without scrutiny. Thus, what under the exclusive view could be a justificatory realm comprised solely of political conceptions of justice will become cluttered by comprehensive truths that supposedly have no operative role in the justification process. Debates over fundamentals are not the place where doctrines should be spelling out their connection to political values. We need to keep participants focused on the challenge at hand — given the political values we honor, what result? That process

¹⁵⁸ IPRR, *supra* note 7, at 766.

¹⁵⁹ *Id.* at 772 (emphasis added).

¹⁶⁰ *Id.* at 766; see also *supra* text accompanying note 158.

will be obfuscated should citizens suddenly embark on discussions of how their view of the whole truth coincides with some of these values. Worse than cluttered, the debates may become preachy, for as long as there are public reasons sufficient to support a conclusion, Rawls puts no limits on how doctrines are promoted within public deliberation. And finally, where there is no hope of either winning on the issue or convincing others that one's comprehensive view is sound, doctrines may inject truths into political debates in order to "remind" fellow believers. Thus, the public political culture transforms from a method of choosing a direction for constitutional justice into a place where citizens advance goals unrelated to the particular question of what course to follow given existing political values. While some of these other agendas might be laudable, as Rawls portrays the efforts to demonstrate allegiance to democracy and quell opponents' doubts, others may not be. We should think carefully about public reason's mission when it becomes a locus for airing beliefs rather than persuading with political values.

VI. OTHER VERSIONS OF PUBLIC REASON

Having considered problems with Rawls's wide view, it is now worthwhile to try to defend the exclusive view against other scholars' versions of public reason. As will become clear, these ideals are as (or even more) permissive than Rawls, allowing comprehensive views into public political deliberation. The upshot is that my argument thus far in favor of keeping comprehensive views out of the debates over fundamental matters turns out to be the outlying argument.

Notably absent from these few versions I highlight are those versions that call for no restraint whatsoever on the introduction of religious reasons and comprehensive views in democratic deliberation. There are two reasons for the absence, neither of which is the notion that I am trying to make things easy for myself. First and foremost, I think those arguments require and deserve more than an addendum to one's primary argument. My sense is that the differences between me and those scholars is one of kind rather than one of degree. But as will become clear in my discussion of Michael Perry *infra*, my preference for the exclusive view is not borne out of animosity toward religion. The second and related reason is that my agenda here has been to persuade liberals who share many of Rawls's premises to consider the pitfalls of wide and inclusive views of public reason. The scholars below represent that sort of audience. In sum, I will let my argument loose for a while to see if it has traction, at least with those who share my impulses, before I endeavor to change the minds of those who think my position hostile to religion or simply wrongheaded.

A. Audi's *Secular Justification*

Robert Audi's vision is somewhat akin to Rawls's in that he wants to ensure that the coercive power of the state is wielded only when based on proper reasons.¹⁶¹ The right kind of reasons for Audi are secular ones, or those not dependent upon the existence of God. Audian public reason is really an outgrowth of the separation of church and state. The first component of his view is that one has a *prima facie* moral obligation not to support restrictions on conduct without an adequate secular rationale that one is willing to articulate. The second *prima facie* obligation requires one not to advocate restrictions on conduct unless one is sufficiently motivated by adequate secular reason. The first is a justification principle that is more important than the second, a virtue principle. The more restrictive of human conduct the law in question is, the stronger the two obligations become. Like Rawls, Audi holds that citizens are less constrained than government officials, who are less constrained than judges, but his ideal applies to all conduct restricting laws, not just constitutional and basic justice questions. Audi recently offered two interesting discourse principles that comprise a respectful civic voice. First, one should avoid making a sociopolitical issue appear to be a religious issue. Second, one should seek to frame any religious treatment of sociopolitical issues in a way that avoids polarization. Moderate discourse is always to be preferred.¹⁶²

Despite his attempt to justify law on secular, non-religious grounds, he is more permissive than Rawls in terms of what religious language may be introduced. Comprehensive views "may figure crucially both evidentially and motivationally, and both in general public discussion and in advocacy and support of laws and public policies, provided (evidentially) adequate secular reasons play a sufficiently important role."¹⁶³ Part of Audi's reluctance to purge religious language comes from what he sees as a wide variety of usage: explicit vs. implicit religious references; mixed vs. pure religious discourse; persuasive vs. descriptive appeals; etc. These various uses are not amenable to a rule for the extent to which such religious language is consistent with civic virtue. Thus, secular rationales must exist, but they can be supplemented by religious reasons.

Unlike Rawls, Audi is mainly concerned with underlying justifications with much less regard to public rationales put forward in deliberation. Though it is generally best to keep discussion secular, like Rawls he sees a value in full candor,

¹⁶¹ See ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE* (1997) [hereinafter AUDI & WOLTERSTORFF]; Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677 (1993) [hereinafter Audi, *The Place of Religious Argument*]; Robert Audi, *Religious Values, Political Action, and Civic Discourse*, 75 IND. L. J. 273 (2000) [hereinafter Audi, *Religious Values*]. These recent works lay out his version of public reason. His earlier work on the subject includes Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989).

¹⁶² Audi, *Religious Values*, *supra* note 161, at 291.

¹⁶³ AUDI & WOLTERSTORFF, *supra* note 161, at 35.

whereby all one's reasons are disclosed. Interestingly, though, one's explanations are relatively unimportant for Audi:

The principles of secular rationale and motivation may . . . be adhered to without being stated or even consciously endorsed and may be minimally satisfied even by those who have never heard of them or would reject them. It is the reasons one has and one is motivated by that matter most, not what one would say about one's reasons or about the principles those reasons should satisfy.¹⁶⁴

Thus, Audi's general approval of deliberation according to secular principles turns out to be a nice but unnecessary gloss on what he sees as the important locus of secular reasoning — citizens' internal decision-making.

Many features of Audian public reasoning are troubling. First, I find the public/non-public distinction much more helpful and less "religion-phobic" than the religious/secular one. The virtue of an exclusive view of the Rawlsian version is that it highlights the common fodder of social reason: shared political conceptions of justice. Religious reasons are not excluded because they draw from a tradition that recognizes God; rather, all comprehensive views are excluded because: (a) they draw on doctrines that others do not share and could not reasonably be expected to endorse; and conversely, (b) they do not draw on the shared political values and modes of reasoning that are common to the entire polity.

A serious problem lies in Audi's willingness to allow religious reasons to play an evidential role in justifying law (by which he means reasons in favor of one proposal or another). Unlike Rawls, who thinks that such reasons play no operative role where sufficient public reason exists, Audi allows for mutual justification requiring only that "secular reasons play a sufficiently important role."¹⁶⁵ At first, it seems that I should applaud Audi for recognizing what Rawls does not: that all reasons introduced factor into the eventual justification of law. But as becomes clear, Audi sees the justification of law stemming not from what is said in deliberation but from the reasons why citizens and government officials do what they do. So while Rawls locates the justification by public reason in those political values expressed in public deliberation (but misses the fact that comprehensive views introduced are also part of that same deliberation and ensuing justification), Audi locates the justification of law in private secular reasons motivating individuals (and misses the fact that public manifestations such as voting and deliberative discourse are the only parts of reason the citizenry can see and hear, and thereby recognize). What Rawls and Audi have in common is that they misunderstand that to which citizens look when seeking out the basis for, and the

¹⁶⁴ *Id.* at 53.

¹⁶⁵ *Id.* at 35.

justification of, law. Rawls assumes citizens can filter out all the reasons they do not need. Audi assumes citizens can peer into one another's individual rationales to be sure there is a secular nugget within. Though he includes in his obligation a willingness to articulate secular reasons, that expression's role in reason serves mainly to show compliance.¹⁶⁶ He either misses or undervalues the constructive role of deliberation and debate, where reasons are offered up and eventually crystallize into the justification for a decision.

This assumes, of course, that we can even read Audi to situate democratic justification in any visible, deliberative pedigree at all. Not surprisingly, my final criticism focuses on his claim that internal motivations rather than public explanations are what matter most. First, I can hardly refer to Audi's vision as a version of *public* reason because his aim is to secularize reasoning rather than publicize it. His secular rationale and motivation is not much of an attribute of democratic citizenship to which all should aspire; it can be satisfied unwittingly even by those who would prefer not to. I do not see how Audi believes that citizens can repudiate those who fail to abide by secular reasoning if in fact they had no basis to expect that such reasoning be openly and accurately articulated. And if what is said matters far less than what is meant or done, then why should citizens articulate their secular reasons even when they are challenged to do so by others?

Here we revisit the need to isolate the reasons necessary and/or sufficient to justify a particular result. Rawls made the (incorrect) assumption that the content of justification would not change with the introduction of comprehensive views accompanying public reasons. Audi makes a different, though I think equally flawed, assumption: that the reasons and justification of law are not dependent on what is articulated in the public sphere — citizens and government actors need only be sure that they are moved by their own secular reasons. As I tried to articulate in Part IV-B, deliberation by public reason not only plays a role during the deliberation itself (to help convince people how they should order political values to choose a course of action), but also serves as an enduring body of reasons to which citizens can refer during other debates now and in the future.¹⁶⁷ Audi is wrong about the minimal importance of what is *said* because legitimate reasons (public or secular) draw upon values, principles and reasons (political or simply non-religious) that have been articulated before. The deliberation through which we produce law not only allows us to justify and interpret that particular law, but also adds to the collective body of legitimate public reasons that may be invoked in the future. Understanding what are proper secular rationales and motives would seem necessary in an Audian regime, so what is said ought to shape what is (and will be)

¹⁶⁶ Audi allows for citizens to repudiate those who support government restrictions without an adequate secular rationale and motivation. Audi, *Religious Values*, *supra* note 161, at 289.

¹⁶⁷ See *supra* notes 134-41 and accompanying text.

done and why. Audi's focus on what is done rather than what is said, and his lackadaisical attitude toward a disparity between the two, demonstrate a misunderstanding of the value of deliberation. It is akin to Rawls's failure to see that the inclusion of comprehensive views in current discussions makes it difficult to decipher the public reasons supporting a conclusion after the decision stage.¹⁶⁸

B. *Greenawalt's Compromises*

Kent Greenawalt is one of the most prolific writers on the subject of public reason. His book *Private Consciences and Public Reasons* offers a most thorough survey of the spectrum of ideas about public reason — far more complete than the few versions I isolate here.¹⁶⁹ In addition, Greenawalt has articulated his own "intermediate position" on public reason.¹⁷⁰ While Greenawalt should be credited for his excellent synthesis of competing ideas about public reasoning, his own particular prescription has some problems.

Most significant about his view is the conclusion that liberalism itself provides no prescriptive theory. Greenawalt contends that the degree of self-restraint appropriate for public reason (*i.e.*, the degree to which citizens should refrain from relying upon or articulating certain private reasons) depends on each society's own history and current composition. Not conducive to either general rules of restraint or a total absence of restraint, the United States, in Greenawalt's view, properly embraces expectations and norms of restraint without making them too rigid.

An interesting point in Greenawalt's argument is that restraint in advocacy is enforceable because citizens and legislators can check one another's use of comprehensive views. Conversely, no one can be sure about private, underlying motivations and decision mechanisms; thus, reciprocity is difficult to ensure when it comes to the actual grounds of one another's judgment. Adding to this policing problem, Greenawalt concedes that it is generally quite tough to free one's mind from the push of comprehensive views.¹⁷¹

His version of public reason differs from Rawls's in two key respects. First, he would want public reasons to be used for political debate, while allowing

¹⁶⁸ On that last point, we can draw one helpful lesson from Professor Audi. Of religious discourse in the public realm, he writes that "intonation and context are crucial both for understanding the speaker (or writer) and for judging the appropriateness of the discourse." Audi, *Religious Values*, *supra* note 161, at 286.

¹⁶⁹ See KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995) [hereinafter GREENAWALT, *PRIVATE CONSCIENCES*]. My discussion here also draws on Kent Greenawalt, *Some Problems with Public Reason in John Rawls's Political Liberalism*, 28 LOY. L.A. L. REV. 1303 (1995). His most significant earlier treatment can be found in KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

¹⁷⁰ GREENAWALT, *PRIVATE CONSCIENCES*, *supra* note 169, at vii.

¹⁷¹ This is basically the opposite of Audi's general approach.

comprehensive doctrines to play an internal role in individual citizens', and even legislators', decision-making. In other words, Greenawalt is willing to accept some disparity between the reasons advanced in public deliberation and the reasons privately motivating those public positions. Rawls instead opted for sincerity, hoping that the public reasons offered in the political forum and culture would be sufficient to justify and motivate one's position.

Second, Greenawalt rejects different public reason approaches for fundamental questions and ordinary political matters; he thinks the same norm should apply to both types of issues. He doubts the feasibility of citizens employing separate reasoning methods. Moreover, he argues rather convincingly that certain political questions may not themselves be constitutional essentials, but would seriously implicate them; it seems arbitrary to apply different reasons to these than to the decisions over essentials themselves.

That said, Greenawalt offers a fairly straightforward set of principles. Judges should conduct their reasoning and write their opinions solely in terms of public reason. As for government actors and citizens, there is a distinction between discourse and judgment. Legislators should conduct their arguments and debates mainly with public reason, avoiding the use of premises derived from comprehensive views. Including comprehensive views like religion in political debates rarely helps decide an issue, and it does not produce a much deeper understanding of religion, Greenawalt contends. Rhetoric using religious references and imagery is permitted, though. The aim is simply to focus arguments on public reason, though legislators may sometimes explain how comprehensive views affect their thinking. While he concentrates on legislators, Greenawalt does mention that administrators and executive officials should feel even more constrained to use the discourse of public reason because they speak for all the people in a fuller sense than representatives.

As for legislators' actual determinations, the problem is more complex because constituents may be advancing their own comprehensive views. Greenawalt will only say that a legislator "probably should afford more weight" to citizens' arguments cast in public reason than in comprehensive views.¹⁷² As for reliance on their own comprehensive views, he thinks legislators should conduct themselves more like judges and rely on public reasons. But again he is noncommittal, allowing legislators to decide for themselves when it is more appropriate to rely in part on comprehensive views.

Citizens' judgment need not be based solely on public reasons, Greenawalt concludes. To require otherwise would be too oppressive of religious liberty. Besides, citizens have "an immeasurably slight effect on political life."¹⁷³ These factors alone would be enough for Greenawalt to abandon any restriction on

¹⁷² GREENAWALT, *PRIVATE CONSCIENCES*, *supra* note 169, at 161.

¹⁷³ *Id.* at 160.

citizens' motivations; the feasibility and reciprocity concerns mentioned earlier only secure him in the view that citizens should be able to decide based on all of their reasons.

As for citizens' discourse, there are also few limits. Like Rawls, Greenawalt would secure the use of any compelling reasons in background cultural discussion. Even when citizens make their views known to representatives, the unlikelihood that those opinions will be actively engaged, rather than duly noted, makes for little worry about their form. When immersed in public political debate, Greenawalt thinks ordinary citizens should use public reasons, but self-restraint is not that important.

A tad more pressing is the case for what he calls "quasi-public citizens" — people like media commentators, editors, CEOs, heads of large civic organizations, some law professors, and the like. These are citizens who are more sophisticated in their understanding of public life, and who are familiar with settings where they need to appeal to less than their own full feelings. There is some modicum of responsibility to use public reason in their contribution to political dialogue, but even Greenawalt finds that modicum debatable. Self-restraint for quasi-public citizens is less important than government officials, but it matters more than for the "ordinary Joes" of society.

On the whole, Kent Greenawalt demonstrates the "perils of moderation."¹⁷⁴ His normative approach is so thoroughly determined by his descriptive account of current American deliberative norms that he inadequately theorizes the benefits and burdens of his public reason schema. His major premise explains the convergence between *what is* and *what ought to be*: the notion that public reason norms depend on historical and social experience. In a way, Greenawalt's claim is like Rawls's early explanation that a more inclusive view of public reason provided flexibility.¹⁷⁵ The idea was that, while a well-ordered society might be able to abide by public reasons exclusively, unjust societies or those marked by fundamental disagreement over basic liberties might need to invoke comprehensive views.¹⁷⁶

While the contingency and flexibility in Greenawalt and Rawls initially sounds appealing, current practices within a society say very little about what produces consensus on political values, what fosters allegiance to those values, what quells doubt about others' allegiance, or what strengthens the commitment to public reasoning in general. If a society is well-ordered, for example, Rawls thinks it appropriate for it to invoke primarily public reasons. But such a society is well-

¹⁷⁴ I borrow this phrase from the title of my colleague's recent article on the freedom of association. See Richard Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 SO. CAL. L. REV. 119, 119 (2000).

¹⁷⁵ "[T]he appropriate limits of public reason vary depending on historical and social conditions." PL, *supra* note 2, at 251.

¹⁷⁶ See *id.* at 248-52.

ordered because it has some consensus on political conceptions of justice, so really this society might be *least* threatened by the inclusion of comprehensive views. Conversely, a society marked by the lack of such consensus or by deep divisions over constitutional essentials might be *most* threatened by the inclusion of comprehensive views because its political conceptions of justice do not carry enough force to justify conclusions on their own. Thus, there is a more serious chance that comprehensive views are figuring into the justification of some decisions. This is most frightening for such a divisive society, because a common reason for the inability to coalesce around an overlapping consensus of political values is the recalcitrance of incompatible comprehensive doctrines. As such, there would be much to fear with the introduction of comprehensive views during fundamental decision-making deliberation in societies where anti-miscegenation laws and the subordination of women are justified by Biblical mandate or where religions coexist in a mere *modus vivendi*, always hoping to wield political control. In sum, those doctrines may either be partial explanations justifying current unjust conditions (as in the former societies) or they may be the very heart of profound disagreement (as in the latter).

Having a debate over constitutional essentials and matters of basic justice may *need* to be exclusively based on public reason if these societies are ever to move past the divisions that are (if only in part) products of attitudes molded by comprehensive views. Thus, it is not clear that Rawls's impulses about the forms of public reason most appropriate for well-ordered and not well-ordered societies are right — they may be exactly wrong. Whether Rawls's estimation of the needs of different societies or my own is closer to the mark, the point is that the status of current agreement or disagreement over fundamentals is indeterminate as to the selection of an appropriate ideal of public reason.

With Greenawalt, the issue gets squishier because: (a) he simply wants to link public reason to whatever practices a society has successfully employed; and (b) his ideal of public reason is a composite of noncommittal norms and expectations, rather than concrete ideal rules to which democracies should aspire. The problem here is slightly different from that in Rawls, who assumed that the inclusion of more comprehensive views better eases doubt about mutual allegiance to political values. For Greenawalt, we must ask whether the ideal of public reason should be constructed around a society's experience, *even assuming* that it is well-ordered and has a developed set of shared political values. This seems the most appropriate characterization of the United States right now, so the inquiry can focus on why we should (or should not) construct an ideal based on our current deliberative inclinations.¹⁷⁷

¹⁷⁷ See GREENAWALT, *PRIVATE CONSCIENCES*, *supra* note 169, at 6-7 ("I argue in favor of principles of restraint that correspond substantially with those that I claim now exist . . .").

The major problem with Greenawalt's position is that he assumes Americans are both pleased and proud of the public reason norms that have developed, especially the inclusion of religion. This seems questionable, even on his own empirical evidence. For example, Greenawalt notes the general absence of explicit religious reasons given by government officials, despite the strong likelihood that religious motivations drive some of their positions.¹⁷⁸ It is from this state of the nation that Greenawalt will later argue for a nearly exclusive idea of public reason for government discourse, but a slippery inclusive view for officials' internal choices on positions. He cites a convention that has emerged, arguing that disputes by these officials should be argued in nonreligious terms.

Unfortunately, current norms are not as revealing as he would like them to be. For while the reluctance to invoke comprehensive views in government discourse may reflect uneasiness about their place there, it might also suggest that Americans really doubt whether such reason should have a motivational force at all. In other words, we might be displeased with religious argument whenever it influences government officials, but only see evidence of that influence when it comes out in deliberation. In other words, Greenawalt's normative conclusion is belied by his own point that the use of public reason in debates is enforceable, whereas its private influence is not. Americans might prefer norms that kept comprehensive views out of both deliberation and the motivation of their officials; the primary insistence in the deliberative sphere is merely a product of the greater ease in enforcement. In fact, a common desire to purge comprehensive views from both the dialogic and the evidential or motivational realms of public reason would best explain the reluctance of government officials to use religious arguments despite broad-based religious constituencies — officials realize that citizens prefer such arguments be kept out of the decision-making process.

The point here is just to suggest that current practices should not, and probably do not, have normative appeal solely because they have proved workable. The failure of Greenawalt's explanation is that it fails to account for the possibility that current norms do not exist because they represent what is best or what we most think we ought to be doing. Instead, I would say that current practices represent how close we have come to ideal deliberation so far. In other words, current practices might reveal our impulses and how we operate on them, but they say much less about our aspirations. While I agree with Greenawalt that American public reason and acceptance of comprehensive views in political debates is nuanced, and while I concede that our history has brought us to where we are, the development and existence of nuance does not make it the desirable normative end. *That we have come to a point (and that it is not bad) does not mean that where we are is where we sought or ought to be.*

We should now look at two disparities that Greenawalt accepts. First,

¹⁷⁸ *Id.* at 153-56.

legislators and citizens are affected much differently by the force of his public reason ideal. Because citizens' contribution to political decisions is so slight, he feels safer in allowing comprehensive views to shape their positions and most of their expression. The problem is that official government discourse, like legislative debate, works in tandem with the rest of the public political culture. Legislators are approached by individual constituents, interest groups, lobbyists, and other legislators, but they are also influenced by the citizenry indirectly. Citizens' arguments collectively evoke public opinion, which shapes legislators' positions on different issues. In turn, most citizen participation in public deliberation is shaped by what government officials say and do. Citizens know or can guess officials' positions based on what they have voted for in the past or the statements they have made in prior debates. Moreover, one group of citizens can gauge a legislators' interests based on the speech of her constituents because they too know to whom she must answer. The lesson is that political deliberation is symbiotic; the discourse of officials and citizens both aim at and shape one another.

If that is true, then it makes much less sense to have an ideal of public reason that operates too differently for legislators than it does for citizens. There should be some space where the two can invoke and be exposed to the same types of arguments, because we know that both the dialogue and the motivations of one impact the other. The exclusive view of public reason supplies such fertile persuasive ground. First, it asks both legislators and citizens to frame arguments in debates over fundamentals in such a way as to: (a) draw on shared political values; (b) avoid comprehensive views that are inaccessible by those who do not share the same doctrine; and (c) utilize a criterion of reciprocity so that what is said may reasonably be expected to have traction with others. Because the values are shared, both citizens and legislators can understand and respect them. Because ultimate decisions over constitutional essentials and matters of basic justice both protect and constrain government officials and citizens, the same reasons should eventually be put forward by and for all. By reserving the demands of public reason to debates over such fundamental matters, those debates are special — like constitutional conventions to which we are all invited. By entering, we take on responsibilities for the good of the polity.

Thus, I would reject Greenawalt's notion that people become quasi-public citizens (bound stronger by public reason norms) solely by the high-profile occupations they hold. As a descriptive matter, I think it much fairer to say that citizens take on a quasi-public character based on the issues on which they advocate and forums in which they do so. If that is right, then any citizen entering the public political deliberation over constitutional essentials can and should be bound by Greenawalt's quasi-public norms. As a normative matter, I find his discussion of quasi-public citizens offensively elitist. Why does having a public life make one more likely to understand the demands of limited reason? While being the head of

a large organization might force a person to act and speak politically correct — by which I mean appease, rather than alienate, others so as to curry favor — there is little reason to believe that the ability to limit one's speech for self-interested purposes translates into some better capacity for limiting that speech for the sake of a collective ideal. And public figures from Rush Limbaugh to Howard Stern tell me that gaining a media audience hardly breeds argumentative sophistication. In short, I think a version of public reason that exalts or restrains some citizen contributions rather than others falls prey to the notion that there is something about exclusive versions of public reason that is beyond the bounds of the common man. Legislators, judges, and quasi-public citizens were all, and will again become, ordinary citizens. While their roles may lend themselves to restraint on reasons, there is nothing different about those persons that makes them different from the citizenry. Thus, a change in the expectations of citizenship in one role (as advocate in public political debate over a constitutional essential or matter of basic justice) is not much more to ask and should not be all that different.

The second disparity in Greenawalt's view is that public reasons voiced in government debates do not link up with actual motivations insofar as officials take comprehensive views into account. The simple point is that if one finds such disparity troubling, the exclusive view is the better ideal because it asks that the reasons why one supports a position in a constitutional debate, and the reasons one articulates for that position, both be based on public reasons. Of course, the bite of the exclusive view is that it would keep all comprehensive views out of such debates. As for a deeper claim that comprehensive views should have no place in one's internal motivation, there are challenges. After all, it does seem quite difficult for citizens to purge their doctrines from their own internal thought processes. I find Rawls's approach convincing: One's private thoughts are like the background culture where all reasons come in, though one should aim for sincerity in public deliberation.

My way out of this puzzle is to re-emphasize the need for exclusive public reason as the ideal for both citizens and government officials. All deliberation over constitutional essentials and matters of basic justice then resembles a burden no heavier than jury duty: relying only on facts presented at trial and the law as it has been presented. Jurors often reach verdicts they do not "like" by using the rules and facts they are given. This solves the problem of a discrepancy between the host of internal motives and the limited set of public reasons. While it may often be the case that the private motives shaped by one's comprehensive view will overlap with one's position on a fundamental matter given public reasons, that convergence is a happy fortuity. In other words, the justification for the final result will come from what is said and, hopefully, from why what was done was done. But even where we suspect that non-public motives played a part in someone's position on such a fundamental question, we give our fellow citizens the benefit of the doubt. After

all, they have presented adequate public reason to support their position — that civility should be met by our own refusal to doubt their commitments. Our only concern must be to assure one another that there is a fit between public reason premises and the solution we advocate.

Once we focus on deliberation as the source of justification and legitimacy, Greenawalt's point about executive officials holds for private citizens. Though they are giving their own reasons, they are speaking *for all* because their contribution to deliberation becomes a part of the justificatory realm. Such is the lesson of the realization that all reasons put forward in deliberative forums both motivate decision-makers and legitimate decisions.

C. Solum's Disclosure

Lawrence Solum's work on this subject deserves comment not only because it is so thoughtfully written, but also because it affected Rawls's own rejection of the exclusive view.¹⁷⁹ Like Greenawalt, he would not separate ordinary coercion by the state from constitutional essentials; public reason applies to both.¹⁸⁰ His inclinations are the opposite of Audi's: he thinks it may be impossible to purge the causal influence of comprehensive views, so therefore, the focus should be on the reasons articulated.¹⁸¹ Like the others, Solum would put no restriction on the reasoning processes for private discussions — a laissez-faire for the background culture, as it were.¹⁸² He also makes a crucial point that has not elsewhere been clearly expressed: Public reason gives a standard for self-evaluation, telling us what reasons to forbear, but it also works as a standard for political criticism, telling what reasons we can chide others for offering.¹⁸³ I should point out that Solum's view is close to my own at least in one respect: He would require exclusive use of public reasons in the deliberation of public officials in their official capacity.¹⁸⁴

Solum's best contribution to the subject, and the point where we differ, rests in his explanation of why inclusive public reason is more desirable than exclusive. Like Rawls, he offers a positive account of the virtues that follow from exposure to one another's comprehensive views.¹⁸⁵ The general feature of Solum's inclusive

¹⁷⁹ See PL, *supra* note 2, at 247, n.36. In this discussion, I draw on Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1993) [hereinafter Solum, *Constructing*]; Lawrence B. Solum, *Inclusive Public Reason*, 75 PAC. PHIL. Q. 217 (1994) [hereinafter Solum, *Inclusive*].

¹⁸⁰ Solum, *Constructing*, *supra* note 179, at 738-39.

¹⁸¹ *Id.* at 739-40.

¹⁸² *Id.* at 737, 752.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 739, 753; see also *infra* notes 200-02 and accompanying text.

¹⁸⁵ Recall Rawls's claims that arguing from comprehensive views may: (a) quell doubt about allegiance to democratic values; and (b) demonstrate how a doctrine affirms a political

view is the same as in Rawls's inclusive and wide views: one must offer sufficient public reasons for a conclusion one urges.¹⁸⁶ In justifying the coercive power of the state, we must respect the autonomy of our fellow citizens, and there are three ways of showing that. First, give reasons "they could accept as reasonable."¹⁸⁷ Second, refrain from giving reasons they cannot accept as reasonable.¹⁸⁸ Third, disclose all reasons for one's own position.¹⁸⁹ Solum resolves the tension between the second and third by arguing that the second must give way; thus, full disclosure is preferable to the withholding of religious or comprehensive views that motivate us.¹⁹⁰ He offers four reasons for that choice, two attacking exclusion and two praising inclusion.

First, Solum argues that exclusion requires some intolerance. Just as public reason tells each of us what are inappropriate reasons that we must refrain from offering, it contains a duty that one "must" disapprove when others fail to forbear.¹⁹¹ Solum calls this a form of limited intolerance.¹⁹² I would challenge that characterization. Saying reasons are not properly introduced is not a substantive critique. There is nothing intolerant about telling people that they have gone beyond the bounds of the rule. And consider how ironic it is to call the enforcement of exclusive public reason intolerant: We are trying to secure reasons that all can endorse, so that no reasons operate unreasonably by drawing on unshared premises. Thus, it would not take much to recast the unreasonableness of comprehensive doctrinal arguments as a form of intolerance itself. Finally, then, we note that refraining from the introduction of non-public reasons is established as a social good (assuming an exclusive view of public reason has been chosen). Calling on others to exercise the degree of reciprocity seen as facilitative of that social good is not intolerant because they, too, benefit from restraint. Even where a religious doctrine wants to forebear forbearance and go ahead with comprehensive views on some issue, it still benefits from other competing doctrines' restraint — both on the issue and all the others. What Solum simply names as a species of intolerance is nothing more than the operation of a mutually advantageous norm.

Second, Solum charges that exclusion assumes that citizens "should not even be allowed to listen and think about the non-public reasons, because they might not understand that the non-public reasons play only a supporting role."¹⁹³ This

conception of justice. *See supra* notes 145-52 and accompanying text.

¹⁸⁶ Solum, *Constructing*, *supra* note 179, at 748.

¹⁸⁷ *Id.* at 750.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 749.

¹⁹² *Id.* at 749-50. I am not sure it is an obligation rather than an option, but this is a small point.

¹⁹³ Solum, *Inclusive*, *supra* note 179, at 228; Solum, *Constructing*, *supra* note 179, at 750.

statement, made in two of his works, is fraught with misunderstanding. First, the existence of a dynamic background culture refutes any claim that what is kept out of fundamental debates is something citizens and legislators should not hear or think about. The exclusive view's point is simply that debates over essentials are not the particular places where we want that exposure and evaluation occurring. Moreover, it is exactly because I fear that people *do* understand such reasons as supplementing the justification for a particular decision that I want them kept out. And so my claim is not that I doubt the ability of citizens and legislators to see that sufficient public reasons justify a result even though they are supplemented; my claim depends on that very understanding. The problem is that having sufficient public reasons does not purge the supplemental ones, and so the justification of law comes in some hybrid mix of public and non-public reasons. That a sufficient portion of the justificatory mix is public does not eliminate the portion grounded in comprehensive views.

The gist and the tone of Solum's charge also merits response. The idea is that an exclusive view of public reason rests on skepticism about the capabilities of citizens. Consider, though, the fact that we ask jurors not to read newspapers or watch the news during a trial. That request is not based on a desire to keep them from being exposed to or thinking about different perspectives; rather, the goals are: (a) to keep focus; and (b) to produce a decision on a limited, identifiable set of premises. No one would charge the Catholic Church with thinking its own bishops dumb simply because it excluded from a debate before the Council of Bishops those arguments based on Jewish or Protestant teaching. The point is simply that there are valuable benefits and appropriate occasions for limiting, and thereby focusing, a decision set. These are not dependent on some lament about decision-makers thinking too much or their inability to think right. The major focus is not so much what we keep out as it is an effort to devote all attention to what reasons we let in, hoping for enhanced scrutiny of those.

But insofar as Solum may be right to characterize the exclusive view as a grand effort at limiting that to which citizens are exposed or that which they consider, it is always important to remember that the restrictions are not designed to keep arguments away from ears or out of minds. Rather, the aim is to produce a set of reasons that justify a fundamental conclusion that can be accepted by all those who affirm a political conception of justice. In a deliberative democracy, the entire public political debate contributes to that justificatory realm. And so, for the sake of focusing attention on only those reasons that we hope have operative force and for the sake of producing a complete set of reasons in that debate, we opt for the exclusive view.

The final two of Solum's arguments applaud features of an inclusive view. First, inclusion breeds tolerance.¹⁹⁴ This is the flip side of his claim that the

¹⁹⁴ Solum, *Constructing*, *supra* note 179, at 748.

exclusive view requires citizens to object to the introduction of certain non-public reasons, which he sees as a bit of intolerance.¹⁹⁵ In the end, he concludes that a system of public reason that promotes tolerance is more desirable, and so the inclusive version wins out over the exclusive.¹⁹⁶ But I would at least question just how tolerant the inclusive view is. We know that non-public reasons could not carry the day on their own, so their inclusion *may* be something like a red-headed stepchild at the family reunion. That is, agreeing upon a norm of admission includes no endorsement other than the minimal right to speak certain views. But even if these views are welcomed and not just included, I find it hard to praise the system. Solum apparently equates toleration of arguments with listening to them, but we know that there is a moral duty to listen. Further, listening to comprehensive views is not all that goes on: an opponent can fire right back with her own comprehensive views. This begins to look like the background culture.

While it is true that we tolerate all kinds of reasons insofar as the First Amendment keeps us from using government to squelch them, it is not at all clear that competing comprehensive views are all that tolerant of one another's speech. And if they are, then tolerance might be rather thin. I might even go so far as to characterize the possibility that religions share in an overlapping consensus (*i.e.*, it is not just a *modus vivendi*), and they affirm a principle of free speech, but they do not care much at all for the religious speech of other sects. Now to the extent that they do not try to have government stamp it out, they are tolerant. And to the extent that they affirm from within their comprehensive views of the good and political conceptions of justice that free speech is desirable, they are tolerant. But one gets the feel from Solum that there is something more to this tolerance of which he writes. If so, I think he is overestimating what his inclusive view requires. If not, then it is unclear to me why one could not make the claim that one shows tolerance by restraining one's use of controversial ideas of the good. That is, we could be tolerant by listening, but we could also be tolerant by not pushing our comprehensive views. If so, then greater restraint is a greater boon to tolerance: a mutual reliance on those political premises we share. Deliberation in the public political culture under the exclusive view of public reason, then, should be an exemplar of tolerant political discourse.

I anticipate a response that tolerance means a willingness to accept ideas and ways of life that are different, and so a tolerance of reliance on what we have in common is rather thin itself. Allowing in more of what is *not* shared is truly more tolerant. Touché. But if that is right, then we might question whether tolerance is a proper value to promote at all in public political deliberation over constitutional essentials. Solum never does that; he just cites the tolerance-promoting features of an inclusive view as an obvious reason for its superiority over the supposed limited

¹⁹⁵ *Id.* at 749-50.

¹⁹⁶ *Id.* at 750.

intolerance associated with the exclusive view.¹⁹⁷ I would say that when matters touch on the core of the social contract — the heart of matters of justice — then there are at least three related goals far more important than tolerance: persuasion; consensus; and the construction of a clearly identifiable justificatory realm. In various places, this article offers reasons why the exclusive view makes sense for each of these. Briefly, persuasion is most likely where all sides can embrace a set (albeit a limited one) of mutually acceptable premises; the exclusive view asks that all reasons put forward in debate be reasonable ones. Consensus on one component of the Constitution or on one basic liberty probably should have some relationship to the points of consensus underlying the rest of our agreements on the Constitution and on justice; the exclusive view utilizes reasons from those agreements, and is thereby easily situated within a constitutional tradition. Because the work of persuasion and consensus are never done, we need an identifiable realm of reasons that we understand as grounding each particular decision over fundamentals. This is especially so because such fundamentals are usually decided on broad terms that must be digested by the public and further elaborated by administrators, judges, and legislators. Debates carried on solely in terms of public reason have the virtue of providing a necessary and sufficient set of reasons, the record of which will not only shape the application of the particular decision but will also add to the body of political values that will later be used as public reasons themselves.

Finally, Solum contends that the inclusive view is sometimes necessary to stop evil, as in the case of the abolitionists or Martin Luther King, Jr., who both used Christian rhetoric.¹⁹⁸ This rationale is worth mentioning because Rawls has consistently picked up on it.¹⁹⁹ Obviously, there were public reasons available to gird these heroic figures' arguments, whether or not they used them. The problem I see is that it seems just as likely that comprehensive views can be introduced to justify that which is evil.

Take as a given the fact that the primary evil in the pre-1860s and pre-1960s American societies was African American inequality. Could we not see inequalities today that are justifiable in religious terms? Surely the homosexual question suggests that we are experiencing just that. Regardless of whether one thinks homosexuality is or is not a sin, is or is not normatively desirable, is or is not natural, one must admit that proscriptions of homosexual conduct and the overall absence of gay equality measures are rooted in religious beliefs. And so if one can even grant that someday America *might* consider the legal and cultural treatment of homosexuals an affront to equality or an evil, we would then have a case where religions promoted an evil outcome rather than stopped one. We can see the same possibility for non-religious comprehensive views as well. Imagine that a

¹⁹⁷ See *supra* notes 194-96 and accompanying text.

¹⁹⁸ Solum, *Constructing*, *supra* note 179, at 751.

¹⁹⁹ See PL, *supra* note 2, at 247-51, lii; IPRR, *supra* note 7, at 785-86.

comprehensive utilitarian urges his views in public political debate over abortion and claims (a) that a fetus is not a being with interests that even enter into the utility calculus, or (b) that even if all fetuses have interests, those are outweighed by women's happiness in choosing not to bear children and by the relieved social responsibility for unwanted children. If one can even grant that someday America *might* consider abortion an evil form of infanticide, then again we would have a case where a comprehensive view promoted an evil outcome rather than stopped one. Thus, I find the anti-evil/flexibility argument indeterminate.

I want to take up Solum's explanation for his partial endorsement of the exclusive view: He would constrain government officials' arguments in their official capacity to public reasons only.²⁰⁰ He offers two justifications. First, these offices were entered voluntarily, and so officials should accept the burden of public reason.²⁰¹ Second, they still have freedom to speak as private citizens, so the burden is itself limited.²⁰² Each of these considerations apply in some respects to citizens as well, so I hope to use them to advance my argument that exclusive public reason is good for citizens, too, in debates over constitutional essentials and fundamental matters.

First, just as officials enter government voluntarily, citizens freely participate in public political deliberation. If we think that there is something in the nature of taking up the task of making political decisions that carries a special responsibility with it, then it is hard to draw a bright line between, say, legislators and citizens. Just as officials choose to take a job, citizens choose to weigh in on certain matters.

Second, if citizens who enter government can have two capacities (official and private) with two levels of restraint (a lot and none), then why should we not imagine different levels for citizens who take on decision-making capacity at the margins? Obviously, Solum does not think it impossible to be of two voices, even if one cannot be of two minds when faced with a political question — one voice bound by dictates attendant to the job and one voice free to reason at will. My exclusive view makes it quite easy for citizens in that regard because entrance into particular forums on particular issues triggers the restraint on nonpublic reasons. And just as Solum reminds us, citizens will remind one another when it is appropriate to use solely public reasons. The point about public reason providing a standard not only for personal forbearance, but also for political criticism, goes far toward undermining claims that citizens cannot distinguish either where or on what subjects they are supposed to leave non-public reasons out. None of us need bear the burden of the reciprocity criterion alone, because we all police the borderline between reasonable and unreasonable views.

²⁰⁰ Solum, *Constructing*, *supra* note 179, at 739, 753.

²⁰¹ *Id.* at 753.

²⁰² *Id.*

D. Perry's Scrutiny of Religious Reasons

Michael Perry has produced a great deal of thoughtful scholarship on the question of appropriate reasons, but his perspective is special as it comes from a devout Catholic who is wary of what he calls "'God'-talk."²⁰³ Perhaps the most unique feature of Perry's contribution is his claim that we should welcome religious arguments in the public sphere so that we can test them there.²⁰⁴ Unlike Rawls's reluctance to have comprehensive views criticized, Perry wants them evaluated just like any other political reason offered in deliberation. This is part of an "ecumenical dialogue" designed to draw religions away from the "temptations of infallibilism."²⁰⁵ Like other scholars, however, Perry contends that "citizens should forgo reliance on a religious argument" (or at least be wary) unless they are motivated by an independent secular reason.²⁰⁶

He offers a clear, rather compelling set of reasons for that approach. First, he considers it impossible to maintain separation between religious argument in the background culture and in public political debate.²⁰⁷ Second, "[r]eligiously-based moral argument is not necessarily more . . . divisive than secular moral argument."²⁰⁸ Third, it "is not necessarily less deliberative."²⁰⁹ Fourth, the influence of religious argument makes it important to have it tested in political debate.²¹⁰ Finally, we must "let ourselves be tested by [the religious argument of others]."²¹¹

As my inclinations in the earlier discussion of Greenawalt may have indicated, I recognize the difficulty of asking citizens to split apart the public and comprehensive aspects of their internal, actual motivations. I find myself convinced by Perry that mixed motives are acceptable, as long as there exists a secular (or for me, public) reason to support one's position. Thus, my version of the exclusive view limits itself to the public political dialogue. After all, my claim is that the real

²⁰³ Michael J. Perry, *Liberal Democracy and Religious Morality*, 48 DEPAUL L. REV. 1, 48 (1998) [hereinafter Perry, *Democracy*]. Most of my discussion is drawn from this recent article, because Perry's own views have undergone slight change. See MICHAEL PERRY, LOVE AND POWER (1991); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997); Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts — And Second Thoughts — on Love and Power*, 30 SAN DIEGO L. REV. 703 (1993).

²⁰⁴ Perry, *Democracy*, *supra* note 203, at 5.

²⁰⁵ Perry, *Democracy*, *supra* note 203, at 12 (quoting MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 183 (1988)).

²⁰⁶ Perry, *Democracy*, *supra* note 203, at 20.

²⁰⁷ *Id.* at 13.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

justification for a constitutional decision rests in the reasons offered in the public political deliberation; what is said there becomes the justificatory realm. Thus, I will accept a degree of disparity between citizens' internal mixed public/non-public motivations and their public advocacy in the political forum.

What I cannot accept is Perry's call for the testing of comprehensive views in the public political domain, and so I will defend the exclusive view against such inclusiveness. I may seem to be contradicting my earlier position where I complained about the listeners' dilemma — the duty to listen to comprehensive views accompanied by a duty not to attack or criticize them. Perry does solve the dilemma by letting those views in but also subjecting them to contest. I find myself troubled by the implications of that approach, though, and it is here that I hope to offer an innovative reason in favor for exclusive public reason.

I do not think that public political debate over constitutional essentials and matters of basic justice is a place where comprehensive views should be criticized or questioned. These are debates that go to the core of citizenship, and so most everyone individually — as well as being part of the polity — has a stake in their resolution. But comprehensive views go to the core of citizens' conception of the good life. I reject any deliberative method over fundamental constitutional issues that would have as part of it any denigration, or even counter-argument, against doctrines that comprise the heart and soul of certain citizens.

My impulse here is quite consistent with my overarching critique of inclusive and wide views of public reason. First, because all citizens have a stake in, or at least should have an opinion on, fundamental matters, there is every reason to want maximum participation. But entry into the political arena in these issues ought not open a person up *either* to competing truth claims that cannot help but sound preachy *or* to criticism of one's own comprehensive view that cannot help but sound hostile. In other words, the inherently persuasive character of such political debate makes comprehensive views sound like they are looking to convert citizens (figuratively if not literally) and makes criticism of those views sound like a denial that they could be true. My agreement that there is a duty to listen in these debates compels me to exclude what I might call "anti-comprehensive views."

So too does my understanding of deliberation as producing a justificatory realm for a decision. I cannot endorse a realm of reasons for any constitutional or basic justice result that includes an *explicit* denial of the truth of citizens' beliefs. Of course, there will be implicit denials, as when the decision to strike down anti-miscegenation statutes denies the truth of the claim by some believers that God wanted to keep the races pure. But the point here is that, by keeping out affirmations of belief from the body of reasons, we also keep out their specific denials or negations. And so, just as I find repugnant the religious belief that people of different races ought not marry or reproduce, I find equally repugnant a constitutional debate that would have me express my repugnance! I mean to keep

comprehensive views, and especially religious views, out of public political debate not to demean or marginalize those views, but to keep them insulated from attack. The decision over a constitutional essential or a matter of basic justice should never have within its supporting premises the explicit, intentional advancement or negation of any comprehensive conception of the good life. While comprehensive views may be promoted or attacked in the background culture or even in everyday politics, the same should not occur under the rubric of what we consider fundamental decision-making.

In the end, the questions and debates covered by public reason are those by which we re-write a portion of our social contract. All the language in that contract can and will, in turn, become the future language of public reason. Unfortunately, though, the process is not like writing on a page where one can scratch out or erase the superfluous and the unwanted. Drafting the language of this social contract is a dynamic endeavor comprised of what is put forward and what is comprehended. We cannot erase what we have heard and scratch out what we have read. Try as we might, reasons endure. And to keep some of those reasons out of our contract, we must leave them off the drafting table.